

# The International Sports Law Journal



2010/1-2



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In April and May 2010 respectively, seminars were held in Brussels and The Hague seminars were held on the ECJ's verdict in the Bernard case on training compensation in professional football. In this issue of ISLJ, Prof. Stephen Weatherill, University of Oxford, presents an early comment. In their contribution, Roberto Branco Martins, General Manager of EFAA (European Football Agents Association) and Gregor Reiter, CEO of the German players' agents association DFVV, provide an inside exploration from the inside exploring the options that are open for the future (de)regulation of the intermediary function in European professional football.

Introducing the *Chambre Arbitrale du Sport*, Jean-Michel Marmayou, Paul Cézanne University, Aix-Marseille III, expresses the wish that this French CAS will have sufficient legitimacy for its awards to contribute to the growth of arbitration case law and the development of general principles forming a kind of *lex sportiva à la française*.

Further, this issue of ISLJ *inter alia* contains a pre-publication of several national contributions on sport governance, sports image rights, sports betting and CAS and football from corresponding books which are due planned to appear in the Asser International Sports Law Series. Currently, the ASSER international Sports Law Centre is implement-

ing two research studies: a Study on the Equal Treatment of Non-Nationals in Individual Sports Competitions, which was commissioned by the European Union, and a Study on the Implementation of the WADA Code in the European Union, which was commissioned by the Flemish Ministry of Sport on behalf of the Belgian Presidency in the second half of 2010. In April this year the Asser Institute presented a project proposal on The Lisbon Treaty and EU Sports Policy in response to an invitation to tender which was announced by the European Parliament. The Study's objective is to provide a panorama of the possibilities of EU Sports Policy at a time when such possibilities are being reviewed after the approval of the Lisbon Treaty (Article 165).

On 17 February this year, the Asser/Edge Hill team delivered lectures at a workshop on "The Impact of the EU Acquis on Sport" that took place in Ankara within the framework of the European Commission's TAIEX instrument and was organized by the General Directorate of Youth and Sports of Turkey. The team previously took part in similar workshops in Kiev (Ukraine) in November 2007, Tirana (Albania) in April 2008, and Minsk (Belarus) in June 2009.

*The Editors*



# The *Olivier Bernard* Case: How, if at All, to Fix Compensation for Training Young Players?

by Stephen Weatherill\*

## 1 Introduction

The list of sports-related judgments in EU law was extended in March 2010. The decision of the Court of Justice of the European Union (CJEU - as it has been known since the entry into force of the Lisbon Treaty) in *Olympique Lyonnais v Olivier Bernard and Newcastle United*<sup>1</sup> deals with payment of compensation in circumstances where a club that has invested in training young players finds that an emerging star wishes to try his luck elsewhere. Against the background of the EU Treaty provisions governing free movement of workers the Court confirms that such restrictions on player mobility may be compatible with EU law - but the particular French rules challenged by Bernard are *not*. The judgment therefore accepts that sport is 'special', for such arrangements for compensating training would not be found in normal industries, while it uses EU law to confine the space allowed to sporting bodies in shaping their preferred system. But plenty of open questions bedevil identification of precisely what measure of compensation is allowed under EU law, and there may yet emerge frictions between the demands of EU law and the international transfer system painstakingly renovated by football's governing bodies in recent years. The judgment in *Bernard* is also notable as the first occasion on which the Court has made reference to the new provisions on sport introduced by the Treaty of Lisbon with effect from 1 December 2009. The judgment suggests that Lisbon will *not* be used by the Court as a basis to adjust its long-standing approach to the subjection of sport to the legal rules of the internal market.

## 2 The litigation: the road to Luxembourg

At the material time Olivier Bernard was a 'joueur espoir' at Olympique Lyonnais, one of the strongest clubs in French football. The category of 'joueur espoir' covers players between the ages of 16 and 22 who are employed as trainees under a fixed-term contract - one lasting three years in Bernard's case. Before the expiry of that contract Olympique Lyonnais offered him a professional contract lasting one year, but Bernard rejected the offer and instead chose to sign a professional contract with Newcastle United, at the time a leading English club.

The problem was that Bernard's actions did not conform to the *charte du football professionnel* ('the Charter') which at the time governed the employment of football players in France. The Charter required a 'joueur espoir' to sign his first professional contract with the club that had trained him, if the club so wished. The Charter did not provide for the payment of compensation in the event that the player refused, but it did envisage that the club which had provided the training could bring an action for damages against the 'joueur espoir' under the French *code du travail* for breach of the contractual obligations rooted in the Charter. This is precisely what Olympique Lyonnais did, and a tribunal in Lyon, finding a unilateral breach of contract contrary to the Charter, ordered Bernard and Newcastle United jointly to pay damages of EUR 22 867.35.

The *Cour d'appel* in Lyon quashed that judgment, finding that the scheme, which restricted the player's contractual freedom once his training was complete, infringed Article 39 EC, which governs the free movement of workers between Member States of the EU. After all an award of damages in such circumstances, as foreseen by the Charter, plainly serves to discourage a player from exercising his right of free movement. Olympique Lyonnais appealed against that decision. The French *Cour de Cassation* made a preliminary reference to Luxembourg in July 2008 - by which time Bernard's *espoirs* were all but exhausted as his modestly distinguished professional career limped to a close. It asked whether the Treaty, specifically the provi-

sion governing free movement of workers, caught the matter at hand - which it rather obviously did. And, referring to another instance of journeyman footballer turned legal milestone, the famous *Bosman* ruling<sup>2</sup>, it also asked whether 'the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying' the French scheme - a much more tricky question.

## 3 The ruling of the CJEU

The CJEU quickly placed its ruling in the mainstream of its sports law jurisprudence. Sport, it reminded us, 'is subject to European Union law in so far as it constitutes an economic activity'. It duly cited both *Bosman* and the more recent anti-doping case, *Meca-Medina and Majcen v Commission*.<sup>3</sup> In fact, the Court makes a subtle adjustment here: whereas in *Bosman* and *Meca-Medina* it had referred to an economic activity within the meaning of Article 2 of the EC Treaty<sup>4</sup>, in paragraph 27 of *Bernard* mention of Article 2 has been deleted - probably because even though the litigation pre-dates the entry into force of the Lisbon Treaty, the ruling does not, and Article 2 EC has been deleted by the Lisbon reforms with effect from 1 December 2009. This is probably merely presentationally important, rather than signalling any change of substance.

Bernard's employment falls within the scope of the Treaty - and the Court, again updating its analysis to take account of the entry into force of the Lisbon Treaty on 1 December 2009, proceeds to consider Article 45 TFEU, the successor to Article 39 EC. That provision controls not only the actions of public authorities but also rules of any other nature aimed at regulating employment in a collective manner, and accordingly the French Charter which had detrimentally affected Bernard fell to be tested against the requirements of Article 45 TFEU, just as the international transfer rules had been subjected to testing in *Bosman* itself. And, as the *Cour de Cassation* had correctly recognised, the Charter tended to discourage the exercise of a player's right of free movement by according a protected advantage to the club providing training.

The enduringly important core of the judgment tackles the question whether the French scheme governing 'joueurs espoir' is justified, despite its restrictive effect on labour mobility within the EU. The Court once again cites *Bosman* in declaring that:

'A measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose ...'<sup>5</sup>

This is in fact an orthodox statement of general EU trade law. As Advocate General Sharpston correctly observed in her Opinion in *Bernard*: the specific characteristics of sport must 'be considered carefully when examining possible justifications for any such restriction - just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector'.<sup>6</sup> The Court's judgment then turns to the particular context of professional sport, and in paragraph 39 of *Bernard* the

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1 Case C-325/08 judgment of 16 March 2010.

2 Case C-415/93 [1995] ECR I-4921.

3 Case C-519/04P [2006] ECR I-6991.

4 Para 73 of Case C-415/93 n 2 above, para 22 of Case C-519/04P n 3 above.

5 Para 38 of the judgment.

6 Para 30 of her Opinion.

Court confirms what it had explained almost fifteen years earlier in paragraph 106 of *Bosman*: ‘... in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate’.

So the *end* is permitted; what matters is whether the *means* used are suitable to attain that end and do not go beyond what is necessary to attain it. That, the Court acknowledges, involves taking account ‘of the specific characteristics of sport in general, and football in particular, and of their social and educational function’.<sup>7</sup> And, the Court adds, the ‘relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU’.<sup>8</sup>

Paragraphs 41-45 of the ruling are centrally important and therefore deserve to be set out in full, before being subjected to analysis:

- [41] In that regard, it must be accepted that, as the Court has already held, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (see *Bosman*, paragraph 108).
- [42] The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club (see, to that effect, *Bosman*, paragraph 109).
- [43] Moreover, the costs generated by training young players are, in general, only partly compensated for by the benefits which the club providing the training can derive from those players during their training period.
- [44] Under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport.
- [45] It follows that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally (see, to that effect, *Bosman*, paragraph 109).

The Court then tested the scheme of which Bernard had fallen foul against this standard. The French arrangements governing ‘joueurs espoir’ did not involve compensation for real training costs incurred, but rather damages for breach of contractual obligations calculated with reference to the total loss suffered by the club. This, the Court concluded, went beyond what was necessary to encourage recruitment and training of young players and to fund those activities. So there was a violation of EU law.

#### 4 A critical glance at incentives to invest in training

The judgment in *Bernard* has much in common with that in *Bosman*. In both rulings the Court finds that the particular arrangements challenged in the litigation are not compatible with EU law. But in both rulings the Court sketches the possible contours of what *might* be permitted in conformity with EU law, leaving it to the governing bodies of the sport to choose their preferred adapted model from within the space created by the requirements of EU law. So *Bosman* did *not* rule a transfer system to be incompatible with EU law; it ruled the system of which Bosman himself fell foul to be incompatible with EU law.

And *Bernard* does not rule a system which protects a club which incurs costs in training young players to be incompatible with EU law; it rules the system of which Bernard himself fell foul to be incompatible with EU law.

*Bernard* adopts the reasoning advanced in *Bosman* entirely uncritically. The Court reaffirms that the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players. This is entirely convincing. But it is only part of the story. The prospect of receiving training fees might be equally likely to encourage universities or supermarkets to seek new talent and train young workers - but no one suggests that it should accordingly be permitted that universities and supermarkets set up collectively enforced arrangements that inhibit the exercise of contractual freedom by employees once they have been trained. Universities and supermarkets train young talent and try to keep good workers by offering them attractive contractual terms and conditions, whereas, it seems, in football some kind of supplementary industry-wide compensation system may be maintained to benefit the training club. Why is professional football different? Why, in particular, are professional footballers not treated as any other employee would be? The Court in *Bosman* never explained this. *Bernard* too largely neglects the point. The only hint of elucidation is found in paragraph 44 of the judgment which, as set out above, states that the alleged disincentive to invest in training absent any compensation scheme would in particular ‘be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport’. This chimes with *Bosman* and it also brings to mind the laudatory style of the Amsterdam Declaration on Sport and the Declaration on ‘the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies’ which was annexed to the Conclusions of the Nice European Council held in December 2000. And of course it is perfectly possible that some small clubs behave in a manner which does indeed promote the social and educational function of sport. Plenty probably do not. The Court’s throwaway remark offers neither a shred of empirical evidence about practice in sport nor a direction to a national court to acquire any, nor even any attempt to consider just what ‘the social and educational function of sport’ really is in the context of organised and commercially significant professional sport. Sports federations are wearily eager to pillory the institutions of the EU, most notably its Court and Commission, for their alleged failure to take adequate account of sport’s special characteristics, but in fact *Bernard*, like *Bosman* before it, is remarkably *generous* to sport. It accepts that sport is special in its need to provide incentives to invest in training, *inter alia* for social and educational benefit in circumstances where little, if any, evidence has been presented to demonstrate that sport - especially professional sport - is different from normal industries in this particular matter.

#### 5 What system for the future?

Be that as it may, the Court seems determined to accept that as a matter of EU law it is open to the national and international governing bodies in professional football to concoct a compensation scheme designed to reward clubs that invest in training, even if the result is that in some way a player’s exercise of contractual freedom and right to move between Member States is affected in a way that would not be tolerated in a normal industry. On the question - how far may such restraints go? *Bernard* is inconclusive. Paragraph 50 of the judgment states that the impugned scheme is not compatible with EU law because it entails a liability ‘to pay damages calculated in a way which is unrelated to the actual costs of the training’. This might be interpreted to mean that only a scheme tied directly to the actual costs of training that player is permitted. But that might be too narrow an interpretation. Paragraph 50 refers only to a relation between the compensation payable and the actual costs incurred - it does not insist on precise congruence. Moreover, paragraph 45 refers to taking ‘due

<sup>7</sup> Para 40 of the judgment.

<sup>8</sup> Para 40 of the judgment.

account of the costs borne by the clubs in training both future professional players and those who will never play professionally'. This might conceivably be interpreted to mean that the compensation payable by those who succeed as professionals might be inflated beyond the costs incurred in their particular case to allow also some coverage of training costs incurred but wasted on those players who fall by the wayside.

In her Opinion in the case Advocate General Sharpston was prepared to accept that the acquiring club might be required to compensate the training club for costs incurred in training failed players, but that the player should be expected only to cover costs incurred in his own training. The Court chose not to explore such nuances. The calculation is in any event complicated by the practical reality that players are trained in groups, not individually: the cost of training twenty players is lower than the cost of training one multiplied by twenty thanks to the realisation of economies of scale.

The matter is therefore left obscure: perhaps deliberately so, in so far as the Court is (quite properly) prepared to leave the detailed renegotiation of the scheme to the football authorities themselves. The more one chooses to read *Bernard* as requiring that compensation be closely tied to, or even limited to, the costs incurred in training a particular player, the less 'special' football is permitted to be - and the less comfortable the governing authorities in sport will doubtless feel.

As is well known, the international transfer system was overhauled in the wake of the *Bosman* judgment, and the current system has been informally approved by the Commission.<sup>9</sup> The renovated international transfer system makes dedicated provision for payment of 'training compensation' in the case of young players. This applies when the player signs his first contract as a professional and each time a professional is transferred until the end of the season in which his 23rd birthday falls. An Annex to the regulations sets out a method of calculation, but each case will need to be assessed according to its own facts.<sup>10</sup> To this extent *Bernard* is old news: it is dealing with the past not the present. But it remains open for discussion whether the current transfer arrangements comply with EU law. The Commission's informal green light does not preclude the possibility that an individual litigant, a new *Bosman*, might challenge the system as incompatible with EU law.<sup>11</sup> Without going into detail, it suffices to observe that restraints are envisaged in football which would not be tolerated in 'normal' industries. Those defending the system tend to emphasise the virtues of contractual stability in team-building; those attacking it prefer the importance of the autonomy of the individual employee and the prevalence of contractual negotiation as a means to retain valued workers.<sup>12</sup> Were a challenge based on EU law to be advanced, the heart of the matter would involve a weighing of these interests and an assessment of the suitability of measures used to promote them. As a general observation it seems probable that the Court's receptiveness in *Bernard* to some limited form of training compensation system

should encourage the view that the transfer system currently applicable to young players would survive a challenge rooted in EU law.

There is more to the system governing international transfers than young players alone. The regulations provide for a 'protected period', within which breach of contract may be addressed not only by an award of compensation but also by the imposition of sporting sanctions (for example, a suspension from playing). This 'protected period', which lasts for three years for players who were under 28 when they signed their contract and two years for older players, is plainly designed to promote contractual stability. But breach of contract may also occur outwith the protected period. In such a case sporting sanctions may not be imposed, but the possibility of compensation is envisaged. As is well known, the Court of Arbitration for Sport has delivered two contrasting rulings in the last three years dealing with this phenomenon of the player who unilaterally terminates his contract without just cause and joins another club. The international transfer rules envisage that compensation shall be payable to the 'losing' club in such circumstances but do not make clear precisely how this shall be calculated. In *Webster* in 2008 it was decided that the measure should not be the player's value on the transfer market nor even the amount payable under the new contract but rather merely the sum that would have been payable to the player on the residual length of the old contract.<sup>13</sup> This was greeted with some horror by clubs and federations since it seemed to encourage contract-breakers by confining monetary compensation to (usually) a relatively low amount.<sup>14</sup> But in *Matuzalem* in 2009 a quite different approach was taken by a differently constituted panel.<sup>15</sup> Much heavier emphasis was placed on the promotion of contractual stability and it was accepted that value *is* related to the transfer fee foregone by the 'losing' club. A sum close to 12 million euros was payable - a great deal more than would have been due under the approach favoured a year earlier in *Webster*. *Matuzalem* has attracted astute criticism for its thin reasoning and the uncertainty it creates<sup>16</sup> but as far as clubs and governing bodies are concerned it was a welcome re-orientation in favour of deterring contract-breaking. That debate need not be pursued here. It is, however, worth observing that the apparent concern of the CJEU in *Bernard* to ensure linkage (albeit imprecisely defined) between training costs incurred and compensation payable does not readily fit with the way that the jurisprudence of the CAS seems to be moving. There is certainly no direct conflict - *Bernard* was a 'joueur espoir', with his career in front of him, whereas *Matuzalem* was an established top-level player; and *Matuzalem*, a Brazilian, was not even a national of an EU Member State. But it is at least possible that one can read the CJEU in *Bernard* as showing caution lest disproportionately onerous transfer fees be dressed up as 'compensation payments'. An 'EU *Matuzalem*' might conceivably argue that an award of approaching 12 million euros goes beyond what is permitted under Article 45 TFEU. What will be needed - and what is so far missing from the interventions of both the CJEU and the CAS - is a close explanation of just what the functions and therefore the limits of such compensation really are.

## 6 The Treaty of Lisbon

The final point in the *Bernard* ruling which is worthy of mention is the place of the Treaty of Lisbon. This is the first sports-related judgment delivered by the CJEU since the entry into force of the Treaty of Lisbon on 1 December 2009, and even though the facts of the case long pre-date the Lisbon Treaty, the CJEU still lost no time in referring to the text in its ruling in *Bernard*. As mentioned above, the Court recited 'the specific characteristics of sport in general, and football in particular, and of their social and educational function', finding that the 'relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU'.<sup>17</sup> What should we make of this?

Because the Lisbon Treaty brings sport within the explicit reach of the founding Treaties for the first time, it is in formal terms profoundly significant. But the question is - will it change anything?<sup>18</sup> At the *legislative* level, the answer is clearly 'yes': the EU now possesses an explicit, albeit textually limited, legislative competence in the field of

9 Available at <http://www.fifa.com/aboutfifa/federation/administration/playersagents/regulationstatustransfersplayers.html>. On the interplay of actors and ideas in crafting a new system see D. Dimitrakopoulos, 'More than a market? The Regulation of Sport in the EU' (2006) 41 *Government and Opposition* 561.

10 On aspects of practice see M. Bakker, 'the Training Compensation System' [2008] 1-2 *ISLJ* 29.

11 See eg J.-C. Drolet, 'Extra Time: are the new FIFA Transfer Rules doomed?' Ch. 10 in S. Gardiner, R. Parrish and R. Siekmann (Eds), 'EU, Sport, Law and Policy' (The Hague, TMC Asser Press, 2009).

12 See eg S. Gardiner and R. Welch, 'The Contractual Dynamics of Team Stability versus Player Mobility: who rules the Beautiful Game?' 5/1 *ESLJ*, available via

<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/>.

13 <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1298,%201299,%201300.pdf>

14 E.g. Duncan Castles, 'Wenger sees the end of transfer fees: Arsenal manager says the power has shifted from clubs to players' *The Observer*, 29 June 2008, Sport p.7; David Hytner, 'FIFA transfer rule undermines my youth-team policy, says Wenger' *The Guardian*, 22 April 2008, Sport p.5.

15 [http://www.tas-cas.org/d2wfiles/document/3229/5048/0/0Award%201519-1520%20internet\\_.pdf](http://www.tas-cas.org/d2wfiles/document/3229/5048/0/0Award%201519-1520%20internet_.pdf)

16 Eg B. Dabscheck, 'Being Punitive: the Court of Arbitration for Sport overturns *Webster*' [2009] 3-4 *ISLJ* 20.

17 Para 40 of the judgment.

18 See more fully S. Weatherill in A. Biondi and P. Eckhout (eds), 'EU Law after the Treaty of Lisbon' (forthcoming, 2011).



sport. This is contained in Title XII of Part Three of the Treaty on the Functioning of the European Union (TFEU), entitled *Education, Vocational Training, Youth and Sport*. Article 165 TFEU empowers the adoption of incentive measures and recommendations in the field of sport. No longer need the EU squeeze sports-related activity into some other area where the Treaty was kinder: contortions such as the designation of 2004 as the European Year of Education through Sport, based on what was then Article 149 EC on education<sup>19</sup>, are no longer necessary.

But even if the EU Treaty made no mention of sport until 1 December 2009 it is well-known that the intersection of sport and EU law has provoked a vivid and controversial narrative lasting over thirty years, since the landmark *Walrave and Koch* ruling.<sup>20</sup> The law of free movement and competition law, foundational provisions in the Treaty, apply to sport in so far as it constitutes an economic activity. Much ink has been spilled in tracing what this 'sports law' really involves.<sup>21</sup> Sport enjoys an autonomy *conditional* on respect for the core norms of the Treaty, which delegates to the Court and the Commission considerable flexibility in setting the governing conditions unconstrained by any sports-specific guidance in the text of the Treaty. Again, the question: does Lisbon change anything? Article 165 TFEU stipulates that the Union 'shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'. And, pursuant to Article 165(2), Union action shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.' No doubt one will anticipate that in future sports bodies will structure defence of their practices around these provisions. They will be able to look to the text of the Treaty, as they were not able to before, and assert that respect for the 'specific nature of sport' is guaranteed by the Treaty. This, they will argue, is an instruction to the Court and the Commission to back off. And yet the retort may be - the Court and the Commission have *always* accepted that sport has a 'specific nature'. The particular practices impugned in *Bosman* were held incompatible with EU law, but the Court freely and famously accepted in that judgment that sport has 'considerable social importance' and that accordingly 'the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate'.<sup>22</sup> The Treaty was barren but the Court had its own certain idea of the function of sport. On this reading the Lisbon Treaty does no more than *confirm* the Court's pre-existing case law on the application of the Treaty provisions on free movement and competition law to sport.

This is a debate to watch as the Lisbon Treaty becomes the key reference point in the future development of EU sports policy, driven in detail by the implementation of the Commission's 2007 White Paper on Sport, which itself contains a section entitled 'The specificity of

sport'.<sup>23</sup> The ruling in *Bernard* is merely the Court's first and brief hint. But the Court's approach is much more in line with the school that would argue 'Lisbon is nothing new!' than with those who would treat Lisbon as a change of direction. The Court reaches its conclusion in *Bernard* with reference to its own case law, most of all *Bosman*, and only then does it mention the Lisbon Treaty. And it merely points out that its own existing embrace of the 'specific characteristics of sport' is 'corroborated' by the second subparagraph of Article 165(1) TFEU.<sup>24</sup>

It might be foolish to read *too* much into this - the Court's treatment of Lisbon is strikingly brief. And yet in *Bernard* the Court did not *need* to mention the Lisbon Treaty. The litigation itself pre-dated the entry into force of the Treaty. That it nevertheless chose to mention Lisbon may therefore be taken as significant. Note too that this was a ruling of the Grand Chamber of the CJEU - enhancing further its authoritative feel - and the *juge rapporteur* in the case was Mr Ilešić, a jurist noted for his expertise in sports law and not likely to have slipped in a reference to the Lisbon Treaty's innovations without calculation. The Court's first post-Lisbon intervention shows first of all that although Article 165 TFEU is not formally 'horizontal' in nature - unlike, for example, environmental protection (Article 11 TFEU) and consumer protection (Article 12 TFEU) it is not embedded in all the Union's activities - it is nevertheless to be treated as germane to cases arising under the free movement provisions of the Treaty. That is no surprise: the Court has consistently read the free movement provisions (and those governing competition) with reference to the special features of sport and it would have been a shock had it used Lisbon as a reason to backtrack. But consistency seems to be the main point in *Bernard* - the Court cites Lisbon, but simply to confirm its existing approach. So the first indication from the CJEU is that the Lisbon Treaty is not about to upset what we have long recognised as the trajectory of 'EU sports law and policy'. And with reference to the particular circumstances of the case sports bodies have much to celebrate - *Bernard*, like *Bosman* before it, reveals a remarkably tolerant approach to professional sport's claim that it uniquely needs a scheme whereby training costs can be recouped as a means to promote incentives to invest in training.

*The International Sports Law Journal*

19 Dec 291/2003/ EC OJ 2003 L43/1.

20 Case 36/74 [1974] ECR 1405.

21 See eg R. Parrish and S. Miettinen, 'The Sporting Exception in European Law', (Den Haag: T M C Asser Press, 2007); E. Szyszczak, 'Is Sport special?', Ch. 1, and S. Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule'?', Ch. 3, in B. Bogusz, A. Cygan, and E. Szyszczak (eds), 'The Regulation of Sport in the European Union' (Cheltenham: Edward Elgar Publishing, 2007); S. Van den Bogaert and A. Vermeersch, 'Sport and the EC Treaty: a

Tale of Uneasy Bedfellows' (2006) 31 ELRev 821.

22 Case C-415/93 n 2 above para 106.

23 COM (2007) 391, para 4.1. Full documentation is available via [http://ec.europa.eu/sport/white-paper/index\\_en.htm](http://ec.europa.eu/sport/white-paper/index_en.htm).

24 Para 40 of the judgment. French: corroborée; the German version is differently structured: Für die Relevanz dieser Faktoren spricht außerdem ihre Erwähnung in Art. 165 Abs. 1 Unterabs. 2 AEUV.



# Players' Agents: Past, Present ... Future?

by Roberto Branco Martins\* and Gregor Reiter\*\*

After the well-known Bosman case, the European labour market in professional football changed substantially. Due to Bosman the 3+2 rule<sup>1</sup> was repealed and the payment of transfer sums at the end of a players' contract was found to be illegal in the territory of the European Union for internal EU transfers.<sup>2</sup>

Since the abolishment of the limitation of the number of foreign EU players there has been an immense influx of foreign EU players in EU domestic leagues. Eventually, also many non-EU players began to be employed by EU clubs due to the lower acquisition and salary costs of these players as compared to EU players. Due to the elimination of out-of-contract transfer sums players could receive higher sign-on fees and players' salaries rocketed. A shift occurred in the duration of employment contracts from short-term contracts to longer-term contracts as clubs attempted to keep players on now that they could leave a club without any difficulty. Longer-term contracts also ensured a surrogate "transfer sum" in the form of damages for preliminary breach of contract if players left before the contract was fully served. If one adds to all these elements the fact that football players are, in general, relatively young high-skilled workers acting in a sector that operates under the magnifying limelight of the global media and the fact that many clubs are financially dependent on (international) transfers of players, the outlines of a truly idiosyncratic international labour market clearly emerge.<sup>3</sup> It is due to these aspects that the profession of players' agents has evolved over the past twenty years into an activity that is carried out by thousands of persons worldwide. Nowadays players' agents play an indispensable role as the link between players, associations and clubs. They are the oil that keep the wheels of international football in motion.

In this contribution a short overview is given of the way in which the profession of players' agent has been regulated throughout the (recent) years. This overview is followed by listing some of the indicators for the need to regulate the profession. Despite the regulations already in place, there have been many calls for still stricter regulation coming from stakeholders in international football, including the agents themselves, and from politics. The reasons for this development are also explained in this contribution. Subsequently, some recent actions that affect the future of the agent industry are described, namely a study into the activities of agents ordered by the European Commission and an early draft of FIFA regulations dealing with the activities of intermediaries. Finally, in the conclusion, a look is taken at the future: who can best ensure the sound regulation of a true football profession and guarantee the protection of professional agents, players and clubs against corruption?

## FIFA Players' Agents Regulations

From the mid 1990s up to 2001 players' agents were granted a licence by FIFA to carry out the profession of players' agent. In those days, applicants had to take an oral exam that was carried out by employees of the national governing bodies. After passing the exam the only further requirements were the deposit of a CHF 200,000 bank guarantee and signature of a code of conduct, after which the agent could start carrying out his activities.

Due to the growing number of agents and the increase in the international movement of players a new licensing systems for agents was introduced in 2000 which entered into force in 2001. These 2001 regulations introduced the written examination and licensing of agents by FIFA was replaced by licensing by the national member associations. For this reason, the wording "FIFA-licensed agent" no longer applies since 2001 with the official wording now being "Agent licensed by (the national) FA". In order to avoid an overly elaborate descrip-

tion, below only the most recent version (2008) of the players' agent regulations will be discussed in broad terms.

The 2008 Players' Agent Regulations (PAR) determine that only licensed agents can carry out the profession. However, certain categories of individuals are exempted from the licensing requirement and may act as agents regardless: parents, siblings or spouses of players as well as legally authorized practicing lawyers are allowed to carry out the activities of an agent without falling under the jurisdiction of FIFA. Natural persons not falling under the exempted categories may only take the examination at their national association if they have an impeccable reputation and they may not, under any condition, hold a position as an official, employee, etc. at FIFA, a confederation, an association, a league, a club or any organization connected with such organizations or entities. After passing the examination<sup>4</sup> the agent further needs to take out liability insurance and sign a code of professional conduct before receiving his license.

The license is temporary and expires after five years. The agent then needs to take the exam again and if he fails the license is suspended until the exam is finally passed. Examinations take place once or twice a year on a date set by FIFA.<sup>5</sup> The agent is further obliged to conclude a written contract with the player he represents, meeting further formal requirements and for a maximum duration of two years.<sup>6</sup>

The agent is allowed to work for players as well as for clubs upon the request of either. In accepting such requests, agents need to avoid any (potential) conflicts of interest. In addition, the agent is a priori presumed to be guilty of inducing a player to breach his contract if the contract is breached prior to the contract's expiry and without just cause.<sup>7</sup> The burden of proof rests upon the player to establish that he is innocent in order to avoid a sanction. Sanctions that may be imposed upon agents for violating the regulations are a reprimand or warning, a fine of at least CHF 5000, suspension of the licence for up to 12 months, withdrawal of the licence or a ban on taking part in any football-related activity.

The regulations also include the rights and obligations of clubs and players. Clubs may only work with licensed agents and have to make reference to the agent in any contract that has been negotiated by the agent.<sup>8</sup> In the context of a player's transfer, clubs have to make sure that they pay agents by means of a lump sum only of which the amount has been agreed in advance.<sup>9</sup> If clubs violate these regulations they can expect to be warned or severely punished, with sanctions ranging from fines to deduction of points, transfer bans and even relegation to a lower division.<sup>10</sup>

Players that use the services of agents may choose to pay the agent

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1 The 3+2 rule quota system meant that only a limited number of foreign players could play in a particular match. For example, in the UEFA club competitions, only 3 foreign players (plus 2 'assimilated' foreign players) could play for a team.

2 Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v. Jean Marc Bosman [1995] ECR I-4921.

3 See also: S. van den Bogaert, 'Regulation of the Mobility of Sportsmen in the EU', (2005) Kluwer Law international and Gardiner, James, O'Leary and Welsh ed., 'Sports Law', third edition, (2006) Cavendish Publishing, pag. 500-521.

4 Passing the exam is very difficult. In the Netherlands, out of the 175 candidates who sat the two most recent exams in 2008-2009, only 8 were successful.

5 Article 17 PAR.

6 Article 19 PAR.

7 Article 22 PAR.

8 Article 27 and 28 PAR.

9 Article 20 PAR.

by means of a lump sum or a fee on a yearly basis. The fee is based on a percentage of the annual income of the player. If no agreement is reached concerning the fee, the agent is entitled to receive 3% of the annual income of the player, including any sign-on fee.<sup>11</sup> If the player is responsible for a violation of the regulations he can be warned or punished by a fine of at least CHF 5000, a match suspension or a ban on taking part in any football-related activity.<sup>12</sup>

### The need for regulation of the profession of agents

It is common knowledge in football practice that discrepancies occur in the international transfer business. However, problems directly involving agents rarely come before the relevant (international) football arbitration or dispute chambers.<sup>13</sup> Nevertheless, there are many sources that may serve to illustrate the type of problems connected with agent activity from which the need for regulation has become obvious. Below some snapshot examples will be given using different perspectives.

#### European Court of Justice

The European Court of Justice (ECJ), the highest court in the European Union, has dealt with the players' agent regulations in a case that was decided in 2005.<sup>14</sup> French citizen Laurent Piau filed a complaint against the PAR of 1995. Piau questioned the legality of the regulations and FIFA's authority to draft and implement these regulations. The ECJ was of the opinion that

*"Thus the need to introduce professionalism and morality to the occupation of players' agents in order to protect players whose careers are short; the fact that competition is not eliminated by the licence system; the almost general absence (except in France) of national rules and the lack of collective organisation of players' agents are circumstances which justify the rule-making action on the part of the FIFA."*<sup>15</sup>

#### The Independent European Sport Review(2006)

The Independent European Sport Review is a study that was undertaken in the context of the EU dealing with the specific nature of sport in European Union law generally, and using football as a case study. The findings were published in 2006. The UEFA, the European governing body in football, has fully endorsed these findings.<sup>16</sup> The study made a strong contribution to the flourishing debate on the regulation of professional sport in relation to the application of EU law and freedoms. The review also focused on the activities and regulation of agents:

*"Having analysed both the legal reasoning set out in the Piau case and also the practical operation of regulatory control of agents in the European area, the authors of this Review consider that a more rigorous form of regulatory enforcement is required. Furthermore, it may be appropriate to examine a system involving not only EU legal instruments but also with a stronger role for the European governing body (UEFA in the case of football) in particular to oversee effective enforcement of the Rules. A more effective system for regulating the activities of players' agents would also assist in the fight against money laundering<sup>17</sup> by ensuring the integrity of registered agents and monitoring financial flows. This would represent a logical development of the central clearing house system that has been discussed in the context of player transfers in Europe. It is submitted that rules concerning players' agents are inherent to the proper regulation of sport and therefore compatible with European Community law."*

#### European Parliament: Report on the future of Professional Football in Europe (2007)

In 2007, the European Parliament's Committee on Culture and Education issued a report on the future of professional football in Europe.<sup>18</sup> The main rapporteur was Belgian Member of the European Parliament (MEP) Mr. Ivo Belet. In this report some critical remarks as regards the activities of players' agents can be found:

*"[The committee on culture and education] believes that the current economic reality surrounding players' agents requires that football governing bodies at all levels, and in consultation with the Commission, improve the rules governing players' agents; in this respect calls on the Commission to support UEFA's efforts to regulate players' agents, if necessary by presenting a proposal for a directive concerning players' agents which would include: strict standards and examination criteria before anyone could operate as a football players' agent; transparency in agents' transactions; minimum harmonised standards for agents' contracts; an efficient monitoring and disciplinary system by the European governing bodies; the introduction of an "agents' licensing system" and agents' register; and ending "dual representation" and payment of agents by the player."*

#### European Commission: White Paper on Sport (2007)

A landmark development for the future of sport in the EU was the publication of the EC's White Paper. The European Commission is the main source for initiatives in EU policy action and for placing policy initiatives on the legislative agenda of the EU. The White Paper on sport has as its overall objective to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of the sector. The initiative aims to illustrate important issues such as the application of EU law to sport. It also seeks to set out further sports-related action at EU level.<sup>19</sup> In the White Paper the EC states that it has been informed about malpractices and that it intends to take action:

*"There are reports of bad practices in the activities of some agents which have resulted in instances of corruption, money laundering and exploitation of underage players. These practices are damaging for sport in general and raise serious governance questions. The health and security of players, particularly minors, has to be protected and criminal activities fought against. The Commission will carry out an impact assessment to provide a clear overview of the activities of players' agents in the EU and an evaluation of whether action at EU level is necessary, which will also analyse the different possible options."*

Below, the current state of the impact assessment thus carried out will be discussed further.

#### National governments: France and Netherlands

In October 2007, in response to and as encouragement of the EC's initiative to publish a White Paper on Sport, the State Secretary for European Affairs of the Netherlands, Mr. Timmermans, together with his colleague, the State Secretary for Sport, Mrs. Bussemaker, cooperated with France in the signing of a Memorandum.<sup>20</sup> The French signatories were the State Secretary for European Affairs, Mr. Jouyet, and the State Secretary for Sport, Mr. Laporte. Concerning the activities of players' agents, the Memorandum states:

10 Article 35 PAR.

11 Article 20 PAR.

12 Article 34 PAR.

13 For an overview of DRC Jurisprudence see also De Weger, 'The jurisprudence of the FIFA Dispute Resolution Chamber', (2008), T.M.C. Asser Press..

14 Case T-193/02 Laurent Piau v European Commission supported by FIFA, Jur EG 2005, p.II-0029, no.8..

15 Idem

16 See also the specific website of the review [www.independentfootballreview.com](http://www.independentfootballreview.com): "The

report will take into account relevant input from UEFA's high level strategy Vision Europe (April 2005). These Terms of Reference have been drafted in consultation between UEFA and under the UK Presidency, some of the EU member states. Whilst led by UEFA, the EU ministers are part of the governance of the report. The "football authorities" in Europe are UEFA for European/EU matters and UEFA's member associations for national matters."

See also in this respect [www.uefa.com/uefa/](http://www.uefa.com/uefa/)

keytopics/kind=2048/newsid=480464.html

17 Concerning money laundering in football the Financial Action Task Force published a report in July 2009, the role of agents in money laundering( pag. 20-23) is in fact only relevant if the client of the agent is involved in money laundering. The report specifies the difficulty to control the business of unlicensed agents in this respect. A copy of the report in possession of the author,

18 The link to the report: [www.europarl.europa.eu/](http://www.europarl.europa.eu/)

sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0036+0+DOC+PDF+Vo//EN&language=EN

19 Introduction to the White Paper on sport, to be found at [http://ec.europa.eu/sport/white-paper/whitepaper8\\_en.htm#1](http://ec.europa.eu/sport/white-paper/whitepaper8_en.htm#1)

20 Report to be found at [http://www.minvws.nl/images/s-2808263b\\_tcm19-154391.pdf](http://www.minvws.nl/images/s-2808263b_tcm19-154391.pdf)

*“Par ailleurs, dans un contexte juridique complexe, des joueurs professionnels de plus en plus nombreux recourent aux services d’agents pour négocier et signer leurs contrats. Des rapports à ce sujet font toutefois état de dérives multiples, prévisibles compte tenu des montants en jeu. La France et les Pays-Bas soutiennent le lancement de l’étude d’impact de la Commission sur cette question. Elle constituerait la base de réflexion en vue d’une position commune dans l’Union sur les licences requises pour exercer les fonctions d’agents de joueurs, ce qui permettrait de protéger joueurs et clubs des pratiques délictueuses.”*

#### *European team sports’ federations: Safeguarding the heritage and future of team sports in Europe (2008)*

In 2008, a letter and a document was sent to the French presidency of the Council of the European Union and to the EU Ministers in charge of European Affairs. The signatories of the document were the presidents of the governing bodies in football, handball, rugby, volleyball, basketball and ice hockey, i.e. Europe’s main sports.<sup>21</sup> In paragraph 3.3 of the document the following remark can be found:

*“The increased prevalence of agents in team sport (operating predominantly in the European area) and the well documented problems linked to their various activities calls for improved regulation to be developed by the sports federations possibly in conjunction with appropriate measures at EU level.”*

#### *European Football Agents (2008)*

In 2007, the European Football Agents Association (EFAA), a not-for-profit association according to Dutch law, was founded.<sup>22</sup> Members of EFAA can only be national agent associations. Currently there are 10 European associations, including the “big 5 league” countries, represented in the EFAA. In addition, in countries where there are no agent associations, EFAA assists in establishing one. Recently, EFAA has decided to accept associated members in response to requests from Brazil, Japan, the United Arab Emirates and Indonesia. An obvious goal of EFAA is to try to improve the general image of agents. The other goals of EFAA are laid down in Article 2 of the organizations’ statutes and focus on creating common ground amongst agents in Europe and to support the creation of national agent associations. Article 2.2 goes on to state that:

*“The Association tries to achieve these objectives inter alia by: promoting the cooperation, amicable relations and unity of the Member Associations and their Members, the FIFA licensed players’ agents; aiding the exchange of information between the Member Associations and supplying information about developments that are important to the collective and individual position of the Member Associations in Europe; promoting the interests of the Member Associations while considering the collective affairs important for said Associations in the fields of economics, social economics and employment law; promoting and improving the interests of players’ agents in possession of a FIFA license in all respects while safeguarding the general interests of the Member Associations; promoting the co-operation, intermediary activities and relations among organizations, sports institutions, professional football clubs or any other entities and the individual Member Associations, in particular in the field of management, consultancy and all forms of employment in the professional sector of football; concluding collective agreements; all other lawful and permitted means that may be conducive to the objectives.”*

21 Report to be found at [http://www.uefa.com/multimediafiles/download/uefa/other/73/43/89/734389\\_download.pdf](http://www.uefa.com/multimediafiles/download/uefa/other/73/43/89/734389_download.pdf)

22 More information: [www.eufootballagents.com](http://www.eufootballagents.com)

23 See also: <http://www.pro-agent.nl/index.php?cid=4&aid=163&start=0>

24 R.Branco Martins, ‘The Laurent Piau Case of the ECJ on the status of players’ agents’, in ‘EU, Sport, Law and Policy’ (2009), pag. 256, T.M.C. Asser Press..

25 A few examples: in the Netherlands play-

ers are not allowed to pay for the services of agents, while the FIFA PAR allows this; in Belgium an agent must have a license for the specific regions Walloon, Flanders and Brussels in addition to the FA license before being allowed to carry out work; in France foreign agents need to be registered and have a French license in order to work in France. All this serves to illustrate that the umbrella-level regulations are not consistent with national regulatory frameworks.

26 France has introduced a ban on the activ-

At the end of 2008, EFAA drafted a list of 10 urgent issues and malpractices that need to be tackled in European football. This list served as the basis for discussion with football stakeholders.<sup>23</sup> The issues listed are described below, 3 out of the 10 in more detail.

First, a solid legal framework needs to be created for the regulation of the activities of agents, clubs and players concerning all issues related to transfers and representation. As opposed to the ECJ’s ruling in *Piau*, many EU Member States regulate the activity of sport agents through general statutory interventions or general legislation such as contract law and agency work laws. Others have established a sport-specific statutory basis for agent regulation. Currently 93% of the European Union-based agents are primarily regulated by a source of law or collection of rules that prevail over the FIFA PAR.<sup>24</sup> The complexity in this legal environment is aggravated by the rulemaking activities of international sports federations, whose rules are applicable to agents through the system of licensing. The mandatory transposition of international sports regulations by national associations has increased legal inconsistencies and has led to conflicts in the European sports sector. There is an absolute necessity for a source of regulation that is in line with the hierarchy of laws (EU law - national law - association law) in order to create legal certainty in the regulation of the profession of agents and the transfer of players. Such regulation needs to be applicable to a well-defined area of activities.<sup>25</sup>

Second, the football sector should work towards a ban on the activities of unlicensed “agents” and the activities of unlicensed exempted individuals and focus on better control of licensed agents who act as a cover for unlicensed agents. There is a need to attach more meaning and value to the FIFA license issued by the national associations. The activities of unlicensed agents take place beyond the control of the governing bodies as they do not fall within the scope of rules or regulations. These agents can therefore be involved in malpractices without being sanctioned. This leads to immense discrepancies if licensed, professionally organized agents are subject to stricter regulations that lead to a limitation of the freedom to provide their services. Moreover, this has the opposite effect to that pursued through the objectives of the regulators and the agents themselves. The problem of exempted individuals are also widely felt. A number of countries have introduced bans on the activities of lawyers who, in many cases, “sell” their autograph to unlicensed agents.<sup>26</sup>

The governing bodies should have the authority to investigate if a players’ agent uses his licence actively. This test may quite simply consist of analyzing the transfers negotiated by the agents. If the analysis shows that an agent uses his licence mainly to act as a cover for unlicensed agents he should be sanctioned.

Third, EFAA is working on improved protection for youth players and minors. This is a problem that involves all stakeholders. It is a broad issue and many aspects must be analyzed, including the proper limits to the professional influence agents should be allowed to have on football players below the age of 16. Another important element in the discussion are the criteria for the entry of minors into the territory of the EU. It should be avoided that parties involved in human trafficking are able to go “forum shopping” to bring minors into EU territory. The fact that due to the effects of training compensation and transfer sums players already represent a substantial value at a very young age also needs to be thoroughly investigated. More proportionate means may exist to reach the effect envisaged by the initiatives mentioned. An analysis of the negative effects of the

ities of lawyers in agent activities, see also: <http://droitdusport.wordpress.com/2009/05/29/agent-sportif-avocat-la-robe-ou-la-licence/>: “Alors que la proposition de loi ne contenait à l’origine aucune disposition relative au cumul d’activités agent - avocat, la Commission des affaires culturelles du Sénat a proposé d’apporter une précision : “L’activité d’un agent ne peut être exercée par un avocat. (...) Si les avocats peuvent préparer les contrats et conseiller les agents, ils ne doivent pas pouvoir

négocier et opérer les transactions avec les clients”. Le Sénat a ainsi adopté le texte suivant: “Nul ne peut obtenir ou détenir une licence d’agent sportif s’il exerce la profession d’avocat” and for the text of the proposal see: <http://www.senat.fr/leg/pplo7-310.html>. In Portugal the bar association has warned its members to refrain from working as agents and more recently the Dutch bar association has announced that lawyers are not allowed to act as intermediaries for non-licensed agents.



home-grown player rule is also strongly welcomed and endorsed by the agents.

Other elements appearing on the abovementioned list include a transparent sanctioning system for agents, players and clubs in case of malpractices related to transfers; a ban on the tolerance of ownership of "athlete's registration rights" or "federative rights";<sup>27</sup> harmonization and simplification of the method of invoicing of agents' fees; uniformity in tax legislation; harmonization of the method of payment of agents, enabling agents to be paid directly by players as well as by clubs on behalf of players; compulsory permanent education for players' agents including an annual seminar devised, taught and controlled by the Football Associations and football stakeholders including EFAA; and guidelines on the "legal and allowed" services rendered by agents to clubs. EFAA intends to continue working together with football stakeholders in order to reach these common goals.

### Significant recent developments: Deregulation of agents by FIFA vs. EC agent study

From the above it can be concluded that there is a serious need for football to control the activities related to transfers in general and agent activity more in particular. The main concerns of football practice and of politics related to sports in general and football in particular include child trafficking, money laundering, corruption and the protection of players' careers.

A recent development resulting from the 59th annual FIFA conference in the Bahamas appears at first sight to conflict with all the arguments mentioned above as put forward by the stakeholders: FIFA intends to deregulate the profession of agents to focus exclusively on its target groups: players and clubs.

The member associations of FIFA voted in favour of reviewing the current system of regulation of agents because FIFA argued that only 25% to 30% of transfers are carried out by licensed agents.<sup>28</sup> The member associations of FIFA generally support the idea of in-depth reform of the players' agent system through a new approach based on the concept of intermediaries and thorough discussions with club and player representatives. A working group of the FIFA committee for club football (including 2 FIFPro world players' union members, 2 club representatives and the FIFA legal department) was established to draft this reform, the outlines of which already appeared in the Dutch media at a very early stage of negotiation of the new regulations.<sup>29</sup> The working group proposes that all currently licensed agents need to hand in their licences to their national FA's. The FA's must refund any bank guarantees to the agents. The agents will no longer be regulated, but instead the focus will be on the contracts that are connected with transfers. Anyone will be able to act as an agent: lawyers, family members, managers, etc. Players and clubs as the main actors need to exercise due diligence and transparency in negotiating and concluding contracts. They are also the parties that can be sanctioned. Emphasis is put on avoiding conflicts of interest and on the fact that the party hiring the services of the intermediary is obliged to pay for them. In essence, therefore, the reform consists of the following elements: no licence, no insurance, no agent regulation and no agent activity control apart from control at the very last stage of the transfer process.

At the other end of the spectrum we find the outcome of the EC-commissioned study into the activities of agents. At the time of writing of this article only a draft had been completed, but it appears that, considering the abovementioned arguments brought forward by football practice, more particularly European football practice, the total abolishment of the licensing system is undesirable. In fact, if the overarching international system disappears, regulation of the profession will still exist at the national level. Many EU countries have their own regulations or laws dealing with agent activity.<sup>30</sup> This would add up and lead to legal uncertainty and difficulties in carrying out the profession for agents and in concluding transfers for players and clubs. Moreover, by solely focusing on the final stage of the transfer, the contract, the sources of very real problems (child trafficking, corruption, money laundering, etc.) that are rooted in the process preceding actual transfer are left undealt with and unsupervised.

An interim conclusion could therefore be that the level at which the profession and activities of players' agents is regulated will shift from the worldwide level of the umbrella organization to the level of the European Union. This interim conclusion is based on the recent drafts of the FIFA intermediary regulations and the views of the European football sector as contained in many official documents. The question then becomes: what avenues exist that may lead to the EU regulation of agents? A look at the future shows that there are many possibilities of which 2 will be outlined below.

### The future ...

The calls for the better regulation of players' agents in Europe from the different perspectives described above, have many things in common. There is a call for uniform regulation that may be enforced throughout the continent, guaranteeing professionalism and the permanent education of agents and the protection of (young) players and minors. Added to this is the demand for transparency in financial transactions, clear sanctions and a licensing system including a register. These elements could form the basic pillars of a set of rules embedded in any type of law or regulations in which a clear definition of the activities and role of the agent should also have a place.

In this contribution, the concept of the European Social Dialogue in football and a possible EU directive are broadly investigated as potential instruments to address the abovementioned issues.

### Social Dialogue in European Professional Football

On 1 January 2008, after almost eight years of preparatory work, the Sectoral Social Dialogue Committee for professional football was officially established.<sup>31</sup> The creation of the Committee has been heavily endorsed by the EC and other European institutions.<sup>32</sup> The comment in the European Parliaments' (Mavrommatis) report in reaction to the White Paper probably best underlines the position of the EU:

*"[The committee] underlines the importance of social dialogue promoted by the Commission as a valuable platform to promote social consultation and stable relations between employer and employee representatives and ensure legal certainty and contractual stability in sport; in this respect, welcomes the fact that the EPFL and FIFpro, mutually recognising each other as social partners, have jointly requested to the Commission the formal establishment of a EU social dialogue committee in the professional football sector, with the clubs and UEFA taking part as equal partners."*<sup>33</sup>

The negotiations between the social partners may lead to agreements on the level of the EU that have to be implemented in every Member State. Implementation is effected by means of an EU directive or through channels of social dialogue structures at the domestic level of the Member States.<sup>34</sup> Currently, fruitful discussions are already taking place within the Social Dialogue Committee.<sup>35</sup> These discussions focus on the creation and implementation of a standard players' contract for the EU.

The topic of agent regulation does not however seem to be a topic for negotiation within the framework of a Sectoral Social Dialogue

27 See also: <http://www.tsslaw.co.uk/documents/Sport%20and%20the%20Law%20Journal.pdf> and E. A. García Silvero, 'La Extinción de la Relación Laboral de los Deportistas Profesionales' (2008), pag 97 and further, Thomson Aranzadi..

28 See also: <http://www.fifa.com/aboutfifa/federation/administration/news/newsid=1081337.html>

29 Voetbal International, edition 18 August 2009.

30 See footnote 23.

31 EPFL Sports Law Bulletin edition 1, August / October 2008.

32 The European Commission DG Employment and Social Affairs supported a total of 7 projects that have lead to

the eventual creation of the European Sectoral Social Dialogue Committee in football.

33 Report to be found on: <http://www.europarl.europa.eu/oeil/file.jsp?id=5565022>

34 See the most recente article in a series R. Branco Martins, 'Regulation of professional football in the EU: The European Social Dialogue as a basis for the creation of legal certainty', in 'EU, Sport, Law and Policy (2009)', pag. 317-337, T.M.C Asser Press

35 EPFL Sports Law Bulletin edition 3, January / March 2009.

36 The social partners may reach agreements that can be transposed into national guidelines or regulations only if



agreement.<sup>36</sup> It could still be part of discussions within an “informal” Social Dialogue, but this would not serve the main reason for such discussions (establishing a solid legal basis) which means that the problems described cannot be solved under the instrument of the Social Dialogue. It is possible that the EC might apply a different approach when it comes to including the topic of the regulation of agent activity in a Social Dialogue framework. After all, the EC already appears to have introduced a form of “sport specificity” in the European Professional Football Social Dialogue by allowing the European Club Association (ECA) to act as a social partner, given that the ECA does not *prima facie* meet the requirements which the EC has attached to the status of social partner organization.<sup>37</sup> Still, the EC judged that the participation of the ECA was necessary to guarantee that football employers were more densely represented.<sup>38</sup> EPFL and ECA now represent the interests of the employers together. The fact that UEFA was appointed as the chair of the Social Dialogue Committee in football completes the picture<sup>39</sup> and underlines how a Social Dialogue in sports functions. The Sectoral Social Dialogue Committee is an obvious reflection of the professional football strategy council in the UEFA structure.<sup>40</sup> This “cross-fertilization” of both committees guarantees the compatibility of football regulations with EC law and vice versa. This is an example of a sport-specific, strong Social Dialogue taking place within the ambits of the law.

When viewed from this perspective, the topic of players’ agents could also be included in the Social Dialogue agenda. Or as the EP Employment and Social Affairs Committee put it in the Mavromatis report:

*“[The committee] considers that players’ agents should have a role within a strengthened social dialogue in sports, which, in combination with better regulation and a European licensing system for agents, would also prevent cases of improper action by agents.”*<sup>41</sup>

This would be in line with practice in a number of Member States where private employment agencies (which is the legal status of players’ agents according to international legislation)<sup>42</sup> take part in the self-regulation of their profession and in collective agreements with employers and employees.<sup>43</sup>

#### EU Directive on Players’ Agents

A serious number of football stakeholders have requested that the EC draft a directive on players’ agents. Judging by the problems that were outlined above, the EC seems very capable from a policy point of view to shape such a directive. The European Commission is normally reluctant to intervene in a sector and to impose rules by means of a directive.<sup>44</sup> However, considering the desire of all major EU football stakeholders, including the organized agents themselves, for a strong legal framework, the EC might be tempted to undertake serious legislative action. If we add to this the arguments in favour of tackling corruption, money laundering and child trafficking and the inability of the stakeholders so far to reach a stable solution, it could be argued that there is not only a possibility for the EC to come up with a directive, but also a political responsibility. Moreover, it would not be the

first time that the EC has intervened in the regulation of a profession.<sup>45</sup> However, a counter-argument for issuing a directive including a licensing system would be that competition could be distorted due to the introduction of thresholds for carrying out the free provision of services. The application of Article 81 EC Treaty (dealing with EU competition law) seems to be out of the question for reasons connected to morality and professionalism – the same reasons which allowed FIFA to regulate agents in the first place.<sup>46</sup>

If the EC issues a directive, the parties bound by it are the EU Member States. They have to guarantee the implementation of the directive under national law within a given period of time. This could be done with respect for national sport structures by letting the stakeholders at national level decide how to implement the (minimum) guidelines drafted at EU level.<sup>47</sup>

#### Conclusion

Developments are about to take place in relation to the regulation of players’ agents, that much is certain. However, the direction and source of any future regulation is still unclear and depends on the outcome of the EC impact assessment study into the activities of agents. Therefore, the role of the stakeholders in the regulation of the profession also remains undefined for the time being.

The European Social Dialogue Committee in football is now an institutionalized setting for negotiations within the football sector. Difficulties may arise when the topic of players’ agents is tabled as this topic is not officially a topic that can be discussed within the Social Dialogue framework.

A directive on sport agents in the EU could be a solution. Such a directive could not exclusively cover players’ agents in football as it would be too specific for a relatively small sector and would not provide an answer to the requests of other team sports. However, the European Commission remains reluctant to intervene in sectors where self-regulation is possible and would first wish to explore the possibilities for self-regulation before deciding to issue a directive itself.

Again, considering that common ground does exist amongst the stakeholders that are part of the platform that is the Social Dialogue Committee, it is to be expected that the EC will investigate those avenues before imposing legislation. Any form of future regulation should meet the criteria of subsidiarity and proportionality.<sup>48</sup> A major difference compared with before is that licensed players’ agents are now united in a European grouping and that they have been involved in the discussion. This opens up many perspectives for cleaning up the industry.

Besides the two options explored above, a range of other options is also open, but only the future can tell in which direction the sector will head.

In view of the seriousness of the subject, one final remark still needs to be made. It seems possible to create a stable, EU-wide agreement on agents. However, this would not provide the ultimate solution to the most stringent problem related to transfers and agents, namely the trafficking of children. The EU does not possess the power to establish a common immigration policy and it has to be avoided that individuals or networks engaged in these activities are able to go “forum

the topic is directly related to the issues mentioned in Article 137 EC Treaty. The activities of players’ agents do not seem to fall within this scope.

<sup>37</sup> There are 3 criteria which an organization has to meet in order to be eligible for consultation. The organization has to: *be cross-industry, or relate to specific sectors or categories and be organized at European level; consist of organizations which are themselves an integral and recognized part of Member States’ social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; have adequate structures to*

*ensure the effective participation in the consultation process.* The ECA does not possess these characteristics.

<sup>38</sup> EC representative presentation at the Sport and EU meeting in Britain.

<sup>39</sup> Zie stukken internet sectoral committee in football.

<sup>40</sup> See for the composition of the council: [http://www.uefa.com/multimediafiles/download/uefa/keytopics/90/11/92/901192\\_download.pdf](http://www.uefa.com/multimediafiles/download/uefa/keytopics/90/11/92/901192_download.pdf).

<sup>41</sup> Report to be found at <http://www.europarl.europa.eu/oecil/file.jsp?id=5565022> and more specifically at the comments of the European

Parliament point 99 concerning the organisation of sport.

<sup>42</sup> See the International Labour Organisation convention on private employment agencies: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C181> and also F. Hendrickx ‘De reglementering van de sportmakelaar in België’, in ‘Transfers en makelaars in de sport’, (2002), pag. 71-95, Intersentia

<sup>43</sup> See in this respect also the report of EuroCIETT, the European Trade Union for private employment agencies, to be found at: <http://www.eurofound.europa.eu/eiro/studies/tno807019s/index.htm>

<sup>44</sup> A directive seems to be the obvious choice given the effect that football stakeholders intend to reach; harmonized rules in every Member State.

<sup>45</sup> See A. Hustung, ‘Quelle intervention communautaire pour réguler la profession d’agent des joueurs?’, (December 2007), 85 RJE pag. 157.

<sup>46</sup> See footnote 23.

<sup>47</sup> Supra 45.

<sup>48</sup> See for an elaborate description of sports regulation in the light of EU law S. Miettinen, ‘Regulating sports services in community law’, in ‘EU, Sport, Law and Policy’ (2009), pag. 259-280, T.M.C. Asser Press.

shopping” for the best entry conditions for minors or for countries with little border control. A focus by FIFA on the protection of minors<sup>49</sup> is not enough as this is restricted to the moment of actual transfer. The malpractices occur in the process leading up to the actual transfer and take place mainly in non-EU states. Europe can take over the regulation of agents in the EU<sup>50</sup> and relieve FIFA of the administrative burden. However, football needs to act as one in order

to combat the most serious problems and FIFA is the only body capable of reaching all football nations worldwide.

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<sup>49</sup> See the new regulations of FIFA dealing with minors, incorporated in the Regulations on the status and transfer of players, article 19.

<sup>50</sup> Europe is currently the continent that is responsible for the biggest amount of transfers and the circulation of money considering transfers.

## The “Chambre Arbitrale du Sport” (CAS): a New Body for Dispute Settlement in French Sport

by Jean-Michel Marmayou\*

**Background.** The so-called “Mazeaud law” 75-988, enacted in France on 29th October 1975, made the *Comité National Olympique et Sportif Français*<sup>1</sup> (CNOSF) the main body for dispute settlement in French sport. Article 14 of this law states that “*the CNOSF settles disputes opposing practitioners, groups and federations, when requested*”. These powers were not put into practice at the time as disputes in the field of sport essentially involve the individual sport federations themselves (which derive their authority from the state) and therefore concern public law, which excludes resolution by arbitration. This meant that the French sports movement preferred a prior conciliation approach. Today, in a concern to adopt a position as the preferred body for the settlement of sports disputes, and no doubt due to pressure from the world of professional football which has been very critical of the conciliation approach, the CNOSF has sought to create an arbitral body for resolving disputes in sport. As authorized by its articles<sup>2</sup>, its General Assembly of 23rd May 2007 approved a resolution amending Article 19 of its Rules of Procedure. Henceforth, this article stipulates that a “*special rule adopted by the board of administration on a proposal from the Executive Committee, after opinion from the Committee of Ethics, also lays down the conditions in which, for any private dispute resulting from a sports activity or related to sport and involving rights freely available to the parties, the parties may enter into an agreement to submit their dispute to an arbitration panel consisting of persons drawn from a list approved by the CNOSF’s board of administration*”.

The CAS’ Rules of Procedure were published in January 2008 together with a list of the first 40 arbitrators.

**Models.** By creating the French CAS, the CNOSF demonstrated its determination to transpose the undeniable international success of the Tribunal Arbitral du Sport<sup>3</sup> (TAS) based in Switzerland onto a national platform. However, a different approach has been adopted. The CNOSF prefers to follow the approach adopted by certain European Olympic committees, that is to say, a national arbitration institution for sports as an internal body created within the National Olympic Committee, the highest authority in the domestic sports movement.<sup>4</sup>

In Italy for instance, the Italian National Olympic Committee (CONI) set up and continues to administer the *Camera di conciliazione e di arbitrato per lo sport*. The Belgian Commission for Arbitration of Sports Disputes is also a creation of the Belgian Interfederal Olympic Committee (COIB) which has created and accommodated the *Commission belge d’Arbitrage* (Belgian Commission of Arbitration) since 1991 in its headquarters. In Luxembourg, the Luxembourg Commission of Arbitration for Sport is also a creation of the *Luxembourg Olympic and Sports Committee* (COSL) in accordance with its articles. In Poland also, the *Trybunał Arbitrażowy do Spraw Sportu* has been set up by the Polish Olympic Committee (PKO).

However, even if arbitration is a form of justice that meets the needs of the world of competitive sport in that the arbitrator chosen by the parties is able to issue confidential and rapid settlements that take into account the particular nature of a sport but without strict adherence to the rules of legal procedure, it will only be effective and accepted as a valid form of justice if it is entirely legitimate. Therefore, it is essential that the arbitration instances set up to hear disputes in the field of sport have very high standards in terms of their respect for fundamental rights. Indeed, the corollary of jurisdictional independence is irreproachable quality, the most important criterion of which is a very high degree of independence. In fact, the CNOSF is the highest institution in French sport and to create a dispute resolution entity within its confines is to ignore this obligation of independence. Indeed, it will be noted that the organization of the CAS comes under the authority of a Committee of Ethics and does not depend on the CNOSF’s board of administration directly. Nevertheless, it cannot be ignored that the members of the Committee of Ethics are designated by the CNOSF’s board of administration on a proposal made by the CNOSF chairperson.

This approach by the French authorities is all the more surprising in that since 1994 the TAS in Lausanne has, for reasons of legitimacy and on the instigation of the Swiss federal court, been separated from the international sports authorities that created it.<sup>5</sup> Certain countries have noted the message delivered by Switzerland and created arbitration institutions for sport that are juridically independent from the national sports authorities.

This is the case in Germany where the German athletics federation has entrusted its disciplinary affairs to the German Institute of Arbitration, which generally deals with economic disputes. Similarly in Canada, where the law in favour of physical activity and sport (C-12 of 19th March 2003) has created a non-profit making legal entity called the Sports Dispute Resolution Centre of Canada, clearly independent from the national Olympic committee and the other sports federations. This principle has also been applied in the United Kingdom where the Sports Disputes Resolution Panel limited (SDRP)<sup>6</sup>, a private company registered in England and Wales, is the highest independent authority of the National Anti-Doping Panel (NADP) and the Tribunal Service for Sport in the United Kingdom.

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<sup>1</sup> French National Sports and Olympic Committee.

<sup>2</sup> Art. 2 of the CNOSF articles: “The role of the CNOSF: [...] to facilitate resolution of disputes within the sporting world by way of mediation or arbitration,

act in justice to defend the collective interests of the sports movement”.

<sup>3</sup> Court of arbitration for sport.

<sup>4</sup> Cf. F. Buy, I.-M. Marmayou, D. Poracchi, F. Rizzo, *Droit du sport*, LGDJ 2009.

<sup>5</sup> Swiss federal tribunal, 15 March 1993, *Gundel*, *Recueil Officiel des Arrêts du Tribunal fédéral*, ATF 119 II 271; *Bull. ASA* 1993, p. 398; *Rev. suisse dr. intern. et dr. eur.* 1994, p. 149, obs. Knoepfler.

<sup>6</sup> The SDRP has even created a brand of its services which it uses to present all its activities: *Sport resolution (UK)*.

## I - Internal organisation

### A - Management entities

The Secretariat. According to the *Chambre's* Rules of Procedure, the Secretariat is the body that administers the CAS. It functions in the same way as a court clerk's office and manages the day-to-day workings of the CAS. It receives applications, checks on payment of registration fees, fixes the budgets for general and administrative expenditure, refers disputes to the arbitration panel, receives all the documents exchanged between the parties and the panel, and establishes the amount of the arbitrators' fees on an hourly rate.

Chairperson and vice-chairpersons. The chairperson of the CNOF's „panel of arbitrators is also the CAS Chairperson. This approach has been preferred in order to avoid conflicts of interest between conciliation and arbitration. The Chairperson is assisted by two Vice-chairpersons that he/she appoints from the list of arbitrators. When a defendant is silent or one of the parties puts forward one or several arguments to challenge the existence, the validity or the scope of the arbitration agreement, the Chairperson may decide that arbitration is to be pursued only if the parties first recognize the existence of an arbitration agreement setting out the rules of procedure.

Appointments Committee. The Appointments Committee consists of the CAS Chairperson and its two Vice-chairpersons. Article I of the CAS' Rules of Procedures stipulate that it has the authority to rule on any questions concerning the appointment of arbitrators. More precisely, the Chairperson only chooses the arbitrators for a particular case from those on the list drawn up by the CNOF's board of administration on a proposal from its Committee of Ethics.

Any appointment of an arbitrator by one party has to be confirmed by the Appointments Committee which is under an obligation to answer the notification of appointment within eight days. The Appointments Committee organizes the replacement of an arbitrator in the event of death, challenge, resignation or impediment. When the arbitration agreement does not stipulate the number of arbitrators, the Appointments Committee will base its decision on the importance of the dispute. Generally, the Appointments Committee rules on the appointment, confirmation, challenge or replacement of an arbitrator. Its decisions concerning the composition of an arbitration panel are without right of appeal.

CAS' Rules of Procedure. The CAS has to apply the Rules of Procedure enacted by the CNOF. The text of these rules, at present undated, was published in January 2008. It contains 28 articles and an appendix.

This body of text has four parts in addition to the preliminaries and an introduction intended to explain the fundamental mechanisms of the arbitration procedure. These parts are: constitution of the arbitration panel, the arbitration procedure, the award and costs. An Appendix discusses the fees of the arbitrators and sets up a scale for the general and administrative costs of arbitration.

The CNOF's board of administration has authority for enacting the Rules of Procedure with its general assembly constituting the final recourse in case of discord. The Committee of Ethics is able to issue opinions on the contents of the rules.

### B - The arbitrators

The creators of the CAS took the justified but disputed decision to set up a closed list of arbitrators. Under Article 7 of the CAS' Rules of Procedure, only the persons on the list drawn up by the CNOF board of administration may be appointed as arbitrators for a dispute, and on a proposal from its Committee of Ethics. The first list contains 40 arbitrators including lawyers, university academics, CNOF mediators, and court officers. This list, which can be added to as the need arises, demonstrates a desire to see various sports represented.

**Arbitrators' obligations.** Every arbitrator is required to be impartial and has to remain independent of the parties. Therefore, before his/her appointment or confirmation, an arbitrator signs a statement of independence that he/she communicates to the Secretariat, and when applicable, gives any information or circumstances which could undermine his/her independence in the minds of the parties. Similarly, when facts or circumstances of this kind arise during the

arbitration process, an arbitrator has to immediately inform the Secretariat and the parties in writing.

An arbitrator is also bound to observe strict rules of non-disclosure concerning all the information they receive. In this respect, it is surprising that nothing is set down in writing obliging the Chairperson, Vice-chairpersons and Secretariat to satisfy this same obligation.

By accepting a brief, an arbitrator who has a right to receive remuneration for his/her intervention, undertakes to fulfil this obligation through to its conclusion.

**Arbitration panels.** Disputes submitted to the CAS may be heard either by a single arbitrator or a panel of three arbitrators. The parties are free to decide which of these options they prefer, but if they do not agree and the principle of arbitration is not disputed, the Appointments Committee will choose the arbitration panel.

**Instructions.** Unlike the TAS which offers mediation services and is able to deliver opinions, the CAS has only one purpose: to resolve disputes and disagreements arising from a sports activity or relating to a sport and which have been submitted to it by the parties. Sports federations and their national and regional bodies, and affiliated sports groups and their members, may submit disputes concerning their rights to the CAS.

However, it must not be forgotten that disputes arising in the context of a sport regulated by a state-appointed federation will implicate public authority prerogatives and therefore come within the competence of the Court of Administration and be excluded from any arbitration procedure. Consequently, the CAS competence does not cover disciplinary aspects but rather economic ones (sponsorship contracts, TV and radio contracts, relations between agents and professional players or clubs, relations between clubs themselves, etc.).

## II - CAS internal working

Even though CNOF Articles of Association stipulate that the Committee is competent *“to facilitate the settlement of disputes arising within the sports movement by conciliation or arbitration”*, arbitration cases brought before the CAS do not escape the common law rules applicable to internal arbitration governed by articles 1442 and thereafter of the Code of Civil Procedure and by articles 2059 to 2061 of the Civil Code.

### A - Arbitration agreement

**Admissibility.** Every legal system, even the most liberal, stipulates that certain matters may never be submitted to arbitration. Swiss domestic arbitration law, for instance, stipulates that the only disputes that can be submitted to arbitration concern rights which are *“freely available to the parties”*, that is to say without legal constraints. Article 2059 of the French Civil Code similarly lays down that persons *“may compromise rights that are freely available to them”*. Hence, disputes may be submitted to arbitration by the CAS when their scope concerns contracts of sponsorship or media rights, but not disputes that may involve criminal law or public law, such as those generated by the sports federations delegated to exercise their public authority prerogatives. A dispute concerning a person's employment is more dubious due to the need to observe the competence of the industrial tribunal.

**Arbitration agreement or clause.** Arbitration is always based on a contractual relationship. However, depending on whether the dispute has already arisen or not, the arbitration agreement may take the form of an agreement or an arbitration clause. In fact, arbitration clauses are probably the most common and in most cases will designate the CAS as the arbitration authority.

Today, French arbitration law takes a rather benevolent view of arbitration clauses and Article 2061 of the Civil Code validates the clauses in contracts signed for professional employment, with the sole proviso that they comply with specific statutory provisions. In the case of sports practitioners, it may be assumed that such a professional could encounter opposition to this type of clause when it involves

7 Art. 5, Concordat intercantonal sur l'arbitrage of 27 March 1969. -A. Rigozzi, *L'arbitrage international en matière de*

*sport*, Bruylant, LGDJ et Helbing & Lichtenbahn, 2005, no. 704.



his employment, but provided that for the purposes of the arbitration he is not acting as an employee (for instance, in a dispute with a club). In this case, the clause will be overridden by Article L. 1411-4 of the Labour laws (Code du Travail).<sup>8</sup>

The arbitration clause will also be null and void if it is not set down in writing in the main agreement, or in a document to which this refers, or when it does not designate the arbitrators or provide for their method of appointment.<sup>9</sup> In the latter case, designation by the CAS will be sufficient.

**Effects of the agreement.** The arbitration agreement confers on the arbitrator the authority to settle disputes. If a dispute is brought before a state judge, the latter may declare himself/herself not qualified to hear the case<sup>10</sup>; and if one of the parties dispute the jurisdictional authority of the arbitrator, the latter will decide on the validity or the limits of his/her appointment.<sup>11</sup>

Disputes are heard before the CAS by an arbitrator or a panel of three arbitrators chosen freely by the parties. If not covered by the arbitration agreement, the CAS' Rules of Procedure state that the Appointments Committee will take this decision. If the parties decide that the dispute will be heard before a panel of arbitrators, each party designates an arbitrator chosen from a list of three arbitrators, with a Appointments Committee taking the decision in the event of disagreement or omission by the parties in this respect. A third arbitrator is appointed by the two appointed arbitrators, or by the committee if the two arbitrators disagree.<sup>12</sup>

## B - The arbitration procedure

**Unfolding of a procedure.** In accordance with Article 1460 of the Code of Civil Procedure, the arbitrators will decide on the arbitration procedure without being obliged to follow the rules laid down by the courts. However, certain procedural guidelines are always applied.

According to the CAS' Rules of Procedure, the arbitration panel establishes a brief describing the claims and any documents communicated by the parties. This brief gives the timetable for the procedure. The procedure enables the panel to hear any witnesses and experts

designated by the parties. It may also order any investigation if it feels necessary, or take any measures of a provisional or protective nature.<sup>13</sup>

When it considers that it has received sufficient information, the panel closes the proceedings and fixes the dates for hearing the arguments of the parties.<sup>14</sup>

**The award.** The CAS decision takes the form of an award, which is a sort of judgement. It is delivered within six months of notification of the brief, based on a majority decision by panel members when there are several arbitrators.<sup>15</sup>

The arbitration procedure is governed by the legal system chosen by the parties or when no system has been chosen, according to French law.<sup>16</sup> If the parties so desire, it will also rule on the fundamental fairness of the case as "*amiable compositeur*", as authorized by article 1474 of the Code of Civil Procedure.

Lastly, it has to be remembered that the effect of the award is to release the arbitrator and, once made known, constitutes a conclusive judgement binding on the parties (*res judicata*). In theory, the parties may file an appeal before the state courts, but CAS rules stipulate that the parties are assumed to have waived all lines of appeal that it is in their powers to waive. Only an action to set aside the award remains open to the parties before the Court of Appeal and within the limits stipulated by article 1484 of the Code of Civil Procedure.

Finally, there is no doubt that the CAS will contribute to the general process of creating *de jure* standards applicable to the sports world. Whatever the outcome, it is hoped that it will have sufficient legitimacy for its awards to contribute to the growth of arbitration case law and the development of general principles forming a sort of *lex sportiva à la française*.

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8 F. Buy, *L'organisation contractuelle du spectacle sportif*, PUAM, 2002, no. 491. - M. Maisonneuve, "La chambre arbitrale française du sport", *Rev. jur. éco. sport* 2008, no. 88, p. 17.  
9 Art. 1443, CPC.  
10 Art. 1458, CPC.

11 Art. 1466, CPC.  
12 Art. 8, CAS Rules.  
13 Art. 18, CAS Rules.  
14 Art. 20, CAS Rules.  
15 Art. 1456 and 1470, CPC. - Art. 21 and 22, CAS Rules.  
16 Art. 17, CAS Rules.



# The Application of Criminal Law on Doping Infractions and the 'Whereabouts Information' Rule: State Regulation v Self-Regulation

by Gregory Ioannidis\*

## Introduction

Much discussion has been generated with the introduction of a rule to combat the use of performance enhancing substances and methods in sport. This discussion has been initiated and subsequently became an integral part of the sporting public opinion, as a result of the application of this rule on high profile professional athletes, such as the Greek sprinters Kenteris and Thanou, the British 800m athlete Christine Ohuruogou, as well as FIFA's disagreement to incorporate the rule in its regulatory framework.

The "Whereabouts Information" Rule [hereafter WIR] concerns the so-called "non-analytical finding" cases, which do not require a finding of a positive result of an anti-doping test for the application of sanctions on anti-doping rules violations. Instead, they require that the athlete fail to submit whereabouts information and/or fail to be present, for an anti-doping test, during the chosen time and place of

his/her whereabouts information. The WIR, therefore, is a prerequisite for a "missed test"; before the sanction of an anti-doping violation could be applied on an athlete and during the analysis the reader must always keep the two together.<sup>1</sup>

The consequences, for an athlete, of failing to adopt, apply and follow the WIR are immense. When an athlete fails to submit up to dated whereabouts information or is not where his information states he should be and an officer attempts to test the athlete unsuccessfully, the athlete, according to the World Anti-Doping Code [thereafter WADC], is deemed to have missed the test and he would be the subject of an evaluation of a missed test. Three missed tests in a consecutive period of eighteen [18] months constitute an anti-doping violation, which carries a sanction of ineligibility from all competitions.

## The historical framework

The creation of the WIR dates back to June 2004. It was the International Association of Athletics Federation [thereafter IAAF], that first incorporated such rule into its regulatory framework. This rule came into force in June 2004 and all National Olympic Committees and National Governing Bodies had been notified as to the existence and application of this rule during the last week of June 2004. This was almost 7 weeks before the opening of the Athens Olympiad in August 2004.<sup>2</sup>

\* Dr. Gregory Ioannidis is an Advocate and a lecturer in Sports Law at the University of Buckingham School of Law, United Kingdom. This article expands further on the author's PhD thesis on criminalization of doping in sport and it incorporates the author's findings from his professional litigation

and practice before the Court of Arbitration for Sport.  
1 For more information on missed tests see Dr Gregory Ioannidis, "Doping in Sport: The Rules on Missed Tests, 'Non-Analytical Finding' Cases and the Legal Implications", *International Sports Law Journal*, 2007/3-4, 19-27.



This Rule came into force for one obvious and well documented reason: that is, to enhance the ability of the sporting governing bodies towards detection of those who attempt to refuse and/or avoid the anti-doping test. Applying the strict liability standard, the result, of the intended aim of the rule, is also obvious: to create an anti-doping violation [in a form of a positive test for performance enhancing substances] even where the athlete has not tested positive for the use of performance enhancing substances and/or methods of enhancing one's performance.

Once the legality of such rule has been established, there is little question as to the ethics of its application. Despite the fact that there are concerns as to the serious detriment to an athlete's career if this rule is applied in an arbitrary and capricious way, the aim of its inception and application appears to be defeating all arguments against its use. Once a justification for the ban on doping practices has been established, all arguments on ethicality and morality tend to become weak in rebuttal.

I would not argue as to the ethicality or morality of the existence of this rule. To do so, would require me to consider the highly subjective contention of "what is wrong with drugs and doping in sport." The justifications of the ban on doping in sport are well documented elsewhere and another analysis, here, to this effect, would simply leave me repeating the point. What is important, however, for the purposes of this work, is to examine and critically analyse the practicalities of the application of the WIR. It is not only important that gaps in knowledge must be filled, but it is equally important and thought provoking, to enhance practice in this area of sports law. This will assist not only those who practice sports law, but also the ones who practice different sports and, in particular, those who are responsible for the governance of these sports.

I would aim to further analyse and constructively criticise the inefficiency of the operation of the said rule in practice. In doing so, I would analyse the theoretical framework, the intention of the legislator for the creation of this rule, the response of the governing bodies and that of the state governments. The latter will help us consider the argument for criminalising doping methods and practices in sport.

### The theoretical framework

It is submitted that the WIR is controversial not only because of its apparent subjectivity in its application, but also because it fails to consider principles of privacy and human rights. It also fails to address issues of transparency and equality. Its operation in practice does not consider due process and natural justice and violates general principles of law.

There are, at the moment, significant gaps in the knowledge and omissions that emanate from lack of practice. The rule appears to be problematic and creates significant gaps in its application. These gaps reveal significant findings, which they would, without a doubt, call for a review and re-examination of the propriety and fairness towards the application of the general anti-doping rules. It would come as no surprise when the time arrives where a case attempts to test the legality and fairness of these rules before a national court of law. Despite the fact that certain regulations of sporting governing bodies attempt

to exclude the resolution of a private dispute before national courts of law, it is submitted that where an error of law and/or injustice have occurred, immunisation from judicial intervention may not so easily be achieved.

Under English law, an attempt to exclude the courts from their effort to interpret the law is considered to be against public policy. To this effect, *Lynskey J* has argued in the past: "The parties can, of course, make a tribunal or council the final arbiter on quotations of fact. They can leave questions of law to the decision of a tribunal, but they cannot make it the final arbiter on a question of law."<sup>3</sup>

This is obviously an encouraging statement which should allow some latitude for the accused athlete, where an obvious error of law has occurred, or some other principles of law have not been observed. The truth of the matter, however, is that the Court of Arbitration for Sport in Lausanne (CAS) remains the final arbiter, for both the facts and the law, and as such is followed by the parties to a dispute.<sup>4</sup> *Lynskey J*'s statement, however, would not find application in practice, if the accused athlete feels that his rights have been breached and CAS has failed to produce an appropriate remedy. In my experience and in recent cases before CAS, the panel has remained silent on questions relating to human rights.<sup>5</sup> On a different issue, that of the lifting of the provisional suspension, the Panel suggested that CAS is not a court of law, but a tribunal, and therefore not the appropriate forum to deal with complex legal issues, such as the one raised by counsel for the accused athletes! And with the ECJ's recent decision in *Meca-Medina v Commission of the European Communities* [C519/04]<sup>6</sup> it is clear that actions that take a different road from that to Lausanne may also conventionally fail.

### *The consequences for failing to submit 'Whereabouts Information' and/or missing tests*

Article 2.4 of the WADC states: "Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation."

This regulation was further implemented with some important changes applicable as of 1 January 2009. The two major changes that resulted from the revision of the WADC and the International Standards for Testing in relation to whereabouts information and missed tests are as follows:

- The requirement for top-level athletes included in the registered testing pool of either their International Federation or National Anti-Doping Organisation to specify 1 hour each day (between 6 a.m. and 11p.m.) during which they can be located at a specified location for testing. These athletes do not have to identify the 60-minute time-slot at a home address, but they can if they wish to.
- The harmonization of what constitutes an anti-doping rule violation in relation to whereabouts and missed tests and what potential sanctions can be applied. Any combination of 3 missed tests and/or failures to provide accurate whereabouts information within an 18-month period now leads to the opening of a disciplinary proceeding by the ADO with jurisdiction over the athlete. Sanctions range between 1 and 2 years depending on the circumstances of the case. Previously this was discretionary for ADOs with a suggested range of between 3 months to 2 years.

As it was submitted earlier, the significance of this regulation lies in the fact that it does not concern positive tests for the use of performance enhancing substances, but instead the so-called "non-analytical finding" cases.<sup>7</sup> Such cases, as mentioned above, do not include positive tests on behalf of the athletes, but rather anti-doping violations, in a form of a strict liability offence, where the accused athlete failed to submit whereabouts information and/or missed the anti-doping test. There may be an argument that these two offenses are similar and they must be kept together when one applies sanctions, which may

2 I remember the facts well as this rule was interpreted and tested rigorously in the case of *IAAF v Kenteris & Thanou* before the Court of Arbitration for Sport, where I acted as Counsel for the Greek sprinters. One of the submissions made concerned the lack of knowledge and understanding of the application of the rule on behalf of the athletes, as the rule was so fresh and new in its inception and application in practice. It was accepted that on the eve of 12th August 2004, where the third missed test had occurred, the authorities had failed to notify the sprinters as to the previous two tests, with the result that the sprinters did not have knowledge as to the

number of missed tests they had at the time.  
3 *Baker v Jones* [1954] 2 All Er 553, p. 558.  
4 See Dr. Gregory Ioannidis "WADA Code draft revision: questions remain", World Sports Law Report, January 2007, pp 14-15.  
5 *IAAF v SEGAS, Kenteris & Thanou CAS A/887/2006* [unreported].  
6 *The ECJ dealt with the issue as to whether sporting governing bodies' anti-doping rules were exempt from review under EC competition law because they concerned purely sporting matters which did not affect economic activity.*

well be the case; it will be shown, however, that these provisions not only are they mutually incompatible, but they are also unworkable because of their specific definitions and applications in practice.

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

These questions cannot be answered unless we consider some kind of uncontroversial and well tested data from practice. Those of us, who had the opportunity to test the theory and interpret the regulations before the CAS, have come to the conclusion that these regulations can, indeed, produce great injustices with immeasurable consequences, particularly where the athlete is at no fault. Are there such examples? To our dissatisfaction, the answer is unfortunately affirmative.

This brings us to the point where an inevitable distinction between self regulation and state regulation has to be made. The latter, it is submitted, could take the form of a criminal law, whereby effective, transparent and, above all, consistent application of the rules could be achieved.

The regulation of anti-doping is now days left with the appropriate sporting governing bodies. Where there is a dispute between a SGB and an athlete, or a breach of the rules<sup>8</sup> by the athlete, the SGB is left to play the role of the investigator, jury and judge. This, in theory, is enough to raise eye-brows and, in practice, the examples that justify this contention are nothing short of plenty. In no more than a handful of cases, it was accepted that it is not always the athletes who find themselves at fault, as a result of an alleged missed test, or, indeed, failure to provide the authorities with adequate and up to dated whereabouts information. This serves as a catalyst towards an extremely ineffective application of these rules and to the detriment of the athletes.

Let us consider now some of the situations where sporting governing bodies are responsible for the missed tests of athletes and/or failure to submit [I would argue failure to receive] the whereabouts information.<sup>9</sup> Some examples include the following:

1. An athlete submits his whereabouts information in a timely manner, but the SGB fails to receive, file, or analyse this information in a timely manner. Days later, the athlete, due to an emergency, changes his whereabouts information, but the SGB fails again to note these changes. As a result, the DCO attempts to test the athlete at a place and time that are not applicable. Result: Missed test.
2. A DCO attempts to test an athlete at the correct place and time, however, the DCO is unaware of the true identity of the athlete. As a result, the DCO cannot find the athlete. Result: Missed test.
3. A DCO arrives at the training camp to test an athlete. The athlete's whereabouts information state that the training will take place between 6-8pm. The DCO arrives at 6pm and identifies the athlete without approaching the athlete yet. At 7:10pm the athlete has an emergency and needs to be rushed to the dentist. The DCO records this as a missed test and also evasion.
4. The DCO arrives at the location of the athlete, according to the whereabouts information. The athlete cannot be found, but before the allotted time has expired, the DCO hands in a notification form to the coach of the athlete, stating that the athlete has been notified of the test and if the athlete is not back by the end of the training, he would be deemed to have missed the test.
5. The athlete falls asleep and forgets to go to the training camp on time. The DCO records another situation of a missed test and adds the charges of refusal and evasion! One of course would argue that it is impossible to miss a test and refuse it at the same time! Well, it has been recorded as such!
6. The athlete has an emergency and needs to be rushed to the hospital. He does not know how to send a text message nor does he have a fax to notify the authorities on time. Result: a missed test.

7. The NADO attempts to test the athlete at 8:25pm. The athlete finished his training at 8pm according to the whereabouts information. Result: a missed test.

There may be a contention that these situations are far-fetched<sup>10</sup>. That may well be the case and to someone who listens to a press conference produced by a SGB into an allegation of a missed test, it may appear as an intentional attempt of the athlete to evade the test. It all of course depends on the evidence; however, the application of these rules in the above circumstances can create unwanted and unwelcome consequences for innocent athletes. Once the name of the athlete brakes the news, the athlete automatically is considered presumed guilty. This cannot be right and it offends against fairness and justice.

These reasons serve to justify the contention that not always the SGBs are able to properly regulate anti-doping in sport. Worse still, sometimes they are unable to properly interpret and apply these regulations. It is submitted that self regulation, in this context, is rather ineffective, discriminatory and arbitrary. This criticism could also be compounded by the application of the established burden of proof.

### *The burden of proof in doping trials*

There is no doubt that the aims of the rules of sporting governing bodies are simple: healthy competition, equal or level-playing field for all and punishment for those who do not obey the rules. The rules themselves, however, are not always straightforward. As my learned friend, Michael Beloff QC suggests: “*In my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here, a loft there, a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole.*”<sup>11</sup> This is an element which gives rise to intense criticism, particularly from the penalties' point of view. The issue of proportionality or the argument that the punishment is disproportionate to the offence committed has given rise to many different interpretations before national courts of law. It has been suggested that a four year ban is contrary to German law<sup>12</sup>, whereas it was held valid under English law.<sup>13</sup> The case of *Meca-Medina* certainly confirms that a ban which is over a certain number of years could be held disproportionate. The introduction of WADA, with the main aim to harmonise different rules and penalties from different sports, suggests that a two year ban could be upheld as reasonable and proportionate to the offence committed. The European Court of Justice appears to agree. There are, however, exceptions to this general rule. If a second offence is committed and the accused is found guilty, then the ban takes the form of life ineligibility from international and national competitions.<sup>14</sup> There may be cases where the accused athlete is able to establish “exceptional circumstances” and have his lifetime ban reduced to 8 years.<sup>15</sup> Or there may be a case where an athlete is found to have committed two separate anti-doping rule violations, which have not arisen from the same test, and could receive a sanction of a three-year ban.<sup>16</sup>

<sup>7</sup> Examples include the cases of the American sprinters Tim Montgomery, Chirstie Gaines, Kelly White and the well-known and highly publicised case which arose out of the Athens Olympic Games with the Greek sprinters Konstantinos Kenteris and Katerina Thanou.

<sup>8</sup> Breach of rules by SGBs is almost never acknowledged.

<sup>9</sup> These are examples stemming directly from litigation before the CAS or from the pre-trial stage and/or the stage of disclosure. As some of these cases have been dealt with in confidence, or settled out of court, I am unable to produce names or dates. They need, however, to be taken at face value, as they are real cases and serve to illustrate that sometimes the SGBs are unable or incompetent to deal with the correct application of these rules.

<sup>10</sup> These examples are based on real scenarios of cases that were decided between 2004-2009.

<sup>11</sup> “*Drugs, Laws and Versapaks*”, in “*Drugs and Doping in Sport: Socio-Legal Perspectives*”, Cavendish, 2000, p. 42.

<sup>12</sup> *That was the view of the German Federal Court in the case of Katrin Krabbe against the IAAF [1992]*, unreported, 28 June.

<sup>13</sup> *In the case of Paul Edwards v BAF & IAAF [1997]* Eu LR 721, Ch D.

<sup>14</sup> *Not always the sporting governing bodies appear to follow the application of this regulation as it could be seen in the recent case of the American sprinter and former world record holder Justin Gatlin.*

<sup>15</sup> See IAAF Rule 40.3.e.

<sup>16</sup> See IAAF Rule 40.8.

To make things even more complicated and perhaps disadvantageous for the accused athlete, the sporting governing bodies, with the assistance of CAS, have devised a specific **standard of proof**. This indicates that the standard of proof in doping cases should be below the criminal standard but above the civil standard.<sup>17</sup> In addition, the CAS has already argued<sup>18</sup> that the ingredients of the offence must be established "to the comfortable satisfaction" of the court, bearing in mind "the seriousness of the allegation" made. The CAS has also suggested that the more serious the allegation, the greater the degree of evidence required to achieve comfortable satisfaction.<sup>19</sup> The "comfortable satisfaction" standard of proof is rather subjective and is not always the same for prosecution and defence. As Michael Beloff suggests<sup>20</sup>: "*The CAS held in the Chinese swimmers cases that the standard of proof required of the regulator, FINA, is high: less than the criminal standard, but more than the ordinary civil standard.*"<sup>21</sup> The Panel was also content to adopt the test, set out in *Korneev and Gouliev v IOC*<sup>22</sup>, that ingredients must be established to the comfortable satisfaction of the court, bearing in mind the seriousness of the allegation made. To adopt a criminal standard [at any rate, where the disciplinary charge is not one of a criminal offence] is to confuse the public law of the State with the private law of an association. The CAS went on, in *Korneev*, to reiterate the proposition that the more serious the allegation, the greater the degree of evidence required to achieve 'comfortable satisfaction'."

This statement, could give rise to different accounts of interpretation, regarding the disciplinary nature of the anti-doping offences. In my personal view, the disciplinary charge and the sanction that follows such a charge, produce elements of a criminal law regulation. If one considers the penalties that follow the exclusion of an athlete from his trade, one would arrive at the safe conclusion that such penalties not only exclude the offender from his trade, but they also have as an aim to "exhaust" him financially. The harshness of the rules in relation to the application of the penalties<sup>23</sup> not only is disproportionate to the offence committed, within the disciplinary framework, but it also creates an anathema of a kind that usually the criminal law regulates. It follows that the nature of the disciplinary proceedings and the subsequent penalties imposed on the offender meet the criteria established in many criminal codes, whether in common law jurisdictions or civil law ones.<sup>24</sup>

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

Despite the fact that professional athletes are now considered employees<sup>25</sup>, or self employed in the case of many individual sportspeople and should be treated in the same way as other professionals, it is submitted that the special nature of sport has led tribunals to adopt different ways of dealing with issues of disclosure and admissibility of evidence. It is evident from the CAS' jurisprudence, that the

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

Finally, there is another obstacle for the athletes when they prepare their defence. The majority of the offences covered in the sporting governing bodies' regulations are strict liability offences. Athletes are responsible for the substances found in their bodies, but strict liability could operate rather unfairly where the rules themselves are unclear and their applicability to the facts of the cases doubtful. This is certainly the issue in the majority of the circumstances<sup>26</sup>, as the rules in force do not clearly and in a concise way establish the intention of the legislator or their actual, correct and proper application. Although there may be an opportunity, for an athlete, to put a case in rebuttal, it is submitted that in cases where there is a prohibited substance present, the athlete may find himself in a very difficult situation rebutting the allegation. Testing laboratories usually operate under the auspices of the sporting governing bodies and there may be cases where issues of independence and bias may be put into question.

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

The CAS seems to support the idea of strict liability and has in the past rejected the principle of *nulla poena sine culpa*, or at least, tried not to apply it or interpret it too literally.<sup>27</sup> To a certain extent, the use of strict liability rules on behalf of sporting governing bodies, or at least, the reasoning behind their use, could be understood. What would, however, find itself labouring under great difficulty, is the argument that the CAS should be seen to support the operation of strict liability rules. This, however, appears to support the contention that if the non-intentional use of performance enhancing substances were to be allowed, it would then create a legal minefield and would eventually bankrupt the sporting governing bodies. This would appear to be the reason as to the CAS' propensity to support the operation of strict liability rules. But where is the balance to be struck? Strict liability rules are arbitrary and capricious and when the rights of the individual are breached and general principles of law are violated, the accused is left with no remedy and the whole system becomes

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

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

19 *Ibid*.

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

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

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

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

24 See the arguments in favour of criminalization of doping below.

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

26 Consider the examples above.

27 *Quigley v UIT* CAS 94/129, para 14. The

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

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



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ALEXANDRE MIGUEL MESTRE is a senior advocate and international sports lawyer. He is a former assistant to the Portuguese Secretary of State for Sport.

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unfair, unjust and offensive. This as a result offends against fairness and justice. So far the decided cases serve to confirm that there is not a balance between the fight for a healthy and fair competition and the rights of the accused athletes. Is there a solution?

### The application of criminal law on doping infractions: can a coercive response be justified?

The jurisprudential and philosophical analysis suggests that it is only when the basis of why doping is dangerous and contrary to sporting ethics has been established, can a coercive response be justified.

It is submitted that the invocation of such powerful machinery, such as the criminal law, needs to be made with reference to sufficient reasons that can justify its application in the area of doping in sport. It is not my intention to fully consider theories of liberalism and paternalism in the current work. These are well known and well documented elsewhere. I intend, however, to develop and explain further the theory of “public interest” with reference to the application of criminal law on anti-doping violations. This analysis will help us understand as to how such a coercive response can be justified and assist us towards rebutting the current self regulation of the anti-doping mechanisms.

Once a coercive response has been justified, this lays the ground for the creation of a framework, built with reliable, transparent and efficient legal foundations. The creation of a legal framework is imperative. The current regulatory framework is weak, inefficient, and open to manipulation and it is not supported by legal certainty, which should strike a balance between the protection of the image of sport and the rights of the individual. The discussion, so far, has indicated that the sporting governing bodies are unable to regulate doping in sport and consequently, the current self regulation produces more harm than the damage it attempts to eradicate.

#### Main justifications

Much of the objection to the use of performance enhancing substances and other doping methods in sport is founded on issues of unfair competition and health. The application of criminal law on anti-doping violations considers these justifications, since the aim of criminal law is to protect the individual as well as society from harm. The application of criminal law, however, often receives intense criticism.<sup>28</sup> Such criticism relates to the rigid and often dogmatic nature of criminal law, with reference, primarily, to the rights of the individual. It does not, however, strike the required balance between the individual and society. It lacks factual certainty and it appears to include a substantial degree of subjectivity. It fails to consider the fact that doping is both dangerous and destructive and it also fails to take into account the coercive nature of doping that is at its most insidious at State level.

The creation of a criminal framework produces the elements that are currently missing from the sporting governing bodies’ regulatory framework: certainty, consistency, and transparency. The purpose of a criminal framework is not retribution for an injustice, but the protection of athletes’ health, as well as the protection of the social and cul-

tural role of sports, the “fair-play” principle, the genuineness of the results and the general and specific prevention. General prevention relates to the argument that doping produces social harm to sports and this kind of prevention is imperative in order to prevent other athletes from using performance-enhancing substances. Specific prevention relates to the illegal conduct of the athlete or others who encourage and help the athlete with the use of such substances and suggests that punishment should be imposed on these specific individuals.

Criminalisation of doping in sport is a radical step and to a certain extent it creates highly elevated consequences for both the individual and the State. Such coercive response needs to be analysed, explained and justified. The incorporation and interpretation of the jurisprudence explains and, most importantly, counters the claims of liberal theorists. It also joins the Mill/Hart/Devlin<sup>29</sup> debate and it ensures that these proposals can withstand the rights-based agendas of jurists such as Dworkin<sup>30</sup>. It distinguishes and justifies the highly paternalistic approach of criminalising doping in sport and it shows that such an approach is inherent within the new proposals. A further justification, however, relates to the application of criminal law on the suppliers.<sup>31</sup> It is submitted that athletes may not possess the medical or chemical knowledge to assess the dosage or the optimum time for receiving performance-enhancing substances.<sup>32</sup> They turn, therefore, to doctors, physiotherapists or coaches for advice. In this case, all forms of participation can be established [complicity, accessory before the fact, etc.] and the paternalistic approach is not necessary for the application of criminal law. In addition, the application of criminal law can be justified in terms of proving joint responsibility for a common criminal purpose with the aim to aid and abet. Such a joint responsibility concerns the sporting officials, doctors or physiotherapists, who supply the athletes with performance-enhancing substances<sup>33</sup>.

#### The Public Interest Theory

The main justification of the imposition of the criminal law on anti-doping violations relates to the illustration of the “public interest” theory. Here, it is not necessary to justify a paternalistic approach, as this approach needs to strike a balance between the individual autonomy and the rights of society. It is submitted, that the application of criminal law has a moral element in its enforcement. The distinguishing point here, however, is that these proposals, with regard to criminalisation of doping in sport, do not enforce the morality of a political or elitist will. These proposals enforce the will of society.<sup>34</sup> As a result, it is shown that these proposals do not discriminate against a minority, but they are, simply, acting in the public interest. They prove that State coercion is not only justified because of the “public interest” argument, but also because it is reserved for activities that pose a serious threat to the integrity and existence of sport, which is an activity, valued by society, such that it demands a public rather than private response.

This discussion also suggests that there are additional decisive factors to justify such a coercive regime, namely that the establishment

<sup>28</sup> Jason Lowther, for example, submits that criminal controls, beyond those that one would expect for consumer protection, help neither the image of sport, nor the health of the non-competitive user.

*“Criminal Law Regulation of Performance Enhancing Drugs: Welcome Formalisation or Knee Jerk Response”, in “Drugs and Doping in Sport: Socio-Legal Perspectives”, Cavendish, 2000.*

<sup>29</sup> See below, *“The Application of Criminal Law on Doping Infractions: A Jurisprudential Justification”.*

<sup>30</sup> Dworkin will not accept a dividing line between the law and morality, which characterises positivist interpretations of the law. He argues that a judge engaged in the process of adjudication may have to

*make moral judgments. He may have to balance principles and policies, and his decision is unlikely to be divorced from the community’s general perceptions of ‘right’ and ‘wrong’ which constitute morality. The variety of abstract rights which, at any given time, epitomise communal morality are unlikely to be disregarded by a judge. “Law’s Empire”, 1986*

<sup>31</sup> See the analysis of my proposals in relation to liability for suppliers and others below, where I propose that the penalties for suppliers of performance-enhancing substances should be heavier than those applied to athletes. Pre-requisite here, it is argued, would be the establishment of intent on part of the offenders.

<sup>32</sup> See the example with the former East

German athlete Rita Reinisch, in “Doping, Health and Sporting Values”, Gregory Ioannidis and Edward Grayson, in “Drugs and Doping in Sport: Socio Legal Perspectives”, Cavendish 2000, at p. 245. Also at note 53 below. I do not imply here that athletes are not clever enough to know what they are doing. I simply argue that with the increase of technological advances and the sophistication of new doping techniques, the athletes need the help of suitably qualified people in medicine and chemistry, in order to achieve the desired results for optimum performance.

<sup>33</sup> It is submitted, that heavier penalties should be imposed on the doctors, coaches and sporting officials (from 3 to 6

years imprisonment) and lighter penalties on the athletes (1 to 2 years imprisonment). It is also necessary that the minimum sentence should be increased in situations where performance-enhancing substances and/or doping methods are prescribed to athletes who are below 18 years of age.

<sup>34</sup> In two surveys conducted by the author in the summer of 2001 and spring 2002 in Greece and the UK respectively, results showed that society is in favour of criminalisation of doping infractions. 350 people questioned about criminalisation of doping, and in Greece, a high percentage of 73% said they were in favour of criminalisation, whereas in the UK, a lower 53% said they would also support criminal

of such a legal framework aims to restore public confidence and respect in this area of sports law that has fallen into disrepute and it also aims to ensure adherence to the essential values of fairness, justice and equality in terms of competitive sport. These issues support the hypothesis of this proposal, which states that the problem of doping in sport can only be resolved with the application of criminal law on doping infractions.

#### *The nature of anti-doping regulatory mechanisms*

The nature of the current anti-doping framework of sports governing bodies is, without a doubt, of a disciplinary character. When an athlete wishes to participate in competitions, he would have to accept, unilaterally, the regulatory framework of his governing body. This, in a sense, creates a contractual relationship between the athlete and the governing body, which means that both parties are bound by the terms of the anti-doping regulatory framework. The terms, however, are drafted by the governing body and are imposed on the athlete. The athlete, therefore, submits to these terms and agrees to obey them, irrespective of whether this agreement is supported by a valid consent, based on an informed decision<sup>35</sup>. The athlete, consequently, agrees to submit to referential authority. If such authority is not obeyed or followed, by means of breaching the regulatory framework, the athlete is subject to disciplinary sanctions. This, opponents of criminalisation would argue, is enough to indicate the private nature of doping. This again is open to argument.

Unlike criminal law, the private nature of doping disciplinary proceedings, fails to take into account the required elements of certainty and transparency, towards a reliable disciplinary procedure, which would respect the rights of the accused athlete<sup>36</sup>. Although the proceedings are of a disciplinary nature, the actual prosecution of the anti-doping offence and its subsequent punishment resembles that of the criminal law<sup>37</sup>. The disciplinary proceedings of sports' governing bodies fail to address the aims of their penalties, or at least, consider the main principles of penology. An athlete who is disobedient to his federation could be disciplined, but an athlete who breaches the anti-doping framework would be excluded.<sup>38</sup> If one, however, considers the penalties that follow such exclusion, he would arrive to the safe conclusion that such penalties not only exclude the offender from his trade, but they also have as an aim to "exhaust" him financially. The harshness of the rules in relation to the application of the penalties<sup>39</sup>, not only is disproportionate to the offence committed, within the disciplinary framework, but it also creates an anathema of a kind that

usually the criminal law regulates. It follows, that the nature of the disciplinary proceedings and the subsequent penalties imposed on the offender, meet the criteria established in many criminal codes, whether in common law jurisdictions or civil law ones. As Simon Boyes suggests: "...there are areas which are traditionally self-regulatory (in the truest sense of the term) that have become sufficiently important to warrant great concern over the extent to which their regulation is subject to scrutiny and required to adhere to constitutional standards. These sectors of activity, of which sport should be considered a foremost example, have, in effect, changed their nature to the extent that their activities can now be regarded as truly 'public' in practice and thus of constitutional significance."<sup>40</sup>

#### *The application of criminal law on doping infractions - a jurisprudential justification*

This work not only examines and applies existing jurisprudence into its theme, but it also develops and expands the current theories, by creating, at the same time, a new jurisprudential and theoretical framework, which the new proposals, that this work proclaims, can be tested on.

It is undoubtedly logical to suggest that the application of the criminal law has a moral element in it. Certain academics and scholars of jurisprudence<sup>41</sup> would, without the slightest doubt, agree that morality does influence the law, but should not be the sole determinant of illegality. Debates about the legal enforcement of morality can be found in the works of many different philosophers<sup>42</sup> and scholars from all over the world.<sup>43</sup> These were rekindled in the middle of the last century by the publication of the Wolfenden Report on Prostitution and Homosexuality<sup>44</sup> and led to the Hart-Devlin debate<sup>45</sup>, and continue today with the challenge of new moral problems, such as the one that is analysed in this work<sup>46</sup>, and also gay marriages<sup>47</sup>, surrogacy,<sup>48</sup> cloning<sup>49</sup> and assisted suicide.<sup>50</sup>

John Stuart Mill's position was that legal coercion could only be justified for the purpose of preventing harm to others<sup>51</sup>, although he did accept a slight form of paternalism as well.<sup>52</sup> At this juncture, it has to be stated that Mill's thesis was disputed by the Victorian judge Stephen, in his work "Liberty, Equality and Fraternity."<sup>53</sup> Although this debate has never come to an end, it came to prominence again, in the late 1950s when the Wolfenden report observed that there was a realm of private life, which was not in the law's business.<sup>54</sup> A leading judge, Lord Devlin, attacked this position in a lecture in 1959 and returned to the theme a number of times.<sup>55</sup>

sanctions on doping infractions. The surveys were conducted in two countries with different attitudes towards governance of sport - in Greece sport operates under the auspices of the government and it receives its full financial support, whereas in the UK, sport is independent from government intervention and it enjoys self-regulation - and suggest that despite these attitudinal differences, the public are resigned to the view that sport is so important [even in different societies], that doping should be criminalised.

35 As Carolyn Thomas suggests: "The onus is on the athlete to consent to things that he or she would not otherwise consent to. Coercion, however, makes the athlete vulnerable. It also takes away the athlete's ability to act and choose freely with regard to informed consent." [1983], "Sport in a philosophical context", Philadelphia: Lea & Febiger.

36 See the case of Squizzato v FINA CAS 2005/A/830 where the Panel notes: "Applying the above explained principle was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation

against those of the athletes concerned, in particular his personality rights (see i.e. Aanes v FILA, CAS 2001/A/317)."

37 In the case of Kabueva v Fig CAS 2002/A/386 the Panel noted: As to the standard of proof, the Panel appreciates that because of the drastic consequences of a doping suspension on a professional athlete's exercise of his/her trade (Article 28 Swiss Civil Code [ZGB] it is appropriate to apply a higher standard than the generally required in civil procedure, i.e. to convince the court on the balance of probabilities." See also CAS OG/96/003, CAS OG/96/004, K. & G. v IOC, p.20; CAS 98/208, N. et al. v FINA, Award of 22 December 1998, CAS Digest II, p. 234, 248; confirmed by the Swiss Federal Tribunal, Judgment of 31 March 1999 [5P83/1999], unpublished).

38 According to Januillien Soek: "The main difference between the punishment of say, rough play and that of the doping offence is that the punishment of the first aims to discipline, whereas that of the second aims to exclude. Penalties lasting two years and, in some cases, even four years, for a first offence cannot be considered as aiming to restore discipline." In *The International Sports Law Journal*,

2002/2, p. 2, "The Legal Nature of Doping".

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

40 In "Sports Law", 2nd edition, Cavendish, 2001, p. 198.

41 Devlin, *Dworkin*.

42 Plato, Aristotle, Socrates, Thukidides.

43 A notable example of this, in Victorian England, concerns John Stuart Mill, and his work "On Liberty" [1859], which is the classic statement of the liberal position. R. Wacks, "Law, Morality and the Private Domain" [2000] may also be consulted.

44 [1957] Cmnd. 247. It is worth comparing the "Report of Advisory Committee on Drug Dependence: Cannabis", [1968], which quite relevant and central to the main arguments of this work.

45 Devlin's views can be also traced back to Durkheim, though there is no evidence that Devlin was knowingly deriving any such assistance (see W. Thomas [1994] 32 Amer. Crim. L. Rev. 49).

46 The application of criminal law on doping infractions is examined with reference to a principled justification of this coercive response towards doping.

47 See the debate between J. Finnis and A. Koppelman in (1997) 42 Amer. J. of Jurisprudence 51, 97. See also J. Finnis (1994) 69 Notre Dame L. Rev. 1049.

48 See D. Satz (1992) 21 Phil. And Public Affairs 107.

49 See J. Robertson (1998) 76 Texas L. Rev. 1371; M. Nussbaum and C. Sunstein (eds), "Clones and Clones" (1998).

50 See R. Weir (1992) 20 "Law, Medicine and Health Care" 116, and, in particular now, J. Martel (2001) 10 Soc. & Legal Studies 147.

51 See J. Riley, "Mill on Liberty" (1998) for a detailed exposition, although Lord Devlin's account on Mill, in his work "The Enforcement of Morals", is rather comprehensive and illustrative.

52 The liberty principle does not apply to children or "barbarians" in "backward states of society." Mill, "On Liberty".

53 First published in 1873 (the edition cited is edited by R.J. White in 1967).

54 This statement has caused much criticism and was attacked by Lord Devlin in his work "The Enforcement of Morals".

These theories play an important part in developing a jurisprudential justification of the application of criminal law on doping infractions. It is submitted that morality is a necessary condition and an appropriate justification for the imposition of a criminal legislation to regulate doping in sport. Such discussion, however, inevitably resurrects the subjectivity of the argument as to whose morality are we to apply, before a justification for the application of the criminal law on doping could be submitted. To avoid this vicious circle of subjectivity, I have decided to apply the new theory of “public interest” to doping. It is submitted that the introduction of criminal law on doping infractions will not discriminate against the minority. Its introduction has as a main aim the protection of the public interest, which is purely objective and does not appeal to any one particular moral code out of necessity.

#### *The Public Interest Theory and the Legal Enforcement of Morality*

It has been argued that sport is strictly connected with society and it is one of the most important ingredients for its healthy development and existence. The ancient Greeks believed that a complete person is someone who is healthy in body, mind and soul. The Corinthian Ideals have always played an important role in the relationship between sport and society. For some countries sport is so important that it is supported and it operates under the auspices of their governments. In Greece, for example, sport has always been part of the Greek psyche and was one of the first aspects of cultural life to be protected in the Hellenic Constitution of 1974.<sup>56</sup>

Sport, therefore, promotes values that society creates, approves of and wishes to safeguard. These values relate to health, honesty, fairness, fitness and a series of other general values that promote the healthy development of individuals and subsequently, the healthy development of society. It is submitted here, that doping in sport threatens to destroy, and it does destroy all these values that society deems necessary for its existence. It is argued here that doping is immoral, is cheating and unhealthy and its use should be regulated by the criminal law, with the main aim to protect the public interest. The arguments above suggest that doping undermines sport and, therefore, aims to destroy one of society's important and necessary cornerstones. If we are, however, going to justify the introduction of criminal sanctions on doping infractions, it is, first of all, necessary to justify the connection between morality and sport. If doping is immoral and therefore cheating, then it is in the public interest to take action and stop it from undermining sport.

Sport, without a doubt, has a moral element and this is, perhaps, what causes difficulty in the legal moralism discussion. Problems of morality could be discovered in all spectrums of society and in different ways and we usually find ourselves at pains to define and connect the discussion of moralism to sport. Where general moral values can be identified in the area of sport, a reference to them is being made under the term of ethics in sport. According to Morgan<sup>57</sup> *“one philosophical perspective may be to apply, with sensitivity, those general moral standards*

*and requirements (e.g., universality, consistency, impartiality, etc.) to sporting situations. For example, if the general moral standard is “do no harm” and it is applied to issues of violence in sport, it will raise questions about the way in which we would make moral judgments about these issues.”*<sup>58</sup>

But why is doping so special, so different, that it requires criminalising? The arguments discussed above, suggest that any form of cheating has the potential to undermine and seriously damage sport. Doping's nature has an undisputable element of cheating and a certain degree of immorality in it. The “Public Interest” theory suggests, therefore, that, and without the invocation of morality, it is in the public's best interests to invoke the law and protect sport, from the disintegration it faces posed by an uncontrollable degree of cheating.<sup>59</sup> The introduction of legislation to control doping in an appropriate and efficient way is not the desire of the legislature, but the desire of society<sup>60</sup>. The adoption of such legislation is intended to reflect the important role sport plays in society and in citizen's lives<sup>61</sup>. In this legislation, the parties involved will accept responsibility for safeguarding the public interest in sport, which encompasses education, professionalism and the ideals of fairness, justice and equality. The legislation will also have to take into account the enormous public interest in sport as a means of promoting health and the vital role that sport plays in improving the health of a nation.<sup>62</sup> Doping, therefore, destroys the above principles and creates a field of uncertainty, confusion and destruction. Doping is special and different, because it also destroys sport as a whole. It is not difficult to point out the importance of sport for society. People like sport, they play sport and they consider sport to be one of the most important elements of pedagogic development. Sport is also important for the development of community in financial and social terms. The relationship between the community and the individual might be seen to be anachronistic, but on both sides of the Atlantic, pressure groups and politicians have pushed communitarianism to the forefront of the early 21st century political agenda.

Furthermore, the importance of sport in society has been argued and illustrated in a number of different sporting and non-sporting cases and it has always been connected to the public interest justification. The definition of the public interest argument suggests that in decision making processes which encompass large sectors of the population a unitary public interest has to be assumed, although there will always be some part of the population which disagrees with the consensus. Unitary public interest is very sensitive to the specific issue. The more controversial the issue, the more polarized public opinion becomes. The part of the population, however, that disagrees with the consensus would concentrate on an argument that illustrates, to a great extent, the need for individual freedom, free from State intervention or interference. State interference here, takes the form of the law.

But the question for our purposes is “how far should the law go in achieving a balance between the rights of society and the rights of the individual”? Or is there a need to achieve a balance? Over the years,

<sup>55</sup> His essays are collected in *“The Enforcement of Morals”* (1965).

<sup>56</sup> *“The Regulation of Sports Activities in Greece”*, Gregory Ioannidis, in *“Professional Sport in the EU: Regulation and Re-Regulation”*, Andrew Cager, TMC Asser Press, 2000. Sport falls under the auspices of the government with regard to its organisation and operation. The government is responsible for the finance of sport and supervises it through the General Secretariat for Sport, which is a subdivision of the ministry of Culture.

<sup>57</sup> *“Ethics in sport”*, W. Morgan, 2001, Human Kinetics.

<sup>58</sup> Morgan also believes that sport has its own set of moral standards. He argues that: *“Sport is interesting, however, in that it imposes its own set of moral standards and requirements on those who participate*

*in it. Our shorthand way of referring to these standards and requirements is to talk of “fair play” and “being a good sport.” These internal moral requirements are important for at least two reasons. First, they mean that general moral standards are usually applied to sport after due consideration has been given to sport's moral character. Second, the vast majority of people participate in sport because they enjoy it; therefore, people often have a built-in motivation to act morally and play fairly. The person who loves sporting competition will want that competition to be fair, or else he or she will not consider it sporting at all.”* Ibid, note 32.

<sup>59</sup> Thus The Council of Europe Resolution (67) 12 stressed the ethical implications of doping as an act of cheating and Resolution (76) 41 of 1975 said that dop-

ing was *“abusive and debasing.”* Moreover, the Explanatory Report to the Anti-doping Convention (ETS no. 135) argued that *“Doping is contrary to the values of sport and the principles for which it stands: fair play, equal chances, loyal competition, healthy activity.”*

<sup>60</sup> Society's desire to protect sport and therefore regulate its existence derives through the legislative mechanisms of national and international organizations or governments. Evidence for this is the Tour De France 1998 and 2000, an event that exposed, in an unprecedented way, the pervasive nature of doping. 2000 was also the year in which, for the second time, following the example of Germany, a State [France] decided to investigate and prosecute the perpetrators with the full use of the criminal law. A criminal trial

of 10 defendants connected with the FES-TINA team indicted under a 1998 French statute criminalizing the supply of sporting drugs took place in October 2000.

<sup>61</sup> Belgium [Flemish Community] was the first country to criminalize doping in 1967. Greece followed in 1986 with law 1646/1986 as amended by law 2725/1999 and 2002. France and Italy followed the example.

<sup>62</sup> At this juncture, we may, perhaps, need to consider the view that criminalisation of doping concerns only a minority of sport participants and not the vast majority, who will never come into contact with doping control. That being the case, I submit that the same can be said for every criminal offence with a “special nature”. Save to mention the offences of fraud or dishonesty that resemble doping,



the courts have established, on certain occasions that the public interest ought to outweigh the rights of the individuals. This justification has been illustrated in a number of sporting and non-sporting cases and it produces the ground on which criminalisation of doping infractions can be based on.

In the Canadian case of *Jobidon v The Queen*<sup>63</sup> the accused was charged with manslaughter as a result of the death of the victim in the course of a fistfight. The trial judge found that the accused and the deceased agreed to a fight as a result of a prior altercation in a bar in which the deceased had beaten the accused. The trial judge found that the accused was not criminally negligent and he was acquitted. An appeal by the Crown to the Ontario Court of Appeal was allowed, the Court of Appeal holding that the Crown was not required to prove the absence of consent to assault where the accused intended to cause bodily harm. The Supreme Court of Canada also upheld the Court of Appeal's decision and stated: "It is public policy which vitiates the consent in fist fights. The common law for policy reasons had always limited the legal effectiveness of consent to a fist fight and that limit persists in s. 265. It is not in the public interest that adults should willingly cause harm to one another without a good reason. To erase long-standing limits on consent to assault would be a regressive step, one which would retard the advance of civilised norms of conduct. Such fist fights are valueless and may sometimes lead to larger brawls and to serious breaches of the peace. If aggressive individuals are permitted to get into consensual fist fights and they take advantage of that licence, then it may come to pass that they eventually lose all understanding that such activity is the subject of a powerful social taboo. It is unseemly from a moral point of view that the law would countenance such conduct."<sup>64</sup>

The respondents in this appeal produced similar arguments. In step with the Court of Appeal, the Crown argued that the overwhelming weight of common law authorities supports the position that one cannot validly consent to intentionally caused bodily harm in all circumstances and that the law prohibits consent to street brawls or fist fights. It is not in the public interest that people should engage in these sorts of activities, so on public policy grounds, the Crown argued, the word "consent" in s. 265 of the Code should be read in light of the common law, which limits its applicability as a defence to assault. The Crown also noted that fist fighting is without social value and has been outlawed in other common law jurisdictions.<sup>65</sup>

The Nova Scotia Supreme Court, Appeal Division, more broadly applied this approach in *R v McIntosh*<sup>66</sup>. The sole issue in that appeal was whether a participant in a fist fight can give a legally effective consent to the intentional infliction of bodily harm upon himself. After reviewing the relevant jurisprudence, the unanimous court, speaking through MacDonald J.A., concluded that because it was not in the public interest that people should try to cause each other actual bodily harm for no good reason, most fights would be unlawful regardless of consent.

The issue of "public interest" has been used to a great extent as a justification for the invocation of the criminal law and as an argument against the freedom of an individual and his subsequent consent to

the infliction of harm. Policy considerations have been analysed by the courts at great length. In the same case of *R v Jobidon*<sup>67</sup>, Gonthier J, explained: "Foremost among the policy considerations supporting the Crown is the social uselessness of fist fights. As the English Court of Appeal noted in the *Attorney-General's Reference*<sup>68</sup>, it is not in the public interest that adults should willingly cause harm to one another without a good reason. There is precious little utility in fist fights or street brawls. These events are motivated by unchecked passion. They so often result in serious injury to the participants... Our social norms no longer correlate strength of character with prowess at fisticuffs. Indeed, when we pride ourselves for making positive ethical and social strides, it tends to be on the basis of our developing reason. This is particularly true of the law, where reason is cast in a privileged light. Erasing longstanding limits on consent to assault would be a regressive step, one which would retard the advance of civilised norms of conduct."

Gonthier J, in the same case, goes on to consider the moral side of the law. He does not only base his decision on the public interest justification, but he argues that all criminal law is paternalistic to some degree. He states<sup>69</sup>: "Wholly apart from deterrence, it is most unseemly from a moral point of view that the law would countenance, much less provide a backhanded sanction to the sort of interaction displayed by the facts of this appeal. The sanctity of the human body should militate against the validity of consent to bodily harm inflicted in a fight... All this is to say that the notion of policy-based limits on the effectiveness of consent to some level of inflicted harms is not foreign. Parliament as well as the courts have been mindful of the need for such limits. Autonomy is not the only value which our law seeks to protect. Some may see limiting the freedom of an adult to consent to applications of force in a fist fight as unduly paternalistic; a violation of individual self-rule. Yet while that view may commend itself to some, those persons cannot reasonably claim that the law does not know such limitations. All criminal law is 'paternalistic' to some degree - top-down guidance is inherent in any prohibitive rule. That the common law has developed a strong resistance to recognising the validity of consent to intentional applications of force in fist fights and brawls is merely one instance of the criminal law's concern that Canadian citizens treat each other humanely and with respect."

Similar approaches have been illustrated in the UK. In *A-G's Reference (No 6 of 1980)* [1981]<sup>70</sup>, Lord Lane CJ, delivering the judgment of the Court of Appeal, said: "...it is not in the public interest that people should try to cause or should cause each other bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt on the accepted legality of property conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in other cases."

The public interest justification, however, was supported in non-sporting cases too. In the landmark case of *R v Brown*<sup>71</sup> the House of Lords ruled that consensual sado-masochistic homosexual encounters which occasioned actual bodily harm to the victim were assaults occasioning actual bodily harm, contrary to s 47 of the Offences Against the Person Act 1861, and unlawful wounding, contrary to s 20 of that Act. Lord Templeman stated that: "counsel for the appellants argued that consent should provide a defence to charges under both ss 20 and 47 because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally." In agreeing with Lord Templeman and in what I would argue applies to doping, Lord Jauncey said:<sup>72</sup> "...in considering the public interest it would be wrong to look only at the activities of the appellants alone, there being no suggestion that they and their associates are the only prac-

the nature of the offence of insider dealing, also suggests that there is only a tiny minority of those who have the knowledge or the inside information in a company, to proceed with it. It is submitted that the number of offenders is not important in the consideration of establishing a criminal framework. What is important is the subject matter for protection, the nature of the offence and its impact on society, which justifies the imposition of such powerful legal machinery. In the end, the true justification for this offence, which resembles the case of doping, lies in the notion of gaining an unfair advantage, possibly yielding enormous profits, by a deliberate deviation from the rules of the mar-

ket. In addition, this argument can be extended to, at least within the UK, to the criminal liability of obtaining a pecuniary advantage by deception under section 15 (1) of the Theft Act 1968.

63 Indexed as *R v Jobidon*, 66 CCC (3d), September 26, 1991.

64 Ibid, p. 455.

65 Ibid, p. 466.

66 [1991], 64 CCC (3d) 294, 102 NSR (2d) 56, 12 WCB (2d) 639.

67 Ibid, note 28, p. 491.

68 See below.

69 Ibid, note 28, p. 493 and 494.

70 2 All ER 1057 at 1059, [1981] QB 715 at 719.

71 [1993] 2 All ER

72 Ibid, note 36, at pp. 91-92.

tioners of homosexual sado-masochism in England and Wales. This House must therefore consider the possibility that these activities are practiced by others and by others who are not so controlled or responsible as the appellants are claimed to be... When considering the public interest potential for harm is just as relevant as actual harm. As Mathew J said in *R v Coney* (1882) 8 QBD 534 at 547: 'There is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous.'<sup>73</sup> It is submitted that this argument can be applied to doping in sport too. In the following pages there is evidence to suggest that doping is dangerous, not only because it poses a serious threat to the health of the athletes<sup>73</sup>, but also because it threatens with its expansion amongst young athletes, who are influenced by the demands of the modern over-commercialised nature of sport. Society cannot remain inactive and passive when the result of drug taking in sport, is the creation of an injurious activity. I have provided, in the past, evidence<sup>74</sup> which explained graphically the adverse health consequences of doping violations both internationally and domestically. The evidence, in the next paragraph, also identified the fundamental interrelationship between the health and ethical sporting problems.

Although there is the argument that interference with the individual's liberty cannot be justified, it is submitted that this argument cannot rebut the fact that doping is both extremely dangerous and destructive. In particular, the "individual liberty" argument fails to take into account the coercive nature of doping that is at its most insidious at the state level<sup>75</sup>. The evidence, which follows, illustrates the above. Manfred Ewald, the former head of the East German Sports Federation, and his former medical director, Dr Manfred Hoppner, were charged with complicity in causing bodily harm for administering performance enhancing drugs to young athletes. They were both found guilty of doping and received suspended sentences in a trial that came to an end in July 2000. Ewald, was found guilty of making 142 East German sportswomen, mostly swimmers and athletes, take performance enhancing drugs. He was given a suspended

prison sentence of 22 months. His co-accused, Hoppner, 67, was given 18 month suspended sentence.<sup>76</sup>

The use of doping, however, has as ultimate targets, apart from the obvious personal ones, to achieve financial and social rewards. In this case, and because the athlete enters a competition against fellow competitors, the issue becomes public and deserves the scrutiny of the public<sup>77</sup>. When an athlete uses banned substances, or resorts to prohibited doping practices, it is submitted, that he does not only injure himself, but he also injures society<sup>78</sup>. It is suggested that it is unlikely that the majority of parents or educators would wish to see their young athletes facing the dilemma of having to choose between glory and a serious injury to health. The third kind of doping that has been identified in the introduction fits in with this argument. The use of this paternalistic justification for the invocation of the criminal law is seen in the argument that use of drugs by role model athletes will set a bad example to the young, who will end up following their heroes and using drugs which will, in turn harm them. In addition, another paternalism-based argument suggests that doping is the result of coercion, and hence is a non-consensual and harmful action. Such coercion can be both literal and non-literal. It can be literal in cases where coaches provide athletes - including in the case of the former East Germany, very young athletes - with prohibited and harmful substances, without telling them what they are taking.<sup>79</sup> In such cases the law can and does step in by charging the coach or doctor with assault against the athlete.<sup>80</sup> Equally, in this, the focus of the law is the criminal act of the supplier rather than the self-harming action of the athlete.<sup>81</sup> This, in turn, illustrates the second kind of doping identified above and I submit that it is a very important justification for the application of the criminal law on doping infractions<sup>82</sup>.

Furthermore, one needs to understand that the stakes at issue here are not only private. They are also public and are closely related to an element of society, namely sport, which is so important, unique and necessary for its healthy development and existence. In other words, these issues relate to the public interest.

73 The horrendous examples from the former East Germany below illustrate the point, not only for the dangerous side effects of performance enhancing substances, but they also prove the active involvement of the criminal law on doping related offences. This is an important development, as Germany appears to be the first EU country to apply the law of the land [previous bodily harm] on doping offences.

74 See below, following paragraph.

75 This argument also raises the possibility of assault which derives through lack of full, free and informed consent.

76 During the two-month trial, the prosecution had submitted that the two men ran a secret programme of doping during the 1960s and 1970s, providing athletes with performance enhancing substances. Part of the prosecution's case was that most of the athletes were unaware of the drugs they were receiving and, therefore, unaware of the health risks. Former athletes testified in order to substantiate and justify these arguments. According to the indictment, the female athletes who were given performance enhancing substances (mainly anabolic steroids) suffered side effects including hormonal disturbances, developing male characteristics such as excessive body hair, muscles and deep voices, and liver and kidney problems. Some of these athletes still suffer from menstrual and gynaecological problems. Details concerning East Germany's drugs programme began to emerge seven years ago in Berlin, when a special team of the Central Investigative Agency for

Government and Institution poured over thousands of files seized from the Stasi, the German Democratic Republic's (GDR's) notorious State Security Service, and questioned dozens of former athletes. In all, 90 investigations are underway and 680 coaches, doctors and former officials are under suspicion. Nine of them have been prosecuted and two have been found guilty. The Stasi evidence suggests that, in the years since 1969, when the GDR made sports a priority to try to humiliate West Germany at its 1972 Munich Olympics, as many as 10,000 athletes received drugs. Many did not know what they were taking. When they found out, they were forced to sign pledges of silence. Giselher Spitzer, a Historian at Potsdam University suggests that: "There was this psychosis to prove that socialism was better than capitalism. The party was pathologically ambitious about beating West Germany and gave sports free rein and gobs of money. The only goal was brilliant results." The price was heavy, however. The cost of brilliance was physical damage, sometimes of grotesque proportions. In a 1977 report to the Stasi, Hoppner listed known side effects of performance enhancing drugs given to women, including growth of body hair, deepening voice and aggression resulting from unfulfilled sexual desire. But Hoppner concluded that sporting success could be achieved only with continued drug taking. Years later, Rita Reinisch, a GDR swimmer who won three gold medals at the 1980 Moscow Olympics, recalled: "Taking pills was

normal, though I had no idea what I was taking. My coach told me, 'That's good for you, it will help your body recover quicker after training', and I trusted him blindly." He did not tell her that would also cause inflamed ovaries and the growth of cysts, forcing her to take premature retirement. Reinisch, now a TV sports broadcaster in Munich, was relatively lucky - she overcame the damage and had two children. Others ended up infertile and young gymnasts sometimes found themselves in wheelchairs when their bodies rebelled against unnatural regimes. Some men have grown breasts: under artificial stimulation, their own systems lost their capacity to produce sufficient male hormones. In one of the most important and unfortunate cases of all, a top East German shot putter, Heidi Krieger, European gold medallist in 1986, changed her sex after 10 years of drug taking in GDR. Unusually high doses of anabolic steroids - as much as 2,590mg per year - could be the reason why she not only started looking like a man, but also developed transsexual feelings. Krieger underwent sex change surgery in 1997. This evidence helps to identify the potentially dangerous and destructive nature of doping and the extent to which harm can be resulted from the use of performance enhancing drugs. Gregory Ioannidis and Edward Grayson, "Drugs, Health and Sporting Values", Cavendish, 2000.

77 In *R v Coney* [1862] Stephen J said: "...consent of the person who sustains the injury is no defence to the person who

inflicts the injury, if the injury is of such a nature or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But, the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."

78 It has been argued above that the use of doping threatens to destroy and does destroy important values for the healthy development of society. Sport promotes these values, namely, health, fairness, fitness and general Corinthian ideals, which represent the principle of fair play and the genuineness of the results. Sport also promotes health in body, mind and soul. Doping is also injurious and harms others.

79 See above the examples from the former East Germany.

80 See for example Galuzzi, "The doping crisis in international athletic competition: lessons from the Chinese doping scandal in women's swimming" 10 (1) *Seton Hall Journal of Sports Law*, 2000 at p.94 for the view that... "many athletes are given drugs by doctors and coaches and are unaware that they are taking steroids."

81 Even if the focus was the harm to the athlete, we would be able to classify this as permissible soft paternalism and

## Conclusion

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

It is becoming increasingly clear that there is dissatisfaction amongst many commentators and athletes, that the way anti-doping is organized and regulated today, is unfair and unjust and it lacks transparency and efficiency. It is also evident from decided doping cases, that not always the athletes' rights are observed. This argument serves as a catalyst for the introduction of criminal law on doping infractions. Before a State invokes such powerful machinery, however, a framework of co-operation and education must first be established.

It is submitted that healthy competition demands attention and action at every level, where medicine, sport and the law merge. Doctors, lawyers, parents, schools, club coaches and governing bodies

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

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indeed Mill specifically does not apply his liberal theory when minors are at issue. Mill, p.69.

82 Alternatively, coercion can be non-literal

where an athlete feels that because everyone else is on drugs, realistically, if he or she is to succeed, then he or she must do likewise.

# The Organization of Sports in France

by Delphine Verheyden\*

*"Physical and sports activities are an important part of education, culture, integration and social life.*

*They especially contribute to fighting against academic failure and reducing social and cultural inequalities, in addition to their importance to health.*

*The promotion and development of physical and sports activities for all, especially for the disabled, are in the general interest."*

This declaration of principles emphasizing the benefits of sports to society is in fact the first article of the French Sports Code, Article L. 100-1.

As French law recognizes the promotion and development of sports as being in the public interest, the State and its bodies naturally play a major role in the organization of sports in France.

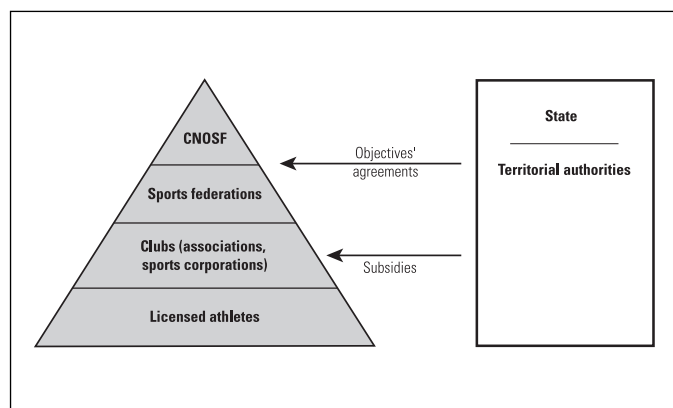
Since 1936 and Léon Blum's Front Populaire government, France has had a government body specifically responsible for sports.

The current government includes a Ministry for Health and

Sports, directed by Ms. Rosalyn Bachelot, which oversees a State Secretariat for Sports, under Ms. Rama Yade. This State Secretariat is responsible for implementing government policy on sports and all initiatives involving physical and sports activities, as well as their practice.

To do this, the State must count on the French sports world, a pyramid structure of sports associations with at its base licensed athletes and clubs, the clubs being grouped into sports federations which themselves are members of the CNOSF (*Comité National Olympique et Sportif Français*, or French National Olympic and Sports Committee).

The institutional organization of French sports can be represented as shown in the diagram.



\* Vivien & Associés, Paris, France.

	Associations (without company)	SAOS	EURL	SAEMS	SASP
<b>Basketball</b>	15	3	0	7	9
<b>Football</b>	0	6	1	0	53
<b>Handball</b>	9	1	1	1	2
<b>Rugby</b>	0	3	0	0	27
<b>Volleyball</b>	13	0	0	1	0
<b>Total</b>	37	13	2	9	91

Source: French Sports Code, Dalloz 2009

## I. Institutional Organization of French Sports

### A. The Pyramid Structuring of the French Sports World

#### • Licensed Athletes

At the base of the French sports world are the athletes themselves; approximately 16,000,000 sports professionals are licensed in France as part of a sports federation<sup>1</sup>.

The sports license materializes the link between the federation and the athletes practicing the discipline it organizes. Once issued, the license authorizes holders to practice his or her discipline in France and to participate in competitions organized by the federation (Article L.131-6 of the French Sports Code). License issuance also has the effect of making the licensed athletes subject to his or her federation's rules and regulations.

#### • Sports Associations

These licensed athletes are members of sports clubs, which consist principally of associations governed by the French law of July 1, 1901. In this way close to 170,000 sports associations exist in France<sup>2</sup>.

These associations can receive State funding, on the condition of having obtained certification prior (Article L. 121-1 of the French Sports Code). To obtain this certification, the associations must adopt by-law provisions guaranteeing:

- that they function in a democratic manner;
- that they are managed in a transparent manner; and
- that both men and women have equal access to senior management.

They may also receive grants from territorial authorities, with no condition of certification being necessary.

#### • Sports Corporations

Articles L. 122-1 *et seq.* of the French Sports Code set out that when sports associations reach one of the two following thresholds:

- €1.2 million in annual revenues from the organization of paying sports events; or
- €800,000 total in annual remunerations;

they have a legal obligation to incorporate a sports corporation responsible for managing the club's professional sector.

The company created in this way must mandatorily take one of the legal forms listed in the French Sports Code, i.e.:

- a French sole shareholder limited liability sports company (*entreprise unipersonnelle sportive à responsabilité limitée*);
- a French sports corporation (*société anonyme à objet sportif*, or SAOS); or
- a French professional sports corporation (*société anonyme sportive*

*professionnelle*, or SASP), the functioning of which is very close to that under French general law; in this type of company, it is possible to remunerate the executives and distribute profits.

It is today prohibited to incorporate "mixed-economy" sports corporations (*société anonyme d'économie mixte sportive*, or SAEMS), but there are still SAEMS incorporated prior which may still be found in existence.

Most clubs have recourse to the legal form of the SASP, it being the one offering the most freedom and making it possible to attract investors the most easily.

The sports association and the company created in the event of reaching the aforementioned thresholds are linked by an accord determining their respective authority and legal obligations. In this way the agreement determines who is responsible for the club training center, if necessary; it also sets out who is responsible for the conditions of use of the club's distinctive marks or signs, as well as the federation membership number making it possible to register for competitions, all of which remain the property of the association.

Since publication of the French Law of December 30, 2006, sports corporations, which comply with several conditions required by law (right in rem over sports installations used to organize tournaments), can make a public offering (Article L. 122-8 of the French Sports Code). As of today, only two clubs (Olympique Lyonnais and Istres) have recourse to this new kind of financing.

In order to preserve equity in sports competition and in its results, Article L. 122-7 of the French Sports Code prohibits a single private individual holding control over more than one sports corporation with the corporate purpose bearing on a single sports discipline.

#### • Sports Federations

Sports federations are central to the organization of sports in France. They act as relays between the world of sports and of Olympic sports, on the one hand, and the public authorities on the other.

The federations are associations governed by the French Law of July 1, 1901. Pursuant to the provisions of Article L. 131-1 of the French Sports Code, they serve to organize the practice of one or several sports disciplines.

They are comprised principally of the sports associations affiliated with them. However, they also include sports corporations (professional clubs), certain individuals, and organizations for the purpose of gain and profit, specifically in the practice of one or several sports disciplines (example: health clubs); also included are those which, without having the purpose of the practice of one or several sports disciplines, nevertheless contribute to one or several of them (examples: ski lift companies, pleasure ports).

The federations, in their turn, are members of the CNOSF (*Comité national olympique et sportif français*, or French National Olympic and Sports Committee).

<sup>1</sup> Source: Mission des Études, de l'Observation et des Statistiques (Meos). <sup>2</sup> [www.acteursdusport.fr](http://www.acteursdusport.fr)



They are organized in a decentralized manner; for the most part, this is in the form of leagues, committees, sections or districts representing the federation at the regional and departmental levels.

There first exist single-sport sports federations, like the French Rugby Federation, which may take responsibility for several disciplines, such as for example rugby union, rugby sevens and beach rugby.

There then exist multi-sport federations or federations which group sports by affinity (Catholic sports, handisport, etc.), which groups clubs united by common thinking (*Union française des œuvres laïques d'éducation physique, Fédération française de sport travailliste.*).

From a legal point of view, the State recognizes two levels of national sports federations:

i. *Fédérations agréées* (literally, “certified federations”) (Articles L. 131-8 *et seq.* of the French Sports Code).

To be certified by the Minister of Sports, a federation must adopt certain mandatory provisions in its by-laws and standard internal disciplinary rules for participation in performing a public service (accessibility of physical and sports activities and their development). For their part, *fédérations agréées* may obtain State support in the form of financial aid or personnel such as sports technical advisors on the State payroll.

In 2009, there were 114 *fédérations agréées* in France<sup>3</sup>.

ii. *Fédérations délégataires* (literally, “delegated federations”) (Articles L. 131-14 *et seq.* of the French Sports Code).

This is in fact a higher level of recognition by the State, as *fédérations délégataires* must necessarily be certified prior. Being delegated means the federations enjoy a monopoly to organize sports competitions concluding in international, national, regional or departmental titles. Therefore there is only one *fédération délégataire* per discipline. They are also empowered to conduct the selection process for national teams. Last, they offer athletes the opportunity to be listed in the administrative category of *sportif de haut niveau* (literally an amateur or professional high-level athlete).

The notion of a given delegatee having a certain scope of expertise or jurisdiction is a legal fiction, because in fact and in law the power to organize sports tournaments has always been held by the federations, outside of any State involvement.

*Fédérations délégataires* are also responsible for issuing technical rules on discipline, rules on the organization of events open to their licensed athletes and the determination of sports installation standards.

Only *fédérations délégataires* may use the official wording “*Fédération française de*” (“French Federation of”), “*équipe de France*” (“French National Team”) and “*champion de France*” (“Champion of France”).

In 2009, there were 78 *fédérations délégataires* in France<sup>4</sup>.

#### • Professional Leagues

Federations specialized in the professional sector may delegate their management to a professional league.

There are today six professional leagues in France (the National Rugby League, the Professional Football League, the National Basketball League, the National Volleyball League, the National Handball League, the National Track & Field League).

#### • The CNOSF

The *Comité national olympique et sportif français* (French National Olympic and Sports Committee) was created in 1972, with the merging of the *Comité national des sports* (French National Sports Committee) and the *Comité olympique français* (French Olympic Committee). This is an association governed by the French Law of July 1, 1901 and is recognized as being in the public interest. Its current president is Mr. Denis Masseglia.

The principal members of the CNOSF are:

- the French members of the IOC;
- the national Olympic sports federations;
- the French national non-Olympic sports federations;
- school and university sports federations;
- multi-sport federations and federations which group sports by affinity;
- representatives of the local *Comités régionales olympiques et sportifs* (French Regional Olympic and Sports Committees, or *CROS*) and the *Comités départementales olympiques et sportifs* (French Departmental Olympic and Sports Committees, or *CDOS*).

#### i. A Sports Governing Body Linked to the IOC

Like all the national Olympic committees, the CNOSF is a sport governing body linked to the International Olympic Committee.

In this connection, the CNOSF is responsible for protecting the Olympic symbol, flag, motto and hymn, as well as the expressions “Olympic Games” and “Olympiad” (Article L. 141-5 of the French Sports Code).

In the 1990s a company had filed the trademark “Olymprix” to be used for a Leclerc store advertising campaign. The French National Olympic and Sports Committee (CNOSF) then brought the matter before the civil courts of jurisdiction to present its case as to the wording used.

With its decision of October 31, 2006, the French Supreme Court affirmed that the trademarks “Olympic” and “Olympic Games” were unregistered yet customary and well-known trademark terms, and that the CNOSF was well-founded to take action on the basis of general French law regarding liability, and to ask for protection.

In connection with its Olympic responsibilities, the CNOSF represents France at the Games, where it organizes and manages the French delegation. It registers athletes who are part of it and are placed under its authority. In the event of French candidacies to host the Olympic Games, the CNOSF makes the selection. In this way it was the CNOSF that selected Annecy as a candidate to host the 2018 Winter Olympic Games.

#### ii. A Representative of the French Sports World

Contrary to classic national Olympic committees, the CNOSF also has specific additional responsibilities:

- representing French sports to the public authorities (Article L. 141-1 of the French Sports Code);
- compliance with sports ethics; for this purpose, it draws up a charter of ethics (Article L. 141-3 of the French Sports Code);
- developing and promoting sports activities and athletes;
- initiatives to assist federations in their functioning;
- bringing national federations together;
- conciliatory work as provided in Article L. 141-4 of the French Sports Code; the CNOSF also mediates disputes opposing licensed athletes, associations, sports corporations and certified sports federations, with the exception of doping disputes; at the end of the mediation process, they formulate a proposed conciliation based on French law, but also with an eye to equity; a party may challenge the proposed conciliation; in this case the party is then free to bring the matter before the judge of jurisdiction.

Moreover, the CNOSF is at the origin of a great many initiatives:

- think tanks, especially in the area of sports labor law and professional training;
- creation of the French Sports Arbitral Chamber; this is an arbitral tribunal which, similar to the CAS based in Lausanne (Switzerland), settles disputes resulting from a sports activity or those otherwise linked to sports.

Internally, the CNOSF is organized into commissions (international relations, professional sports, high-level sports, sports law, etc.). It is a decentralized structure, represented in the regions by the *Comités régionaux olympiques et sportifs* (Regional Olympic and Sports Committees, or *CROS*) and in the French departments by the *Comités départementaux olympiques et sportifs* (Departmental Olympic and Sports Committees, or *CDOS*).

3 French Sports Code, Dalloz 2009

4 *Ibid.*

## B. The Public Authorities

Through the Secretariat of State for Sports, the French State defines and implements government policy on sports. To do so, it depends on an administrative body, that is, the sports administration. The French Decree 2005-1795 of December 30, 2005 indeed entrusts the sports administration with the authority to establish policies on physical and sports activities, develop high-level sports and promote sports for all.

Further, this administration determines the regulatory framework for the practice of professional sports. It facilitates France welcoming major international events and also has the authority to facilitate access to sports and safety for players and the public.

In the French regions (DRJS), and in the departments (DDJS), the French Ministry of Sports has decentralized services to relay its policies locally and to allow it to properly distribute sports installations across the national territory (Article L. 111-2 of the French Sports Code).

There are several national public institutions under the guardianship of the Minister for Sports. It is their job to help implement the Minister's policies. Legally speaking, these institutions have the status of public institutions for administrative purposes.

Among them the French National Center for the Development of Sports (*Centre national pour le développement du sport*) can be named, along with various other public institutions for training:

- the French National Institute for Sports and Physical Education (*Institut national du sport et de l'éducation physique*), the four fundamental goals of which are: high-level sports, training, medical supervision and scientific research;
- the French National Horse Riding School (*École nationale d'équitation*);
- the French National School for Sailing and Nautical Sports (*École nationale de voile et de sports nautiques*);
- the French National School for Skiing and Mountain Climbing (*École nationale de ski et d'alpinisme*);
- the Centers for Public Education and Sports (*Centres d'éducation populaire et de sport*, or *CREPS*).

As far as physical and sports education is concerned, this is a required discipline in the educational system, with its content determined by school programs, and instruction given by teaching professionals. It is for this reason it has been under the Ministry of National Education since 1981.

The legislative and regulatory provisions governing the subject are found in the French Education Code.

## II. Relations Between France's Public Authorities and Sports World

### A. The State Legislative and Regulatory Framework for Sports

The provisions governing the organization of French sports can be found in the French Sports Code, which is comprised of the legislative section and a regulatory section.

In this manner, the French State regulates most aspects of physical and sports activities, and finds itself led to work together with the French sports world in a great many areas, such as:

- Policies on Preventive and Anti-Doping Measures

The French State is responsible for defining policies on preventive and anti-doping measures.

To do so, it created the French Anti-Doping Agency (*Agence française de lutte contre le dopage*) (Articles L. 232-1 *et seq.* of the French Sports Code), which is an independent public authority working principally on:

- conducting initiatives to prevent doping;
- carrying out anti-doping checks;
- analyzing samples taken;
- punishing violations of anti-doping legislation, a mission it shares with the sports world and in particular the *fédérations délégataires* responsible for sanctioning their licensed athletes.

- Physical and Sports Activities Management Professions Training

The teaching of sports for remuneration takes place in the framework of Articles L. 121-1 *et seq.* of the French Sports Code).

While volunteers need no special diploma, the teaching, management, supervision and training of physical and sports activities for remuneration as a principal or secondary occupation on a regular, seasonal or occasional basis is reserved for holders of a professionally qualifying diploma or certificate. These certificates are in the national registry of professional certifications, which guarantees the competency of the holder and ensures the safety of those practicing the sports as well as that of third parties.

This is why the French State ensures or oversees organizing training for physical and sports activity professions, as well as the issuance of the corresponding diplomas.

Training for the sports professions is partly provided by the State public training institutions. The people who manage, oversee, supervise and teach physical and sports activities may in this way be trained at the French National Institute for Sports and Physical Education (*Institut national du sport et de l'éducation physique*, or *INSEP*) and in the French Centers for Public Education and Sports (*Centre d'éducation populaire et de sport*) for training locally.

The federations themselves may organize training programs under State supervision.

- Certification of *Sportifs de Haut Niveau* (literally, "high-level athletes") (Articles L. 222-1 *et seq.* of the French Sports Code)

*Sportifs de haut niveau* are sports men and women appearing on the list with the French National Commission for High-Level Sports (*Commission nationale du sport de haut niveau*), which groups the French State, the CNOSF and representatives of the territorial authorities. This commission is also responsible for delineating criteria defining *sportifs de haut niveau* (for example, by listing tournaments in which candidates must have participated) and a list of the criteria to be chosen for the Olympic team.

Once the list is drawn up, it is approved by the Minister for Sports.

*Sportifs de haut niveau* appearing on this list gain material advantages and personalized help, especially in training and employment (flexible working hours as employees of the French State, territorial authorities and public institutions).

The Ministry for Sports signs agreements with businesses to facilitate employment of *sportifs de haut niveau* and to facilitate their vocational retraining. In consideration of which, partner businesses have the benefit of financial assistance.

- Management of sports agents

Sports agents belong to a profession governed by the French Sports Code (Article L. 222-6 *et seq.*), the regulation of which the French State entrusts to the *fédérations délégataires*.

Sports agents have to pass a legal exam and meet all conditions of ethical conduct required for the pertinent *fédération délégataire* to issue a license authorizing them to practice their activity in the concerned discipline.

The validity of this license is temporary; it must be renewed regularly every three years after the *fédération délégataire* has confirmed compliance with the conditions of ethical conduct provided in the French Sports Code.

- Organization of International Sports Tournaments

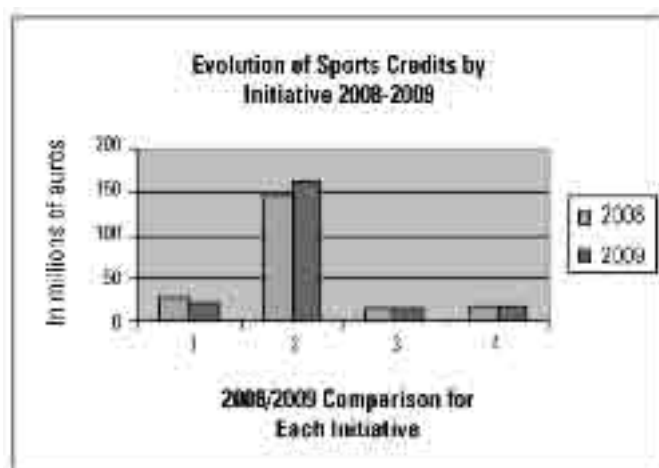
In order to receive major international tournaments in France, organizers often choose to create public interest groups (Article L. 114-1 of the French Sports Code), a structure intended to bring about cooperation between public and private persons to conduct sports activities in the public interest.

A public interest group is a legal entity operating under ordinary French law. Within such a structure, the French State maintains legal and technical control, as well as economic and financial control over the structure. The public interest group is a legal form frequently employed to organize major sports events. It was for example used for the World Track & Field Championships in 2003 in Saint-Denis and for the 2007 Rugby World Cup.

### B. Public Authority Financing of Sports

Public financing of sports comes from three main sources:

- The Sports Program defined by the Ministry of Sports  
The total Ministry of Sports budget for 2009 was €995.7 million.  
It was used to achieve four main goals indicated in the Sports program, for which the 2009 budget was €220 million, i.e.:
  - Initiative 1 = the practice of sports by the greatest possible number (€21.8 million in 2009);
  - Initiative 2 = the development of high-level sports (€16 4.5 million);
  - Initiative 3 = prevention in sports (the fight against doping and sports violence) and protection of athletes (medical supervision and overseeing safety in the practice of sports) (€15 million);
  - Initiative 4 = promotion of the sports professions (€0 million).



Source: Opinion no. 100 (2008-2009) by Messrs Pierre MARTIN and Jean-Jacques LOZACH, on behalf of the French Senate Commission of Cultural Affairs

Each year the French State signs agreements with certified sports federations aiming to set conditions for the allocation of aid, which may take the form of grants (about €100 million in 2008) or their making personnel available to them.

The State uses these means to support certified sports federations in conducting their tasks, which are in the public interest.

These agreements establishing objectives are the principal means through which the Ministry of Sports applies its policies, by contributing to establishing broad guidelines for federations.

The portion that State financial aid plays in federation budgets can vary widely, depending on which discipline is involved.

For example, for the French Tennis Federation, State aid represents only 0.95% of its sources of revenue, whereas for the French Modern Pentathlon Federation, it represents close to 92% of its revenue.

State aid also includes making personnel available, such as national trainers or national technical directors (*directeurs techniques nationaux*, or DTNs) who are responsible for managing the high-level sports sector for federations.

Moreover, the French State is involved in sports through the Ministry of National Education, responsible for organizing the teaching of physical and sports education in primary and secondary schools. The Ministry of National Education is therefore responsible for training and paying physical and sports education teachers, and for financing school sports installations.

- The French National Center for Sports Development (*Centre national de développement du sport*)

This is a public institution for administrative purposes, its responsibilities being defined by Article R. 411-2 of the French Sports Code, i.e.:

- contributing to the development of the practice of sports by the greatest possible number;
- facilitating access to high-level sports and organizing sports events;

- promoting health through sports;
- improving safety in the practice of sports and protective health and safety measures for athletes;
- encouraging sports management reinforcement

To reach these objectives, the CNDS is financed through two sources:

- from sports betting (1.8% of the amount bet, capped in 2009 at €165.6 million);
- from 5% of the proceeds generated by event organizers or sports competitions transferring TV rights.

CNDS revenue came in this way to €211.7 million for 2009.

This amount was spent essentially to develop the practice of sports locally and to build or renovate sports installations, in the form of:

- first, operating grants (€150 million); and
- secondly, grants for equipment and installations (€68.9 million).

In 2008, the CNDS allocated about €45,000 grants in an average amount of €2,800 (source: Lamy Droit du sport).

- Territorial Authorities

The territorial authorities (regions, departments, district councils, municipalities) are the leading partners in French sports. They devote about 10 billion yearly to financing sports.

The amount of grant money that territorial authorities may pay to a sports association is regulated and restricted by Article L. 113-2 of the French Sports Code. This provides that territorial authorities may give grant money to sports clubs to support their activities in the public interest, i.e. training, educational initiatives, integration or social cohesion or public safety, this within the limits set at €2.3 million per sports season.

In the same way, Article L. 113-3 of the French Sports Code provides that amounts paid by territorial authorities to sports associations to perform service provisioning contracts, which often correspond to the purchase of advertising space (on the club uniform, for example) may not exceed 30% of the total revenue indicated in the income statement, restricted however to €1.6 million.

### Conclusion

Aside from the €13 billion the French State puts into sports yearly (€10 billion for territorial authorities and €3 billion for the State), the private sports economy remains relatively undeveloped. It represents approximately €3 billion annually, distributed as follows:

- sponsoring (€1.9 billion);
- TV media (€1.2 billion).

The upcoming availability of the games and betting sector on-line on a competitive basis should permit French sports to develop new sources of revenue comprised of:

- revenues drawn from on-line betting operators sponsoring teams;
- a tax on bets placed on players; the generated income would be paid to French sports.

It still remains that the lesser role that private investment plays in French sports is a handicap for the country in terms of international sports competition. Seeking to increase it necessarily means putting the current institutional system into question, significantly shaped as it is by the State's regulatory and financial involvement in organizing physical sports activities.

The International Sports Law Journal

<sup>5</sup> *Décideurs Magazine*, Stratégie, finance, droit, no. 106.

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# Sport Governance in Portugal

by Alexandre Miguel Mestre\*

## 1. Legal Framework

### 1.1. Sport at the Portuguese Republic Constitution

Since the first Portuguese Republic Constitution (“Constituição da República Portuguesa”) - PRC - dated from 1976, sport is recognized as a fundamental right. The “right to physical culture<sup>1</sup> and sport” is enshrined in Article 79, under the umbrella of the Section dedicated to “Rights, Freedoms and their Guarantees” in Title III which covers “Economic, social and cultural rights and duties”.

Article 79 (1) stipulates a general right to physical culture and sport as follows: “Everyone shall possess the right to physical education and sport”. This means that all citizens are entitled to sport in its various dimensions and scenarios: school; recreation; high performance; amateurism; professionalism, informal activities, *inter alia*.

In its turn, no. 2, added at the time of the 1989 constitutional revision, states as follows: “Acting in cooperation with schools and sporting associations and groups, the state shall be charged with promoting, stimulating, guiding and supporting the practice and dissemination of physical culture and sport, and preventing violence in sport.” One can infer from this provision that instead of a State’s monopoly, there is a collaborationist and decentralized model. The PCR demands State to have a central role in sport policies but simultaneously refuses a sole intervention of the State. In other words, the State’s intervention shall be developed necessarily in close collaboration with public and private stakeholders, mainly schools, the “sports movement” (private and autonomous sport governing bodies such as clubs, associations and federations) and local authorities<sup>2</sup>.

Apart from and in conjunction with Article 79, sport is covered by some other constitutional provisions, both explicitly and implicitly:

- (i) Further to Article 59 (1) (d), “workers have the right to rest and leisure time, a maximum limit on the working day, a weekly rest period and periodic paid holidays”;
- (ii) According to Article 71 (1), “[c]itizens with physical or mental disabilities shall fully enjoy the rights and shall be subject to the duties enshrined in this Constitution and save the exercise or fulfilment of those for which their condition renders them unfit.” If one read this provision in conjunction with Article 79, one must conclude that handicapped citizens have a fundamental entitlement to sport;
- (iii) Pursuant to Article 64 (1) “[e]veryone shall possess the right to health protection and the duty to defend and promote health”. Further to no. 2 of the same provision, this right to health protection shall be fulfilled, among other means, by “(...) promoting physical fitness and sport at school”;
- (iv) The constitutional provision related to youth is also very relevant for sport. In fact, as stated in Article 70 (1) (d), “[i]n order to ensure the effective enjoyment of their economic, social and cultural rights, young people shall receive special protection, particularly (...) [i]n physical education and sport”;
- (v) Article 65 enshrines the “right to housing and urban planning” In order to ensure the enjoyment of the right to housing the State shall be charged with “[p]lanning and implementing a housing policy that is embodied in general town and country

planning documents and supported by urban planning documents that guarantee the existence of an adequate network of transport and social facilities”. There is no doubt that sport facilities integrate the concept of “social facilities”;

- (vi) Article 66 (1) states that “[e]veryone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it”;
- (vii) Article 69 enshrines the right of children to the protection of society and the State, “with a view to their integral development”, i.e., children shall possess the right to take part in recreational and sporting activities suitable for their age;
- (viii) According to Article 73 (1) and (2) “[e]veryone shall possess the right to education and culture” and it is for the State to “promote the democratization of education and the other conditions needed for education” and to contribute to equal opportunities, the overcoming of economic, social and cultural inequalities”. Physical culture and sport are very useful tools for such State’s duty since they contribute for some of the objectives provided in the said constitutional provision, namely “(...) the development of the personality and the spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to democratic participation in public life.”

### 1.2. The evolution of “Sports Law” in Portugal

The first Portuguese legislation relevant to sport which structured the sports system dates from 1932<sup>3</sup>. With subsequent legislation enacted in 1943<sup>4</sup>, which introduced the regulations governing the General Directorate of Physical Education, Sport and School Health<sup>5</sup>, the approach of the law to sport became less harsh and began to see sport as a pleasure, to be afforded to the citizenship. Despite accepting payment in order to enjoy sport as a pleasure, that new legislation made no mention of professional sport).

The first time that professionalism is referred to in a law occurred only in 1960<sup>6</sup>. The legislator admitted the existence of professional sportsmen and sportswomen even so with great reservations in the so-called “sports of the masses”, i.e., those sports in which practice was starting to demonstrate the inevitability of the professionalization.)

Only after the revolution of the 25th of April of 1974 start to be talk of real professional sport, but always in connection with topics such as the ethics of sport, namely violence and doping. The inclusion of physical education and sport in the PCR was the starting line of a process of a qualitative and quantitative legal interventionism of the State in the field of sport. Important rules were already enacted in the eighties’ decade. However it was still a period of disperse and non integrated sports law policy.)

In 1990 everything changed. Since then the legislation related to sport has been based on “Basic Laws” (“Leis de Base”). This type of laws “develop the general basis of legal frameworks”<sup>7</sup>, i.e., they contains general principles and programmatic rules, which are then developed not also by laws (adopted by the Parliament) but also and mostly by decree-Laws (adopted by the Government). Therefore, all the ordinary legislation directly and indirectly related to sport is a devel-

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<sup>1</sup> The concept of “physical culture” is no longer used both at the legislation and by the Portuguese sports scientists. Some

have replaced it by the term “physical activity” and others prefer to use just the notion of “sport”, in accordance with the broad definition of sport provided by the Council of Europe’s European Sport Charter.

<sup>2</sup> Article 2 (1) of the “Basic Physical Activity and Sport Law” (“Lei de Bases da Actividade Física e do Desporto”) - Law no. 5/2007 of January 16 - has a text that merges and reflects the whole con-

tent of Article 79 of the PRC: “The sportive system, within the scope of the constitutional principles, encourages the sportive practice for everyone, either for recreation or for competition, in primary conjunction with schools, given its high educational content, and equally in alliance with associations, sportive collective groups and local authorities”.

<sup>3</sup> Decree no. 21.110 of September 4. It approved the regulations governing phys-

ical education in grammar schools. The law’s preamble referred to the “evil spirit” of competitive sport, as a cause of “physical and moral malformation”. Competitive sport was therefore not encouraged in schools.

<sup>4</sup> Decree no. 32.946 of August 3.

<sup>5</sup> This administrative organ was created by the Decree-Law no. 32.241 of September 5.

<sup>6</sup> Law no. 2104 of May 30.

<sup>7</sup> See Article 112 (2) of the PCR.

opment of a legal framework structured by the “Magna Carta” of physical education and sport.

Currently it is in force the “Basic Sports Law of Physical Activity and Sport” (“Lei de Bases da Actividade Física e do Desporto”), adopted in 2007<sup>8</sup>, which was preceded by the “Basic Law of the Sports System”<sup>9</sup> (“Lei de Bases do Sistema Desportivo”), approved in 1990, and by the “Basic Law of Sport” (“Lei de Bases do Desporto”), enacted in 2004.<sup>10</sup>

### 1.3. The current legal regime in the field of sport and its influence on the Portuguese “sports governance”

The scope of the “Basic Sports Law of Physical Activity and Sport”<sup>11</sup> is to establish the general framework of the sport system and its aim is to promote and offer guidance to the generalization of the sportive activity as “(...) an indispensable cultural factor to the complete education of the human being and to the development of the society.”

The “Basic Sports Law of Physical Activity and Sport” comprises several different topics that cover the different subsystems of the Portuguese Sports System, namely sport at school (curricular and extracurricular activities) and at the University; sport in the armed forces; sport at the workplace; sport in prisons; sport in the armed forces and in the security forces.

Legislation covers not only sport for all but also high professional and high performance (or high level) sport. The legislator has also a horizontal and holistic approach since it adopts several laws that discipline the interplay between sport and other sectors of the society such as culture, youth, tourism, and environment. Sports medicine, sports insurance, taxation in sport, sports infra-structures or sports ethics (doping, violence associated to sport, racism, xenophobia, intolerance, and corruption); image rights; merchandising; and sponsoring are other paradigmatic examples of the public intervention of the State in sport by means of the adoption of legislation.

## 2. Institutional Framework

### 2.1. Administrative organization in the sports field

#### 2.1.1. The Government Structure for sport

The Government intervenes in sport through the work of the Presidency of the Council of Ministers, namely by the Minister of the Presidency which is supported by the Secretary of State for Youth and Sport<sup>12</sup>. The role of government in sport is to establish the basis upon which all sports activities can be developed and fostered to create the technical and material conditions for sport development.

#### 2.1.2. The administrative organs with competence in the field of sport

##### 2.1.2.1. The Portuguese Sport Institute

The Portuguese Sport Institute<sup>13</sup> (“Instituto do Desporto de Portugal”) performs the duties and exercises the powers of the Presidency of the Council of Ministers and is an organ of the Indirect State Administration, with administrative, financial autonomy and its own assets<sup>14</sup>. It is governed by its own bylaws<sup>15</sup> and its role is to support the definition, implementation and evaluation of sports public policy as well as to promote the generalization of physical exercise. It is also responsible for supporting normal and high performance sport via the provision of technical, financial and human resources.

So far as security is concerned, the Portuguese Sport Institute is the

body responsible for (i) proposing measures with a view to the prevention and combating of racism and xenophobia in sport; (ii) proposing and implementing an integrated program for the construction and recuperation of sports facilities and infrastructures, in collaboration with local authorities, as well as giving an opinion regarding sports security and safety rules to be complied with in the construction and licensing thereof; (iii) promoting the generalization of medical checks on access to and during sports activities; (iv) carrying out such supervisory and inspection activities and issuing such authorizations and licenses as it is charged with by law and to issue the certifications and credentials envisaged in the law<sup>16</sup>.

#### 2.1.2.2. The National Sport Council

The National Sport Council (“Conselho Nacional do Desporto”), which has replaced the former Higher Council for Sport (“Conselho Superior de Desporto”)<sup>17</sup>, is made up of representatives of the Public Administration and of the “sports movement”<sup>18</sup> and operates under the immediate auspices of the Government member responsible for sport.

The power and responsibilities of the National Sports Council include the following tasks:

- (i) To monitor the development of policies to promote physical activity and sport;
- (ii) To give an opinion regarding draft legislation related to sport, when requested so to do by the Government member responsible for sport;
- (iii) To promote and co-ordinate the adoption of measures with a view to ensuring compliance with the principles of sports ethics, i.e. with regard to the fight against doping, violence associated with sport, racism, xenophobia corruption and different forms of discrimination;
- (iv) To state its opinion regarding the development factors of high performance sport, the measures to be taken within the ambit of the non-academic training of sports staffs and the links between the various sports subsystems<sup>19</sup>;
- (v) To recognize the professional nature of the competitions in each sport.

In addition to the powers and duties referred to above, the National Sport Council is the body responsible for the regulation, on a provisional basis, of disputes that arise between the professional leagues and the corresponding sports federations, namely conflicts regarding the number of clubs that take part in the professional sports competition, the conditions governing access to professional and non-professional sports competitions and the organization of the activities of national teams.<sup>20</sup>

The National Sport Council is divided into two internal sections, the Council for Ethics, Safety and Security in Sport (“Conselho para a Ética e Segurança no Desporto”) and the Council for the Sports System (“Conselho para o Sistema Desportivo”). The Council for Ethics, Safety and Security in Sport’s role is to promote and co-ordinate the taking of measures to safeguard sport ethics and to evaluate the implementation thereof. In its turn, the Council for the Sports System’ role is to give an its opinion regarding the legality of the bylaws and regulations of sports federations, the organization of national sports competitions, the appli-

8 Law no. 5/2007 of January 16.

9 Law no. 1/90 of January 13.

10 Law no. 30/2004 of July 21.

11 See Article 1.

12 See Articles 3 (4) (b), 11(2) (b) and 11 (3) (c) of the Decree-Law no. 321/2009 of December 11 which approved the organic of the XVIII Government.

13 The Portuguese Sport Institute was created by the Law no. 96/2003, of May 7. This law was repealed by Decree-Law no. 169/2007, of May 3, which came into force on June 1 2007 and introduced a new organisational framework.

14 The organization of Public Sports’

Administration in the Autonomous Regions is subject to specific provisions approved by the local government bodies. Azores and Madeira have their own official sports bodies, the Azores Regional Directorate for Physical Education and Sport (“Direcção Regional de Educação Física e Desporto”) and the Sports Institute of the Madeira Autonomous Region (“IDRAM”).

15 The bylaws were approved by Statutory Instrument no. 662-L/2007 of May 31, as amended by the Statutory Instrument no. 573/2008 of July 4.

16 The Portuguese Sport Institute has vari-

ous departments, which are first level organizational units, which are hierarchically and functionally subject to the chairman of the Institute. It also has local offices. The Portuguese Sport Institute has the following departments: (i) The Information, Communications and International Relations Department; (ii) The Human, Financial and Material Resources Department; (iv) The Sports Medicine Department; (v) The Sports Development Department; (vi) The Jamor National Sports Centre Management Department.

17 The Decree-Law no. 202/2006 of

October 27 abolished the Higher Council for Sport and provided for the creation of the National Sports Council.

18 The Decree-Law no 1/2009 of January 5 enlarged the number of members from 33 to 38.

19 These non-binding opinions are submitted to the Government member responsible for sport.

20 This power derives from Article 23 (4) of the “Basic Law of Physical Activity and Sport”. It is provisional since the intervention of the National Sport Council occurs only until such time as a consensus is achieved between the parties.

cations for the grant or renewal sports public utility status, and the social and economic impact of sport. It also belongs to the Council for the Sports System the above mentioned dispute resolution competence.

### 2.1.2.3. The Portuguese Anti-doping Authority (“Autoridade Antidopagem de Portugal - ADOP”)

The Portuguese Anti-doping Authority is attached to the Portuguese Sport Institute, being the national body with functions of control and fight against doping in sport, namely as an entity responsible for the adoption of the rules aimed at unchain, implement or apply any phase of the doping control procedure<sup>21</sup>.

The Portuguese Anti-doping Authority<sup>22</sup> is specifically responsible for:

- (i) Recording the federation regulations governing anti-doping controls and verifying their compliance with the provisions of this statute;
- (ii) Issuing scientific and technical advices, recommendations and notices namely about the procedures of prevention and control of doping;
- (iii) Providing sports federations with technical assistance as they may request, both in the drawing up and in the application of their respective anti-doping regulations;
- (iv) Pronouncing about the drafting of legislation regarding the fight against doping, having heard the National Council for Anti-Doping (“Conselho Nacional Antidopagem” - CNAD)<sup>23</sup>;
- (v) Issuing binding advices concerning the regulations of fight against doping in sport adopted by the sport federations holding the statute of public sport utility, having heard the National Council for Anti-Doping;
- (vi) Receiving the requirements for the Therapeutic Use Exemption of substances and prohibited methods, proceeding with the respective guiding the Therapeutic Use Exemption’s Commission, and to establish the procedures inherent to the system of authorization of therapeutical use at national level;
- (vii) Studying in collaboration with the entities which are responsible for the educational system and for sport pedagogical plans, and particularly information and education campaigns, as are aimed to increase the awareness of a practitioner, their entourage and young people in general of the dangers and unfairness of doping;
- (viii) Studying and proposing adequate and suitable legislative and administrative measures designed to ensure the fight against doping in general and the control of production, commercialisation and illicit trafficking in substances or prohibited methods;
- (ix) Studying and suggesting measures aimed at coordinating the national programs to fight doping with the guidelines issued by the World Anti-doping Agency, and complying with the obligations derived from conventions entered into by Portugal within the same ambit;
- (x) Proposing the financial support of research programs in the domain of the fight against doping, namely sociological, behav-

ioral, legal and ethical as well as researching in the medical, analytical and physiological fields;

- (xi) Issuing general or special recommendations which concern doping prevention and control procedures and are aimed not only to the entities which form part of the sport associations (“sports movement”) but also to sport practitioners and their entourage;
- (xii) Deciding to hold and initiating extraordinary inquiries and the anti-doping controls which are inherent therein whenever it receives or gathers strong indications of the existence of habitual or continuous doping on the part of a given athlete or in a given sector of sporting activity;
- (xiii) Revising, substituting and repealing the filed, absolved or punishment decisions adopted by the jurisdictional organs of the sport federations, after the verification of a non conformity with the provided in the present law;
- (xiv) Providing the services requested by other national or foreigner entities, in the framework of the fight against doping in sport;
- (xv) Following the national technical participation in the different international instances responsible for the fight against doping in sport;
- (xvi) Evaluating the risks of new substances and methods, having heard the National Council for Anti-Doping.

## 3. The Non Governmental Sport Organizations (“The Portuguese Sports Movement”)

### 3.1. Sports clubs

Sport clubs (“clubes desportivos”) are private corporations whose aim is the organization, promotion and supervision of the practice of sports activities through membership. Sports clubs which do not take part in professional sports competitions shall form associations for non profit-making purposes.

### 3.2. Sports companies

Sport companies (“sociedades desportivas”) are deemed to be private corporations incorporated as private limited companies whose object is to participate in one sports discipline, in competitions of a professional character, to promote and organize sport spectacles and to promote or develop activities connected with the professional practice of such discipline.<sup>24</sup>

According to the law<sup>25</sup>, sport companies may be come about as the result of:

- (i) The transformation of a club which participates, or intends to participate, into professional competitions;
- (ii) The “legal personalization” of the teams which participate, or intend to participate, into professional competitions; or
- (iii) The original formation, which does not result from the transformation of a club or of the “legal personalization of the teams”.

### 3.3. Sports federations

A sport federation (“federação desportiva”) is a private corporate body which, integrating athletes, clubs and groups of clubs - generally called “associations” (“associações”), becomes incorporated under the legal system of a non profit-making association, and pursues, at national level, exclusively or cumulatively, the following requirements and/or aims:

- (i) To record the federation regulations governing anti-doping controls and to verify their compliance with the provisions of the “Legal Regimen of Sports Federations”;
- (ii) To seek to pursue the objectives set out below under the terms of their articles of association;
- (iii) To promote, regulate and direct, at national level, the practice of a sport discipline or of a group of similar sport disciplines at national level;
- (iv) To represent the interests of their members in their relationship with the Public Administration;
- (v) To represent their sport disciplines a group of similar sport disciplines with the international sport organizations as well as to ensure the competitive participations of the national teams.<sup>26</sup>

<sup>21</sup> See Article 16 of the Law no. 27/2009 of June 19.

<sup>22</sup> See Article 18 (i) of the Law no. 27/2009 of June 19.

<sup>23</sup> This Council is the consultative body of Portuguese Anti-doping Authority. Its competences are the following: (i): To provide previous and binding advices concerning the application by the sport federations of the sanctions derived from the use, by sportsmen, of specific substances, as defined in the list of substances and prohibited methods; (ii) To issue previous and binding advices concerning the attenuation of the sanctions based on the exceptional circumstances defined by the World Anti-doping Code; (iii) To issue previous and binding

advices concerning the aggravation of the sanctions based on the exceptional circumstances defined by the World Anti-doping Code; (iii) To ensure the remaining functions provided at the law. See Article 26 of the Law no. 27/2009 of June 19.

<sup>24</sup> See Article 2 of Decree-Law no. 67/97 of April 3.

<sup>25</sup> See Article 3 of Decree-Law no. 67/97 of April 3.

<sup>26</sup> See and Article 2 of the Decree-Law no. 248-B/2008 of December 31 - the “Legal Regimen of Sports Federations” (“Regime Jurídico das Federações Desportivas”).



A distinction is drawn between “single-sport federations” (“federações unidesportivas”) and sports federations with multi-sport nature (“federações multidesportivas”)<sup>27</sup>: single-sport federations are those including people or bodies who play the same sport including its various disciplines or a series of similar disciplines and multi-sport federations represent a range of sports for specific areas of social organization, namely sports for the disabled and sports played within the framework of the education system.

The large majority of the Portuguese sport federations hold the “statute of public sport interest”<sup>28</sup> (“estatuto de utilidade pública desportiva”) which is the instrument by means of which the State<sup>29</sup> endows a federation with the competence to exercise, within the respective scope, regulating-making powers, disciplinary powers and other powers of public nature.<sup>30</sup>

### 3.4. Professional leagues

The single-sport federations engaged in sport competitions of a professional nature integrate one professional league (“liga profissional”), under the status of a non-profit association, endowed with legal personality and administrative, technical and financial autonomy<sup>31</sup>. A professional league, which is compulsorily composed by the sport clubs and the sports companies that compete in the professional competitions<sup>32</sup>, develop, by means of a delegation from the respective federation, the competences related to the competitions of professional nature. Its main tasks are the following:

- (i) To organize and regulate the competitions of professional nature, respecting the technical rules defined by the relevant national or international federate organs;
- (ii) To perform, as to what concerns its associates, the supervision, control and monitoring duties as have been established by law or by its respective bylaws and regulations;
- (iii) To define the sports, financial and organizational requirements of access to professional competitions, as well as to supervise its execution by the participant entities of those competitions.

The referred competences are delegated by the sports federations and the relations between the sports federations and the leagues are regulated by a contract.<sup>33</sup>

### 3.5. Sport-promoting associations

Sport-promoting associations (“associações promotoras de desporto”) are non profit entities whose aims are the promotion and organization of physical and sports activities for recreational, educational or social purposes which do not fall under the jurisdiction of sport federations.<sup>34</sup>

### 3.6. The Portuguese Sport Confederation

The Portuguese Sport Confederation (“Confederação do Desporto de Portugal”) is a private association created in 1993 that brings together the national sport federations. This “umbrella organization” seeks to support and to foster the affiliated Federations. As stated in its bylaws, it is an instrument of cooperation, consultation and representation of its members towards the State, namely the Parliament, the Government, the Autonomous Regions, the local authorities, the European Union, the International Confederations, and other national and international institutions<sup>35</sup>. Its objectives are the following:

- (i) “To defend the right to sport as an essential factor of the complete development of the human being, as an obligation arising from the Portuguese Republic Constitution and the Basic Sports Law of the Sports System;
- (ii) To promote the sports association’s movement and the relationships with homologous organizations from other countries;
- (iii) To intervene in the national sports policy and to participate in the general strategies for sport, as a social partner of the State;
- (iv) To represent the whole of the sport federations with the State, the European Union and the organisms congeners from other countries;
- (v) To support its affiliated sport federations, in the framework of their respective activities;
- (vi) To promote the conciliation of interests within the sport federations;
- (vii) To promote and support cultural, educational and training initiatives related to sport in all its features;
- (viii) To contribute through sport to the reduction of the regional asymmetries as well of the social inequalities in the access to sports practice;
- (ix) To defend and promote participation in sport, with equal opportunities, non discrimination on grounds of sex, age, ethnic origin, sexual orientation or deficiency;
- (x) To promote the values of ethics and sport spirit, supporting all ways of fighting against doping as well as combating all sources of corruption and violation associated to sport.”<sup>36</sup>

### 3.7. The Sport Foundation

In 1995 a private Foundation with public-interest status was formed<sup>37</sup>, the Sport Foundation (“Fundação do Desporto”), with the State as one of the founders, among others such as the Portuguese Olympic Committee, the Portuguese Sports Confederation and the RTP - the Public Portuguese TV broadcaster. The purpose of this Foundation is “to support the promotion and the development of sport, mainly in the domain of high-performance”<sup>38</sup>. In special conditions, the Sports Foundation can grant patronage or subsidies to a specific sport modality or sport competition.

### 3.8 The INATEL Foundation

The INATEL Foundation (“Fundação INATEL”) is a legal person of private law and public interest, with legal personality, which main purpose is “(...) to promote better conditions for the occupation of leisure time and leisure for workers, retirees and active in developing and enhancing social tourism, the creation and enjoyment of cultural, physical activity and sport, the social inclusion and solidarity”<sup>39</sup>. (Emphasis added)

### 3.9. The Olympic Organization

#### 3.9.1. The Portuguese Olympic Committee

The Portuguese Olympic Committee (“Comité Olímpico de Portugal”) is a non-profit association, endowed with legal personality, which is governed by its statutes and regulations, by respect for the law and the Olympic Charter.

It has exclusive competence to set up, organize and manage the Portuguese delegations participating in the Olympic Games and other sporting competitions under the auspices of the International Olympic

<sup>27</sup> See Article 15 of the “Basic Law of Physical Activity and Sport”. See also Article 10 of the “Legal Regimen of Sports Federations”.

<sup>28</sup> At present, there are 79 sports federations. According to the information provided by the Portuguese Sports Institute, 64 hold the “statute of public interest”.

<sup>29</sup> Further to the Statutory Instrument no. 595/93 of June 19, the application for the granting of the statute is submitted to the Prime Minister and delivered to the Portuguese Sport Institute.

<sup>30</sup> The granting of the aforementioned

statute is subject to specific statutory provisions and must be based upon the consideration and accomplishment of objective requirements, namely: (i)

Compliance of the respective bylaws with the law; (ii) Democratic structure and the representation of the respective bodies; (iii) Independence and technical powers of the appropriate jurisdictional bodies; (iv) Degree of social and sports implantation, nation-wide, namely in terms of the number of sports players, associative organizations and other elements enabling the verification of sportive

development; (v) Framing in an international sport federation possessing a recognized representation.

<sup>31</sup> Until now Portugal had only three Professional Sports Leagues: Football, Basketball and Handball.

<sup>32</sup> Professional leagues may also integrate other sports agents, in accordance to the law and their respective bylaws. See Article 22 (4) of the “Basic Law of Physical Activity and Sport”.

<sup>33</sup> See Article 23 of the “Basic Law of Physical Activity and Sport”.

<sup>34</sup> See Article 33 of the “Basic Sports Law of

Physical Activity and Sport”. The legal regimen of the Sport Promoting Associations was first established by the Statutory Instrument no. 279/97 of October 1.

<sup>35</sup> See Article 4.

<sup>36</sup> See Article 6.

<sup>37</sup> See Article 1 of its bylaws.

<sup>38</sup> See Article 7 of its bylaws.

<sup>39</sup> See Articles 4(1) and 5 of the Decree-Law no. 106/2008 of June 25.

Committee, by collaborating in the preparation thereof and encouraging participation in the activities that form part of them. Among other functions and powers provided in the law, the Portuguese Olympic Committee shall keep the register of participants in Olympic sports up to date and has the right to the exclusive use of the Olympic symbols in the national territory, in accordance with the law.<sup>40</sup>

Further to its bylaws<sup>41</sup>, the competences of the Portuguese Olympic Committee are the following:

- (i) To spread, develop and defend the Olympic Movement and sport in general, in conformity with the Olympic Charter;
- (ii) To promote the pleasure for the sport practice as a mean of character formation, health protection, environment, social cohesion and social integration;
- (iii) To fight against the use of substances and prohibited methods, in observance of the norms of the International Olympic Committee (IOC) Medical Code, collaborating with the national authorities in the control of those practices;
- (iv) To promote the compliance of the sports ethics in the competitions and in the relations between the sports agents;
- (v) To adopt measures against any form of discrimination, on grounds of gender, deficiency, race or religion, in the sports practice and within its directing organs;
- (vi) To participate compulsorily in the Olympic Games and to organize and direct on an exclusive basis the respective national delegation, being responsible for the behavior of its members;
- (vii) To designate, on an exclusive basis, the bid city to the organization of the Olympic Games and to ensure its realization when those Games take place in national territory;
- (viii) To represent, in the framework of its attributions, the national sport federations with the Government and official organisms;
- (ix) To promote the diffusion of the values of Olympism in the curricula of physical education and sport in the school and University institutions;
- (x) To stimulate and support the training of sports agents;
- (xi) To support the activities of the Olympic Academy, the Olympic Museum and any other institutions dedicated to Olympic education or that promote cultural programmes related to the Olympic Movement;
- (xii) To cooperate with governmental and non governmental organizations in any sports activities which are not in contradiction with the Olympic Charter;
- (xiii) To coordinate with the federations the programs of Olympic preparation;
- (xiv) To participate, jointly with public and private institutions, in the collection and management of funds dedicated to the support of programs of development of high performance and programs of Olympic preparation, either directly or through the entities to which the funds are destined;
- (xv) To support the institutionalization of the Court of Arbitration for Sport.

### 3.9.2. The Portuguese Paralympic Committee

The Portuguese Paralympic Committee (“Comité Paralímpico de Portugal”) is also mentioned in the Basic Law of Physical Activity and Sport”, namely in Article 13 according to which “the regimen provided in the previous article [the one related to the Portuguese Olympic Committee] “(...) shall apply to the Portuguese Paralympic Committee, adapted as appropriate, in relation to participants in sport who have a disability and in relation to the relevant international sports competitions.”

The adaptations are diminutives, as one can easily remark by reading the aims of the Portuguese Paralympic Committee provided in its

bylaws. The few differences arise from the different competitions and institutions at stake: the Portuguese Paralympic Committee role is related to the Paralympic and Deaflympic Games and it must comply with the International Paralympic Committee (IPC) Handbook and the International Committee for Sport and Deaf (ISCD), the role of the Portuguese Paralympic Committee.

## 4. Sports Financing

### 4.1. The “Financial Support’s structural framework: the “Programme contracts for sports development”.

Under the “Basic Law of Sports and Physical Activity” 42, sports associations sports events with public interest recognized as such by the member of the Government responsible for sport are eligible to benefit from aids or financial contributions from the State, the Autonomous Regions and local authorities. That financing must be granted through the so-called “Programme contracts for sports development”, in accordance with the law (“Contratos-programa de desenvolvimento desportivo”).

This sort of contracts shall be subject to the presentation of sport’s development programmes and its detailed characterisation, specifying the forms, means and deadlines for compliance therewith. It is also obligatory the presentation of costs as well as checking the degree of financial, technical, material and human autonomy envisaged in the programmes. In other words, the legislator wants to be sure that public subsidies are properly targeted.

There must be also emphasised two other important features of the Portuguese financial support’s framework: (i) Financial contributions may only be granted exclusively for the purposes envisaged and are insusceptible of judicial apprehension or any onus; (ii) Sports clubs which compete in competitions of professional nature can not receive from the State any kind of financial contributions except in the case of the organisation of sport competitions with public interest or in the case of construction and improvement of sport infra-structures or sport equipments.

The “Basic Law of Sports and Physical Activity” and the new “Legal Regimen of Sports Federations” (“Regime Jurídico das Federações Desportivas”) lead to the repeal of the decree-law that framed the programme contracts of sports development that was already in place since 1991. The main novelties introduced in 2009<sup>43</sup> can be systematized as follows:

- (i) The need for prior binding opinion of the member of the Government responsible for sport for the provision of State funding for the construction of sports facilities (public and private);
- (ii) The need of an assumption by the beneficiaries of public interest compensations in the case of financial contributions for public construction or improvement of sports facilities owned by private entities when the nature of the investment is justified and in the case of acts of free allocation of the use or management of State Property to the same entities;
- (iii) The previous recognition of the sporting events’ public interest as a condition for public funding thereof, through an order of the member of the Government responsible for sport;
- (iv) The principle that sports clubs participating in competitions of a professional nature can not benefit in this context of support or financial contributions by the State, Autonomous Regions and local authorities, in any form, except as regards the construction or improvement of facilities or sports facilities for the achievement of sporting events of public interest, acknowledged as such by the member of the Government responsible for sport;
- (v) A compulsory certification of the accounts of the entities beneficiaries of public funds when the amounts paid exceed a limit set in the contract programmes of sport development;
- (vi) The ban of new public financing imposed to entities that are in breach of their tax and social security obligations and simultaneous suspension of any financial benefits from any contract programmes in progress as the situation continues;
- (vii) The immunity from judicial arrest or encumbrance of funds derived from public financing, duly granted by contract pro-

<sup>40</sup> See Article 12 of the “Basic Sports Law of Physical Activity and Sport” as well as Article 1 of Decree Law no. 1/82 of January 4.

<sup>41</sup> See Article 6.

<sup>42</sup> See Article 46.

<sup>43</sup> Decree Law no. 273/2009 of October 1.

<sup>44</sup> See Article 1(i) of Decree-Law no. 84/85 of March 28.

grammes, since the sums are considered exclusively granted for the purposes for which they were awarded;

- (viii) The funds granted by sports federations as well as by the Portuguese Olympic and Paralympic Committees to entities under their jurisdiction should also occur through contract programmes which clarify the objectives of the support, since those conceding entities have previously received public funding for such purpose (it is still here concerned public money);
- (ix) In order to avoid gaps resulting from transition economic years it is established a scheme that consists of the funding maintenance until the signature of a new contract programme.

#### 4.2. "Social games" as sources of sport financing in Portugal

"Social games" ("jogos sociais") such as lotto games, lotteries and football betting are an important financing stream for the Portuguese sports system due to the fact that the State's financial contribution to the sports sector also includes a levy on "social games" (games of chance and lotteries).

Under the law<sup>44</sup>, the right to promote "social games" is reserved by the State which grants the Santa Casa da Misericórdia de Lisboa, a centuries-old private non-profit-making organization with public administrative interest, the exclusive right to organize and operate them throughout Portugal.

It is also the law<sup>45</sup> that sets out the distribution of revenue from the "social games". Santa Casa retains only 28% of the earnings from the various games and the balance is shared among other public-interest institutions<sup>46</sup>. Part of the earnings serve to finance sports activities: (i) 0.7% of the money allocated to the Ministry of Internal Affairs are assigned to the policing of sporting events, (ii) the funds allocated for the Presidency of the Council of Ministers, 7.8% is for the promotion of activities and infrastructure sports (are transferred to the Sports Institute of Portugal), 1.5% for the promotion of activities and facilities juveniles (transferred to the Portuguese Youth Institute) and 0.6% have as objective the promotion and development of football (are transferred to the Sports Institute of Portugal); (iv) 1.2% of the money allocated to the Ministry of Labour and Social Security are conducted for the organization of leisure, culture and sport popular across the INATEL Foundation and; (v) 1% of funds allocated to Ministry of Education are used in support of school sport and investment in sports facilities at school.

#### 4.3. Tax Benefits related to "Sports Patronage"

Under the law, donations<sup>47</sup> given to certain sport entities are considered cost or losses, to the limit of 6/1000 of their turnover or services rendered. Those entities are the following:

- (i) The Portuguese Olympic Committee;
- (ii) The Portuguese Sports Confederation;
- (iii) Sports federations holding public interest status;
- (iv) Promotion Sport Associations;
- (v) Associations endowed with the statute of public interest whose main goal is the promotion and practice of sports activities, except those sections which participate in professional sports' competitions;
- (iv) Culture and sports' centres organised under the terms of the INATEL Foundation.

The sports patronage ("Mecenato Desportivo") is a relevant tax incentive which aims to increase financial support to the sports sector by private entities, alleviating the sports movement from an excessive reliance on public money and helping to offset the shrinking budgets of the majority of the Portuguese non-governmental sport actors.

#### 4.4. Bans or restrictions on tobacco and alcohol beverages' advertising as legislative measures with a (negative) impact on sports funding

By banning or restricting tobacco and alcohol beverages' advertising, sports stakeholders lose or have less possibilities of obtaining funds. The main features of the legislation in force are described below.

##### 4.4.1. Tobacco

According to Article 16 (1) of the Law no. 37/2007 of August 14, all and any forms of advertising and promotion of tobacco and tobacco products, including occult, dissimulate and subliminal advertising, are prohibited.<sup>48</sup>

##### 4.4.2. Alcohol beverages' advertising

Article 17 of the Advertising<sup>49</sup> Code ("Código da Publicidade")<sup>50</sup> establishes the general principles regarding alcoholic beverage advertising. Some of those principles have an impact on the sports field:

- (i) The advertising of alcoholic beverage, regardless of the advertising vehicle used for such purpose, is only permitted providing it does not link the consumption of alcohol to enhanced physical performance<sup>51</sup>;
- (ii) It is forbidden any association between alcoholic beverage advertising and any national symbols as identified in the PCR<sup>52</sup>;
- (iii) Advertising of any events where minors participate, namely sports events, cultural activities or other, shall not make any, direct or indirect, reference to alcoholic beverage brands. This restriction is also applicable to the locals where such events take place<sup>53</sup>.

#### 5. Conclusion

The PCR provides a collaborationist model between public and private actors in the promotion of the "right to physical culture and sport". However, other multiple constitutional rules which directly and indirectly apply to sport constitute an "open door" to an interventionist and bureaucratic model.

In fact, the State - the Government, the Parliament, the Autonomous Regions and the local authorities - tends to regulate extensively the different features of physical education and sport which inevitably jeopardizes the implementation of a subsidiary cohabitation and collaboration between all the stakeholders.

State Interventionism in sport is also evident in what regards financing. In fact, the Portuguese sports financing is structured in a model that relies primarily on public sources. Unfortunately, the existent legal and institutional mechanisms created to stimulate other sources of revenue are still not sufficient to mitigate the high dependency of the sports movement on public funds. There is no doubt: public funds assume a crucial role, being almost a non substitutable resource, in particular in the case of sports federations.

Paradoxically (or not), there are a lot of nongovernmental sport organizations - ranging from sports collectivities to fitness centers and health clubs - that have an increasing role in the generalization of

<sup>45</sup> See Decree-Law no. 56/2006 of March 15.

<sup>46</sup> Those institutions comprise associations of voluntary firemen, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, the cultural development fund or social projects.

<sup>47</sup> For tax purposes, donations are money or goods granted without any counterpart which may create commercial or money obligations for the mentioned public or private entities and whose activity mainly consists of promoting activities within

those social, cultural, environmental, scientific, technological, sports and educational fields - See Article 61 of the Statute of Tax Benefits.

<sup>48</sup> An exception to this general principle was set forth in Decree Law 52/87 of 30 January 30 according to which advertising to tobacco was generally accepted in automobile sports events with international prestige, including, inter alia, sports events such as World and European cups and championships, formula 1, rallying, motorcycling and sport-

cars. Advertising to tobacco was therefore permitted through the placement of any name, brand or logo in the equipment or clothing of the intervenient in such events and in placards where such events take place. That exceptional regime ended in December 31 2005 by means of the Decree-Law no. 178/2001 of June 9.

<sup>49</sup> Further to Article 3 (1) of the Advertising Code, "advertising" is defined as "any form of communication made by a public or a private undertaking in connection with trade, industrial activity, business,

craft or profession in order to promote, directly or indirectly the commercialization of any goods or services, any ideas or principles, initiatives or institutions".

<sup>50</sup> This Code was approved by the Decree-Law no. 330/90 of October 23. Its last amendments were introduced by Decree-Law no. 62/2009 of October 3.

<sup>51</sup> Article 17 (1).

<sup>52</sup> Article 17 (4).

<sup>53</sup> Article 17 (5) and (6)

sports practices and in the promotion of healthy life habits in the Portuguese population. However, even the most important and prestigious Portuguese nongovernmental organizations - the Portuguese Olympic Committee and the Portuguese Sport Confederation - have more prestigious than decision-making powers. Maybe it is also their own fault, taking into consideration that despite having a lot of members and competences in common, those entities do not consider the possibility of merging into one single social partner. Apart from obvious economies of scale, we are convinced that efficiencies could certainly arise from the existence of a single voice representing and defending the interests of the whole sports movement in the context of the dialogue with the public authorities.

In this context, we advocate the adoption of a new model of sports governance based on clear and different missions allocated to public and private entities with equity mechanisms and stronger commitments of all the different stakeholders.

In accordance to the PCR State must assume a decisive role.

However, unless its intervention is an added value for the sports system, room should be given to voluntary, commercial and other private activities. More collaboration and shared accountability are urgently needed.

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The International Sports Law Journal

# Image Rights: the Albanian Perspective

by Denis Selimi\*

Differently from other jurisdictions where established statutes and case law entitle individuals to control how their image or likeness is used for commercial purposes in public the realities of Albania have not yet caused that the legislator addresses and protects image rights. This is mainly due to somewhat historical but nowadays also commercial reasons. Sportsman who would like to be recognized not only for their physical abilities but also as icons to the public would certainly like to have defended their rights to the exploit of their image as they see fit.

Nowadays, Albanian sportsmen are building up their image by mainly playing for foreign teams. Some of them have started cashing in on their image based on agreements with their sponsors. However, there is little awareness that the Albanian law does not afford them protection of their image rights. Furthermore to date there has been almost no court cases elaborating on the legal means in defending rights of sportsman in availing of their image.

In Albania, civil relationships are mainly regulated by the Civil Code (that is Law no. 7850 entered into effect as of year 1994). The Civil Code constitutes a series of provisions designed to comprehensively deal with the core rights of a private person. The Albanian Civil Code being mainly inspired by the Italian Civil Code has a remarkably resemblance and takes many of its provisions from the Italian Civil Code.

However, as at the time the Albanian Civil Code entered into effect the realities in Albania were not the same as those in western countries the drafters of the Albanian Civil Code did feel that many of the regulations provided for in the Italian Civil Code were too advanced to be included in the Albanian statute.

This becomes evident also due to the fact that while the Italian Civil Code provides on and the defends the so called personality rights including the right to name and the right to image, the Albanian Civil Code limits its protection only in regard to the name.

Furthermore, image rights are not comprehensively protected also by the relevant copyright protection legislation. Whilst the rights of a person appearing in a drawn picture are distinctly defended there is no mention regarding rights of persons appearing in other representations.

On the other hand considering the non-existing case law there is no guidance and certainty on the applicable principles and valid arguments to be put forward to a court.

As earlier mentioned in regard to protection personal rights (i.e. the rights that a person has over their own body), the Albanian Civil Code only entitles a person to defend the rights to its name. The

defense entitles any person to oppose the use of its name against any other person that unjustly uses its name.

However, as personal rights should be associated with the aspects of the personality of a person as qualities that make a person distinct from another, a person's image or likeness should have been distinctly been protected in the Albanian Civil Code. That becomes important as in general Albanian courts are reluctant to recognize rights that are not specifically provided for in the Albanian statutes. Furthermore, the doctrine has not elaborated on the intrinsic aspects of personal rights. Therefore, the subject remains uncharted by the scholars and untested by the courts.

In regard to one specific case the Albanian legislation explicitly provides a portrayed person with rights as to the use of its image. Under the Albanian copyright law (*Law no. 9380 of 2005*) the authorization of a person portrayed in a picture must be first be obtained. However as the provision is limited only in regard to pictures it is arguable whether courts would interpret this provision by way of analogy and extend its application also in regard to other portraying formats.

As remedy, considering that the Albanian legislation fails to convincingly protect image rights one should consider registering its own image as a trademark. Under the Albanian Intellectual Property Law (*Law no. 9947 of 2008*) this remedy is possible if a person is registered as an entrepreneur and the trademark relates to goods or the provisions of services. The registration is generally a straightforward process and entitles the trademark owner to oppose the use of the trademark owned against all other persons as of the day of the application for the registration of the trademark.

### Conclusion

The Albanian legislation fails to explicitly protect image rights and the courts have not yet established precedent upon which to rely on the standards and tests in considering infringements to such rights. Nevertheless, in absence of legal clarity and to ensure protection of proper image sportsman are strongly advised to consider registration of the proper image as a trademark in Albania.

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# Sports Image Rights in Bulgaria

by Boris Kolev\*

## 1. Introduction

In Bulgaria the concept of “image rights” has not been developed as such. The reason is the fact that the English word “image” has been literally transplanted in the Bulgarian language but associated only with one of its aspects. Dan Harrington and Nick White, who contributed the chapter on the image rights in the United Kingdom<sup>1</sup> for the first edition of the Sports Image Rights in Europe, revealed the different meanings of the word “image”, which “may be used to refer to a particular picture or photo, or, alternatively, to how an individual is perceived”. They underlined the ambiguity of the word when used in terms of “how an individual is perceived”, because this “may be a reference on the one hand to that individual’s persona or character or to what others think of that person”. On the other hand, according to the authors of the UK chapter, “it may be used more literally, to refer to the person’s physical appearance”. They ultimately agreed that the meaning of “image” as a person’s physical appearance “is reasonably near to the meaning of “image” in the phrase “image rights”.

In Bulgaria the word “image” is used only to refer to its aspect of how an individual is perceived. Consequently, the Bulgarian word “image” does not correspond in meaning to “the person’s physical appearance”, not even implies this aspect of the word as present in the original English word. That is why the use of “image” according to its Bulgarian context in the connotation “image rights” would turn out to be far from its actual meaning in English.

However, Bulgarian legal doctrine has identified and developed as concepts other rights, which, in their totality, covers all aspects of the image rights arising from the original meaning of the word “image” in English. Personality rights for the protection of privacy and protection of personal data, right of portrait, right of name, and right of trademark constitute such rights. The right of good name is the concept which to a maximum extent overlaps the concept of image rights as it is perceived in Bulgaria due to the likeness of the words “image” and “good name” in Bulgarian language.

This country chapter will review and analyse the above mentioned rights in the context of Bulgarian law as well as the legal means for their enforcement, enhancement and protection. It will further provide information and discuss matters related to the management of image rights (sponsorship)

## 2. Personality Rights

The general personality rights for the protection of privacy of citizens including sportsmen are set forth in the Constitution<sup>2</sup>. Pursuant to article 32 of the Constitution of Republic of Bulgaria “the privacy of citizens shall be inviolable. Everyone shall be entitled to protection against any illegal interference in his private or family affairs and against encroachments on his honour, dignity and **good name**. No one shall be followed, photographed, filmed, recorded or subjected to any other similar activity without his knowledge or despite his express

disapproval, except when such actions are permitted by law.” The right of any citizen to refuse to be filmed and photographed in certain cases not falling within the permissible exceptions may serve as a ground for athletes to commercially exploit their general personality rights by agreeing to be photographed and filmed against a fee.

## 3. Right of Good Name

Right of good name is one of the personality rights explicitly mentioned in the Constitution. As already said before this right to a largest extent fits the concept of image rights in Bulgarian context as far as “image” and “good name” are very close in meaning in Bulgarian language. Besides its presence in article 32 of the Constitution this right is also listed among the limitations of the right of expression in article 39 thereof. “This right (the right of expression) may not be used for infringement of the rights and the good name of another person.” Further, article 41 of the Constitution again mentions “good name” among the values which may justify potential limitation of a constitutional right. The right to receive information may be limited in the cases where its enforcement is directed against the rights and the good name of the other citizens.

In its decision dated 14 July 1998 the Constitutional Court of the Republic of Bulgaria<sup>3</sup> also construed the value “good name”. It stressed in its analysis that “the good name of the other citizens” belongs to the values, which protection serves as justification for limitation of the freedom of expression under the Bulgarian Constitution. The corresponding justification under the European Convention on Human Rights (the ECHR) is the protection of reputation and the rights of others. In fact, the word reputation may be determined to be a synonym of good name in Bulgarian language. The Constitutional Court concluded that the good name as a value encompasses in it also the values honour and dignity, which are inherent to every person. Therefore, although not specifically mentioned as justifications for the limitation of the freedom of expression and the freedom to receive information in the respective articles of the Constitution, honour and dignity are part of the concept of good name according to the Bulgarian jurisprudence.

## 4. Protection of the Right of Good Name

### 4.1. Civil Liability

All the cases of infringement of the right of good name may be tried under article 45 of the Law on Obligations and Contracts (LOC)<sup>4</sup> stating the general liability of every person to redress the damage he has faulty caused to another person. Tort, as described in article 45 of the LOC, represents a complex legal fact consisting of the following elements: act (action or omission); damage; unlawfulness of the act; cause-consequence connection between the act and the damage incurred; and guilt of the wrongdoer. All these facts are united by the legal rule and must be cumulatively present. Further to the tort liability under article 45 in the cases where damage has been caused during performance of a work assigned by another person, the latter will be vicariously liable. This liability serves as a guarantee that the actual damage will be ultimately efficiently remedied. That is why the vicarious liability does not require presence of guilt on the part of the assignor of the work.

Bulgarian case law contains numerous examples of litigations having infringement of the right of good name as causes of action. These examples do not involve sportsmen; however, they clearly demonstrate what the reasoning of the court would be in such cases. In a case decided recently by the Supreme Court of Cassations<sup>5</sup> the latter confirmed, as a court of last instance, the amount of BGN 6,000 to be paid as compensation for the infringement of the right of good name of a Bulgarian composer, who was also organizer of a traditional music fest in the city of Burgas. The claim was directed against a

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<sup>1</sup> Ian S. Blackshaw and Robert C.R. Siekmann (Eds.), Sports Image Rights in Europe, T.M.C. ASSER Institute, 2005, Dan Harrington and Nick White, Chapter XVIII United Kingdom, pp 315-343.

<sup>2</sup> The Constitution of Republic of Bulgaria, promulgated in State Gazette, issue 56 of 13 July 1991, in force as of 13 July 1991.

<sup>3</sup> Pursuant to article 149, par. 1 of the

Constitution the Constitutional Court is empowered, *inter alia*, to provide mandatory interpretation of the Constitution and to rule on claims for establishment of non-conformity of the laws and the other acts of the Parliament and the President with the Constitution.

<sup>4</sup> Law on Obligations and Contracts, promulgated in the State Gazette, issue No 275 of 22 November 1950, in force as of 1 January 1951.

<sup>5</sup> Decision No 352 of 23 April 2009 of the Supreme Court of Cassation under civil case No 6517/2007.

woman leading a TV show at one Bulgarian television having national coverage through cable transmission and the legal entity holding the licence for broadcasting the program of the said television. The court accepted as proven the facts that the first defendant had disclosed information about the plaintiff, which was false, insulting, blaming him in corruption, and creating wrong image of his activity as organizer of the musical festival. The Court held that this conduct of the defendant was unlawful and triggered her liability under article 45 of the LOC to compensate the damages she had caused culpably. The Court also made the other defendant severally liable for the payment of the compensation on the ground of its vicarious liability under article 49 of the LOC.

In case of moral damages the court shall decide on the amount of the compensation on the basis of the rules on justice, i.e. the judge has the discretion to rule on this issue. In the case discussed above the Supreme Court of Cassation found the amount of BGN 6,000 even insignificant in the view of the evidence taken during the proceedings and the rules on natural justice. To reach this conclusion the court took into account the publicity of the statements broadcast on the TV and the image and popularity of the person, who suffered the damage. However, due to absence of claim from the respective party for the increase of the amount of compensation the court left it unchanged.

#### 4.2. Criminal Liability

Good name as a value including also the honour and dignity of an individual may be subject matter of the crimes insult, i.e. intentional humiliating the dignity of a given person through mistreatment) and slander, i.e. the conscious disclosure of untruthful and shameful acts for a given person or imputing criminal offence to another person.

The constitutional case referred to in section III of this chapter was initiated in order to question the compliance with the Constitution of the provisions in the Criminal Code<sup>6</sup> about the penalties provided for insult and slander as criminal offences. More specifically, the penalties provided for these crimes at the time of the proceedings before the Constitutional court - "up to six months of imprisonment" for insult and "up to one year of imprisonment" for slander - were deemed too high and disproportionate to the nature of the crimes. Further, according to the 55 members of the Parliament, who initiated the challenge, article 148 of the Criminal Code provided for discriminatory procedure for realisation of criminal liability. The penalties for the crimes insult and slander were more severe in the cases where the perpetrator or the victim was a state official (two years of imprisonment). Also, the crimes committed by or against such officials were prosecuted by the state *ex officio* unlike the other cases of insult and slander which were to be initiated following a claim by the aggrieved party. The effect of limitation on the freedom of expression as a result of the severe penalties for insult and slander would fall foul with article 10, par.2 of the ECHR. Furthermore, the provision of even more severe sanction and different procedure for prosecution regarding the cases involving state officials would contradict the constitutional principle of lower level of defence of public figures and state officials as well as the one for equality of citizens.

In its analysis the Constitutional Court specifies that the freedom of expression is not absolute and subject to limitations. Such limitations are set forth in the Constitution and also in article 10 of the ECHR, which states that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, for the protection of the reputation or rights of others and for the protection of other values specified therein. Therefore, the court concluded, civil and criminal liability as means for protection of honour, dignity and good name constitute a legitimate restriction of the freedom of expression, which is permitted both by the Constitution and the ECHR. The Court confirmed the

requirement for proportionality of the restrictive measures *vis a vis* the nature of the protected values, which followed also from the previous case law on that issue.<sup>7</sup> However, the court did not find the penalties in the Criminal Code disproportionate. It stressed that personal dignity is proclaimed as a supreme constitutional principle and many of the personal rights derive from it. The court observed that the penalties applicable to insult and slander are among the least severe compared to those for all other crimes against personal rights. It further noticed that other European countries which ratified the ECHR had similarly provided for imprisonment with respect to slander.

Likewise, the Constitutional Court did not find the more severe penalties in the Criminal Court and the difference in the procedures for prosecution of cases of insult and slander involving state officials in any conflict with the Constitution and the ECHR. It emphasized on the requirement that state officials may be subject to stricter liability for insult and slander or entitled to higher protection when suffering from such crimes only if, upon the commitment of the crime, they acted in performance of their official duties. The rationale behind the special treatment of such cases is that the respective provision in the Criminal Code is designed also to protect the prestige of the institution, to which the particular state official belongs. Nevertheless, the possibility for criticizing state officials is not affected according to the Constitutional judges. They quoted previous practice of the Constitutional Court where it was stated that "statements concerning the activity of state bodies or constituting critique of political figures, public officials or the government deserve a higher level of protection". Therefore, the extent to which such persons may face critique is larger comparing to private individuals. At the same time such critique cannot exceed the limits of the freedom of expression stated in the Constitution including the protection of good name. The criteria for demarcation of the borderlines are not clear and should be judged on case by case basis. Yet, the court concluded that the criminal liability for insult and slander did not prevent criticizing of persons belonging to the political system or the system of state bodies and, ultimately, did not grant the request for declaring the challenged provisions of the Criminal Code incompatible with the Constitution.

However, following the amendments of the Criminal Code in 2000 imprisonment as penalty was substituted by fine at an amount ranging between BGN 1,000 and BGN 3,000 for insult and between BGN 3,000 and BGN 7,000 for slander. In the latter case the court is obliged to impose also public reprimand while for insult this is optional. In case of insult and slander committed by public official or directed against such person the penalties are: (i) fine between BGN 3,000 and BGN 10,000 and public reprimand for insult, and (ii) fine between BGN 5,000 and BGN 15,000 and public reprimand for slander.

#### 4.3. Ethical Liability

Athletes as famous persons are particularly vulnerable from negative publicity in the media. That is why they may avail themselves of the protection provided under code of ethics effective in this area. In the beginning of 2006 in Bulgaria over 200 newspapers, magazines and radio and TV broadcasters signed the Code of Ethics for the Media. Its norms were deemed to be enforced through two commissions - one for the press and one for the electronic media. The main rule is that everybody who refers to one of the commissions has to point out which provisions of the code he or she considers to have been infringed. It is not a must for the one who files the complaint to be personally affected because he or she may alarm for the infringement of public interest. In case the commission confirms the infringement of the code, the media, which printed or broadcast the respective material or program, is obliged to publish the decision of the commission as well as to apologize to the persons affected by its misconduct. The two commissions are consisted of 12 members divided in 3 quotas having 4 members. The quotas belong to the journalists, media owners and one independent quota, which includes representatives of the society.

In the preamble of the code the fundamental freedom of expression,

<sup>6</sup> Criminal Code, promulgated in the State Gazette, issue 26 of 2 April 1968, in force as of 1 May 1968.

<sup>7</sup> Decision of the Constitutional Court No 7 of 4 June 1996 under constitutional case No 1 of 1996.

access to information, protection of dignity and inviolability of the personal life and the right of safety and security are proclaimed as leading principles. In point 2.3.2. of the code the media, who signs it, undertakes to avoid publications of images and recordings, made outside public places if the persons affected have not given their consent for such use. The code also refers to the practice of the European Court of Human Rights to invoke the principle that the public persons shall have a lower level of protection of their personal lives and this would be the justification for disclosure of such information by the media but only in case the protection of public interest imposes such disclosure.

The first decision of the Commission on the Electronic Media was adopted on 3 August 2006 in reply to a petition filed by a popular man, who was leading a TV show in the program of the Bulgarian National Television (BNT), against another television having national coverage BTV. The complaint was provoked by a TV show broadcast on BTV, in which a photo of the claimant was shown to the guest in the studio (a former Ms. Bulgaria and owner of an agency for models) and a hidden voice said that he was inspired by her to become a woman, that he wanted to participate in the next Ms. Bulgaria competition, and asked for advice how to improve his way of walking. According to the claimant the broadcasting of his image and this insulting text constituted a moral and ethical duress towards his personality. He opined that the electronic media were obliged to respect the human dignity and journalists should be responsible for truth, moral and good name of people. The respondent argued that the format and the nature of the particular TV show allow such caricatures and that the claimant was a public person.

The commission emphasized that the freedom of expression is not absolute and is limited in the cases where the human dignity is affected. In order to mark up the borderline between the freedom and its limitations the commission cited the following paragraph from the Decision of the Constitutional Court No 7 of 1996:

*"The freedom of speech is one of the fundamental principles, which is the basis for the growth of each democratic society and one of the major conditions for its progress and for the development of each person. It is valid not only for 'information' or 'ideas', which enjoy good acceptance and are not considered to be insulting or are accepted with indifference, but also for those who insult, shock or embarrass the state or whatever else part of the population. These are the requirements of pluralism and tolerance without which a democratic society will not be able to call itself in such a way."*

The commission reminded in its decision that the Code of Ethics of the Bulgarian Media was based on the Constitution of Bulgaria and the international agreements in the area of human rights, including the ECHR. According to the commission the Code of Ethics is an act which serves as a legal ground for the limitation of the freedom of expression if its rules are breached. The commission found as undisputable the fact that the personal dignity of the claimant, which is a protectable value, was affected in the case at hand. However, it applied the test under article 10, par.2 of the ECHR requiring, in addition, that the potential limitation of the freedom of expression is necessary in a democratic society. In this connection the commission found important to consider the format and the nature of the TV show, the speech and the expression used therein, whether the claimant qualifies as a public person and, if so, what the implications from this fact would be.

The commission noted that humour, caricature, and grotesque have been known since ancient times and that they had enormous impact on the development of art and culture. The inevitable tolerance in a democratic society, according to the commission, falls foul with the imposition of any limitations regarding style and way of expression, which are part of the freedom of expression. In this context, creation of models in advance (which would be the main consequence if the way of expression is sanctioned) conflicts the values of a democratic society.

The commission agreed that the claimant has been personally affected and has morally suffered as a result from the broadcast of his image in that TV show. However, for the commission he had the status of a public person, although the claimant did not admit that fact attributing this status only to persons who occupy public positions.

The commission referred to the practice of the European Court of Human Rights in order to demonstrate that there is no difference between public and famous persons whatsoever. For public persons may qualify also actors, businessmen etc. as the criterion is not the particular position or occupation but the influence of that person on public opinion.

The commission relied on the well known and largely recognized principle that public persons shall bear the freedom of speech and expression to a larger extent in comparison to private persons. They shall accept critique not only towards their statements and opinions but also to their personality, as a whole. Also they must admit the fact that they will be more often subject to publicity in the media, comments and all forms of judgments. The claimant was leading a weekly TV show on the Bulgarian national television enjoying a large audience. He participated in discussions on various issues and influenced the formation of public opinion on them. Therefore, there was no doubt for the commission that the claimant was obliged to be more tolerant and adaptable to different forms of his reflections, including the one used by the TV show on the BTV.

During the procedures before the commission the representative of the BTV showed the readiness of the television to apologize to the claimant. The commission noted that any media may apologize or give a right to reply even if they are not obliged to do so under the Code of Ethics and this is entirely left at their discretion. Ultimately, the commission found no infringements of the Code of Ethics and rejected the claim.

## 5. Right of Portrait

The right of portrait in Bulgarian law would be the closest to the concept of image right if by "image" is meant only physical appearance. The legal definition of the right of portrait is provided in article 13 of the Law on Copyright and Neighbouring Rights (LCNR)<sup>8</sup>. A work of art or photography, which represents a portrait of a person other than the author of the work, is protected by copyright. The single person who is entitled to such copyright protection is the author of the work. However, article 13 further specifies that the author and the portrayed person may agree on the conditions under which the work will be used.

Article 13 of the LCNR shall be construed in conjunction with the prohibition under article 32 of the Constitution that no one shall be followed, photographed, filmed, recorded or subjected to any other similar activity without his knowledge or despite his express disapproval, except when such actions are permitted by law. The requirement for consent of the person, who is to be photographed, filmed or recorded, gives such a person the bargaining power to negotiate the conditions for dissemination and other use of his/her image.

Interesting issue who is the holder of copyright may arise in collective sports where usually the author of a photograph of the players from certain team or photographs of the individual athletes playing for that team is an employee of the club. The LCNR introduces the general rule that copyright with respect to a work, created under employment shall belong to the author unless this law provides otherwise. Indeed, there is a specific rule providing that copyright shall belong to the employer but it concerns only computer programs and databases. Therefore, the photographer who has shot the players of a team will enjoy copyright protection even if acted as employee of the club. However, in case of employment the club as employer will have the exclusive right without asking for author's permission and paying any royalties, as far as the particular employment contract does not provide otherwise, to use the photographs so created for its own purposes. This follows from the provision of article 41, par.2 of the LCNR. Such use is limited in scope and extent, as both must conform to the usual activity of the employer.

When the employer is a sports club this usual activity may be eas-

<sup>8</sup> The Law on Copyright and Neighboring Rights, promulgated in the State

Gazette, issue No56 of 29 June 1993, in force as of 1 August 1993.



ily identified because the activities which any sports club may exercise are enumerated in the Law on Physical Education and Sports (the Law on Sports)<sup>9</sup>. In the exercise of some of them athletes' image may be used. For instance, sports clubs are entitled to exercise activities aiming promotion and development of their sport. Encouraging youngsters to train a specific sport may be most effectively achieved by using images of the most successful and popular athletes practising that sport. Also, sports clubs are entitled to provide sports services defined as all payable services related to the specific sports activity. Such services may include selling different merchandise bearing players' images. Sports clubs are further entitled to hold the advertising rights and the rights for TV and radio broadcasting of sports competitions, but only those organized by them. Such competitions, in fact, take place very rarely because national championships and main tournaments during the sporting season are considered to be organized by the sports federations and not by the clubs. Nevertheless, filming of players within the exercise of the advertising and TV and radio broadcasting right will constitute a lawful use of players' image rights.

The LCNR extends further the legal protection of authors who created a work under employment relationship. In situations when the remuneration of the employed author at the time of creation of the work turns out to be obviously disproportional to the revenues realized from the use of that work the author is entitled to claim additional remuneration. In case the parties cannot agree on the amount of the additional remuneration their dispute will be decided by the court under the rule of natural justice.

## 6. Image Rights in Bulgarian Football

Football is certainly the most popular sport in Bulgaria and, consequently, football players are among the most popular faces. The awareness of the idea of image rights and possibilities for their commercial exploitation in football is the strongest in comparison to other sports. This is the reason why a separate section of this country chapter deals with image rights in Bulgarian football.

The Bulgarian Football Union (BFU) does not regulate image rights in its statutes or internal regulations. However, the standard employment agreement which was drafted by the BFU and must be used by each football club when signing its players contains an article on employee's image rights called personal rights. Under article 7 thereof the employer is obliged to recognize the personal rights of the employee who, in turn, authorises the employer to organize the exercise of the rights for achieving the club's purposes. The cases and procedure for exercise of the personal rights for the club's purposes shall be determined in an agreement between the club and its players. In that agreement it has to be explicitly specified which rights will be exercised by the employee exclusively and with respect to which he or she will authorise the club to exercise them. The standard agreement lists specific matters which may be dealt with in such additional agreement: use of football shoes, dissemination of player's photos on the media, signing autographs and usual signature, marketing, and ancillary activities of the player.

Practice shows that football clubs agree on different stipulations concerning their football players' image rights. By way of example, there is a provision under which the player may exploit his image rights by himself (if not conflicting with clubs' sponsors/partners), whilst the club shall be entitled to exploit the player's image rights as part of and/or the whole squad.

Statements of players before the media are very often subject to the club's consent or restricted to certain premises such as the club's stadia and offices or to other places approved by the club in advance. The additional agreements on image rights very often include obligations of the player to the club's sponsors such as: attending the shooting of a photo of the representative football team of the club and attending events organized or sponsored by the sponsors (open-

ing commercial outlets, seminars, promotions, conferences, press conferences etc.).

One of the most famous Bulgarian football clubs limits its players to carry out advertising activity only in favour of the club or under contracts concluded by the club for advertising and/or sponsorship. It further requires the players to give their permission to the club to use his name and photograph for the performance of contracts for advertising of goods, services etc. In some cases this club even explicitly provides in its players' agreements that they have no right to conclude personal advertising contracts. The validity of the latter clause is highly questionable. This is so especially if the agreement does not provide for additional payment in consideration for the restraint of the player not to enter into advertising contracts in his personal capacity. As far as this clause is not typical for employment contract it cannot be valid if the player is paid only with respect to the provision of labour.

Players' agreements in football very often contain provisions on protection of club's image and reputation. For instance the player is held liable to have decent behaviour in public places and in his private life, as well as not to harm with its behavior the image and reputation of his club and/or the professional sport as a whole. Here the words image and reputation are in fact very close in meaning and used almost as synonyms.

## 7. Personal Data Protection

The Law on Personal Data Protection (LPDP)<sup>10</sup> defines "personal data" as any information related to a natural person, who is identified or may be identified directly or indirectly by an identification number or through one or more specific indices. On the basis of this definition it is clear that the image of an athlete expressed in a photograph or otherwise visualized will fall within the definition of "personal data" under the LPDP. Being personal data athletes' images may be processed. Pursuant to the LPDP for personal data processing will qualify any action or set of actions which may be carried out with respect to personal data by automatic or other means such as collecting, recording, organizing, storing, adapting or modifying, restoring, consulting, using, disclosing through delivery, disseminating, submitting, updating and combining, blocking, erasing or destroying.

The processing of personal data is allowed in certain cases which are listed exhaustively in the LPDP. In the view of the topic of this country chapter two of them deserve a special note. The processing of personal data will be lawful if the natural person, to whom the data refer, has given his/her explicit consent. Also, in the cases where the processing is performed only for the purposes of journalistic, literature or artistic expression, as far as the procession does not violate the right of private live of the person whom the data refers to.

## 8. Sponsorship of Athletes and Sports Clubs

### 8.1. Definition of Sponsorship and Sponsorship Contract

§ 1.19. of the Law on Sports defines "sponsorship" as a direct or indirect financing of athletes, sports organizations and sports events, provided by a physical person or a corporate body, with the purpose of assisting the popularization of his name, mark or public prestige. Article 62, para. 1, sec. 6 thereof also mentions sponsorship as one of the possible sources of financing for those sports clubs having status of non-profit legal entities. Although the Law on Sports indicates the popularization of the sponsor's name, mark and public prestige as the main objective of sponsorship, very often it might be the case that the sponsor invests in enhancement and promotion of athlete's image in order to gain benefits from his/her increasing popularity.

Sponsorship agreement is not specifically regulated under Bulgarian law. Its definition is developed in legal theory. For instance, the prominent Bulgarian legal scholar Vitaliy Tadger (referred below as Tadger) defines the sponsorship contract as a contract whereby one individual or legal entity undertakes with advertising purpose to support financially an activity of sporting, educational, scientific, cultural or social nature exercised by another individual or legal entity whereas the latter undertakes to perform certain action or achieve certain result and indicate the advertisement of the sponsor. What is characteristic for this type of contract is exactly its advertising purpose.

<sup>9</sup> The Law on Physical Education and Sport, promulgated in the State Gazette issue No 58 of 9 July 1996.

<sup>10</sup> The Law on Personal Data Protection, promulgated in the State Gazette, issue No 1 of 4 January 2002, in force as of 4 January 2002.



In the absence of specific legal regulation it is necessary for the parties to the sponsorship agreement to list precisely their respective rights and obligations although the general contract and commercial law would apply to the matters not specifically agreed on.

The main obligation of the sponsor is, of course, to provide financial support to the sponsored athlete. The form of the support may be certain amount of money, maintenance, provisions of sports equipment, sports facilities etc. Financial support due under sponsorship contract may be made dependent on athlete's performance in competitions, position in the ranking, achieving certain results - world record etc. Sponsorship agreement may provide for immediate termination and payment of liquidated damages in case of events that are harmful for the athlete's image and reputation and would cause similar harm to the sponsor's image. For instance drug abuse, doping and other misconduct may justify such termination. When a sports club is sponsored it may undertake to provide advertising space on the TV or areas of stadia and sporting halls for placement of sponsor's banners. Another obligation of the sponsored athlete, which follows from the very nature of the sponsorship contract, is the obligation to refrain from inflicting material or moral damages to the sponsor and criticizing him.

### 8.2. Multiple Sponsorship and Conflicting Sponsorship Contracts

The popularity and fame of an athlete would give him or her possibility to enter into more than one sponsorship agreement. It would be necessary in such cases that sponsors are aware of this multiple sponsorship and agree on it since this situation may create undesired competition among the sponsors. Tadger suggests that all sponsors may enter into an agreement specifying their rights and obligations in a way any conflict of interests is avoided. It is also possible, according to him, that one sponsor will act as a general sponsor having specific rights and obligations *vis-à-vis* the other sponsors. Depending on the specifics of the particular sport an athlete may have one sponsor for particular sporting competition only and other sponsors for the next competitions in which he or she participates.

Conflicting sponsorship agreements are present very often in collective sports. A given player from a team may have an individual sponsorship contract providing him certain sports equipment and obliging him to wear it. At the same time the club of the athlete could have a similar arrangement with its sponsor.

In Bulgaria such situation has already happened and involved the most successful and famous Bulgarian football player Hristo Stoichkov. In the remarkable and unforgettable for the whole Bulgarian football 1994, in which Bulgarian international team became 4th in the World Cup in the USA and Stoichkov personally was awarded with the Golden Ball as the best football player in Europe for that year, he had sponsorship contract obliging him to wear the sports shoes Cronos. This obligation was in conflict with the obligation of the BFU under a sponsorship agreement concluded with Adidas, obliging the union to ensure that all players of the international team would use the sports shoes provided by Adidas and bearing its brand.

How should this conflict be resolved? One option would be if the player is considered an employee of the sports federation and the latter has the power to impose him the duty to wear the sports shoes provided by the employer. In the Netherlands, for instance, the absence of right of athletes to determine their sports clothing is one of the key elements evidencing the presence of employment relationship because it shows the key element of such relationship - dependence.

In Bulgaria, however, following the court practice established also with the participation of Hristo Stoichkov, who refused to pay certain taxes requested by the tax administration and, instead, tried an action into the court, Bulgarian international football players do not have a status of employees. Their relations with the BFU are governed by civil law and, more specifically, the LOC in its part dealing with the contract for provision of services. From this perspective, the athlete

and the sports federation are independent actors who are free to negotiate all provisions in their contract including the issue regarding the avoidance of potential situation of conflicting sponsorship. In case of disagreement no contract will be concluded. In the particular case with Stoichkov, however, this scenario would mean that he would have missed the World Cup in 1994. Of course, no sponsorship agreement or loyalty to the sponsor would justify such a scenario and not only did Stoichkov participate on the world finals in USA in 1994 but he also won a bronze medal and became top scorer together with the Russian Oleg Salenko.

### 9. Right of Name

Bulgarian law recognizes the right of name as a personal right which is inherent to every individual's personality. It is based on the legal principle for individualization of every member of the society through certain traits. The right of name may be invoked to address cases where the use of name is denied or risks exist for fraudulent impersonation. However, the right of name cannot serve as a defence against the use of the image of an athlete for purely commercial purposes as far as such use would not constitute denial of name or fraudulent impersonation. However, being part of the general personality rights the unlawful use of athlete's name may affect his honour, dignity and reputation and to trigger the civil law and/or the criminal law liability of the perpetrator as described *supra* in this country chapter.

### 10. Athletes' Names as Trademarks

The name, picture or figure of an athlete may be registered as a mark pursuant to the Law on Marks and Geographical Indications (LMGI)<sup>11</sup>.

Mark is defined as a sign capable to distinct the merchandise or the services of one person from these of other persons and could be graphically presented. Such signs could be words, including names of persons, letters, numbers, drawings, and forms, form of the merchandise or its packing, combination of colours, sound or any combinations of such signs. A mark shall be a trademark, mark for services and certificate mark.

The right over a mark is exclusive right and shall be acquired through registration. The right over mark includes the right of the holder to use it and to prevent third parties from using in their commercial activity a sign which is identical with the mark and is used for services which are also identical with those, with respect to which the mark has been registered. Further, third parties may be prohibited to use a sign which is merely similar to the mark if such use would likely cause confusion with the customers who may associate the goods or services bearing the sign with the mark. Third parties may be prevented from using also a sign identical with or similar to the mark for commodities or services, which are not identical or similar to these for which the mark has been registered, when the earlier mark is well-known on the territory of the Republic of Bulgaria and the use of the sign will derive undeserved benefits from the distinguishing character or the popularity of the mark or damages them. However, the owner of the right over a mark cannot prohibit a third person to use his name or address.

An athlete who has registered his name as a trademark may transfer its use to a third party by virtue of licensing agreement. Such use may be limited to all or a part of the products and services, with respect to which the mark has been registered. It may be further restricted geographically to specific territory. License may be exclusive or non-exclusive. If its type is not stipulated in the licensing agreement licence shall be considered as non-exclusive. The licensor of an exclusive license is legally prevented from further licensing the trademark to other parties but may retain his right to use it for his own purposes unless otherwise agreed between the parties. Licensing agreements shall be registered in the State Registry following an application of one of the parties accompanied by certain requisites. The Patent Office of Bulgaria shall issue a certificate for the registration. The licensing agreement shall become effective *vis-à-vis* third parties following the registration in the State Registry.

<sup>11</sup> The Law on Marks and Geographical Indications, promulgated in the State

Gazette, issue No 81 of 14 September 1999, in force as of 15 December 1999.

A trademark has to be registered with respect to certain classes of products and services and used within 5 years following the registration.

The issue about the possibility for a third party to register the name of an athlete in order to assign it later for money is particularly interesting for this country chapter. The LMGI provides for deregistration of a trademark upon interested party's request where the applicant has acted in bad faith upon filing the application. However, bad faith conduct has to be proven by a court judgment entered into force, which makes this remedy quite burdensome in practice, especially with a view to the time consuming court procedure. Another option for deregistration exists with respect to trademarks which use may be prohibited on the ground of earlier right of a third party entitled to protection under another law and, more specifically, on grounds such as, *inter alia*, right of name and portrait.

### 11. Taxation of Income from Athletes' Image Rights

Income from the use of athletes' image rights would fall into the category "income generated by activities other than employment", which would trigger different rules of taxation. For athletes, income from image rights may be received, for instance, under agreements for use of work of art or photography of the portrayed athlete or under licensing agreements concluded with respect to athlete's registered trademark. Such income is subject to deduction of the tax base with 40%, which are recognized by virtue of the Law on the Individuals' Income Taxation<sup>12</sup> as expenditures necessary for the performance of the activity.

The option for deduction of 40% from the taxable income provides incentive for athletes to make arrangements with their clubs in order to receive part of their remuneration under the form of a license fee for the exploitation of their image rights rather than as a salary from employment. However, certain balance between the amounts of the wage and the license fee for the use of athletes' image rights should be maintained. A serious disproportion between the two amounts would alarm the tax authorities for potential hidden wage and they will tax it as income generated from employment.

### 12. Impairment of Good Name under the Law on Protection of Competition

Impairment of good name of competitors is mentioned in the Law on Protection of Competition<sup>13</sup>. Article 30 prohibits the impairment of good name and trust towards competitors as well as towards the products and services offered by them through statement or disclosure of untruthful information and through presentation of facts in misleading (abusive) way. It is clear from this wording and also from the position of the text in the chapter of the law titled Prohibition of Unfair Competition that the perpetrator and the person suffered from this act of unfair competition must be positioned on the relevant market as competitors.

The Law on Protection of Competition applies to undertakings and associations of undertakings which carry out their activity on the

territory of the Republic of Bulgaria and outside if they explicitly or tacitly prevent, restrict, breach or can prevent, restrict or breach the competition in the country. "Undertaking" is defined in that law as every individual, legal entity or impersonalized formation, which carry out economic activity, regardless of its particular legal and organizational form. Sports clubs qualify as such undertakings and may be liable for impairment of good name of their rival sports clubs.

Yet, in Bulgaria there have been no legal actions before the Commission on the Protection of Competition initiated by sports clubs and based on article 30 of the Law on the Protection of Competition. Nevertheless, such action is possible in theory. Recently, the president of one of the biggest Bulgarian clubs Levski Sofia accused the historical rival of that club CSKA Sofia in deliberately organizing through a player's agent a false offer for the potential transfer of four of Levski's key players to the Russian football champion Rubin Kazan. In result of the deceit the four players travelled to Moscow in vain just before the match with CSKA in the local championship. They could not return on time and their teammates ultimately lost the game 0: 2. The angry president of Levski Sofia accused CSKA for the deceit and even went so far to accuse the presidents of CSKA before the media in commitments of crimes in their past. These statements made publicly would be able to serve as grounds for initiation of proceedings for impairment of good name of a competitor as an act of unfair competition.

### 13. Conclusion

In Bulgaria athletes may exercise certain rights and avail themselves of legal remedies in order to protect legally their image. Image of an athlete can be understood as his/her good name or as a reproduction of his/her physical appearance (under the forms of a portrait, photograph, film and others). Image in its first meaning may be protected under the respective rules of the Criminal Code regarding the crimes insult and slander, under the rules of civil law regarding tort liability, and on the basis of ethical norms operating within a certain profession, to which the perpetrator may happen to belong. Image in its second meaning is subject to the right of portrait and qualify as personal data. Consequently, it is protected by copyright and by the rules on personal data protection stated in the respective laws. Athlete's image could be further registered as a trademark and benefit from the protection granted by the trademark law. Image of sports clubs is necessarily perceived as to refer only to good name (reputation). Being undertakings, which carry out commercial activity, sports clubs may further take advantage of the rules on unfair competition and, more particularly, the general prohibition for impairment of good name and trust towards competitors under the Law on Protection of Competition.

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<sup>12</sup> The Law on Individuals' Income Taxation, Promulgated in the State Gazette, issue No 95 of 24 November 2006, in force as of 1 January 2007.

<sup>13</sup> The Law on Protection of Competition, promulgated in the State Gazette, issue No 102 of 28 November 2008.

# Sports Image Rights in Estonia

by Ermo Kosk\*

## 1. Introduction

The contemporary society worships celebrities like pop-stars, actors as well as professional athletes. Celebrities are usually taken as positive role models, whom people want to be or look like. The businesses have understood the ability of celebrities to affect the behaviour and consumption patterns of ordinary people, thus the use of images of well-known persons has become a popular marketing tool also in Estonia.

The Estonian sportsmen and women have been used in various commercials advertising a variety of products and services beginning from domestic food products and beverages and ending with services of commercial banks and mobile network operators. The latest trend is to use sportsmen and women also in political advertising to gain popularity and success at elections.

An athlete's marketable identity, which includes, *inter alia*, the name, nickname, likeness, portrait and other characteristic features of the athlete, is the object of sports image rights. Below is a brief overview of the possibilities of a person to protect his or her image rights and the unlawful use of his or her image by third parties under Estonian law.

## 2. Protection of image rights under the Estonian legislation

Although the Estonian legislation is not very elaborated in regard to the protection of the image rights, it does provide some regulations. The most important principles are set forth in the Constitution of the Republic of Estonia<sup>1</sup>.

Section 19 of the Estonian constitution provides that everyone has the right to free self-realisation. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. According to the legal literature the referred section of the constitution actually provides for the general personality rights, which comprise also the rights to one's image and name<sup>2</sup>.

The identity of the person is protected by section 26 of the constitution, according to which everyone has the right to the inviolability of private and family life. The identity of the person includes also the name and appearance of the person.<sup>3</sup> The constitution does not provide any exceptions or restrictions in respect of public figures, which means that the constitution provides uniform protection for the image rights of all people.

The Law of Obligations Act<sup>4</sup> specifies that the violation of a personality right is not unlawful if the violation is justified considering other legal rights protected by law and the rights of third parties or public interests. In such case, unlawfulness is established based on the comparative assessment of different legal rights and interests protected by law.

## 3. Use of the image of an athlete in media channels

The depiction of the image of a public figure in different media channels raises the conflict between public interest and image rights. Generally there is no problem if the person has given consent for

using his or her image. The Personal Data Protection Act<sup>5</sup> provides that upon the making of audio or visual recordings at a public place intended for future disclosure, the consent of the person may be substituted by a notification to the person thereof in a manner which permits the person to understand the fact of the recording of the audio or visual images and to give the person an opportunity to prevent the recording of his or her person if he or she so wishes.

However, if the person has not given consent to record any visual images of themselves, an athlete as a public figure must still reckon that pursuant to law personal data (incl. the image of the person) may be processed and disclosed in the media for journalistic purposes without the consent of the data subject, if there is predominant public interest therefore and this is in accordance with the principles of journalism ethics. Predominant public interest means that it is not allowed to reflect in media a person or an event related to that person in respect of whom there is no public interest. Usually there is a public interest in respect of public figures and events related to them, and they have to tolerate a heightened public attention towards them. However, there is still a requirement that the disclosure of information and images may not cause excessive damage to the rights of the person, whether a public figure or not.

As the terms "public interest" and "public figure" are not legally defined in Estonian legal system, it is not easy to draw the line between public interest and the need to protect one's personal rights. For example a picture of an athlete next to a newspaper article announcing a victory or other good achievement of the athlete is almost certainly justified by public interest. On the other hand, publishing a photo of an athlete taken on holiday or using a picture to illustrate a story concerning an aspect of private life of the athlete might not be justified by public interest. However, as mentioned above the athlete as a public figure and also as a role model in the society must tolerate in certain extent the fact that the public is also interested in his or her private life, and usually the stories and photos related to private life matters are those that sell. Therefore, in each case it has to be decided whether the public interest outweighs the personal right of the person to his or her image while publishing photos or depicting the image of the athlete in any other way.

Although there is no court practice in Estonia concerning the image rights of well-known persons, there has been one curious case. Namely a magazine issued together with its new number a board game, which depicted images of various public figures in Estonia. As the publisher of the magazine did not ask a consent from the people depicted on the board game, some of them expressed their disapproval but the case did not end up in court. However, the matter was publicly analysed by a legal practitioner, who reached a conclusion that there was no public interest that would have justified the use of images in the board game, but only the commercial interest of the publisher to excite the interest of customers.<sup>6</sup>

In addition, the athlete as well as any other person must take into account that in case of attending a public event the notification obligation regarding the making of audio or visual recordings does not apply as recording of which for the purposes of disclosure may be reasonably presumed. Thus if athletes take part in a competition, visit a public social event or any other event, which is presumably reflected to the public, they have to accept that pictures or other visual images of them may be published.

## 4. Use of the image of an athlete in advertising

There are some more requirements related to the use of image of a person in advertising than there are in relation to the mere disclosure of the image in different media channels. The Advertising Act<sup>7</sup> provides that a person may not be referred to or used in advertising in any way, including by using the voice, images or pictorial representa-

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1 RT I 1992, 26, 349; RT I 2007, 33, 210.

2 R. Alexy. Põhioigused Eesti põhiseaduses. - Juridica 2001, special edition, pp 5-6.

3 A. Uritam. Tsitaadid on vabad, isiku nimi ja kujutis mitte. - Äripäev 09.09.2005. Available: <http://www.ap3.ee/?PublicationId=31503ED6-39D4-4163>

-9D98-74AA1E3959CE&code=2973/arv\_kolumn\_297301.

4 RT I 2001, 81, 487; RT I 2009, 18, 108.

5 RT I 2007, 24, 127; RT I 2007, 68, 421.

6 A. Uritam. Tsitaadid on vabad, isiku nimi ja kujutis mitte. - Äripäev 09.09.2005. Available: [http://www.ap3.ee/?PublicationId=31503ED6-39D4-4163-arv\\_kolumn\\_297301](http://www.ap3.ee/?PublicationId=31503ED6-39D4-4163-arv_kolumn_297301).

7 RT I 2008, 15, 108; RT I 2009, 38, 255.

tions of the person unless prior written consent has been obtained from the person. This prohibition includes also parodies of the person if the parody is to be used on advertising purposes. As an example it would not be allowed to use dolls, caricatures or cartoons mocking athletes or other well-known persons in advertisements.

In addition, well-known actors, sportsmen, musicians, entertainers or any other well-known persons may not be imitated or used or a picture, voice, image thereof or references to such persons may not be used at all in advertising of alcohol. An actor or actress may be used in advertising of alcohol only if the actor or actress does not advertise his or her personal example but plays the role of a character. This restriction relates to the fact that sportsmen and women as well as other well-known persons are often considered as idols for the children and youngsters. Thus their participation in the advertising of alcohol might have a greater impact on the choices made by the children and youngsters, and the purpose is to avoid their alcohol consumption.

## 5. Remedies in case of breach of image rights

### 5.1. Claim against unjustified enrichment

If the image of a sportsman or woman is used without any legal justification just for the commercial purposes, the athlete should have a claim against unjustified enrichment. According to the Law of Obligations Act a person who violates the right of ownership or any other right an entitled person by disposal, use, consumption, accession, confusion or specification thereof without the consent of the entitled person or in any other manner, such person must compensate the usual value of anything received by the violation to the entitled person. This applies also to the violation of image rights.

It is not exactly clear, whether the claim against unjustified enrichment can be brought by all persons or only well-known athletes and other public figures. Some legal practitioners are of the opinion that such claim can only be submitted by well-known persons, who are able to market their image and gain profit thereof<sup>8</sup>. The person is entitled to claim the usual value received by the violation. For example if a photo of an athlete is used in an advertising campaign of a sports drink without consent, then the athlete has a right to claim the amount of remuneration which he or she would have presumably received for participating in such campaign. Thus the amount would depend on the particular person, taking into account his or her notoriety and popularity.

However, other legal writers are on the opinion that it does not matter whether the person is famous or not in order to submit a claim against unjustified enrichment in case of violation of image rights. The reasoning behind this is that the violating party is not only obliged to compensate the received profit but also the expenses saved. Thus if publishing a photo unlawfully saved any expenses for the publisher, then every person is entitled to claim such expenses.<sup>9</sup>

### 5.2. Claim for the compensation of damage

In addition, it is possible to claim compensation of damage in case of the violation of image rights. Although it is a generally accepted position that the violation of image rights cannot cause proprietary damage to the person, it might be possible to claim non-proprietary damage. The unlawful use of a picture or image of an athlete constitutes an interference in the right of self-determination and self-depiction. The unauthorised publishing of a photo by another person deprives the person depicted on the photo from the right to decide on how to depict oneself as well as on how to use the amenity's of one's individual sphere, including the identity of the person.<sup>10</sup>

The obligation to compensate for non-patrimonial damage arises under the Law of Obligations Act upon deprivation of liberty or vio-

lation of a personality right only if this is justified by the gravity of the violation, in particular by physical or emotional distress. The court practice has taken a standpoint that although the violation of a personal right, i.e. also image rights, is presumed to cause non-patrimonial damage to the person, it is not always justified to order monetary compensation. In case of the violation of image rights it would be reasonable to compensate the damage e.g. if it has caused material inconvenience or has negative impacts on the person's life management or relationships with other persons or it has caused material damage to the person's reputation. Monetary compensation should not be paid if the violation of image rights has caused only a feeling of embarrassment or temporary low mood.<sup>11</sup>

In addition to the monetary compensation it is possible to demand that behaviour which causes damage be terminated or the making of threats with such behaviour be refrained from if unlawful damage is caused continually or a threat is made that unlawful damage will be caused. Thus it is possible to demand that a magazine or an advertising company would stop using the image of a sportsman or woman. However, the right to demand that behaviour which causes damage be terminated does not apply if it is reasonable to expect that such behaviour can be tolerated in human co-existence or due to significant public interest.

## 6. Image rights as the object of trademark

The appearance as well as the name or even the nickname of a person may be regarded as trademark. Legal protection is granted to trademarks which are registered in the register or which are recognised as being well known. However, it has to be regarded that the scope of legal protection of a trademark is limited by a list of goods and services entered in the register or for a well-known trade mark, by such goods and services which the trade mark was used to designate when it became well known.

If however, the athlete has registered his or her image or name as a trademark or it has become well known in respect of any goods or service, the athlete as the owner of the trademark is entitled to the protection of the exclusive right to the trademark. The owner of a trademark may file an action against a person infringing the exclusive right for the termination of the offence or for compensation for proprietary damage caused intentionally or due to negligence, including loss of profit and non-proprietary damage.

## 7. Conclusion

Although the Estonian legislation is not very elaborated in regard to the protection of the image rights, it does provide some regulations. The most important principles are set forth in the Constitution of the Republic of Estonia. As a general rule the use of image rights is not unlawful if it is justified considering other legal rights protected by law and the rights of third parties or public interests. Generally there is no problem if the person has given consent for using his or her image rights.

The depiction of the image of a public figure in different media channels without consent raises the conflict between public interest and image rights. As the terms "public interest" and "public figure" are not legally defined in Estonian legal system, it is not easy to draw the line between public interest and the need to protect one's image rights. Therefore, in each case it has to be decided whether the public interest outweighs the personal right of the person to his or her image while publishing photos or depicting the image of the athlete in any other way. However, the use of the image of an athlete in advertising is allowed only with the consent of the person.

In case of the violation of image rights, the athlete may have a claim against unjustified enrichment as well as a claim for compensation of damages. Under the claim against unjustified enrichment the person is entitled to claim the usual value received by the violation. It is a generally accepted position that the violation of image rights cannot cause proprietary damage to the person, however it might be possible to claim non-proprietary damage depending on the circumstances. In addition to the monetary compensation it is possible to demand that behaviour which causes damage be terminated unless it

8 T. Laasik. Igapäevane isikukujutise õiguskaitse. - Äripäev 06.05.2009. Available: [http://www.ap3.ee/blog/2009/05/06/Igapaevane\\_isikukujutise\\_õiguskaitse](http://www.ap3.ee/blog/2009/05/06/Igapaevane_isikukujutise_õiguskaitse).

9 T. Tampuu. Lepinguväliste võlasuhete õigus. Juura, 2007, p 82.

10 E. Liiv. Väljenduvabaduse ja üldiste isikuõiguste konflikt veebipäevikute ja -foorumite näitel. Juridica VII/2008, pp 474, 477.

11 Case no. 3-2-1-11-04 of the Estonian Supreme Court, paragraphs 17,18.



is reasonable to expect that such behaviour can be tolerated in human co-existence or due to significant public interest.

The image of the athlete may also be protected by a trademark. If the athlete has registered his or her image or name as a trademark or

it has become well known in respect of any goods or service, the athlete as the owner of the trademark is entitled to the protection of the exclusive right to the trademark.

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# Image Rights in Top Sport in Hungary

by András Nemes and Réka Józsa\*

## 1. Introduction

When the concept of “image rights” was introduced in Hungary there was no literature whatsoever on the subject and not even an official scientific name for it in Hungarian. There is no Hungarian translation for the English word “image right”. Neither English-Hungarian dictionaries, nor Hungarian explanatory dictionaries give a proper definition. There were some attempts to substitute the English word “image” by Hungarian equivalents like “picture”, “model”, “general design”, “face”, “shape”, “icon”, “brand”, etc. but this only partly covers the athletes’ image right which is a personal right of the athlete only. We also tried to find an appropriate word for “image rights” in our study.

Image rights related to top sport mostly operate on a contractual basis in Hungary. The Law on Sport (Act I of 2004 on Sport; hereinafter: “Sports Act”) provides only the legal framework. The Hungarian Civil Code which is presently in force allows image right agreements to be brought under the heading of “non-typified contracts”. The new Hungarian Civil Code give more significance to the concept of “image rights”, as well as to personal rights generally.

Before we can give a clear and comprehensible picture of the Hungarian rules on “image rights”, we again have to emphasize the difficulty in finding a Hungarian version of the term: the so called “image-use agreement” for example is similar but falls slightly outside the rules of sponsoring. However, we here try to introduce the term “*arculati jog*” as a definition of “image right” in Hungarian sport.

## 2. The image right of the athlete as a transferable personal right

Business partners (commercial entities) who wish to make use of an athlete’s image in their marketing activities try to find a popular athlete who fits in with the image they want to create of the promoted product. The business partner uses the famous and popular athlete’s name, image, typical movements, slogan, etc. and the name, logo and prestige of the athlete’s sport club or sport federation in exchange for consideration that is capable of being expressed in money. Usually, the main element of the contract is when the mentioned image items appear in the advertisements and publications of the business partner. Those items may be displayed on different surfaces which belong to the business partner (posters, flags, walls, umbrellas and other surfaces) but may be displayed on general objects as well, such as cigarette lighters, tie pins, etc. (known as “charming little trifles management” (*„csecke-bece menedzsment”*)).<sup>1</sup> The aim of the image-use agreement is to tempt costumers and influence their decisions. Nowadays this kind of contract is becoming more common. This is caused by the popularity of famous athletes and by the fact that a number of companies have recognized the exceptionally high “commercial power” of sport in Hungary.

The terms of the image-use agreement cover a wider category of issues than the sponsorship contract. The former entitles the sponsor to absolute display and use rights (name, image, etc.) whereas the latter only enables the sponsor to display its logo during the athlete’s sport activity.

It is widely accepted that images in sport exclusively belong to the market. However, some argue that image-use agreements are specialized instruments for personality protection given that through their operation an athlete’s name, image etc. is publically displayed on goods, posters, etc. Accordingly, if a sport club or federation intends to enter into an agreement where the other party would use the name and image of an athlete, this athlete has to give his prior written consent; the agreement without such consent is invalid. This is the governing rule also for other kinds of advertising agreements affecting the athlete’s name or image.

The role of transferable valuable rights attached to sport activity is daily increasing together with the revenues in modern sport. The most valuable rights are television and radio broadcasting rights, but the role of other means of electronic distribution, such as Internet, is also increasing. This is extremely relevant because according to the provisions of the Sports Act not only the federations should profit, but also the younger generation of athletes. Broadcasting therefore cannot take place free of charge.

Generally, national sport federations lay down the conditions for image use in their bylaws. Those rules apply to their top athletes and famous coaches.

The national sport federations try to protect every detail of the use of advertising rights by means of legal guarantees relating mainly but not exclusively to sport events and competitions.

After the political changes in Hungary, numerous returned businessmen tried to profit from the lack of regulation. All they had to do was implement the foreign rules. This situation also occurred in the field of broadcasting. During the socialist period sports clubs were paying television channels to appear on them. Broadcasting rights simply did not exist. They became known when the commercial channels obtained them instead of the national (State) television channels.

Image rights made their appearance through top athletes, the Olympic, World and European championships and successful market operators. Successful athletes certainly make market operators’ goods or services more attractive for business partners or customers.

Athletes thus operate on the supply side, acting in a special arena (e.g.: in the national team, or in a national championship) and what they supply is entertainment. Market operators intending to profit from sporting successes of athletes will also be present at trainings. The image of an Olympic champion will remain valuable even after the next Olympics.

The national sport federations have the right to determine what type of advertising space is “for sale”, which may differ per branch of sport. These determinations are in compliance with the rules of the international sport federations.

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<sup>1</sup> This term was introduced by Mr. Ferenc Dénes, sports economist.

Legally speaking, image-use agreements are quite complex, with the obligations arising from them based on the principle of “*dare et facere*”. The authorized party may use the name, logo and image of the sport club and the athlete on decorations, clothes, gifts, billboards and other equipment in exchange for consideration with the aim of strengthening its marketing activities in order to influence consumer decision making.

According to recent regulations, the authorized user requires the prior written consent of the athlete and the sport club in order to make use of their goodwill. This means that a special image-use agreement must be concluded between the parties. The athlete will benefit from this contract, although usually when the athlete is a member of a sports club the goodwill rights are transferred to the club, which is then entitled to the free use of those rights.

### 3. National prohibitions and limitations connected to image rights

Applicable Hungarian rules prohibit the use of sport activity for advertising goods or services that are injurious to health and a number of rules prohibit the advertisement of weapons, ammunition, dangerous equipment or medical prescription drugs. It is also prohibited to advertise tobacco or alcoholic products when such advertising targets children and adolescents.

Hungarian law, similarly to the laws of other EU Member States, provides that warnings of the health risks involved in smoking are displayed on the packaging of tobacco products. A further prohibition to publish advertisements in which smoking appears as a healthy activity is provided by the bylaws of the sport clubs. Sporting rules therefore use a different formula by stating that images displaying smoking persons are not welcomed. Tobacco products or alcoholic beverages which bear the image of nationally famous film or pop stars cannot in the same way be connected to Hungarian top athletes' images. It is prohibited for top athletes to issue supporting statements for such products.

According to the recommendations of the international sport federations advertising tobacco and alcohol products is thus not allowed.

The National Sport Association issued a recommendation to the national sport federations stating that advertising contracts must not be in breach of the statement on the general value of sport as contained in the European Sport Charter.

When image-use agreements and advertising contracts are concluded with the athlete directly (bearing in mind the restrictions detailed above), the interest of the sport should be the priority during the negotiation of such contracts. Contracts shall not breach the advertising rules of the sport federation.

It is obvious that it is not possible to enter into a contract with companies and associations competing with the top sponsors of national sport federations. After an examination of current practice it has become clear that contracts concluded with the sponsor of the federation may be an exception if expressly authorized. In cases where the national sport federation is entering into a contract with a new sponsor, it should take into account already existing contracts concluded by athletes or sports clubs.

In this examination of practice we further found a bylaw of a national sport federation which allowed the conclusion of advertising contracts only until the next Olympic Games, with the general condition that the contract shall not have any effect on the Olympic Games itself.

Other types of advertising agreements are influenced by the State in the sense that the National Sport Office, the National Olympic Committee and the National Sport Association are entitled to lay down conditions regarding the way that advertising space is used before providing national financial support.

### 4. The use of image rights

The national sport federations usually appoint themselves as the holder of the usage rights of advertising space in their bylaws on the use of goodwill. The national sport federations registered in Hungary have mostly accepted the recommendations laid down by the National Sports Association as standard contractual terms. It is clearly estab-

lished that the sole holders of the usage rights of advertising space are the national sport federations, which grant the use of advertising space to athletes or clubs.

In all situations where athletes or clubs wish to make direct use of the space available for advertising as granted by the national sport federation, they first have to obtain the approval of the national sport federation. Such approval may be withheld if the athlete or the sport club enters into an agreement which breaches the bylaws of the national sport federation. In order to assess whether such a breach may occur, the draft contract or a copy of the final contract must be attached to the request from the athlete or the club. It is recommended that the final contract contains a condition making the validity of the contract dependent upon approval by the national sport federation.

Requests for approval must be submitted to the president (or sometimes to his representative) of the national sport federation. Request shall be answered within a defined period (10-15-30 days) determined in the bylaws. Possible responses are approval, refusal or the initiation of mediation proceedings between the parties. The national sport federation is not allowed to evaluate the amount of the sponsorship and is obliged to keep this confidential.

If an athlete enters into an image-use agreement, he/she has to notify the national sport federation thereof. The image-use agreement shall not be concluded in the area of prohibited or restricted advertisements. The national sport federation is entitled to make exceptions to advertising restrictions at its discretion through negotiating with the sponsors, but it is not entitled to make any exceptions to advertising prohibitions.

### 5. Ad valorem and exclusivity in the utilization of image rights

The national sport federation is authorized to determine the value of the sponsor's support in its bylaws. If support comes in the form of a money contribution, the net amount (free of taxes and other duties) should be taken into account. If support takes the form of a transfer of goods or services, 50-70 % of the net value of that good or service, depending on the type of sport, should be taken into account as the real value of the sponsor's support.

The national sport federation aims to benefit from the principle of exclusivity in the areas of its competence. Usually the sponsor at “diamond level” enjoys this type of exclusivity in certain industrial or service sectors.

When entering into a new agreement the national sport federations have to take into account any already existing and approved contracts that have been concluded by athletes or sport clubs. Exclusivity in a certain industrial or service sector may be guaranteed if the sponsor fulfils the requirements of “gold-level sponsorship”. It follows that sponsors at gold or diamond level have priority over sponsors at lower levels.

### 6. Sharing the utilization of image rights between the parties

It has become clear from our research that the athlete, the club and the federation have different kinds of advertising space that they can make use of due to the difference between private and public interests in national sport federations. Usually the clothes, uniform and sports equipments of the athlete have the most significant value.

In team sports for example (with the exception of the national team) the right to utilize advertising surfaces on sweaters, uniforms, shorts, travelling clothes, etc. belongs to the sport club and the athlete. The national sport federation has imposed restrictions on which parts of the equipments of the national team may be used for advertising, e.g. only the right-hand side or the sleeve or collar of t-shirts and jackets. Athletes and clubs must take care to be aware of such restrictions in order to avoid invalid terms in contracts.

Generally, the national sport federation reserves the whole back area of the national team's top clothes for the national coat of arms. Only the logo of the sponsor may be displayed on the slacks. It is also a requirement in many national sport federation bylaws that the travelling clothes should be specially designed and produced. Only the sponsors and the national sport federation may appear on such clothes.

According to our research it is also possible that certain logos may be displayed on the front of the travelling clothes, with the restriction

that these logos must be of the same size and quality. These extra costs are charged to the sport clubs and the athlete.

Rules as to how the athlete, the sport club and the federation may utilize advertising surfaces are differently determined for each sport.

In order to maintain the value of specific advertising surfaces, the national sport federations guarantee the use of “the most valuable surfaces” in 100% size to sponsors at diamond level and the use of remaining surfaces in 80% size to sponsors at gold level. Rules on the appearance of advertisements and logos are specified in some detail (e.g., a sponsor may only display one logo on the national team’s clothes).

In sports where the equipment also has high visibility (e.g.: a kayak or canoe; a bicycle; a skeet; a car or motorbike, etc.) the right to use the surface of the equipment is equally divided between the national sport federation and the athlete / sport club. The size of the logos corresponds to the amount of sponsoring granted; details are provided by the bylaws.

The situation where there is no sponsor until the preferred deadline must also be considered, although this is extremely rare in a successful sport. To avoid such situations the parties have an obligation to provide information to each other regarding the utilization of advertising surfaces. Therefore, if neither the national sport federation, nor the sport club, nor the athlete can utilize the surfaces in question until the deadline stipulated in the bylaws, the other party is entitled to utilize those surfaces without any restrictions and free of charge.

Almost every national sport federation has a list of prices in order to be able to distribute revenues. These revenues may be used by the national sport federation for preparation and organization of championships and training camps, travel and accommodation costs, the cost of equipments and medical services for the Olympic and youth team.

## 7. Enforcement, sanctions and remedies

At the start of competitions it falls to the referee to verify whether the rules of the competition bylaws and international and national competition rules regarding the placement of advertisements are being complied with and to take such action as the bylaws prescribe.

Sport governance bodies in all sports are trying to establish appropriate internal controls in order to avoid abuses. The Secretaries-General of the federations and the executive officers of the team are under a duty to monitor whether image-use agreements and advertisement contracts are compatible with applicable rules. During such controls these officials may use the assistance of the head coaches and the managing coaches of the national team.

The Sport Act itself allows the operation of self-regulation and self-settlement of disputes in the area of sport. Accordingly, a breach of image rights is a sport disciplinary offence triggering a sport disciplinary procedure. Both the athlete and the sport club can be liable under the bylaws.

A “guilty” athlete’s licence may be suspended or revoked. Another possibility is that a sport scholarship guaranteed by the State is suspended or that the amount of the scholarship is reduced. Fines, or the suspension or reduction of allowances are possible sanctions that can be imposed on sport clubs or, in the extreme situation that civil law conditions are fulfilled, the athlete and/or the sport clubs may be liable to damages. In one case an athlete was excluded from the national team because of a breach of the bylaws on image rights use and advertising agreements.

In case of legal disputes the following general procedure applies. First of all, the body that has drafted and adopted the bylaws (the national sport federation) and the federation board have the right to interpret the bylaws. In principle, the federation board is the body that hears appeals. Following that, the applicant may initiate proceedings before the National Sports Arbitration Tribunal with the final instance being the CAS.

## 8. Hungarian images

Advertising culture has changed radically in Hungary over the past 10 to 20 years. Socialist Hungary had no tradition of advertising and took the culture of other countries as an example and implemented it. During the socialist period the emphasis was on the sport itself, not

on its “advertising value”. At the end of the 1980s influenced by political changes this attitude started to change and advertising was placed in a different light.

The saying “being in the right place at the right time” was certainly true for the Hungarian swimming champion, who is still the youngest Olympic champion ever in the world, Krisztina Egerszegi. When she won the Seoul Olympic Games she “exploded” into public view and onto the advertising arena. She was the first (teenage) athlete in Hungary to advertise a product (effervescent vitamin tablets). After her last Olympic Games (1996, Atlanta) she retired from sport and had 3 children. However, she is still (and probably always will be) an unforgettable sports idol and now, as a mother, she is advertising puddings for children.

When Krisztina Egerszegi was winding down her sports career, another sports idol was just starting out with a gold medal in boxing at the Atlanta Games, namely István “Koko” Kovács. He went from amateur to professional by entering into an agreement with Universum Boxing Promotion and was the face of many advertising campaigns, for example for soft drinks.

A more recent advertisement product is Alexandra Béres who won the European and the World Fitness Championship for the first time in 1995 and enjoyed other huge successes in the late 1990s. Nowadays she is the face of several dairy products and has her own brands and her own company focusing on healthy nutrition.

A present-day example is Ágnes Szávay who is a tennis player who has enjoyed WTA victories. In 2007, she was elected Hungarian female athlete of the year. She is the face of corn flakes and margarines that are rich in vitamins.

These are all examples of individual athletes. Examples also exist in team sports.

Thanks to the combination of excellent players and coaches Hungary has become equivalent with water polo. Think of water polo, and you will think of Hungary; think of Hungary, and you will think of water polo. The members and the head coach of the national team of Hungary are national heroes. During the last Olympic Games (2008 Beijing) the team made history. There has never been a national team in history that was able to win the Olympic Games three times in succession (2000 Sydney, 2004 Athens, and 2008 Beijing). Obviously, any type of good, product or service bearing their image is guaranteed to sell, a fact that is well known to manufacturers and service providers. The team and the coach have so far been advertising real estate, telecommunications, vitamins and even (alcoholic) beer!

## 9. Summary

In Hungary, image rights, like broadcasting rights, are a recent phenomenon without precedents before the change in the political system. Image rights made their appearance in

Hungarian top sport during the country’s switch to a market economy. Act I of 2004 on Sport provides the basic rules, but the self-regulating function of the sport federations is more relevant in this context. The fact that there is no Hungarian word for “image rights” is evidence of the concept’s novelty. The authors have tried to solve this problem by introducing the term “*arculati jog*” for the system described by the Sports Act and detailed by the national sport federations’ bylaws.

The sport club legally becomes the authorized user of the athlete’s image rights through the conclusion of a sport contract or employment contract with the athlete without any further contractual provision being needed; however, this is only a derived right because the main users are the national sport federations.

In the case of the national team, the user of the image rights is the sport federation with the restriction that if a competition is not part of the competition system of the federation, the organizer of the competition when it announces the competition may claim the use of the property rights (broadcasting, advertising, image use, etc.) of the competition. Accordingly, the sport federations may decide in advance whether they wish to participate in the competition under those conditions.

The Sport Act entitles sport federations in regard to competitions organized by them to use the property rights of its athletes according to its bylaws for a defined period of time. It is not possible to use the athlete's property rights for an undefined period of time, but it is possible to conclude long-term contracts. The present study covers some 30 different sports and in most cases use of property rights serves the interests of the members of the national sport federations. The sport federations have to pay the market price for the use of the property rights. The Hungarian Sports Act and the self-governing mechanisms provide the guiding rules for the amount of the financial consideration. Sport-specific aspects, the number of broadcasts, broadcast ratings and the education of youth teams are all taken into account in determining these amounts. Revenues from the use of rights go to the user, but may not be used to cover the operational costs of the federation; the federation keeps only the amount necessary to cover the organizational costs of broadcasting.

The study gives several examples of the successful use of image rights of Hungarian athletes and the possibility for further uses of image rights.

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*The International Sports Law Journal*

# Sports Image Rights in Lithuania

by Jaunius Gumbis and Julius Zaleskis\*

## 1. Introduction

Sports plays a great role in a relatively young<sup>1</sup> Lithuanian society. It is definitely a part of Lithuanian social identity with a power to unite citizens. It was a source of strong patriotic feelings during Soviet times, while present public polls show that 89% of Lithuanian population is still proud of its country because of sportsmen's victories<sup>2</sup>. It is also a way for such a small country and sportsmen thereof to make headlines worldwide. Despite various political, organisational and financial problems, in 20 independent years a number of Lithuanian sportsmen have successfully represented the country in Olympics, world and continental championships. Finally, sports has become an entertainment industry in Lithuania. There is no question that this young and developing industry is already able to give a commercial value to sports events, broadcasts, names and images.

Indeed, sportsmen dominate Lithuanian magazines, newspapers, TV shows. Sports celebrities are not only admired by fans and media but also targeted by advertising specialists who see sports images as a powerful marketing tool. A marketing tool which significantly lifts awareness of Lithuanian consumers and stimulates sales volume of promoted goods and services. Scientific researches show that sportsmen are one of the most persuasive advertisement characters in Lithuania<sup>3</sup>. It is also generally agreed that images of sports celebrities cause very little antipathy towards them in comparison with, for instance, politicians.

The authority of sports images is clearly understood by business companies, both national and international, which rely on famous Lithuanian sportsmen in respect of advertising their goods and services. For example, images of Olympic gold medalist discus thrower Virgilijus Alekna and one of the world's foremost strongmen Žydrūnas Savickas were successfully and repeatedly used in mineral water advertising campaigns. Internationally known Lithuanian basketball stars, such as Arvydas Sabonis, Šarūnas Marčiulionis, Šarūnas Jasikevičius, Arvydas Macijauskas, have drawn consumers' attention by advertising beer, non-alcohol drinks, watches, insurance, underwear as well as many other goods and services. Recently Olympic silver medalist pentathlete Edvinas Krungolcas has become a face of washing powder advertisement<sup>4</sup> too. As it may be seen from the given examples use of sports images has already become a popular commercial practice in Lithuania.

Despite significance of sports images in Lithuania, their legal issues have not been thoroughly analysed yet. It should be noted that sports as social and cultural phenomenon has never enjoyed much attention within the Lithuanian academic society<sup>5</sup>, particularly the legal one. There has been no significant case law on sports image rights as well. Therefore, this chapter aims to provide the readers with a practical introduction to sports image rights in Lithuania, which could give a general understanding on how they are dealt with in Lithuanian legal system.

## 2. Legal framework

As there is no, with a very few exceptions, specific provisions in Lithuania, sports image rights are dealt within the general scope of a right to an image (or image right) which is clearly acknowledged by Lithuanian legislation. Image right is regarded as one of the elements of private life which is protected under the European Human Rights Convention<sup>6</sup> and the Lithuanian Constitution<sup>7</sup>. The most important provisions are set out in the Civil Code<sup>8</sup> which expressly provides that any natural person is granted the right to image. The Civil Code also provides for regulation on other issues which are of key importance

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1 It was only 11 March 1990 when Lithuania restored its independence after 50 years of Soviet occupation. Therefore, Lithuania's legal system, as well as sports market, may be regarded as relatively young as well.

2 For more information on historical sports role in Lithuanian society see the article by Butautas I., epaitien R. "The sport and Lithuanian national identity", Studies of Lithuania's History (Research papers), issue 17 (2006), p. 97-112.

3 For detailed statistics regarding persuasion of various advertising characters in Lithuania see the article by Sirtautien D., Sirtautas V. V. "Elements and audi-

ence of TV advertising: features of relation", Information science, issue 36 (2006), p. 98.

4 This case was rather unusual in respect of general advertising practise where advertisement characters are clearly and directly related to the product being advertised.

5 Op cit. 2, p. 98.

6 The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (in effect in Lithuania from 20 June 1995). Article 8 of the Convention provides that everyone has the right to respect for his private and family life, his home and his correspondence. It should be noted that European Human Rights Convention has ratified international treaty has the legal power of the law in Lithuania.

7 The Constitution of the Republic of



for sports image rights in Lithuania: detailed protection of private life and expression freedom, a right to a name, legal remedies, civil liability, proprietary and moral rights, contracts, etc.

A few more legal acts may also be important for creating, exploiting, protecting and enforcing sports image rights in Lithuania. The Law on Public Information<sup>9</sup> provides for protection of image rights from mass media. The Advertising Law<sup>10</sup> and the Alcohol Law<sup>11</sup> limit use of images, as well as sports images, in advertising. As sports image may be registered as a trademark in Lithuania, provisions of the Trademarks Law<sup>12</sup> may also be important in the said respect. As one's image may be regarded as personal data, relevant provisions of the Data Protection Law<sup>13</sup> should also be taken into account. Sports image may also be regarded as copyrighted work which is protected under the Copyrights Law<sup>14</sup>. The Sports Law<sup>15</sup> regulates sports governance, activities of sports clubs and content of sports contracts which often include clauses regarding sports image rights. The Criminal Code<sup>16</sup> provides for criminal liability for certain infringements of private life while the Code of Administrative Offences<sup>17</sup> sets out regulatory liability for certain violations of advertising regulation. It must also be noted that sports image rights would be protected and enforced in Lithuania under the general procedure set forth in the Code of Civil Procedure<sup>18</sup>.

### 3. Concept of image right

Every person, including sportsmen, is granted the right to image in Lithuania under the Civil Code. Article 2.22 thereof ("Right to an Image") reads as follows:

1. Photograph (or its part) or some other image of a natural person may be reproduced, sold, demonstrated, published and the person may be photographed only with his consent. Such consent after natural person's death may be given by his spouse, parents or children.
2. Where such acts are related to person's public activities, his official position, request of law enforcement agencies or where a person is photographed in public places, consent of a person shall not be required. Person's photograph (or its part) produced under the said circumstances, however, may not be demonstrated, reproduced or sold if those acts were to abuse person's honour, dignity or damage his professional reputation.
3. Natural person whose right to image has been infringed enjoys the right to request the court to oblige the discontinuance of the said acts and redressing of the property and non-pecuniary damage. After person's death, such claim may be presented by his spouse, children and parents."

As it was mentioned before, Lithuanian jurisdiction acknowledges the right to image which falls within the concept of private life<sup>19</sup> protected under Article 2.23 of the Civil Code ("Right to Privacy and Secrecy"), which reads as follows:

1. Privacy of natural person shall be inviolable. Information on person's private life may be made public only with his consent. After person's death the said consent may be given by person's spouse, children and parents.
2. Establishment of a file on another person's private life in violation of law shall be prohibited. A person may not be denied access to the information contained in the file except as otherwise provided by the law. Dissemination of the collected information on the person's private life shall be prohibited unless, taking into considera-

tion person's official post and his status in the society, dissemination of the said information is in line with the lawful and well-grounded public interest to be aware of the said information.

[...]

4. Public announcement of facts of private life, however truthful they may be, as well as making private correspondence public in violation of the procedure prescribed in paragraphs 1 and 3 of the given Article as well as invasion of person's dwelling without his consent except as otherwise provided by the law, keeping his private life under observation or gathering of information about him in violation of law as well as other unlawful acts, infringing the right to privacy shall form the basis for bringing an action for repairing the property and non-pecuniary damage incurred by the said acts."

However, the Supreme Court of Lithuania has elaborated on relation between Articles 2.22 and 2.23. The Court has pointed out the right to image means person's right to request that no one would use his/her image for commercial or other purposes without his/her consent. Thus, person's right to image is a right to control the use of attribute identifying him/her - the image. Differently from the right to the private life which protects person from publishing certain information about him/her, the right to image protects an individual from potential financial loss related to unlawful use of image for commercial or other purposes<sup>20</sup>. So, Article 2.22 is regarded as a special rule in respect of Article 2.23 and should be applied where infringement relates solely to the image right<sup>21</sup>.

The image right is also regarded as a moral right under Section 1 of Article 1.115 of the Civil Code, i.e. a right that has no economic content and is inseparably related with its holder. On the other hand, the image right, as it can be expressed in material object (image, painting, movie, sculpture, etc.), may be also regarded as the moral right related to proprietary rights. This means that in certain cases (e.g. in advertising, professional modelling, etc.) the moral image right may create proprietary rights.

Economic value of the image rights is also confirmed in case law of the Supreme Court of Lithuania. In one of the landmark decisions it has stated that the right to an image, which is traditionally acknowledged as personal moral right, may have certain economic value, i.e. it may be evaluated in monetary. In this meaning the right to image is also a proprietary right which may be a subject matter of a proprietary agreement. Therefore, a person may transfer his/her right to another person for remuneration<sup>22</sup>.

Following the concept of the image right established in the Civil Code and the case law it may be concluded that, as a general rule, one's image can only be used upon his/her consent. On the other hand, image rights, as they may have commercial value, can be freely transferred in accordance to contract law provisions where freedom of contracts is regarded as the key principle<sup>23</sup>.

### 4. Main issues

#### 4.1. Image

Within the meaning of Article 2.22 of the Civil Code "image" should be understood extensively, i.e. not only as photo, portrait but also as any other image where a person (full-length, half-length, face only, etc.) is captured in such a way and extent that it is possible to identify him. If only separate body parts are captured, such as leg or arm which are not sufficient to identify captured person, Article 2.22 may not be applied. Thus, the main criteria while determining whether or

Lithuania (in effect from 25 October 1992). It is the act of supreme legal power in Lithuania with the supremacy over other laws and secondary legislation. Compliance of laws with the Constitution is generally controlled by the Constitutional Court. Article 22 of the Constitution provides that the private life of a human being is inviolable.  
8 The Civil Code of the Republic of Lithuania (in effect from 1 July 2001).  
9 The Law on Provision of Information to the Public of the Republic of Lithuania

(in effect from 26 July 1996).

10 The Law on Advertising (in effect from 1 January 2001).

11 The Law on Alcohol Control of the Republic of Lithuania (in effect from 18 April 1995).

12 The Law on trademarks of the Republic of Lithuania (in effect from 1 January 2001).

13 The Law on Legal Protection of Personal Data (in effect from 3 July 1996).

14 The Law on Copyright and Related Rights (in effect from 9 June 1999).

15 The Law on Physical Culture and Sports (in effect from 31 January 1996).

16 The Criminal Code of the Republic of Lithuania (in effect from 1 May 2003).

17 The Code of Administrative Offences (in effect from 1 April 1985).

18 The Code of Civil Procedure of the Republic of Lithuania (in effect from 1 January 2003).

19 See, for instance, decision of the Supreme Court of Lithuania of 24 February 2003 in case No. 3K-3-294/2003.

20 Decision the Supreme Court of Lithuania

of 12 February 2002 of in case No. 3K-7-437/2002.

21 Cit. op. 18.

22 Cit. op. 19.

23 Section 1 of Article 6.156 („Principle of Freedom of Contract”) of the Civil Code stipulates that the parties shall be free to enter into contracts and determine their mutual rights and duties at their own discretion; the parties may also conclude other contracts that are not established by this Code if this does not contradict laws.

not a certain object is the image is possibility to identify captured person. Respectively, "photographed" is interpreted extensively as well. It should be understood as including filming or any other form of capturing one's image, e.g. painting, sculpturing, etc. Such extensive interpretation is justifiable because the provision itself provides that image is not necessarily a photo, therefore, forms of creating the image may differ as well<sup>24</sup>.

#### 4.2. Consent

It must be noted that Lithuanian legislation does not regulate the form of consent to use one's image. The doctrine provides that person's consent, as expression of one's will, may be expressed in any form except for cases where laws mandatory require to express will in a particular form. Thus, person's consent regarding his/her image may be expressed in writing, verbally or it may be implied from person's acts<sup>25</sup>. It should also be taken into account that the consent must be determined in accordance with all relevant circumstances of the case.

It may be also of importance to determine the scope of consent. According to case law, two types of the consent may be specified. The consent may be qualified or exclusive, i.e. person may give consent for using his/her image for specific purpose or set out certain conditions for using his/her image in advertising goods of particular manufacturer. The consent may also be unqualified or non-exclusive, i.e. person does not specify the purpose for which his/her image may be used and other conditions for using his/her image<sup>26</sup>.

The case law provides that the consent for being pictured does not mean the consent to reproduce, sell, display or print such photos (or particular photo)<sup>27</sup>. It is also of importance that a publisher must be familiar with person's attitude towards publishing and it must be sufficiently evident under what conditions it is permitted to publish. In case of any doubts regarding publishing conditions, they must be interpreted in favour of holder of rights rather than of person who may acquire rights<sup>28</sup>.

#### 4.3. Exemptions

Section 2 of Article 2.22 of the Civil Code provides for cases where the consent is unnecessary:

1. if certain acts are related to person's public activities or official position;
2. in case of request of law enforcement agencies; or
3. where a person is photographed in public places.

It must be taken into account that picturing person or publishing his/her images without one's consent, as any collecting or disseminating information on personal life, may also be justifiable under Article 2.23 of the Civil Code if such dissemination of the said information is in line with the lawful and well-grounded public interest to be aware of the said information.

As to the first exemption, the doctrine distinguishes two groups of public persons whose consent is not necessary for picturing them. Firstly, these are public persons *ex officio*, e.g. politicians, officers, actors, singers, business man, who interest society because of their position or activities. Publicly known sportsmen may be regarded as public persons *ex officio* as well. Secondly, there are public persons which interest society for a short time period only and because of certain event or act related to them (so called "*blic*" persons). Such persons may be pictured without their consent only temporarily and after

a while they become ordinary private persons which are subject to Section 1 of Article 2.22<sup>29</sup>.

Consent may also be unnecessary in case of request of law enforcement agencies, e.g. for picturing persons who are suspected criminals or publishing images thereof. However, law enforcement agencies must have a reasonable ground to suspect that respective person may have committed criminal activities.

The third exemption relates to images which are made in public places. The doctrine defines a public place as any place which may not be regarded as private, e.g. supermarket, park, theatre, restaurant, public institution, stadium, sports arena, etc. The Supreme Court of Lithuania holds that this exemption cannot be applied formally, i.e. only when it is determined that certain place is public. One, even in the public place, does not lose his/her individuality and privacy. Therefore, one's internal subjective attitude is important as well. If one has clearly and unambiguously expressed his unwillingness to be pictured, such will has to be respected<sup>30</sup>.

It must be taken into account that even if the conditions for applying the said exemptions are present, images still may not be demonstrated, reproduced or sold if this abuses one's honour, dignity or damages his/her professional reputation.

As to the exemption set forth in Article 2.23 it must be noted that the lawful and well-grounded public interest to be aware of certain information, e.g. the images of person, depends on all relevant circumstances of the case, it cannot be determined *prima facie*. The Supreme Court of Lithuania holds that lawful and well-grounded public interest cannot be equated to curiosity of society<sup>31</sup>. When deciding which of the competing values - right to privacy or expression freedom - has to be protected in a particular case, just balance between these values must be maintained, none of them may enjoy unreasonable priority over another and essence of both of them may not be distorted<sup>32</sup>.

#### 5. Commercial use

As it was mentioned, the Supreme Court of Lithuania acknowledges that the image right enables any natural person to control use of one's image for commercial and other purposes. Indeed, anyone is free to transfer economic rights related to one's image according to contract law provisions and general principle of freedom of contracts.

By consenting to using his/her image for advertisement for or without remuneration and being informed of commercial conditions of such use, person decides in his/her own will on realisation of his/her rights. One must decide if he/she accepts to participate in commercial activities, if he/she accepts with advertising of particular person, good or service, one must also consider conditions of participating in such activities. The Supreme Court of Lithuania has noted that decision right regarding waiver of part of privacy for commercial purposes belongs to holder of the right. In case of any doubts regarding publishing conditions, they must be interpreted in favour of holder of rights rather than of person who may acquire rights. Therefore, it may be concluded that priority must be given for protection of privacy rather than for commercial interest<sup>33</sup>.

Lithuanian statutory provisions expressly provide that in any case one's image may be used in advertising only with his/her consent. Item 3 of Section 1 of Article 13 of the Law on Public Information prohibits filming and picturing a person and using his/her image for advertising purposes in the media without the consent of that person. Respectively, Item 7 of Section 2 of Article 4 of the Advertising Law prohibits advertising where the name and surname of a natural person, his/her opinion, information about his/her private or public life, property and his/her image are presented without consent. Thus, use of image for advertising purposes without one's consent is prohibited even in the cases which may fall in the above-mentioned exemptions where the consent may not be necessary under Article 2.22. Section 5 of Article 22 of the Advertising Law sets forth regulatory liability for violation of the said requirement - a warning or a fine from LTL 1,000 (EUR 286) to LTL 30,000 (EUR 8,571).

It must also be noted that Lithuanian regulation specifically prohibits use of sports images in alcohol advertising. Item 3 of Section 1

24 Commentary to the Civil Code of the Republic of Lithuania. First edition. Vilnius: Justitia, 2002, p. 54.

25 Cit. op. 19.

26 Ibid.

27 See, for instance, decision of the Supreme Court of Lithuania of 20 October 2003 in case No. 3K-3-1000/2003.

28 Cit. op. 18.

29 Cit. op. 23, p. 56.

30 See, for instance, decision of the

Supreme Court of Lithuania of 9 February 2004 in case No. 3K-3-91/2004.

31 Decision of the Supreme Court of Lithuania of 23 September 2008 in case No. 3K-3-394/2008.

32 See, for instance, decision of the Supreme Court of Lithuania of 13 February 2009 in case No. 3K-3-26/2009.

33 Cit. op. 18.

of Article 29 of the Law on Alcohol Control prohibits alcohol advertising where sportsmen, doctors, political figures and persons famous in art and science, and other famous public figures participate, and where their person, name, image, etc. is used. Under Section 6 of Article 34 infringement of the said prohibition may cause regulatory liability - a fine from LTL 10,000 (EUR 2,857) to LTL 50,000 (EUR 14,286).

## 6. Practice

As image rights may be freely transferred in Lithuania, sports image rights in Lithuania are controlled by various interested parties: national federations, leagues, clubs and, of course, sportsmen themselves. Under Section 4 of Article 35 sportsmen become professionals by concluding contracts of sports activities. Even if Sports Law is silent on the image rights, most of the contracts concluded with professional sports clubs include clauses on the image rights. They usually stipulate that clubs are entitled to use images of their players for purposes of self-advertising and advertising of sponsors with no limitations. As to leagues and national federations (which are responsible for national teams), images rights are often set forth in their regulations as well. Most of such regulations stipulate that the image rights may be used for self-advertising of league or national team as long as such use does not infringe interests of club's sponsors. Even use of sports images is rather popular commercial practice in Lithuania, there has been no significant case law on the matter yet.

## 7. Legal remedies

Section 3 of Article 2.22 of the Civil Code provides the person whose image right is infringed with the following legal remedies which are exercised under the judicial procedure:

1. claim for termination of infringement;
2. claim for award of moral and proprietary damages.

Claim for termination is usually filed in cases where infringement lasts for certain period (continuous infringement), e.g. where image is used in advertising, internet website, etc. As a legal remedy it does not cause many problems in practice.

While exercising another legal remedy - claiming for award of moral and proprietary damages - it must be taken into account that the plaintiff has to prove 4 conditions of civil liability, i.e. unlawful actions, causation, fault and damages<sup>34</sup>. Only one of the said conditions - debtor's fault - is presumed under Section 1 of Article 6.248.

According to Section 1 of Article 6.250 moral damages are understood as person's suffering, emotional experiences, inconveniences, mental shock, emotional depression, humiliation, deterioration of reputation, diminution of possibilities to associate with others, etc., evaluated by a court in terms of money. Section 2 of the same article obliges the court assessing the amount of moral damages to consider the consequences of damages sustained, the gravity of the fault of the person by whom the damage is caused, his financial status, the amount of proprietary damages sustained by the aggrieved person, also any other circumstances of importance for the case, likewise to the criteria of good faith, justice and reasonableness. As to the practice of Lithuanian courts, it may be concluded that plaintiffs who succeed to prove suffered moral damages are usually awarded with compensation of LTL 1,000 (EUR 286) to LTL 15,000 (EUR 4,286).

Claiming for award of proprietary damages is rather unpopular legal remedy in Lithuania, even if the Supreme Court of Lithuania states that the right to an image protects from potential financial loss related to unlawful use of image for commercial or other purposes. Proprietary damages are regarded under Section 1 of Article 6.249 as the amount of the loss or damage of property sustained by a person and the expenses incurred (direct damages) as well as the incomes of which he has been deprived, i.e. the incomes he would have received if unlawful actions had not been committed. Basically, this legal remedy may be exercised in cases where infringement of the image right causes commercial benefit to infringing person (e.g. using one's image for advertising without his/her consent). In cases where plaintiff claims for award of proprietary damages Lithuanian courts usually take advertising tariffs as guidance for evaluating proprietary damages.

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<sup>34</sup> Articles 6.246-6.249 of the Civil Code.



*From left to right: Prof. Safri Nugraha, Dean, Faculty of Law, University of Indonesia, and Dr Robert Siekmann, Director, ASSER international Sports Law Centre, on the occasion of Prof. Nugraha's visit to the T.M.C. Asser institute in The Hague on 24 February 2010.*

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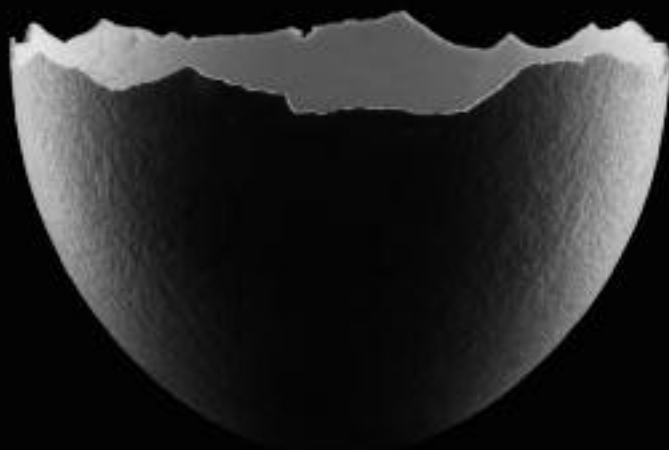


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**WOLF THEISS**

# Sports Image Rights in Romania

by Ana-Maria Andronic and Daniel F. Visoiu\*

## 1. Image Rights in Romania

### 1.1. Overview of Relevant Legislation

Although the “image right” is not listed among the fundamental rights expressly listed in the Romanian Constitution<sup>1</sup>, nevertheless it is recognized indirectly<sup>2</sup> through a provision which stipulates that the freedom of expression cannot violate the right to one’s own image.<sup>3</sup> As such, this constitutional provision was probably meant to be a mirror reflection in the national legislation of the larger right to respect for family and private life<sup>4</sup> and of the freedom of expression right<sup>5</sup> stipulated by the European Convention of Human Rights (“ECHR”).

Following the above referenced constitutional provision, the Romanian Constitutional Court has further given this right — via its interpretation thereof<sup>6</sup> — the identity of a fundamental right by opining that although the image right was provided in the Constitution as a limit to the freedom of expression, when corroborated with other constitutional provisions, image right rises to the rank of a fundamental right having thus a certain constitutional identity and an applicability extended beyond the context of issues involving the freedom of expression, the mass media and public communication.

In addition, several other legislative acts further cement the explicit recognition of the image right:

The law on copyright and neighboring rights<sup>7</sup> awards copyright protection to a picture taken pursuant to the portrayed person which may be further published or copied by the person portrayed in the picture without the author’s consent (i.e., the photographer) if the portrayed person and the author have not agreed otherwise<sup>8</sup>. In the case of a portrait, the portrayed person must give consent to any third party use of his/her portrait and the author (i.e., the painter) shall refrain from copying or using the portrait without the portrayed party’s consent<sup>9</sup>.

In addition, the law on trademarks and geographical indications<sup>10</sup> restricts from registration<sup>11</sup> those trademarks depicting the image of a person in the absence of that person’s consent.

Finally, the audiovisual sector is perhaps the clearest in regulating image rights: the Romanian Audio Visual Council has clearly stated<sup>12</sup> that any person has the right to her/his own image.

### 1.2. Enforcement

Not surprisingly, given the legislative context briefly described above, in Romania image rights surface to the lime light most frequently in

conjunction with freedom of expression limitations. Naturally, the audio-visual sector has been leading the way in terms of image rights disputes. As such, image rights violations are generally disputed in defamation, libel or intrusion into privacy cases.

Most of the cases in the audio-visual sector arise from the National Council of the Audio-Visual’s (“CNA”) key role as the entity empowered to guard the public’s interests with respect to audio-visual communications. Among other, the relevant legislation sets forth that the CNA bears the obligation to ensure the protection of so-called human dignity and the related image rights displayed in any audio-visual program. Pursuant to this prerogative, the CNA’s core function is to monitor the content of audio-visual programs to ensure that no violations of image rights occur. Thus, the CNA has slowly but surely become the main institution contributing to the development of the nascent Romanian case law on image rights.

In a decision issued in 2006<sup>13</sup>, the High Court of Cassation and Justice<sup>14</sup> endorsed the central role of the CNA as a guarantor of the public’s interests with respect to audio-visual communications, and furthermore upheld a sanction imposed by the CNA upon a TV station which allowed an invitee to make unsubstantiated accusations about certain public figures (who were not present during these discussions) during a TV talk show, and thus not complying with its statutory obligations to request that particular invitee to evidence the mentioned accusations or at least to indicate the evidence supporting its statements. The court stated that:

*“The CNA is, according to the provisions of Article 10 paragraph (1) of the Audiovisual Law no. 504/2002, as amended, the guarantor of the public interest in the field of audiovisual communication, and according to the provisions of Article 10 paragraph (3)(e) it bears the legal obligation to ensure the protection of human dignity, an obligation materialized by the enactment and implementation of the Decision no. 248/2004 regarding the protection of human dignity and the right to one’s self image”.*

The court further held that:

*“The relevant legislation sets forth a person’s right to take legal action if that person’s image rights have been infringed by the broadcasting of a show, but this does not exclude the intervention of the relevant public authority for the purpose of sanctioning deeds which might rise to the level of misdemeanors/contraventions according to the relevant law,*

\* Ana-Maria Andronic (Senior Associate) and Daniel F. Visoiu (Partner), Biris Goran SCA, Bucharest, Romania, respectively (www.birisgoran.ro).

1 Title II of the Romanian Constitution: “Fundamental Rights, Freedoms and Duties”.

2 Article 30 (6) of the Romanian Constitution on Freedom of Expression: “Freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one’s own image”.

3 www.cdep.ro/pls/dic/site.page?den=act2\_1&part=2#t2c2s0a30 (link active as of 1 December 2009).

4 Article 8 of the ECHR: “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic

well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

5 Article 10 of the ECHR: “(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

6 Constitutional Court decision no. 54 dated 21 March 2000.

7 Law no. 8/1996 on the copyright and neighboring rights, as amended and published in the Official Journal Part I no. 60 dated 26 March 1996.

8 Article 87 of Law 8/1996 on the copyright and neighboring rights: “(1) A photograph of a person, when made to order, may be published or reproduced by the person or his successor without the author’s consent, unless otherwise agreed. (2) If the name of the author appears on the original photograph, it must also be shown on the reproductions.”

9 Article 88 of Law 8/1996 on the copyright and neighboring rights: “(1) The use of a work containing a portrait shall require the authorization of the person represented in that portrait. Its author, owner or possessor shall not have the right to reproduce it or communicate it to the public without the consent of the person represented, or that of his successors, for a period of 20 years after the death of the said person. (2) Unless otherwise agreed, consent shall not

be required if the person represented in the portrait is a professional model or has received remuneration for the sitting. (3) Consent shall not be necessary for the use of a work containing the portrait: (a) of a widely-known person, if the portrait was made on the occasion of that person’s public activities; (b) of a person where the representation of that person constitutes only a detail of a work representing an assembly, a landscape or a public function.”

10 Law no. 84/1998 on trademarks and geographical indications, as amended and published in the Official Journal Part I no. 161 dated 23 April 1998.

11 Romania has a “registration” based, as opposed to a “use based”, trademark protection system.

12 Title II Article 42 of Decision no. 187/2006.

13 Decision no. 2191 dated 13 June 2006, issued by the Administrative and Fiscal Division of the High Court of Cassation and Justice.

*such public authority would bear the legal obligation to intervene in such cases as a matter of law.”*

In a similar decision issued in 2007<sup>15</sup>, the High Court of Cassation and Justice clearly stated that a public figure's image rights are violated when a public figure<sup>16</sup> is not participating in the relevant radio talk show where accusations are made against her/him and he/she is not given the “right to reply” to the accusations made against her/him. The court clearly stated that:

*“Through his conduct, the radio show producer allowed allegations of unsupported accusations by the guests invited to the radio show or by the persons who called in during the radio show and thus breached his legal obligation to inform the guests that they should be able to prove their accusatory statements, such conduct having the potential to infringe the dignity and the image right of the persons to whom the guests made reference during the radio show”.*

The court added that:

*“(…) any person has the right to one's self-image, and in the event that allegations are made against a person for unlawful or immoral deeds during radio shows, these allegations must be supported by evidence, and the accused persons shall be afforded the right to intervene in order to express their opinion, and if the allegations are made by the broadcaster then the broadcaster must comply with the audiatur et altera pars principle”<sup>17</sup>.*

In both cases the High Court of Cassation and Justice upheld the CNA decision to sanction the TV station and the radio station with a fine.

Another relevant case involving image rights (specifically a humor and parody case) was decided by the High Court of Cassation and Justice<sup>18</sup> in 2006: a TV station was sanctioned by the CNA for incitement to discriminatory treatment of minorities when it published an anecdote pertaining to a certain minority. The TV station appealed the CNA's decision to the High Court of Cassation and Justice. On this particular occasion, the court recognized that the freedom of expression is an absolute right and, as such, any limitations and/or restrictions applied to this right, including thus image rights, should be of strict application and interpretation. The court further held that the CNA cannot limit the exercise of this absolute right, by citing relevant ECHR case law stating that the member states may not limit the exercise of the freedom of expression right<sup>19</sup>, that the freedom of expression can be limited only under very strict circumstances<sup>20</sup>, and that in any event any limitation imposed by any state authorities should be proportionate with the legitimate scope of the intervention, well-reasoned and justified<sup>21</sup>. The court held that the anecdote was a humorous creation which did not discriminate against the minority in question and thus it did not need the intervention of a public authority, and consequently reversed the CNA's decision.

As to cases on misappropriation of one's own image, on the use of “likeness” or “impersonation”, or voice imitation, these have not been substantively addressed by the higher courts although some of the elements of one's own image are indeed negotiated and stipulated in sponsor agreements in the sports sector, as detailed below.

Two types of remedies are provided by the law, differentiated by the authority which is competent to enforce image rights: (1) the CNA or the (2) the regular courts. The CNA generally applies less serious

sanctions, such as fines. The courts usually award “moral damages”, i.e. damages quantified materially by the court to cover the image loss suffered by a particular person as a result of the violation of his/her image rights. It should be noted that although courts will generally give consideration to the amount of damages requested by the parties, a court has absolute discretion to set the amount of the moral damages awarded. In addition, post-1989, Romanian courts were quite reluctant to award moral damages, however they have gradually become more and more accustomed with the concept and at present there is a standard practice regarding the awarding of moral damages for image rights violations.

An illustrative decision on point was issued by the High Court of Cassation and Justice in 2001<sup>22</sup> which outlined the criteria which the courts may use in determining the amount of damages in image rights cases. In that particular case, the court held that although the damage award in image rights infringement cases usually entails a subjective determination (made by the court), a court should nonetheless give consideration to certain objective criteria such as: (1) the specific facts of the case at hand, (2) the degree of harm to the social values protected by the applicable norms, and (3) the gravity of the infringement of these rights. Applying these criteria to that particular case, the court held that the vexatious and offensive statements made by the defendant in public with respect to the plaintiff's physical appearance, professional reputation and track record caused a significant degree of harm to the plaintiff's person and a serious infringement of the plaintiff's image rights. As a result of this analysis, it reversed the lower court's decision and awarded the plaintiff a larger damage award (approximately EUR 10,000). The court further opined that the enforcement of the damage award does not in any way infringe upon the claimant's fundamental freedom of expression right guaranteed by the Constitution<sup>23</sup> and the ECHR<sup>24</sup> when the exercise of this right is infringing upon the constitutional and statutory provisions regulating the dignity, honour as well as the image rights of an individual.

## 2. Image Rights in the Sports Sector

### 2.1. Overview of Commercial Exploitation

Commercial exploitation of sports image rights in Romania has remained largely underdeveloped. Recent statistics indicate that even Romania's most famous sports figure, its football/soccer stars, earn relatively nominal amounts as compared with their Western European counterparts. For example, in 2008, Romania's most well-known football players earned a total of EUR 5.5 million.<sup>25</sup>

In any event, in Romania there remains little knowledge of image rights and their exploitation among sports main public figures<sup>26</sup>. Very good examples of the common situation are provided by world renowned sport celebrities like gymnast Andreea R. Duncan or athlete Gabriela Szabo: both of them have their names registered as trademarks and owned by two different commercial entities with which they have signed sponsorship contracts, although, admittedly, their intent was not to also transfer to said companies such a right. Nonetheless, according to the freely accessible Romanian Patent and Trademark Office on-line database, the “Gabriela Szabo” trademark is registered for goods and services in Classes 1 - 42<sup>27</sup>, and is owned by the respective commercial entity.

*“After establishing a long-term strategy, Gabriela Szabo will soon start to implement it: at the beginning of next year, she will launch what is meant to be the most professional local celebrity brand project, part of*

14 The highest court in the Romanian court system, having both subject matter jurisdiction over certain matters as well as remanding prerogatives (re-directing of cases to lower courts for further review).

15 Decision no. 2088 dated 19 April 2007 issued by the Administrative and Fiscal Division of the High Court of Cassation and Justice.

16 In this particular case, it was a politician.

17 Meaning that the broadcaster should give the other party the opportunity to be heard.

18 Decision no. 401 dated 7 February 2006

issued by the Administrative and Fiscal Division of the High Court of Cassation and Justice.

19 Case of *Müller and Others v. Switzerland*, 41202/98 (2002).

20 Case of *Feldek v. Slovakia*, 29032/95 (2001).

21 Case of *Nilsen v. Denmark*, 33488/96 (2000).

22 Decision no. 62 dated 10 January 2001

issued by the Civil and Intellectual Property Division of the High Court of Cassation and Justice.

23 *Idem* at 2.

24 *Idem* at 4.

25 “Top 5 Romanian sportsmen champions in advertising”, 31 March 2009, [http://www.sport365.ro/Topul\\_5\\_sportivi\\_romani\\_campioni\\_in\\_publicitate-n92624.html](http://www.sport365.ro/Topul_5_sportivi_romani_campioni_in_publicitate-n92624.html).

26 A leading business weekly, “Business Magazin”, author Larisa Ghitulescu: “I am a champion. Do I know how to sell myself?”, Romanian language article published on 6 December 2005 <http://www.businessmagazin.ro/>

cover-story/sunt-campion-stiu-sa-ma-vand-1047517 (active on 1 December 2009): “(...) un unstructured market where sportsmen are good only at sport, there are no experts in branding of celebrities, and Romanian companies use the images of sport personalities in a hazard and amateur manner.”

27 According to the 9th edition of the Nice classification.

which is already outlined in an already established communication plan. And the finalization of a brand license strategy will follow (...) when the champion is expected to regain the rights to her own trademark, this currently being registered with the Romanian Patent and Trademark Office as the property of the European Drinks company (from the information obtained from the Romanian Patent and Trademark Office, it turns out that European Drinks registered the name of the champion in three versions, for all the existing categories, from sweets to tiers or explosives, for example). Gabriela Szabo had two image-related agreements with European Drinks (for the promotion of the mineral water Izvorul Minunilor), one of which was valid in 1998, and the second concluded for the period 1999 to 2004. "I would like to give a piece of advice to all sportsmen and all children: before signing an agreement, they should consult attorneys or image consultants. In my situation I had no one to advise me. People judge you depending on the brand you associate yourself with, says Szabo<sup>28</sup>."

Likewise, the "Andreea Raducan Doll" is registered for services in Class 39 by another commercial enterprise.

"(...) Andreea Raducan remembers an image, as well as a business plan, which could have increased her reputation from a commercial point of view. The girl born in Arad wanted to launch the Andreea Raducan doll in 2003. "I asked for the agreement and they kept delaying sending me the agreement...". The gymnast stops and starts laughing. "Look, the contract was prepared on the spot and not in a professional manner. It was two weeks until the launch and the agreement wasn't yet ready. It was a good idea, I liked the project", she says. What the gymnast does not know is that the project's failure is probably related to the ownership right over the Andreea Raducan trademark. The sportswoman seems surprised, acknowledging that she does not know whether or not the Andreea Raducan trademark is registered with the Romanian Patent and Trademark Office. The research carried out by Business Magazin reveals that the Andreea Raducan trademark is

indeed registered with the Romanian Patent and Trademark Office and belongs to the company CMB InternationalExim (CMT Travel)<sup>29</sup>

Consequently, due to an admittedly lack of review and thorough scrutiny of the above-mentioned sponsorship contracts by said sports figures or their legal advisors, two unrelated commercial entities own the exclusive trademark rights arising from their names instead of these sports figures owning and exploiting these trademarks directly.

Further evidence of the lack of exploitation among Romania's sports stars is Leonard Doroftei, a well known and world champion boxer who assigned his image rights to the Canadian club Interbox.

"The sportsman says that the only money he ever earned from the exploitation his image in his peak period came from an agreement concluded with a casino located in Canada. It concerned the boxing match in which the Romanian won the WBA belt (the logo of the casino was affixed to the boxer's back during the match)"<sup>30</sup>.

The money represented his stake of the winnings minus 30% which he gave to the Interbox club as per the image rights agreement.

## 2.2. Sports Image Rights Considerations

Despite the current lack of major commercial exploitation in Romania, image rights are well established under the applicable Romanian legislative framework and available jurisprudence. Clearly the trend is towards greater development and commercial use of sports figures' image rights, nonetheless this requires proper drafting of sponsorship agreements in order to ensure the full protection of image rights under the current applicable legislation.

The International Sports Law Journal

<sup>28</sup> Idem at 25.

<sup>30</sup> Idem at 25.

<sup>29</sup> Idem at 25.

# Sports Image Rights in Slovenia

by Tone Jagodic\*

## 1. Introduction

Development of commercialization within sport is increasing intensively and Slovenia is not an exception. Athletes and sport organizations try to ensure financial support for their activities through marketing and it is very important to find real values which can be offered on the market. When examining different marketing tools which can secure financial funds from commercial entities it is of the outmost importance to find out the essential value of a sport subject which can be interesting for marketing purposes. Development of different modern electronic and other new media is a great challenge for sport as it is obvious that sport represents one of the most valuable matters in this field. The core value of the sport is image of athletes as individuals or teams and other sport subjects such as clubs, federations, organizers and other legal entities.

## 2. The nature and acknowledgement of sports image rights in Slovenia

The meaning of sports image rights in Slovenian law is not defined at all. In common language we understand that sports image is a synonym for the name, the voice, the signature, the appearance, the trade

name, the symbol and other characteristic attributes of a famous sports entity. As in many other countries the term is tightly associated with the right of privacy on one hand and the right of publicity on the other. It represents the outside representation of a sport entity created in the public opinion. It is worth mentioning that it is not only the personality (of a natural or a legal person) that can represent a sports image. An important sports competition as such also possesses a value of an image and an organizing committee is only the owner of the right to this competition and represents it towards other subjects.<sup>1</sup>

In Slovenia, independent special merchandising right or image right does not exist and neither does a universal foundation of legal protection in case of unlawful commercial exploitation. The protection against unjustified commercial use of sports image is obtained as a protection of different legal situations, which are protected in the framework of different legal fields, especially in the framework of personality law, civil law, unfair competition, trademarks, copyright, corporate law and even criminal law.

## 3. Protection of the right of personality

The right of privacy is basically protected in Article 8 of the European Convention of Human Rights. Everyone has the right to protect for his private and family life, his home and his correspondence. Interference into this right by a public authority is only allowed in most urgent situations such as in the interest of national security, public safety or economic well being of the country, prevention of disorder or crime, protection of health and morals and the rights of freedoms of others. The

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<sup>1</sup> Such sport event in Slovenia is for example "Planica flying hill competition"

with its unique value which is recognized in public as an important sport and even a social event and is able to attract many sponsors and other commercial partners



Slovenian Constitution similarly to the European Convention of Human Rights guarantees the protection of personality right among basic human rights (Article 35 of Constitution). The right of personality enjoys special attention and could be limited in very restricted cases when other constitutional rights have to be implemented.

The right of privacy is a personal right and is regarded as an absolute right, with erga omnes effect that prevents all other subjects to infringe it. The right of personal image, like all other personal rights, belong to all citizens in the same way. This also applies to the world of sport. The fundamental principle is that athletes and other sports subjects should not be used for commercial exploitation without their consent.

In general, the name, the firm, the name registered as a trademark and other designations of sport subjects are protected by the Slovenian law, namely, by the regulations under the Code of Obligations, the Trademark protection act, the Unfair competition Act, the Copyright Act, the Media Act, the Protecting Personal Data Act, the Basic Health Care Law and the Law of Commercial Companies. It is interesting that even the Slovenian Penal Code criminalizes the act of unjustified recording of pictures as a criminal offence.

### 3.1. Civil Code

In case of unjustified commercial use of personality as an infringement of his personality rights an athlete can choose different legal claims. The foundation for the claim is laid down as a legal request to cease infringement of personal rights. Article 134 of the Slovenian Code of Obligations (Slovenian Civil Code) is especially intended to protect personal rights as a request to cease infringement of personal rights and reads as follows.

- 1 All persons shall have the right to request the court or any other relevant authority to order that action that infringes the inviolability of a human person, personal and family life or any other personal right be ceased, that such action be prevented or that the consequences of such action be eliminated.
- 2 The court or other relevant authority may order that the infringer cease such action, with failure to do so resulting in the mandatory payment of a monetary sum to the person affected, levied in total or per time unit.

It means that an athlete can demand that an infringer stop with the infringement, to prevent an infringement to arise, or to eliminate the consequence of the infringement with a public announcement of the verdict, the destruction of the object of infringement. Fault liability of the infringer is irrelevant. The court could decide that the infringer should stop with the infringement and punish him financially in case if he does not respect the court request. Beside these claims an athlete can also demand a financial compensation for the damage or put forward an action for unjust enrichment (acquisition).

#### 3.1.1. Unjust enrichment

In case if a sport subject decides for action for unjust enrichment he has to prove certain conditions such as enrichment, detriment, causal relationship and absence of legal basis. Article 190 of the Slovenian Code of Obligations reads as follows:

- 1 Any person that without a legal basis becomes enriched to the detriment of another shall be obliged to return that which was received, if possible, or to otherwise compensate for the value of the benefit achieved.
- 2 The term enrichment also covers the acquisition of benefit through services.
- 3 The obligation to return or compensate shall also arise if a person receives something in respect of a basis that is not realized or subsequently disappears.

An infringer can benefit materially by unlawfully using the image right of an athlete in two ways. The benefit is the financial amount that an infringer did not pay to the athlete for the commercial use of his image (1) or in light of future benefits which an infringer could get

by commercial exploitation of the image of the athlete such as improvement of its own image, products, services or brand in public sale increase of the products etc. (2). The detriment on the side of an athlete is indicated by prevention of the growth of his property as he has not received any payment for the exploitation of his image. Legal recognition of unjust enrichment is possible when an athlete is able to market his own personality. In contrast to that he can only claim compensation for immaterial damage. Another element on the side of an athlete is his willingness for marketing his image. The new theory does not request this condition for unjust enrichment but only the fact that an athlete's image has a certain material value, which could be converted into money. If an infringer interferes with the personality right of an athlete and uses his image in commercial sense, such an activity, in fact, proves the "indirect" recognition of his market value. Following this approach, the aim of the claim for unjust enrichment is to return material benefits which were gained by an infringer even if detriment of an athlete has not been proved. Such a standpoint which is widely acknowledged<sup>2</sup> seems to be well founded, having in mind, that unjust enrichment should be a legal mechanism to establish equitable situation and it is not fair if an infringer keeps the benefits at an athlete's expense.

The Slovenian legal system limits the claim that an athlete can get from an infringer by detriment which was suffered by an athlete and does not include any benefit which exceeds the detriment. Such a solution is questionable as the infringer is in the same position as if he acquired the approval from an athlete in time. It would also mean a kind of prevention from future infringements.<sup>3</sup>

#### 3.1.2. Claim for damages

An athlete as the injured party can principally not only claim that actual damage sustained a reimbursement of the profits achieved by an infringer, but also the payment of an adequate profit, which was not gained. The amount of Reimbursement of Material Damage for infringement of his personal rights is legally covered by Article 168 of the Code of Obligations, which introduces ordinary damage and lost profit.

Article 168

- 1 The injured party shall have the right to the reimbursement of ordinary damage and the reimbursement of lost profit.
- 2 The reimbursement of damage shall be levied according to the prices at the time the court ruling is issued, unless stipulated otherwise by law.
- 3 In the estimation of lost profit, the profit that could justifiably have been expected given the normal course of events or given the special circumstances but could not be achieved owing to the injurer's action or omission, shall be taken into consideration.
- 4 If an object was destroyed or damaged intentionally the court may levy compensation with regard to the value the object had for the injured party.

Unauthorized exploitation of an athlete personality can harm material interests of an athlete in the shape of lost profit. Infringement of the image of an athlete can reduce or eliminate the willingness of other commercial companies to sign a contract with an athlete in the light of commercial exploitation of the athlete's image. Material damage can appear in two ways. When more companies exploit his image the "blurring effect" (1) might occur, what can weaken the position of an athlete to successfully market his image as potential sponsors are interested to achieve a kind of exclusive relationship with the athlete. The other negative activity by an infringer is known as "tarnishment" as an infringer harm public image of an athlete by making impression

2 Holleben K., Geldersatz bei Persönlichkeitsverletzungen durch die Medien, UFITA 173, Nomos Verlagsgesellschaft, Baden - Baden 1999, p. 110, Witzleb N., Geldansprüche bei Persönlichkeitsverletzungen durch Medien, Mohr Siebeck, Tübingen, 2002, p. 170, Weber O., Human dignity and

the commercial appropriation of personality: Towards a cosmopolitan consensus in publicity rights? SCRIPT 2004, www.law.ed.ac.uk, p. 67

3 Levovnik J., Personal rights of athletes, Monography Sport and Law, Ljubljana, GV Založba 2008, p. 169

in public that a proper relation (especially endorsement) with an athlete has been established.

When enforcing the claim for material damage an athlete should prove that only unauthorised use of his image from the part of the infringer for commercial purpose is the reason for the damage. Casual relationship between an infringement and the material position of an athlete should be proved, what is usually not as easy as there are also other factors which might influence the lost profit of an athlete. (bad sport results, change of life style, public behaviour of an athlete ...).

In a case of the infringement of a personal right the court may order the publication of the judgment or a correction at the injurer's expense or order that the injurer must retract the statement by which the infringement was committed or do anything else through which it is possible to achieve the purpose achieved via compensation. (The Code of Obligations, Article 178). Further compensation of immaterial damage is anticipated as monetary compensation in Article 179. It reads as follows:

- 1 Just monetary compensation independent of the reimbursement of material damage shall pertain to the injured party for physical distress suffered, for mental distress suffered owing to a reduction in life activities, disfigurement, the defamation of good name or reputation, the truncation of freedom or a personal right, or the death of a close associate, and for fear, if the circumstances of the case, particularly the level and duration of distress and fear, so justify, even if there was no material damage.
- 2 The amount of compensation for immaterial damage shall depend on the importance of the good affected and the purpose of the compensation, and may not support tendencies that are not compatible with the nature and purpose thereof.

In the case<sup>4</sup> when picture of naked athletes was taken and then printed in a newspaper *Ekipa*, the court punished the newspaper to pay pecuniary damage for the offence. A photo picture of athletes was taken in dressing room when they were celebrating an important victory while a non invited photograph of the newspaper entered the dressing room and took a picture without the permission of the athletes. The court found out that constitutional right of the personality of athletes (Article 35 of the Constitution of Slovenia) which guarantees inviolability of human physical and psychical integrity was infringed. The court also found out that the newspaper had violated Article 7 of the Law of Public Media and Article 8 of the Code of Journalists and was sentenced to pay immaterial damage defined by Article 178 of the Code of Obligations to the athletes. The case was a clear example of a vulgar behavior of the photograph and poor sense of responsibility of the editor of the newspaper which justified the sanction of paying a compensation for immaterial damage.

### 3.2. Unfair competition

Legal protection of material interests of an athlete comes out of a marketing activity of his/her sports image and can be obtained using the protection of his/her personality rights and his/her public image which represents the constituent element of his/her personality. Every unlawful use of athlete identification elements for commercial purposes represents violation of his/her personality rights. Such an act could be regarded as an act of unfair competition which is prohibited in the Prevention of the restriction of competition act and the Protection of Competition Act. Unfair competition is done when a company does not conform to the rules of a good commercial practice for the purpose of commercial competition and can make damage to other participants on the market. (Article 13 of the Protection of Competition Act)

The relevant relationship in terms of a competition between an infringer and an athlete is established when the infringer tries to improve his market position in comparison with his commercial rivals by unlawfully using sports image of an athlete as the substance of marketing activities of his own personality. It is against the good commercial practice if an infringer unlawfully uses public recognized image of an athlete or the commercial image of an athlete or otherwise derogates his/her public image by infringing his/her personality rights.

### 3.3. Trademark protection

There are 3 different positions of an athlete which are protected by the Trademark Protection Act. An athlete is able to register his/her identification element of his/her personality under the Trademark Protection Act. He/she can protect his/her name, nickname, image and signature, but it is not possible to protect his/her personality as a whole. Under article 43 of the Trademark Protection Act the identification element should incorporate something which is different from other similar elements. An element is supposed to characterize a certain subject but should be divided from the subject itself. An athlete is eligible to stop all other persons from using his/her registered mark under certain conditions which are proposed in article 48 of the Trademark Protection Act. In case of an infringement an athlete can claim compensation using legal ground directly from the Trademark Protection Act (article 121) or common damage action under the provision of the Code of Obligations. The advantage for an athlete with a registered mark is that he/she does not have to prove his/her business image and can impose sanctions directly from the rights which are coming out of a registered mark. On the other hand this kind of protection is limited to identification elements of a registered mark only.

In case that an athlete has not registered his/her element of personality as a trade mark he/she can also defend his/her position. In the procedure of other subjects trying to register similar elements of recognition, he/she has different legal means at his/her disposal and is in a position to stop activities which are in contradiction of his/her personality elements.

### 3.4. Other Legislation

The use of the name of a famous person is protected by the regulation of business entities. In Article 16, the Law on commercial companies has established the use of the name in commercial relations. The name of a famous person could be used as the name of a company only with the permission of the person. As many sport subjects (individuals and legal entities) are known very well in public and are famous, their names are protected by this provision.

It is interesting that unjustified recording of pictures is a criminal offence by article 138 of the Penal Code of Slovenia. Criminal offence is done by unjustified recording of pictures of a person or his/her premises without his/her consensus. The condition is that the offence should deeply interfere with the personal intimacy. An act can be also done by the presentation of pictures to a third person. The infringer could be sentenced with pecuniary penalty or imprisonment up to 1 year. In case the offence is committed by an official on duty, the sanction is an imprisonment from 3 months to 5 years.

In general, legislation protects natural persons and legal entities. However, it is up to a certain field of protection and the examination of a specific situation of a particular case, to find out which legal rules are appropriate to use.

## 4. Sponsorship contract

The history of sport marketing is interesting and rich in many fields. It reflects the stage of the development of sport, economy, political situation, media, globalization trends, commercialization and other areas. Successful marketing activities reflect the status of different sports on a global and on a national scene. Some international federations were very successful in finding a good relationship with the media which has made some sports or sport events even more popular. If we know that sponsoring is, along with the revenues from broadcasting rights, the most important marketing tool for sport organizations, then it is logical that specialization of sponsorship has already made steps forward. On the other hand, sponsorship has become a subject of scientific examinations in different areas.

A sponsorship contract is a special form of the assignment of the rights of use. It is considered as "a typical mutual agreement" and is not codified in the Slovenian legislation.<sup>5</sup> It seems that the nature of

<sup>4</sup> Court case II Cp 1332/98 of the Higher Civil Court of Ljubljana

the relationship is still “moving forward” and it would not be appropriate to stop the development of this modern contract with formal codification. It is a relatively »young« contract of modern commercial law which is still in the process of development and it would be wrong to limit it within a mandatory legislation of the state.

There are many different legal definitions of a sponsorship agreement. It seems that the Code of sponsorship of the International Chambers of Commerce (ICC) gives the real foundation which can be useful for different sport organizations. Following the ICC International Code on Sponsorship, the definition of sponsorship agreement “is any commercial agreement by which a sponsor, for the mutual benefit of the sponsor and a sponsored party, contractually provides financing or other support in order to establish an association between the sponsor’s image, brands or products and a sponsorship property in return for the rights to promote this association and/or for the granting of certain agreed direct or indirect benefits.”<sup>6</sup>

#### 4.1. Substantive legal elements

Sponsorship contracts are very common in the practice and it is therefore recommendable to find out basic legal principles which are suitable for the interpretation of the relationship. Being a modern contract of autonomous commercial law, it should be noticed that all basic principles of commercial civil law should apply for it. The principle of autonomy, equal rights of parties, conscientiousness and honesty, prohibition of misuse of the rights, prohibition of making harm, commitment to fulfil obligations, solidarity in collaboration, peaceful resolving of disputes and some others. A sponsorship contract is a contract of two or more parties, obligatory, consensual, non formal, sinalagmatic and commutative civil law contract. Among common characteristics of one of the contracts of autonomous law, it is functional heterogeneous with practical economical meaning, at some lower levels standardized and has a normative nature.

Apart from those principles, some other specific legal elements should be considered when examining a sponsorship contract. Particular elements are not poured into a harmonious mixed contract and the relations of the parties can not be subsumed into one of the established, known and already codified types of contracts. Many of them are very complex and beside essential structural elements contain many additional and subsidiary activities with the aim to optimize the effects of the main component of the contract. After analyzing some National Olympic Committees (NOC) sponsorship contracts it could be concluded that the main object of the sponsorship is the transfer of the sponsorship property of the sponsored subject into the sphere of the sponsor which is usually combined with the right to use the name of the sponsored party. Most of the contracts include the exclusivity clause, the obligation of the sponsored party for the legal protection, common interest of both parties with the aim to enlarge the value of the object of the contract, clause of confidence, the wish to achieve a long-term relationship, common care of successful public communication and the wish to renew the expiring contract.

Very typical characteristics of the modus of accomplishing the contract is media involvement tightly connected with public appearances of both parties with the particular aim of the sponsor of the identification and recognition of their relationship. One of the most specific and typical elements of sponsorship is the active role and position of the sponsor with its task to take advantage of the sponsorship property using the rights acquired from the sponsored party. It seems that the most specific and typical element of sponsorship is the manner of

the identification between the entity of a sponsor and the value of a sponsored subject (sponsorship property).

Most of the contracts are connected with some obligations of other relationships, especially of a sponsored party. In the world of commercial top sport it is normal to have different relationships with an athlete, his/her club, federation, NOC with their own sponsors and therefore it is of the utmost importance to balance all those different interests.

If we try to make the hypothesis that the recognition of a special and specific sponsorship value of the sponsored subject by the sponsor is the preliminary condition of the sponsorship contract, we have to take into account that this specific value has emerged out of sport, and that it attracts very much the world of business. This specific value of a sport subject is hard to find elsewhere and that is why it is so attractive for a commercial subject. The commercialization of sport has introduced certain new values from the world of sport and launched them to the public by modern ways of communication.

The foundations of sponsorship in legal sense are

- personality rights of the athletes,
- intellectual rights of sport organizations and
- special “sui generis” rights of the organizer of a sport competition.

A sponsor decides for sponsorship trying to use a sponsored subject with specific attributes to achieve certain positive commercial effects. The main object of the sponsorship is the sponsorship property, which gives the sponsor a specific, original and individual approach to the commercial market and to target particular costumers, which is quite different from other conventional means of advertisement or propaganda. Sponsors invest huge amounts of money into sponsorship as they believe that they could make a good investment bringing them certain commercial effects.

Sponsorship property is materialized in different shapes and formations. Its speciality is a specific distinction which gives it another character, much different from other similar values. This particularity involves a touch of a class, extraordinariness, attraction, extreme popularity and fame and reputation, maybe even a kind of a genius. It is the perception of this value system by the public and the environment in which we live that is the final target of the sponsors. The exceptional value of sponsorship which makes a sponsor ready to make a contract is made by the public. Celebrities are famous for a certain reason and that is why they are attractive for sponsors. The same applies to famous sports teams, clubs, organizations or sport competitions which constitute a certain precious brand which are sought by sponsors.<sup>7</sup>

#### 4.2. Specific modus of exercising rights of a sponsorship contract

One of the differences from other contracts is the way of the connection between sponsored subject and a sponsor in the eye of the public. As a licensing contract enables the use of a licensed subject without any wish of making a connection between parties of the contract, the essential element of sponsorship is the emphasis of the relationship between the parties of the contract. The aim of a sponsor is to build a publicly recognizable relationship of a sponsor with a sponsored subject. The task of the sponsor is the promotion of that relationship which represents the focus of the contract itself. A connection is built in a special way by the sponsors who use protected rights of intellectual property of a sport organization or the personal rights of an athlete with the intention to make the public aware of their close relationship. The theory is accomplished in several examples in praxis.<sup>8</sup>

#### 4.3. Legal characteristics of a sponsorship contract

Most sponsorship agreements are long term, strictly confidential and strive for a successful public relationship. Sponsorship contracts are complex as they consist of many different activities which are supposed to assist the principal core of the contract with the aim to optimally emphasize the commercial benefits of the agreement. Practical economic ratio and functional heterogeneity are the vital elements as we can see in some other modern inominative contracts.

5 Sponsorship contract is not (yet) codified in the legislation in any of the EU countries.

6 Code of sport sponsorship, www.iccw-bo.org

7 As an example; the meaning of the brand of the Olympic Games is much more than just a picture of five rings, because people recognize this mark as a symbol of an exceptional international sport competition, with the best athletes,

sport heroes, Olympic legends and tradition, the Olympic Idea and philosophy, what makes it so popular all around the world.

8 For example, sponsorship contracts of the NOCs of Great Britain, Germany, Austria, and Slovenia all give a sponsor its right to acquire an association with the Olympic Team of the respective NOC.

Distinction should be made between sponsors and suppliers. Many sponsorship contracts have more than 2 parties. A lot of contracts with 2 parties are connected with other contracts and consist of some obligations of the subjects who are not contractual parties (athletes have to fulfil some obligations on behalf of a sport organization). A sponsor is entitled to certain rights of a sponsored party, but it is up to its determination and decision to activate those rights in a way that it would bring the expected benefits to it. The evaluation of the contract is vital; inactive role of sponsor exploitation of its rights should not be relevant for the value of the contract. The execution of sponsor's rights is important and depends on the sponsor's ability to exploit its position. The obligations of a sponsored party could be split in 3 directions:

- cession of its rights to a sponsor,
- fulfilment of different services,
- efforts to transfer its image to a sponsor.

Exclusivity is becoming a very important element of a sponsorship relationship. In these cases, the sponsor's right of exclusivity represents the most important element from the sponsor's side. The exclusivity of a sponsor represents an essential element of the contract as it means the priority for the sponsor trying to create a distinction towards its business competitor. There is a clear distinction between the exclusivity of a sponsor in a sponsorship agreement and a contract of selling of the TV rights. Both rights represent two different groups of rights coming from different rights of sponsored subjects. Practical reasons demand an adjustment between the interest of sponsors of a sport event and the sponsors of the TV. Both parties should respect different limitations regarding the substance of the contract; a sponsor must particularly take care of legal restrictions, imposed by law. A clear distinction should be made between the organizer of a sport event and an athlete /team/ competing at that event, as they both have their own sponsors with different interests.

#### 4.4. Legal nature of a sponsorship contract

The relations of sponsorship are hard to subsume within one of the known types of contracts, every contract must be carefully analyzed. They consist of different rights and obligations which are typical for some other contracts. It is an inominative contract and it is not legally codified. As a special contract, a non typical (non formulaic) model of a contract, each contract is a specific and individual one. Only some sponsorship agreements can be subordinated or compared with other nominative contracts.

A licensing agreement is applicable for some sponsorship contracts which are based on intellectual property. We can find out that sponsorship is a new legal instrument which consists of more integrated and connected relations; it is not a "compound" contract. In some cases, it can be regarded as a "mixed" contract if the provisions match with the regulations of some known nominative contract. In its essence, it is a *sui generis* contract with typical characteristics and structure so that it is possible to make a distinction between other contracts.

Apart from sponsorship of sports organizations, sponsorship of individual athletes has another specific nature as they are mostly not based on intellectual industrial rights but rely more on personal property rights.

After analyzing the elements of some of the NOC sponsorship con-

tracts,<sup>9</sup> we can find out some interesting facts regarding the legal nature of this contract. Like some other inominative modern contracts, a sponsorship agreement is a special *sui generis* contract. Some sponsorship contracts have similarities with licensing as the main object of the contract is an intellectual right. The TOP<sup>10</sup> and the NOC contracts are based on the value of the Olympic rings. The image of the Olympic rings as a world famous trade mark makes the essence of the contract in a way which looks as it would be a licensing agreement. A closer look into the structure of the TOP contract proves the thesis of making a distinction between this sponsorship agreement and an ordinary licence contract.<sup>11</sup>

The basic difference lies in the way how the object of the contract is used. As a licensee is trying to use the trade mark itself, the sponsor is trying to connect the trade mark with his own name, brand or product. It is very common that sponsors use the Olympic rings together with their own brand names and logos (a composite logo) trying to raise the image and value of their own brand. Beside the elements which are very close to the elements of a licensing agreement, the TOP agreement gives a sponsor many other rights which are not common for an ordinary licensing agreement. Some of the elements (ticketing, hospitality, and merchandising) are also structural parts of a sponsorship agreement. Some elements of other contracts can be found in certain sponsorship agreements, such as a sales agreement, a lease, a labour contract, selling of the TV rights, joint venture and some others. The most important fact is that the sole right to use the brand name is only one part of the essence of the contract, far more important is the way how successfully a sponsor uses this intellectual property. One of the most specific and relevant elements is the exclusivity of sponsors. A sponsorship contract has developed exclusivity as a special element of distinction between the sponsors which are recognized by the public as a close link with the sponsored subject and other commercial competitor in its brand. Ambush marketing is a very specific attempt to diminish the value of sponsorship and NOCs have been developing special ways and legal means of how to protect and defend sponsorship property from it.

#### 5. Endorsement

An endorsement is the promotion of a company's product by means of personal recommendation of an individual who is sufficiently well known and respected that he can influence the purchasing pattern of sections of the consumer public. In a sense, a personality sponsors the company's product, and is paid for doing so. It is a much simpler commercial agreement than the sponsorship, and is a means whereby that personality can extend his/her own programme of self promotion to increase his/her earning capacity, and to maintain a profile in the public eye. Endorsement is a form of specialised advertising by the manufacturer of the endorsed product.<sup>12</sup> This form of sponsorship<sup>13</sup> has been introduced and developed in the USA, but is quickly getting its space in Europe.

Studies have shown that consumers are more likely to purchase products endorsed by athletes than products not endorsed. Athletes are the role models and consumers tend to believe athletes, especially those with a positive public image. It is estimated that companies in the USA spend close to one billion dollars on athlete endorsements each year and for a good reason.

Society chooses to purchase products that are known, guaranteed and convenient. Companies believe that society is more likely to purchase a certain product if an athlete says it is appropriate or beneficial. A product or a brand may be weak, but an athlete's reputation gives it credibility. Numerous athletes have become "celebrities" due to the increase in endorsements and the companies that have sponsored them. The business of sports endorsements has come a long way since the 1970's. The growing market of endorsements is larger now because of the vast change in technology. The television allows athletes to be seen, the radio allows athletes to be heard and the Internet allows athletes to be downloaded. Therefore, endorsement companies have benefited a great deal due to the large growth of technology. This high percentage is tremendously beneficial to companies because an athlete will always be seen, and if an athlete is seen then so will be

<sup>9</sup> NOCs of Austria, Germany, Great Britain and Slovenia

<sup>10</sup> TOP is abbreviation for The Olympic Programme of the International Olympic Committee (IOC) which forms the foundation for marketing of the IOC and the NOCs which also sign these agreements with the IOC worldwide sponsors for the use of property of the Olympic rings on the national territory of each NOC

<sup>11</sup> License agreement is codified in the

Slovenian legislation in the Code of Obligations under Articles 724 - 728

<sup>12</sup> See also Stallard; Bagehot on sponsorship, merchandising and endorsement, Chapter 7, Endorsement, London Sweet&Maxwell, 1998

<sup>13</sup> In theory it is not clear if endorsement is only one type of sponsorship of an individual athlete or it is a special legal relationship of an athlete with a commercial partner.



the product. Society has become so influenced by the figures that are put in front of them that they forget the main reason of sports figures; they are skilled and talented individuals. This allows a certain product to be seen regularly and allows the viewer to get to know the athlete and the companies that are endorsing them.

Product retention will be high because of the association of the product with the celebrity. The company objectives will be reached because the company will grow because of the increase in the popularity of the product. The idea that the consumer thinks, "if he/she likes that product, then I should like that product too" is what makes endorsement such a highly effective marketing-communication instrument. Because of the high public profiles that most celebrities have and their influence on their audience and fans and the wide reach that advertising has, these two marketing-communication tools will create a strong marketing-communication strategy. The job of a campaign is to transform the need of the target groups into the needing of the product. A celebrity will give a company a competitive edge. An endorsement of a product by a celebrity is very influential on the public's opinion of the product.

It is questionable whether an endorsement is a type of a sponsorship contract of an individual athlete or it represents its own type of contract. The relationship between the sponsorship of an individual athlete and the endorsement is open to discussion. There are many differences between both types of the contracts of an individual personality, especially in the USA, and that is why most of the American literature deals with both types separately. In Europe, the distinction is not as clear as endorsement has not been developed as much as in the USA.

Even if we do not go deeply into the endorsement we can find out some differences and specialities of both arrangements. The most important characteristic of an endorsement is the promotion of a product, service, a name or some other element of a company (sponsor). On the other hand, sponsorship is more "sporty" oriented as a sponsor tries to identify his image with successful sporting results of his sponsored subject. If an athlete gets royalty for his/her commercial efforts for the benefit of his client, a sponsor often gives prizes to his sponsored athlete for his/her outstanding sports achievements. There are also other differences in both types of the relationship of an athlete with a commercial partner but, on the other hand, the basic positions of both arrangements are similar. It is therefore justified to claim that the endorsement is only a very specific type of an individual sponsorship contract.

## 6. An athlete and his relations with other sport and commercial subjects

As an athlete is preparing for a big international competition, he is engaged in legal relations with different partners. He is connected with a sport club, a national and international federation, an NOC and the IOC, and the sponsors of all of them. As Fasel<sup>14</sup> underlines, a professional athlete has loyalties to his sport, club, national team, fans, agent, sponsors and payers union. That can create problems if the relations are not very clear and precisely formulated. If he wants to take part in international sports competitions, he becomes a part of different sport systems and has to follow particular obligations. There are some open legal questions such as:

Who is the owner of commercial rights of international sports competitions?

What kind of obligation an athlete has to obey when preparing for Olympics?

How is it possible to solve the possible conflict of interests of different sponsors of sports subjects?

### 6.1. An example of an "Olympic Games Contract" of an NOC

Commercialization of sport has merged sport and business. Nearly all

important sport subjects have their own sponsors with different interests. Sport subjects come into different relationship. An athlete could be a member of his club, a national federation and an NOC of his country. As all of them have their own sponsors it is necessary to find a solution how to preserve the rights of all the mentioned sport subjects, as they are all important for "sports reproduction".

There are different models and ways how to tackle the problem of the conflict of commercial interests of different subjects in the period of the preparation for the Olympic Games. Many NOCs seek to establish proper relations with a federation and an athlete, signing an agreement in the period of the preparation for the Games.<sup>15</sup> There are two general ways. In some cases, an NOC signs a separate contract with the federation (the NOC of Norway) and an athlete (the NOCs of Great Britain, Norway, The Netherlands, Belgium) or include all parties in the same contract (the NOC of Latvia, the NOC of Slovenia). In this case, it is tripartite agreement with the rights and obligations of an NOC, national federation and an athlete. In the case of the Belgian NOC federation gets a copy of signed agreement between an NOC and an athlete.

It is interesting to examine the reasons of the NOC of Latvia for not to sign a separate agreement with the national federation or an athlete but to make instead a three partite contract. In the case of making a contract with the federations, they are solving their financial problems on an athlete's account (the Federations getting the money for funding athletes from the NOC directly), financially and morally manipulate "disobedient" athletes, the financial flow is not coordinated, the NOC's control over sports work, attraction of sponsor funding and advertising, disappear. In the case of a contract with an athlete, negative impacts are recognized such as uncoordinated financial flow, coaches and federations are ignored, and undecided belonging of purchased inventory, unregulated advertising activities, responsibilities and control of the NF disappear.

The basic criteria to select an athlete to be included in the contract are set by the NOC and are based on the achieved certain sport results. After the signing of a contract an athlete gets a status of an Olympic candidate or a member of an Olympic team, which brings him certain rights and obligations. The NOC of Slovenia signs a three partite contract in which, in the preparation period, an athlete is entitled to get special rights such as logistical support, financial support via national federation, pocket money (scholarship, funding), health care and special health insurance, training measurement at the National Institute for Sport, consultations in legal and marketing matters. In the competition period, an athlete is entitled to clothing and equipment, transportation, accommodation and accreditation, medical and physical therapeutical care, lawyers costs in possible legal procedures, pocket money and prize money in case of getting a medal.

On the other side an athlete is obliged to respect the IOC and the NOC rules, sign the Olympic declaration which includes IOC eligibility code, make every effort to achieve the best possible result, follow the instructions of a team leader, respect fair and decent behaviour towards the Olympic Team, the NOC, sponsors, and obey anti doping rules and ignore attempts of doping. Similar obligations and rights of an athlete are stipulated also in other contracts of the NOC.

### 6.2. Commercial obligations of an athlete

The NOC usually signs a contract with the athletes preparing for the Olympic Games from the point of view of commercial obligations of an athlete. Regarding his relation with his sponsors an athlete is obliged to respect the IOC rules regarding advertisements. He is supposed to inform the NOC about his/her personal sponsors, to wear the official Olympic clothes, to allow that the NOC uses his/her image for the promotion of the NOC sponsors, to follow the instructions of medal ceremonies protocol and fulfil some other common obligations. If an athlete does not respect those rules it is the NOC which is under the pressure by its sponsors and has to react properly so as not to harm its own position.

It is obvious that the Olympic Charter Rule 41 is very strict. Except as permitted by the IOC Executive Board no competitor, coach, trainer or official who participates in the Olympic Games may allow

<sup>14</sup> Presentation of Rene Fasel, "Who owns the ice hockey players", the EOC Technical seminar, Ljubljana, October 2005.

<sup>15</sup> During the EOC Technical seminar in October 2005 in Ljubljana "Who owns

the athlete" the NOCs of Great Britain, The Netherlands, Belgium, Latvia, Norway and Slovenia presented their models of contracts with the National Federations and athletes.

his person, name, and picture or sports performance to be used for advertising purposes during the Olympic Games.<sup>16</sup> The commercial use of athlete's images during the Games may only be made in a congratulatory or generic manner. Such communications may not refer directly to the use of any product or service that enhances performance in practicing or competing in sport and may not refer to the competitor's performance at the Games, except in the case of congratulatory communications. At no time can the use of an athlete's name, image or likeness be used to make reference to the official product of the athlete. Reference to the athlete's biography may be used in a factual manner. The athletes must appear dressed in either his or her National Team uniform, past Games National Olympic team uniforms or in generic, unbranded clothing. Athletes may not be dressed in a uniform that is branded with the sponsor's trademarks or any other commercial mark other than approved manufacturer trademark.<sup>17</sup>

It means that different rights might be in conflict. An image right of an athlete represents his own personal right on the one hand, while on the other hand the rights of sporting organizations are based on intellectual property rights. The IOC original right of the use of the Olympic image has its background in the Nairobi treaty of the protection of the Olympic symbol.<sup>18</sup> It is interesting that the Nairobi treaty only covers the use of the Olympic rings (Olympic symbol) and not the word and other expressions of the word Olympic. An NOC's right to send an athlete to the Olympic Games is coming from the IOC Olympic Charter on the one hand and on the other hand an NOC has the right over its own Olympic symbols as an intellectual property right, which is transferable to its sponsors.

The IOC grants the use of the word Olympic to an NOC in the contract which is integrated in the TOP program. The Olympic emblem shall mean a design, as approved by the IOC, integrating the Olympic symbol with another distinctive element. Olympic designations shall mean any or all of the designations which indicate a sponsor relationship with a member of the Olympic Movement or an Olympic Team, such as »Official Partner, Sponsor, Supplier, Licensee, Product, Service of ...<sup>19</sup>

In praxis, some NOCs (Great Britain, The Netherlands, and Belgium) implicitly regulate the transfer of image (portrait) right for the use of an NOC during the Games. Without an athlete's permission it would not be possible to commercially exploit his/her image right, an NOC would not be able to use athlete's images for the commercial purposes of its sponsors. It is interesting that Poland has protected this right of sport organizations even in formal legislative act. The Polish Act on Sport in Article 33 gives sports organizations the rights to use the image of an athlete during certain competition for promotional reasons.<sup>20</sup>

### 6.3. Position of an athlete and the IOC eligibility code

A typical case of limitations caused by the rules of governing sport organizations which reflects interests of individual athlete and its sponsor is the IOC "eligibility rule." It governs the participation of athletes in the Olympic Games and comprises the basic information about the Olympic Rules and Regulations including the WADA Anti Doping Code and refers to the Court of Arbitration for Sport. The Eligibility Code is the basic element not only for the participation of athletes in the Olympic Games but also for the cooperation between athletes, their NOCs and their stakeholders.

The Eligibility rule (rule 41 of the Olympic Charter) sets criteria to get an Olympic accreditation. To be eligible for the participation in the Olympic Games, a competitor, coach, trainer or other team official must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and the competitor, coach, trainer or other team official must be entered by his NOC. The above-noted persons must notably:

- respect the spirit of fair play and non violence, and behave accordingly; and
- respect and comply in all aspects with the World Anti-Doping Code.

As it is stated in the Bye-law to Rule 41, each IF establishes its sport's own eligibility criteria in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval. The application of the eligibility criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities.

The Eligibility Code might be problematic from the standpoint of the right of an athlete. If he does not agree with the Code he is not permitted to take part in the Olympic Games. After the Medina Majcen<sup>21</sup> case it is questionable what would be the position of the ECJ if the Code would be examined. The importance of the Medina Majcen case is obvious as even The White Paper on Sport which was issued by Commission of European Communities<sup>22</sup> points out to the judgment. Following Chapter 4.1. specifics of sport have to be taken into consideration in the sense that restrictive effects on a competition that are inherent in the organization and proper conduct of competitive sport are not in breach of the EU competition rules, provided that these effects are proportionate to a legitimate genuine sporting interest pursued. The necessity of a proportionality test implies the need to take into account the individual features of each case. It does not allow for the formulation of general guidelines on the application of competition law to the sport sector.

It is obvious that the Code creates fundamental criteria for the athletes to be able to compete at the Olympic Games. A competition of an individual athlete at the Olympic Games is purely of a sporting nature but could also be regarded as an activity with economic consequences. If anti doping rules could be the subject of the Community Law as regarded in the Medina Majcen case, it would mean that also other purely sporting rules such as the IOC Eligibility Code per se could not be excluded from common rules. In other words, restrictions involved in the Eligibility Code should be inherent and proportionate with regard to the sporting objectives pursued.

The best way to solve a possible conflict of interests of different sponsors of sports subjects is an agreement which must be reached in due time. The preparation period for the Olympic Games is an ideal opportunity for the stakeholders of such a mission to solve the possible problems on time. The praxis of different NOCs preparing contracts with the NFs and athletes proves that very effectively. An athlete is regarded as a contractual party with his/her rights and can solve the relations with his/her business related partners in due time.

The holder of the right which is linked to a sport competition is the most important. As a clear example of autonomous sports law it is obvious that the governing body of a particular sport is entitled to settle the rules which all the involved subjects have to obey. After the Medina Majcen case it is, of course, important to follow the European Court of Justice principle that all sport rules are subject to Community Law. In view of the restrictions they cause, the rules set by sporting organizations are inherent and proportionate with regard to the sporting objectives pursued. There might also be restrictions if those rules would be in the conflict with the basic principles of human or some other common rights. As far as those basic principles are not violated, the autonomy of sport is secured.

### 7. Conclusion

The image rights of a sports subject are of the utmost importance for further development of sport. The awareness of the importance of the intellectual property rights in sport is still on a very low level in Slovenia. Neglecting of the property of athletes and sport organiza-

16 Olympic Charter, Rule 41, Bye-law paragraph 3.

17 Presentation of the IOC Managing Director Timo Lumme, "Changes and Challenges within the Olympic Market", the EOC Technical seminar, Ljubljana, October 2005.

18 "Nairobi treaty on the protection of the Olympic symbol", was issued on 26.9.1981 in Nairobi.

19 Definition from the contract between the IOC and an NOC.

20 Jacek Foks, Polish Sports Law and International Law, IASL Congress "International Sports Events and Law", Warsaw, november 2009,

21 T 313/02 and C 519/04 Meca Medina Majcen v Commission,

22 White paper on Sport was issued on 11.7.2007 by the EU Commission, COM(2007) 391 final, [www.europa.eu/sport](http://www.europa.eu/sport)

tions when contracting relations with commercial companies might be dangerous especially for sport subjects as they are primarily oriented to sport activities and could be then jeopardised by clever commercial partners. As it is described in the chapter, the protection of intellectual property rights including the sports image rights is dispersed into different domain of the Slovenian law. Sponsorship is the most

popular legal instrument for athletes and sport organizations in Slovenia as most of the income is generated thanks to it. This is also the main reason that this chapter concentrates so much on the relations within sponsorship.

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# Rights to Broadcast Sporting Events under Italian Law

by Luca Ferrari\*

## 1. Introduction

In this chapter, we explore the Italian scenario of the very current and ever controversial subject of the ownership of and access to special information with extraordinary commercial and entertainment value - the voice and video dissemination of sports events. The contending parties include the sports leagues and associations, the sports clubs, the players, the powerful media conglomerates, the fans and the public, the regulatory agencies and, of course, the politicians. With such diverse interests and so much economic power at stake, the policies and the rules are fluid and often enigmatic. We strive here to give the reader a workable understanding of this changeable mosaic.

## 2. The ownership of broadcasting rights - from individual to collective selling

### 2.1 The legal background

Italian scholars traditionally tend to emphasize the importance of a dogmatic and systematic collocation of the situations, which require legal recognition and protection. In relation to broadcasting rights, they have proposed, tried and rejected several possible juristic conceptualizations. All seem to reject the possibility to have such rights fall directly into the notion of copyright. Not so unanimously rejected is the more general classification of the media right to a sport event as a new kind of intellectual property, although it is noted that Italian Law does not provide a general discipline and definition of this category of rights, but rather a limited number of specific and narrowly defined rights (copyright; trademark; patent right etc...) none of which fits the idea of a right to commercially exploit a football game. No matter how entertaining, a football match does not involve any intellectual creation.

The scholars' effort is not just an academic exercise. Effective legal protection must be found for a value, which undeniably is the object of investment, interest and negotiation. Hence the importance of its identification as a value, whose *ownership* or whose *control* can be affirmed by a court of law. UK courts have come to the prevailing conclusion that such value cannot be the object of an intangible *right*. Rather, the only available protection is that provided by the property or tenancy of the venue where the event is staged and, by its organization, the right to control access to the stadium or racecourse, admitting spectators under contractual restrictions.

A similar approach has been adopted in several continental European jurisdictions including Italy<sup>1</sup>. However, the latest tendency seems to be that of providing a protection based on the idea of an *exclusive right* in the sporting event as the result of the specific economic activity (value creation) of the organizer or investor. From an idealistic perspective, it is the right of the organizer of the game not to be deprived of the results of its economic activity and investments, in other words the sports spectacle as a new kind of entertainment not protected by copyright and yet whose value cannot be "siphoned away" to benefit other entities without the consent of the "owner"<sup>2</sup>.

This perspective coincides with that of the US, where the Courts recognize a right in the commercial value of a sports competition and protection is afforded against "commercial misappropriation" of related goodwill.

Recognition and protection of business investment is still the principle underpinning of the legal protection afforded to organizers of sports competition, affirming ownership and goodwill in relation thereto. However, while this legal reasoning is generally applicable to any sports event, which commands a relevant TV audience and entails a corresponding broadcasting value, professional team sports broadcasting rights have been the object of specific statutory regulation. In particular, Legislative Decree ("D. Lgs") n.9 of 9 January 2008<sup>3</sup>, the only existing Italian statute governing ownership and commercialization of sports broadcasting rights, applies to professional team-sports' tournaments or championships. The latter, based on current CONI<sup>4</sup> qualifications, are football and basketball top national competitions. Volleyball and rugby, which are certainly well developed and largely professional sports in Italy, are not subject to the statutory provisions as they are still qualified, even at the top level, as amateur sports. On the other hand, professional cycling - also a professional team-sport - is not subject to D. Lgs n.9/2008, since there are no national cycling competitions organized as a championship or tournament<sup>5</sup>.

For the reasons stated above, most of the chapter will focus on the

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

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

3 A "Legislative Decree" is a set of regulations enacted by the Government pursuant to specific appointment by the Parliament and under the guidelines set forth by the relevant enabling act. In this case the enabling act is Law n. 106 of 19 July 2007.

4 Comitato Olimpico Nazionale Italiano, or Italian Olympic Committee

5 As a general rule, media rights are marketed by the Leagues or national sports federations, sometimes through wholly

controlled private companies or licensed intermediaries.

In rugby, LIRE (Lega Italiana Rugby d'Eccellenza), as stated in art. 3 letter g) of its own charter, "represents the clubs participating in the top championship (named "Gruppo Assicurazioni Super 10") for the management and negotiation of collective image rights, broadcasting, promotion and publicity, protection of collective trademarks and the safeguard in general of collective interests of a financial nature." The same article also foresees that this objective may also be entrusted to third parties, which are controlled by the League. Volleyball Serie A-1 (Men's and Women's) championship rights are marketed by the respective leagues and have been licensed to Sky, the pay-TV satellite channel for three years, from season 2007/08 to season 2008/09.

As to Cycling, and particularly concerning the 'Giro d'Italia', the organizer, RCS Sport, a public limited company affiliated with the International Cycling Federation is in charge of marketing the audiovisual rights.



broadcasting regulation applicable to professional football and basketball.

## 2.2 Law no.78 of 29 March 1999 and the -gone- age of individual selling

In 1999, limited to football matches, the ownership issue was settled by statute: “*Each Serie A and Serie B Football Club is the owner of the television broadcasting right in codified format*”<sup>6</sup>. Art. 2 of Law 78/1999 has been for years the only Italian statutory provision, which expressly affirmed ownership of (pay) television broadcasting rights; it certainly constituted an important statement as it reinforced the then prevailing opinion that rights to football events belong to the clubs rather than to the league or federation<sup>7</sup>.

It must be noted that the statute did not define the content and the nature of the pay-TV rights. Indeed, the provision appeared as marginal within a law, whose stated objective was the pro-competitive regulation of the pay-TV market, introducing a 60% cap in the ownership of football pay-TV rights by a single operator in a multi-platform TV context. However, the underlying assumption of the mainstream commentators and jurisprudence, recognizing the existence of a commercial property in sporting events had been established.

As to the actual owner of such commercial rights, the 1999 legislator stated that, as to football, the broadcasting rights belonged to each club, individually. This appeared in conformity with the broad principle whereby the goodwill inherent in a sports event would be controlled by whomever “holds the keys of the door”. By the same token this statutory provision clashed with the ambition of the event organizer -the National Professional League in the case of the Serie A and Serie B championships- to be recognized as the actual owner of such goodwill.

Although it did not offer a definition and statement of the right to broadcast a sports event, art 2 of Law 78/99 and European Directive n. 89/552 of 3 October 1989 (“Television Without Frontiers Directive”) provided a rather solid argument for the legal protection *erga omnes* of the “sports property”, in addition to or in lieu of mere recognition of the power to restrict access to the venue. Notably, the object of the act was very narrow, since it was limited to football and “codified” pay television, with the exclusion, arguably, of other forms of transmission including cable TV, free-to-air TV, radio broadcasting, internet and mobile telephone transmission. Nonetheless, there seemed to be no compelling reasons preventing an extension of the principle, if not the actual rule, affirmed by Law 78/99 to other sports events and other technologies for the broadcasting and transmission thereof.

The conclusion that envisaged an original right of commercial

exploitation of the sports event did not resolve whether original ownership of media rights to championships’ or tournaments’ matches rested with the hosting club or both clubs participating. Moreover, the question of individual or collective ownership of matches scheduled within a tournament or championship was and possibly still is the object of divergent decisions elsewhere in Europe<sup>8</sup>. In Italy, however, the individual ownership of such rights by the clubs was generally undisputed at the time<sup>9</sup>. This precept, in conformity with the then only existing statutory statements, rested with the vast majority of the scholars<sup>10</sup> as well as with the sports regulators.

This conclusion was further supported by recent court decisions concerning the commercialization of images of the football games by certain mobile telephone companies. We will later discuss this interesting jurisprudence, but here we stress that all decisions move from the premise that the *hosting* club is the holder of the rights to the economic exploitation of the game, including its transmission through all media<sup>11</sup>.

Indeed, as we know, Italian clubs had been selling pay-TV rights individually for some years before statutory recognition in 1999 and their entitlement to the negotiation and fruits of such agreements had never been seriously challenged.

Based on this practice, and possibly taking into consideration the notion that the visiting club may also have rights in the single game and be entitled to a share of the profit thereof, the League had promoted specific agreements among its affiliated clubs to redistribute part of the revenues from gate receipts as well as season tickets and TV-rights licensing. It is noteworthy that these agreements and the ambivalent language of art. 2 of Law 78/99 did not address the issue of possible co-ownership of the visiting club.

However individual selling and related juristic conceptualizations were swept away, as it often happens, by a stroke of the legislator’s pen.

## 3. Law no. 106 of 19 July 2007 and legislative decree no. 9 of 9 January 2008<sup>12</sup>

### 3.1 Introduction

At the end of football season 2005/2006 a hurricane hit Italian Serie A, in the form of criminal and disciplinary proceedings against representatives of top clubs, referees and prominent members of the football establishment (including the President of the Italian Football Federation). A network of secret alliances and relationships had been discovered, capable of influencing the activity of referees. Although investigations, mainly based on months-long tapping of mobile telephones, did not prove any match fixing or corruption, they opened the public eyes to the abusive and illegitimate power of top Italian

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

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

8 The debate unfolded along two different lines of reasoning: on one side, the one traced in the decision rendered by *Bundeskartellamt*, VI div., on 2 September 1994, DFB, according to which the media rights belong to the hosting clubs, which organize access to and staging of the

event and are responsible for the safety of the viewers and participants; on the other side, the viewpoint adopted by the *Restrictive Practice Court of England and Wales* - now Competition Commission - on 28 July 1999, according to which the English Premiership is a product *per se*, since “the product which has a value is the Premier League Championship as a whole, rather than the individual matches played in the course of that championship” and “while a club can prevent a broadcaster’s cameras from entering its ground, this is a mere power of veto and does not enable the home club to sell the rights without the agreement of the away club”. At today’s date, the position expressed by the English authorities seems to have prevailed. In fact, between 2003 and 2006 the European Commission rendered some decisions whereby it acknowledged, subject to given conditions, the legitimacy of the collective selling of media rights for UEFA Champions League (July 23rd, 2003), for Bundesliga (September 14th, 2004) and for Premier League (March 22nd, 2006). Such view has been out-

lined again in the White Paper on Sport of 11.7.2007 and confirmed by a very recent Resolution of the European Parliament of May 8th 2008 (page 16). Accordingly, the collective ownership or at least collective licensing of media rights is now accepted and allowed in most of the European countries, such as Germany (where however the *Bundeskartellamt* is monitoring the media rights selling market), England, France (where the Law “*Lamour*” of 2003 confirmed the joint selling system) and, now, Italy. Only Spain, among the “big” football countries, is embracing the individual system of selling, mitigated by a mutuality system from which Real Madrid and Barcelona are the only clubs exempted.

9 We here recall Tribunale di Catania, 20 October 1988 - *Società Calcio Catania v. Società Telecolor International*, in which it is specifically stated that “the exclusive owner of a sports competition is the entity organizing the event which - in the case of football - coincides with the club in whose field the game takes place”;

equally stating ownership of clubs as “organizing entities”: Pretura di Roma, 18 September 1987 - *Radio Roma nord v. Lega Calcio*; Pretura di Roma, 10 December 1992 - *Società Teleroma 56 v. Lega nazionale professionisti*; also see decisions recalled in footnote 11.

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

11 See paragraph 5.3. Interim decision of Tribunale di Roma, 29 March 2003, Juventus FC, AC Milan Spa and H3G Spa v TIM Telecom Italia Mobile and Ansa,



clubs. Juventus bore the worse of it and was relegated to Serie B, but other clubs like AC Milan, Fiorentina and Lazio were sanctioned heavily, with a deduction of points in the upcoming season 2006/2007. The ensuing scandal prompted a radical reform of the sports judicial system and the need to reduce the huge financial imbalance between top football clubs and the rest of the league. Under mounting public contempt and resolute press campaigns against the rich and famous, the Italian government decided it was time to shift from individual to collective selling. A new law was enacted, introducing for the first time in the Pay-TV era, the concept of joint ownership of sports broadcasting rights between the organizer of the championship and participating clubs as well as the “centralized commercialization” of such rights.

As explained in the introduction to this chapter (see footnote n. 3), the new law regulating the ownership of broadcasting rights on sports events and related marketing was passed in the form of delegated legislation: Law No. 106 dated 19th July 2007, which defined the aims, principles and criteria of the new discipline, directing the Government to issue a legislative decree defining and setting the new regulations. The Italian government accomplished the task with Legislative Decree no. 9 of 9 January 2008.

### 3.2 Scope and purposes of the new regulations

The scope of the new regulations is limited to the audiovisual rights market concerning “professional championships and tournaments organised for team sports at national level”. Therefore, it only applies to the two professional team sports, namely football and basketball, and does not apply to: a) “amateur” team sports such as volleyball and rugby; b) professional individual sports like tennis or golf; or, c) to professional team sports that are not organized in championships or tournaments, as in the case of cycling

The central and stated purpose of the Law is to ensure transparency and efficiency of the broadcasting rights market while improving the competitive balance among participating clubs. To this end the legislative decree introduces the centralised commercialization of the TV rights through the League, with great similarity to the UEFA Champions League model.

It also regulates the allocation of financial resources ensured by the collective sale of such rights among participating clubs.

Furthermore, the law reserves a quota of the proceeds for the development of the youth sectors in professional clubs, for the promotion of amateur categories, for the safety of sports facilities as well as for the financing of at least two projects a year in support of sporting disciplines other than football, as long as they are of particular social importance.

### 3.3 Co-ownership of audiovisual rights and individual ownership of library rights

In reform of the 1999 statutory recognition of clubs’ individual ownership of (pay) TV rights, the new law affirms the co-ownership of the

broadcasting rights between the “competition (i.e. the championship) organiser” -the Lega Calcio- and the “event (i.e. the match) organisers” -the clubs.

For the first time the Italian legislator also defines and acknowledges the “library” right, i.e. the property of “archived audiovisual recordings of matches played at least 8 days before”. Unlike the broadcasting rights, the audiovisual library of home matches played by each club is the exclusive property of the “event organizer”, i.e. the hosting club. However each hosting club must allow the visiting club, on a reciprocal basis, to store and include audiovisual recording of the relevant match in its own library.

### 3.4 The marketing of TV rights

The sale of audiovisual rights is exclusive to the championship’s organiser, i.e. the League. In other words, the new Law appoints the League as joint-owner of the broadcasting rights and as the exclusive worldwide agent for the licensing of such rights in the interest of all clubs<sup>13</sup>.

In order to increase the overall income generated from such centralized marketing, the League is bound to offer the broadcasting rights to each available platform by means of distinctive, competitive procedures for the national market; the international market and the radio phonic platform.

The League is bound to establish the guidelines for the marketing and licensing of audiovisual rights, defining the criteria of the offer, allocation of rights and formation of packages<sup>14</sup>. The Italian Communications Authority and the Italian Competition Authority check the compliance of the guidelines with the decree’s principles and provisions and approve them within sixty days of receipt of the same.

The rights are licensed by means of a number of separate and competitive licensing procedures dedicated to the national, to the international and to the radio phonic markets respectively. As to the national market, the League can organize separate tenders for each platform, or multi-platform tenders, putting terrestrial, satellite and cable operators in competition, or both. In case different platforms are placed in competition, the competition organiser shall be bound to offer more packages of comparable value. In particular, each package shall include prime matches. Within these limits, and provided all the platforms are given an equal possibility of gaining access to the rights, the League shall be free to create the packages at its own discretion<sup>15</sup>.

Participation in the bidding procedures shall be granted to broadcasters who have the prescribed legal qualifications and independent intermediaries. In the case of multi-platform tenders, participation in the tender shall be granted to broadcasters who have the qualification for at least one platform.

Rules and limitations to the licensing are defined under Art. 11. Broadcasters are only permitted to exercise licensed rights on the platforms where they are authorized to operate and it is forbidden for any licensee to sub-license the rights. It is also forbidden for any single operator to purchase the exclusive rights to all live packages (“No

interim decision of Tribunale di Brescia of 6 August 2003, Brescia Calcio V TIM Telecom Italia Mobile, judgement of January 5th 2006 of Tribunale di Milano, case MP Web S.r.l. and A.C. Parma S.p.A. v. TIM Telecom Italia Mobile S.p.A. and ANSA.. In all these cases the courts, in their preliminary considerations, held that sports clubs and associations must be considered as business entities, which, mainly, stage sports shows and events. Sports events are, by and large, products. The principal income of the clubs derives from the sale of the sports events. The selling of tickets, of radio and television broadcasting rights, of advertising spaces etc. demonstrate, in the opinion of the court, that the clubs, which host and organize the event should be considered the legal owners and legitimate beneficiaries of profit deriving therefrom.

<sup>12</sup> The new set of rules is commonly referred to as “Melandri Reform” and legislative decree no. 9/2008 as “Melandri Decree”. Giovanna Melandri was the Minister of Sports who promoted the new regulations in 2007. A short reference to “legislative decree” is D.Lgs. The foregoing references will be used alternatively in this chapter.

<sup>13</sup> As mentioned in the foregoing paragraph, dealing with the old (individual) selling system, the League used to market the Coppa Italia, the radiophonic rights and the Serie A and B highlights under specific appointment from all members. Regulations of Serie A and B League (LNP) still include such provisions, which are applied during the “transitory period”: under Art. 1.3.d), the LNP “represents, upon specific appointment for each single contract by each single club,

the clubs participating to official tournaments” in the licensing of: 1) TV rights limited to the free-to-air highlights of the Serie A and B championship; 2) radio broadcasting rights to the Serie A and B championship; and 3) TV and radio broadcasting rights to the Coppa Italia matches...”. The foregoing provisions were obviously based on the principle that such rights belonged originally to the clubs. Moreover, art. 25.1 of the same regulations requires each club to submit to the LNP the agreements individually concluded for the licensing of (pay) TV rights, for the inspection of their content relating to certain obligations concerning access of the media to football stadiums and to protection of the championship logo.

<sup>14</sup> The guidelines must be defined within 4 months of the entry into force of the D.

Lgs 9/2008, i.e. no later than end of May 2008. At the time this chapter is being written (early May 2008) such guidelines have not yet been issued by the League. The latter has engaged negotiations with interested sports rights agencies and advisors, which, upon being appointed as exclusive brokers, would assist in defining the marketing and licensing criteria. The League should approve the guidelines by 2/3 majority of the general assembly; if such majority is not achieved after three votes their approval only requires simple majority.

<sup>15</sup> In this respect, D. Lgs 9/2008 also prescribes that tenders are launched and completed well before the beginning of the relevant season (art. 7.2) and that a sufficient number of live matches are available to each broadcaster (art. 7.3).

Single Buyer rule”). These restrictions are an expression of the enabling law’s directives against the creation of dominant positions on the buyers’ side. The aim is to ensure direct negotiation with broadcasters operating on different platforms, in order to increase the overall income from the licensing process and avoid rights being purchased that are not directly exercised by the purchaser but rather resold to third parties with a profit. As we shall see later in this chapter, such restraints and the privileged position granted to the League may, on the contrary, put the Melandri Reform in an off-side position, resulting in a breach of art. 81 and 82 EC.

Rights that remain unsold are reverted to the clubs and may be directly exercised through the club’s thematic channel or licensed individually. Finally, the League may decide in its own discretion to exclude from the licensing packages certain live events. These live matches are not considered unsold events and may not be individually marketed or exploited by the clubs.

The licence agreements shall have a maximum duration of three years. The League must, in any case, foresee a duration of the licence agreements that guarantees equal treatment among broadcasters.

The Italian Communications Authority periodically defines (at least once every two years) the emerging platforms. The audiovisual rights allocated for the emerging platforms are offered on a non-exclusive basis. The League, in order to sustain the development and growth of the emerging platforms, shall undertake to directly grant licences to those platforms. These licenses shall include a significant quota of the rights relative to the live or earliest transmission, and shall be suitable to each emerging platform’s technological characteristics, at prices that are in proportion to their effective market potential. In order to avoid the formation of dominant positions, the licensing of the audiovisual rights allocated for the emerging platforms shall take place separately for each individual platform.

A single package for radio broadcasting, limited to transmission in Italian, can be allocated to a single operator.

The League organizes the marketing and licensing of audiovisual rights in the international market, through licensing arrangements aimed at reaching Italian communities residing abroad and enhancing the image and appeal of the competition.

### 3.5 Distribution of revenues

The League shall allocate no less than 4% of the licensing revenues for the following uses: the development of the professional sports clubs’ youth sectors, enhancement of the amateur categories, stadium safety and financing of at least two social projects a year in support of sporting disciplines other than football. In order to achieve these objectives, a “Foundation for general mutuality in professional team sports” has been established<sup>16</sup>.

The League, shall allocate an annual quota of no less than 6% of the total resources ensured by the licensing of the audiovisual rights for the financial support of the three lower professional leagues: Serie B, C1 and C2.

The distribution of revenue among the competition participants is divided in such a way as to guarantee an equal allocation of a prevailing quota of said resources and the allocation of the remaining quotas on the basis of each club’s audience and sporting achievements.

From the start of 2010/2011 sporting season, the distribution of the license fees generated by the Serie A Championship, after deducting the general mutuality quotas (4%) and those for the lower professional categories (6%), shall be divided as follows:

- a quota of 40%, in equal parts, among all the participants in the Serie A championship;
- a quota of 30% on the basis of the sporting results achieved;
- a quota of 30% according to the Television audience commanded.

The 30% quota relative to the sporting result is divided as follows: 10% of the amount (1/3 of the quota), on the basis of the “historical results”, that is, those achieved by each of the clubs since the 1946/47 sporting season; 15% on the basis of the results achieved over the last five sporting seasons, and; 5% on the basis of the result achieved in the last championship. The 30% quota relative to the Television audi-

ence commanded by each club is divided as follows; 25% of the amount based on the number of supporters of each of the participants in the competition, as calculated by three different and independent polls, taken by three different agencies appointed by the League, and; 5% on the basis of the population of the town of reference.

### 3.6 Regulation of the transitory period (until 2010/2011 season)

The effects of the licensing, assignment or transfer of audiovisual rights agreements entered into prior to 31st May 2006 shall be secured until 30th June 2010 at the latest. The effects of the licensing, assignment or transfer of audiovisual rights agreements entered into after 31st May 2006 but before the entry into force of the new regulations (1st February 2008) shall be secured until 30th June 2010 “only if such contracts were executed between entities different from the ones that were party to the contracts concluded before 31st May 2006”. This rather obscure provision means that media licensing contracts entered into after May 2006 -and possibly after the enactment of the enabling law in July 2007- will be considered valid only if they were not simply renewals of pre-existing licenses. Clubs that, on the entry into force of the D. Lgs. 9/2008, are not party to licensing agreements, are allowed to license the broadcasting rights until 30 June 2010, pursuant to specific authorization by the League (Art. 27.4). The situation of clubs, whose licensing agreements expire *after* the entry into force of the Decree but before the starting of the collective marketing, i.e. during the transitory period (February 2008-June 2010) is not foreseen by the Decree. Commentators tend to conclude, that licensing during the transitory period should follow the same discipline set by Art. 27.4: contracts may be entered into by single clubs, with expiry date no later than June 30 2010 and subject to authorization by the League. However, the issue is of no practical relevance, since none of the current individual licensing agreements are due to expire during the transitory period. In any event, individual selling of broadcasting rights are not allowed after 1st February 2008 and any licensing agreement entered into after that date would be null and void under art. 4 of D. Lgs 9/2008.

### 3.7 Separation of Serie A and Serie B and amendment to the mutuality rules

The language of the Reform did not place any limitation on the amount of revenue to be redistributed in favour of lower categories. Rather, the Reform stated that “no less than 10 per cent” of the TV rights related proceeds (6 + 4, see para 3.5 above) was destined to lower categories.

In addition, the Decree proved to be lacking in detail and allowed room for different interpretations as to which entity was to determine the criteria for the redistribution of such revenue. In particular, it is uncertain whether this decision was for the “Serie A Assembly” within the League or the League General Assembly (comprising Serie A and Serie B clubs). By its wording, the Law<sup>17</sup> indicates the League as a whole (and therefore the General Assembly) in referring to “the organiser of the Serie A championship”. Unquestionably, the League, and not the League’s Assembly of Serie A clubs, is the entity that organises the Serie A (and Serie B) championship.

Needless to say, the alarms immediately sounded for the ‘big’ clubs. At first, they argued in favour of a rather free interpretation of the law, sustaining that the Serie A Assembly alone was to decide on mutuality. However, probably sensing the weakness of such interpretation, the Serie A soon embraced another strategy and sought to have the Serie B agree on a revision of the League’s Regulations, whereby the major clubs would gain full control of the League General Assembly and governance. For months, Serie A and B clubs’ confrontation dominated the League general meetings agenda. Then, at the general

<sup>16</sup> The Foundation’s Board of Directors is made up of twelve members: six, including the Chairman, are appointed by the Serie A and B League, three are appointed by the FIGC (*the Italian Football Federation*), one by the Federazione Italiana Pallacanestro (*the Italian*

*Basketball Federation*), one by the Basketball Serie A League and one by CONI (*the Italian Olympic Committee*). The Foundation annually reports its activities to the Ministry for Youth Policies and Sports Activities.

<sup>17</sup> Articles 22 and 24.

meeting held on 16 April 2009, it became clear that the Serie A clubs<sup>18</sup> were no longer willing to continue the dialogue with the Serie B in order to come to a compromise. The next move was the Serie A's unilateral decision to divorce Serie B and create a new and autonomous Serie A league. On 14 May 2009 Serie A clubs signed the by-laws of the new association before a notary public. The breakaway was thus completed.

However, the Serie A's split from the League was certainly not lacking formidable legal issues. Serie B clubs maintained that the defection was illegitimate, for it was contrary to the provisions of the Reform and in breach of agreements in force between the Serie A and the Serie B as well as between the League itself and third parties. The summer of 2009 became time for discussions and negotiations between the parties' lawyers.

In fact, due to Serie A clubs refusing to attend the general meetings of the League, the latter ended in an impasse and became unable to vote at the FIGC<sup>19</sup> Council. As a result, at the end of May the FIGC put the League under its direct control, appointing Mr Giancarlo Abete as *ad acta* commissioner. This deadlock lasted until the end of July 2009, when Serie A and Serie B clubs finally reached an agreement. Under the terms of this compromise, the parties agreed to consider 10% of the overall mutuality basket as a fixed parameter. In return, the Serie A guaranteed the Serie B a quota of no less than 7.5% of the TV rights proceeds, while the remaining 2.5% would be distributed among the two lower pro-categories, amateur categories and for general mutuality purposes. Representatives of the Government were also involved in the negotiations and endorsed the terms of this solution. Indeed, the Government's commitment to amend the Melandri Reform confirming by statute the terms of the agreement between the Series played a critical role in the negotiations. Furthermore, the Serie B agreed not to oppose the split of Serie A and Serie B into two separate leagues, waiving any potential claim arising in that respect. Therefore, after the end of the transitory period, i.e., from the 2010-2011 season, Italian top football will be re-organised in two separate leagues: League A and League B.

In the meanwhile, Mr Maurizio Beretta, the future president of the next Serie A League, was appointed by the clubs as president of the League for the current season.

#### 4. Athletes' image and broadcasting of sports events

As explained above, Law 106/2007 enabled the Government to issue the D Lgs. 9/2008, which defines ownership of broadcasting rights to football and basketball championships. The enabling law indicated that media rights belong jointly to the entity that organizes the championship (the League) and to the "subjects, which participate thereto". The Melandri Decree spelled out the notion of "participating subject", stating that co-owners with the League are the "Event Organizers", defined under art. 2.1.c of the same Decree as the clubs that host the match in their stadium under their control and responsibility. The ownership issue, at least with reference to Football and Basketball is thereby settled, save for future antitrust or constitutional challenges to the Melandri Reform.

As to other sport disciplines, ownership of the rights is typically regulated by the articles of association of the relevant sports federation, at the international or national level. Athletes are never recog-

nized as part-owners of the broadcasting rights. On the contrary, most sports associations' by-laws or regulations include provisions whereby athletes, upon registration, agree to waive any rights or claims over the broadcasting of the matches, races or competitions to which they participate<sup>20</sup>.

However, to change perspective, there may be room for discussion about the way in which image rights of individual players may interfere with full and exclusive right to extract commercial value from sports events. This challenge is no doubt remote and so far completely embryonic. Yet one could argue that players are the legitimate owners, under Italian Law, of their own image rights, that their image cannot be utilised without their consent, absent the public interest exceptions listed by the Law, and finally that an employment contract does not necessarily imply an assignment or a licence of such image rights. The issue is whether under the (professional) player employment agreements the training and playing services of footballers constitute their only obligation under the contract or, in view of the value of the remuneration, the players necessarily grant the Club the right to "market a movie" in which they are the leading if not exclusive actors. Along a similar line of reasoning, one could question whether it is legitimate for a monopolistic sports federation to require that athletes, upon registration, acknowledge its exclusive property of broadcasting rights and waive any participation in the goodwill generated by the broadcasting of events in which they perform and compete.

Football offers a good example of the complexity of this issue. It is typical doctrine in Italy that a part of the players' image rights used by the Club are acquired almost automatically through the 1981 Convention in force on the regulation of advertising and promotional activities executed between the Associazione Italiana Calciatori (AIC)<sup>21</sup> and Professional Leagues (the Lega Nazionale Professionisti and the Lega Professionisti Serie C). On the basis of this Convention, the players, in consideration for the granting of their image rights as members of the team, would be collectively entitled, unless they waive them, to a part of the profits derived from the promotional and advertising activities of the Club including licensing of broadcasting rights. Such a waiver has, indeed, become a standard, thanks to a brief clause that is always inserted in the contractual forms. But the player contract does not, however, resolve the doubts relative to image rights.

In the first place, the Convention embarks with the fallacious supposition that the football players' image rights are not freely exploitable by the player (an assumption in opposition to Articles 1 and 5 of the same). Over the years this assumption has been repudiated by the conduct of clubs and players and the decisions of the courts. It is, indeed, a fallacy that could eviscerate the entire Convention. Moreover, numerous doubts arise both as to the efficacy of the Convention towards individual players, especially if they come from foreign federations and are not registered with the AIC, as well as to its hallmark as an agreement in restraint of trade. Furthermore, since their inception many of the provisions contained therein (in particular Articles 4, 5, 9, 10, 14 and 15) have never been applied, which leads to the conclusion that they are no longer effective. From the invalidity or inefficacy of the Convention, it would follow that the clubs should not be entitled to undertake commercial activities, which, in some way, imply the use of the players' image, ranging from the addition of the sponsor's name or logo on the jersey to the licensing of broadcasting rights.

But even if contrary to this evidence one wished to uphold the Convention as totally valid and effective, it would still be possible for players with sufficient economic power to refuse to have the customary wording added to their playing contracts agreements, by which they renounce their part in promotion and advertising revenues. They would then be entitled to 10% of such revenues. If we include the proceeds derived from the sale of TV rights to this income, we can easily reach 70% of the club's overall turnover. One can easily understand what unsettling effects would result if this problem, which heretofore has never been raised, were to emerge. Arguably, the Melandri Reform and the legal reasoning about the broad and implied content of a players' employment contract could withstand this kind of claims. Yet, to ward off these risks, it might be wise for

<sup>18</sup> All clubs but one, i.e. Lecce (which was then relegated and is now playing in Serie B).

<sup>19</sup> I.e., the Italian Football Association (Federazione Italiana Gioco Calcio).

<sup>20</sup> See Art. 7.1 of the Olympic Charter, which is applicable to all Olympic sports at national level through art. 1.2 and art. 22.5 of the Italian Olympic Committee's articles of association. See also, for tennis, ATP and WTA's Official Rulebooks under art. 1.14 and B. 10, respectively.

<sup>21</sup> Under Art. 25, paragraph 2 of the AIC'S Articles of Association, it is foreseen that those footballers who wish to join the

Union are obliged without any temporal limits to assign to the association: "the rights to use their likeness in the case in which the likeness is displayed, reproduced or sold together with or in concurrence with that of other footballers and, in any case, within the ambit of the commercial marketing that refer to products involving the entire category".

These are, clearly, restrictions that greatly hinder the marketing potential of one's image rights (see Giorgio Resta, *Diritto all'immagine, right of publicity e disciplina antitrust*, in *Rivista di diritto sportivo*, Aprile-Giugno 1997, page 351).



the Club to explicitly confirm its exclusive entitlement to the good-will generated by the sports events it organizes and to the full income generated by each business activity conducted in the media and advertising sectors, notwithstanding inclusion in it of the Player's image as a member of the team<sup>22</sup>.

## 5. Competition and the collective selling of television broadcasting rights

### 5.1 Collective selling in the Italian football broadcasting market.

#### General considerations

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

As already indicated, before the Melandri Reform came into force, pay-TV and similar rights were sold individually, while the League marketed the free-to-air rights. This marketing system was in line with a set of decisions (no. 6633 and no. 6662 of 1998, no. 7340 of 1999 and no. 8386 of 2000) rendered by the Italian Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*, hereafter also referred to as the "Authority" or "AGCM"), whereby the latter endorsed the principle that the host clubs were to be considered the owners of the media rights to matches. In particular, the Authority stated that articles 1 and 25 of the League regulations, which at the time entitled the League to jointly sell all TV rights including pay-TV, constituted a price-fixing cartel in breach of antitrust law (Law no. 287 of 10th October 1990, art. 2, II paragraph, letter a)<sup>23</sup>. More precisely, the Authority outlawed the joint selling of pay and free-to-air TV rights for individual games, while granting an exception (pursuant to art. 4, 1st paragraph of Law 287/1990) for the collective sale of rights to the 'Coppa Italia' and to the Serie A and B free-to-air highlights. The reasons for those exceptions were that the 'Coppa Italia' is a competition based on the direct knock-out system, which makes it impossible for TV broadcasters and individual clubs to know how many matches each club is going to play during the course of the tournament. Similarly, Serie A and B highlights constitute a package of the most interesting images from the games of the day, which could not be sold individually by the clubs. With its decisions, the Authority followed a similar reasoning made at the time by the Bundeskartellamt, which had considered that collective agreements were anticompetitive by definition. Under this premise, exceptions were only allowed by compelling evidence demonstrating that an individual sale is impossible or unreasonable under the circumstances, or that collective selling has beneficial effects for the relevant market or the end-consumer that outweigh the negative ones<sup>24</sup>.

Of course, such a view was supported with enthusiasm by the richest and most popular clubs while accepted with resignation by the others. To the smaller clubs, individual selling appeared more in line with the interests of the then so-called "Big Five" (Juventus FC; AC Milan; FC Internazionale; AS Roma; SS Lazio) than a strict consequence of the legal requirements of competition law. In any case, in light of the Authority decisions, the Serie A and B clubs, not without robust discussion and internal negotiation<sup>25</sup>, voted in the general assembly of the league to amend articles 1 and 25 of the League's reg-

ulations, limiting the collective sale to the championship's highlights and to the 'Coppa Italia' games<sup>26</sup>.

Now, the clock appears to have been turned back.

Even before the Melandri Reform, the Italian antitrust Authority, on the wave of a different approach adopted by the European Commission<sup>27</sup>, changed its viewpoint on the matter.

A new orientation in favour of collective selling already emerged as a result of the Investigation into the Sector of Professional Football, started by the Authority in March 2005 and concluded at the end of 2006. In the Final Report, published at the beginning of 2007, the AGCM stated, on page 51: "the current broadcasting rights marketing system has determined inequalities and imbalances among the football clubs of the same league". This conclusion is little less than a formal condemnation of the system of individual selling.

The reasoning underpinning said final statement clearly recalls the arguments previously unfurled by the European Commission. Facing the question as to whether a system of joint selling of sports media rights could be legitimate in light of EU competition rules, the Commission stressed that the specificity of sports may lead to the granting of an exception to the uniform application of competition and price fixing rules: the quality of sporting competitions is directly proportional to the balance among competitors, granting uncertainty of the final result. Therefore, inasmuch as a rule (or, more precisely, a rule of competition which disciplines football in its business aspects) tends to increase the gap between rich and poor clubs, it must be sacrificed to the "good of the game" and to the interests of the end-consumer.

The individual selling of media rights had increased the financial imbalance among Serie A clubs. In the 2005/2006 season, for example, the TV rights licensing revenues of top clubs were ten times higher than those of lesser clubs. It is still disputable whether the financial gap was responsible for a less competitive and less attractive championship. However, the Commission concluded that the joint selling of media rights, inasmuch as it would reduce financial imbalances, could eventually increase the competitiveness of smaller clubs and make both the Serie A championship and each match more attractive in the interests of the spectators.

This new attitude of the AGCM certainly paved the way for the Melandri Reform.

However, according to various news reports<sup>28</sup>, in March 2008, just a few weeks after the Decree entered into force Sky filed a formal complaint to the European Commission against the new rules, claiming that certain provisions of the Melandri Reform were restricting trade and in violation of freedom of competition among football clubs as well as among TV networks. From what has transpired through the press, Sky focused its complaint on the creation, by the Melandri Reform, of a League's monopoly on the supply side of the football broadcasting rights market. Such monopoly and the marketing options granted to the League by the Decree, would allow the latter to impose rights packages in which, for example, much less attractive Serie B matches are offered in combination with Serie A, or artificially reduce the variety and amount of available events. A critical eye has been also turned to provisions whereby single clubs are granted the exclusive rights to the audiovisual production of the events, and to the League's power to restrict licensing of (collectively) unsold

<sup>22</sup> (Luca Ferrari, *Sports Image Rights and the Law*, *Idrottsjuridisk skriftserie* Nr. 7, *Artikelsamling* 2002, *Svensk Idrotts Juridisk Förening*).

<sup>23</sup> In decision no. 7340 of 1st July 1999 the Authority stated that the agreement between the single clubs allowing the collective sale of the Serie A and B games TV rights by the League - according to the provisions contained in articles 1 and 25 of the LNP Regulations - is "price-fixing (...) and is, therefore, to be considered anticompetitive in the market of the premium sports TV rights, in violation of article 2 of Law n. 287/90".

<sup>24</sup> In the same decision, the Authority, with regards to the TV rights to 'Coppa Italia' games, held that as there is a large number of clubs participating in the national tournament and that such number is "uneven in terms of commercial value", and "in the event of the relevant television rights being sold on an individual basis, the broadcasting stations would be forced into a multiplicity of negotiations with the clubs which own the rights. The additional costs could be so high as to make the transmission of the games (...) not convenient from an economic point of view". The Authority continued by stating that

"the TV broadcasting stations have held that - with regards to the present characteristics of the national tournament - (...) undoubtedly they prefer collective selling by the League of the Coppa Italia TV rights."

<sup>25</sup> The rather generous redistribution of revenues derived from individual selling, was the result of such negotiations.

<sup>26</sup> Article 1 of the League's Regulations was amended by the Italian Professional Football League in 1999. In fact, its previous version entitled the League to be the exclusive representative of the clubs for the sale and negotiation of all image and

broadcasting rights regarding all events organized by the League (Serie A and Serie B Championships and Coppa Italia) and provided for specific obligations for the clubs to preserve this representative power of the League.

<sup>27</sup> For subsequent reference, see the "Independent European Sport Review 2006", the White Paper on Sport of 11.7.2007 recently followed by the "Resolution of the European Parliament of 8.5.2008 on the White Paper on Sport".

<sup>28</sup> See for example *Il Sole-24 Ore*, 14 March 2008, page 26.



rights by the single clubs. Art. 11.6 poses another major competition issue, by forbidding licensors from sub-licensing the Rights. Finally, advantages reserved in support of emerging platforms, which may be more easily developed by network operators, may alter the competitive balance among broadcasters.

The Melandri Reform and its anticompetitive effects will undoubtedly raise fierce debate and further legal challenges. Its bold interference with market forces and its provisions directing TV-rights revenues distribution among football clubs and in favour of minor sports and the youth sector denotes a policy of State control<sup>29</sup>. The new rules may in time prove their ultimate pro-competitive effects, i.e. a more attractive Serie A and better access to premium football on TV. But from the early signals one could seriously doubt the new regulations will be afforded an appropriate testing period.

## 5.2 The pay-TV market

Since the 2002/2003 season, Sky Italia, a merged entity between Stream and Canal+ controlled Tele+ authorized by the European Commission, - had been enjoying a virtual monopoly in the pay-TV market.

In fact, during the first season following the merger there was an attempt to establish a rival platform, named "Gioco Calcio", owned by Plus Media Trading, a consortium constituted by a sizable number of small and medium Serie A and Serie B clubs. Gioco Calcio, other than threatening the early strategic plans of Sky Italia, struggled to operate under enormous difficulties through its first season, only to collapse in the end, failing to find investors willing to provide the necessary medium-term financial resources. After consulting with the Authority for Telecommunications, the Antitrust Authority, authorized Sky, the only pay-TV provider, to exceed the limit which otherwise at the time prohibited any single operator from acquiring more than 60% of the pay television rights of games of the Serie A Championship<sup>30</sup>. However, the Authority set specific pro-competitive restrictions on Sky. In particular, Sky was prevented from entering license agreements exceeding three years duration. A further limitation was imposed by the European Commission, prohibiting Sky from combining satellite and digital terrestrial pay-TV rights.

At the time of the creation of Sky Italia, digital terrestrial technology seemed far from the kind of development that would make it a platform able to support the distribution of competitive pay-TV service and consequently it was believed that for a painfully indefinite time Murdoch's TV would be the only player on the market of pay-TV contents.

However, Sky's monopoly did not last long.

On 3 May 2004 the Italian Parliament passed a law<sup>31</sup> (commonly referred to as "Legge Gasparri" after Maurizio Gasparri, the Minister for Communications) introducing and regulating digital terrestrial technology.

In order to accelerate the dissemination of the new broadcasting technology, the law in question and the subsequent decrees promulgated for its application required that decoders should be sold to the public at "accessible" prices<sup>32</sup>. In order to facilitate the fulfilment of such condition and provide an incentive for the growth of the new technology, the Government soon made available a state contribution for each decoder purchased.

Availing itself of such a favourable opportunity, in July 2004 Mediaset, the Italian television operator owned by then Premier Silvio Berlusconi, unexpectedly announced its 86 million Euro purchase of the rights to the transmission through digital terrestrial technology of domestic games of the three main Serie A clubs: Internazionale, Juventus and Milan for the seasons 2004/2005, 2005/2006 and 2006/2007. Furthermore, Mediaset obtained a right of first negotiation and a right of first refusal for the transmission of the games of the same clubs through satellite television technology starting from the season 2007-2008. Mediaset was soon followed by the entry in the pay-TV market of another broadcasting channel, La 7, controlled by Telecom Italia, which equally decided to invest in digital technology and acquire the rights of other Serie A clubs. As of today's date, the two digital terrestrial operators collectively control all Serie A games and have agreed to exchange between themselves the highlights of the games broadcasted, so as to enable each of them to offer to their clients the highlights of the day's fixtures in addition to the single game purchased. On 23 January 2005, Bologna-Cagliari and Inter-Chievo were the first games offered by La 7 and Mediaset on the digital terrestrial platform.

Bolstered by the low prices of the viewing offered by Mediaset, selling pre-paid cards for only 3 euros per game and by the State contribution to the purchase of the decoders, the market for digital terrestrial pay-TV surged.

Sky was not commercially prepared for this unexpected early challenge and it was undermined by the appealing offers proposed to the audience by Mediaset and by La 7. Customers were keen to pay and view each single game for merely 3 Euro, rather than having to purchase the entire season package.

Unquestionably, the two new competitors have taken advantage of the fact that while the Commission had prevented Sky from cumulatively utilizing digital and satellite pay-TV technology, no such limitation had been imposed on Mediaset and La 7. As a consequence, Mediaset was able to exact from clubs like Inter, Juventus and Milan a right of first negotiation and a right of first refusal for the transmission of their games through satellite television technology starting from the season 2007/2008. Mediaset thus obtained an -unfair- advantage, which would fully blossom upon the expiry of the contracts between Sky and the top Serie A clubs. Many were wondering whether Mediaset had secret plans to launch a new satellite channel or, rather, it simply intended to carve out territories between it and Sky.

With hindsight, we can now say that Mediaset had neither the intention to oust Sky, nor to engage in a war over the satellite platform.

Due to the blatantly unequal treatment between the competing channels, which the above mentioned circumstances had produced, Sky Italia was considering a claim addressed to the European Antitrust Authority, requesting it to revise the restrictions imposed on it, with special reference to the prohibition to cumulate satellite and digital technologies. According to Murdoch's pay-TV management, the disparity at case was alone sufficient to distort competition<sup>33</sup>.

Sky's belligerent plans were most likely put on hold as the Melandri Reform was taking shape. Today, as described in par. 2, a new regulatory balance has been set within the Football pay-tv market and new antitrust concerns have arisen, as described in the preceding paragraph 4.1, which seem to be shared equally by Sky, Mediaset and La7.

## 5.3 Licensing of media rights for the 2010/2011, 2011/2012 and 2012/2013 seasons .

As required by the Reform, in May 2009 the League adopted new guidelines for the marketing and licensing of audiovisual rights for the 2010/2011, 2011/2012 and 2012/2013 seasons (the "Guidelines", see para 3.4 for more details on their purpose). The Guidelines were submitted to the Italian Communication and Competition Authorities in order to evaluate their compliance with the relevant rules. Both Authorities gave approval. However, on this occasion, the Competition Authority recommended that the packages offered in relation to each platform be in a number and composition adequate to warrant effective competition.

<sup>29</sup> See FT.com "Italian law to shake up broadcasting rights", 10 December 2007  
<sup>30</sup> See paragraph 1.2

<sup>31</sup> Legge 3 maggio 2004, n. 112.

<sup>32</sup> Two other conditions were introduced by the law: a) the percentage of population covered by digital terrestrial channels should not be less than 50%; b) the programmes broadcasted by digital terrestrial channels must provide a variety of programmes, which should differ from those broadcasted on ordinary non pay-TV channels.

<sup>33</sup> Concerns have also been raised about the limits to the use of digital terrestrial

technology in pay-TV or pay-per-view mode. More precisely, a decision passed by the Communication Authority in November 2001 (AGCOM Delibera 435/01 "Approvazione del regolamento relativo alla radiodiffusione terrestre tecnica digitale") stated that a quota of the television digital terrestrial programming, to be specified before 31 March 2004, must be offered on a free basis. However such specification has not been made. As a consequence the "broadcasting capacity" for pay-TV programmes via digital terrestrial television is still unlimited.

On 10 July 2009 the League issued the tender specifications for the sale of football TV rights. A few days after, on 22 July 2009, the Competition Authority opened a formal investigation against the League to assess whether an abuse of dominant position pursuant to art. 82 of the EC Treaty had been perpetrated.

In this regard, by way of general remark, it is important to remember that collective selling of media rights has always been suspect to the European competition authorities. In more than one case, the European Commission pointed out that collective selling creates risk of reducing the number of broadcasters of sporting events to an unacceptable extent. In light of this, although collective selling could be justified in consideration of other relevant issues (as discussed in para 5.1. above), strict scrutiny should always be conducted as to the actual methods of media rights marketing.

Indeed, the decision to open an investigation against the League by the Italian Competition Authority was taken under those premises. Going into the merits of the decision, the Authority, in keeping with its previous recommendations, focused on the formation of packages. In particular, it contended that the packages were too few, in light of the characteristics of the Italian media market, and as such only a few operators would be able to submit an adequate offer. In other words, the packages appeared formed in an *ad hoc* way as to make it easy for established broadcasters of the different platforms to win the tenders and maintain their market share (with particular reference to satellite and terrestrial digital). This would benefit the League and those established broadcasters, but would indeed impair competition, making it difficult for other operators to enter the market. Ultimately, this would lower the variety and quality of the offer to consumers. It would also amount to an abuse of dominant position by the League. The investigation is currently ongoing and is scheduled to end by 31 May 2010.

On a different note, it is worth mentioning that the sale of TV rights has so far yielded almost €900,000,000 to the League. It might reach €1 billion when the revenue arising from the sale of the TV rights to foreign broadcasters is added (the tender specifications relating to the sale to non-national broadcasters were issued in October). The heads of the League and Infront Italy, the company that acts as the League's agent for the sale of football TV rights, have not surprisingly expressed great satisfaction with such results.

## 6. Broadcasting rights and freedom of the press

### 6.1 The difficult co-existence of two fundamental rights: the pursuit of profit and the right to information

Once the primary forms of selling and the streams of revenues are identified, our analysis of the economic exploitation of broadcasting rights cannot ignore the relevant issue concerning the permissible extent of such exploitation. As difficult as it may be to identify the owner of media rights, the picture is not complete if we do not define their extent as well.

In this respect, the freedom of the press has always been the crucial issue. To what extent can the media's access to sporting events and the dissemination of related information and images be limited?

The existence of the right to information is not disputed under Italian law. It has always been held that art. 21 of the Italian Constitution, which establishes the fundamental right to freedom of expression, also imply the right to information concerning events of public interest. Moreover, several statutes mention this right, thus confirming its legal recognition and protection (for instance, article 5 of Law no. 422/1993 according to which "*the transmission of images and sound material and of information concerning all events of general interest ... is allowed for the purposes and within the limits of the exercise of freedom of the press*").

On account of the above, public interest in sporting events allows

the press (i.e., authorized media operators) to invoke a right of free access to the venues where, for example, football games are held and a right to the press coverage thereof.

However, statutory provisions that declare such principle do not define its contents and scope. Theoretically, the right to information compared to the right of marketing of sporting events have different context and fields of exercise. In practice, it is disputable where one should place the threshold at which the right to information crosses the line of free speech into commercialization and entertainment.

It is of course no secret that news organizations are businesses as are football clubs and that, to this extent, they are commercial competitors in the broadcasting market. The business of media operators is to broadcast news on sporting events under the umbrella of public interest and the right to information, which collides with the clubs' aspirations to exclusively own and control the goodwill generated by the same sporting events. This obviously causes hostility between the right to information of the press, on one side, and the right of the owner or licensee thereof to fully exploit their media property, on the other.

As previously explained, the focal question is to define the limits of the media's free access to and press coverage of sports events in order to reconcile public interest to information with the clubs' and Leagues' right to enjoy the economic benefits of their business activity and investment. As such limits are not circumscribed by statute and not clearly defined by the Italian jurisprudence, the Football League has thus far been issuing internal regulations which, upon the media representatives' endorsement, supplied rather detailed guidelines for television and radio broadcasting.

Today, the Melandri Decree has finally provided a statutory definition of the right to information.

Even if the Decree 9/2008 only expressly applies to professional team sports (i.e. soccer and basketball), its provisions regarding the right to information will be considered influential and authoritative guidelines for other sports.

However, an analysis of the new rules introduced with regards to the right to information will show that the new discipline is not exhaustive. In fact, the Decree requires a specific implementation of its general provisions through regulations issued by the Communication Authority<sup>34</sup>, which have not yet been issued at the time this article is being written. Therefore, our analysis must be read bearing in mind that a relevant piece of the puzzle is currently missing.

### 6.2 The right of information in the Melandri decree

The relevant provisions for our analysis of the Melandri Decree are set forth under art. 5, which is entitled "right of information".

In its initial sentences, art. 5 basically reaffirm commonly acknowledged principles.

Section 5.1 states that media operators have the right to report to the public about the single matches of the competition.

Section 5.2, after stating that "*the exercise of the right of information may not prejudice the normal exploitation of the media rights by the licensee of the same, nor cause unfair prejudice to the interests of the competition or event organizer*", clarifies that the bare communication to the public whether orally or written including in real time, of the result of the game or of updates thereof, in no case may represent a prejudice to the full exercise of broadcasting rights. This principle, too, was well consolidated prior to D. Lgs 9/2008.

More substantial provisions are provided under Section 5.3, defining the extent to which the broadcasting of images of the games must be held as information. The Decree affirms more or less the rules contained in the regulations issued by the Football League. Obviously, the statutory regulations prevail and any inconsistent League provisions are replaced or voided thereby (e.g. former limits for the duration of highlights have been slightly increased).

The broadcasting of match highlights is allowed provided that:

- it takes place within news reports;
- it takes place no less than three hours and no more than forty-eight hours after the end of the match;
- each highlights broadcast does not exceed eight minutes for each

<sup>34</sup> The Communications Regulatory Authority (Autorità per la Garanzia delle Comunicazioni, or Agcom) is an independent authority, established by Law no. 249 of 31st July 1997. Agcom is first and foremost a "guarantor". The two

main tasks assigned to it by Law no. 249 are to ensure equitable conditions for fair competition and to protect the fundamental rights of all citizens in the telecommunications, broadcasting and audiovisuals markets.

day of the Championship with a maximum of four minutes per calendar day and a limit of three minutes per game.

As long as media operators respect these rules, they must be held as acting within the scope of the fundamental right to information.

As mentioned above, this discipline represents a minimal framework, and requires implementation by regulations from the Communication Authority. However, this is not the only reason why the Melandri Decree itself does not respond to all possible questions.

In fact, one could have expected a clear definition of the right of information on one side and of marketing on the other, so as to guide the interpreters through any dispute. Instead, the Legislator simply confirmed well-known principles and listed some specific, individual cases that fall into the scope of one category (the right to information) or of the other (marketing).

Such legislative style avoids the nebulous divide between information and commercial exploitation: out of the scope of listed cases, no criteria or definitions are provided for in that respect.

Therefore, the related burden will be supposedly left to the Courts, with a case-by-case approach, unless more clarity will be provided by the AGCOM<sup>35</sup>.

It is, however, difficult to characterize this as a missed opportunity for our Legislature. Arguably, flexibility might be the most suitable option in a growing and developing area such as media and communications. A practical application of this principle has been experienced at the beginning of this century in relation to well-publicized disputes involving Serie A mobile telephone broadcasting via UMTS and MMS technology.

### 6.3 Freedom of the press and telephone broadcasting rights

At the beginning of 2000, the Courts had already expressed their opinion about matches being shown via *videos* displayed on mobile phones. In that respect, it was held that freedom of the press was not fostered by the transmission of videos of the games and that only the clubs themselves or their legitimate licensees were entitled to transmit them. The same conclusion was reached for the so-called *slideshows* (sequences of photos).

However the practice of transmitting *individual photos* on mobile phones had not been directly considered at that time. Related legal quarrels started in 2003, when the Italian mobile telephone company Telecom Italia Mobile and the news agency Ansa were sued in a series of legal disputes concerning the practice of transmitting football match highlights on mobile telephones without having been licensed by the football clubs, nor having paid any fee, but simply relying on the right to information, in keeping with the old adage that one picture is worth a thousand words.

Obviously this practice was hotly opposed by the clubs and by other entities, such as the rival telephone company and sports agencies, which had paid considerable amounts in order to obtain a license to broadcast images and videos through mobile telephones. The legal claims thus sought to protect the financial advantages deriving from exclusive economic utilisation of a sporting event.

In brief, the point was: should the unauthorized transmission of individual pictures of a game be allowed as an exercise of the freedom of the press?

The case law responses to this question were not univocal.

In the first instance, with an order issued on 29th March 2003<sup>36</sup>, concerning the dispute between AC Milan, Juventus FC, as legal owners of the rights to their home matches, joined by H3G (the

exclusive licensee of the right to transmit photos and footage of the domestic games) against TIM (Telecom Italia Mobile), the Court of Rome prohibited TIM from broadcasting photos of goals and video highlights during the games.

The Court recognised football clubs as exclusive owners of the broadcasting rights based on the premise that a sporting event is the product of the economic activity of a business enterprise and that article 41 of the Italian Constitution, in guaranteeing the freedom of economic endeavour, also implies protection of the business investments and the results thereof<sup>37</sup>. Accordingly, any exploitation of such rights by third parties without previous authorization from the holders of the rights was held unlawful.

In its reasoning the Court noted that sporting competitions produce events which generate great public interest and that information about them should be available on TV, Radio, Internet and any other media, including mobile phone technology. This is indeed an exercise of the freedom of expression and related freedom of the press under article 21 of the Italian Constitution. However, the constitutional right to be informed cannot be abused in order to justify the exploitation of a sporting event by interlopers who are not investing in the business. The right to be freely informed should be satisfied by reporting the development of the event to the public and does not entail the private broadcasting and transmission of live spectacular images and highlights.

Again, the distinction between entertainment and information is crucial and malleable. The Court declared that even *still images* of a game if transmitted and viewed before the relevant game is over could be spectacular and thus constitute entertainment. Such transmission diminishes the exclusivity of possessing the goodwill generated by the event.

However, this reasoning did not pass muster in the following similar cases.

In an interlocutory order rendered only a few months after, the Court of Milan<sup>38</sup> started from the same premise and came to a contrary conclusion. The judge decided to allow TIM to transmit *live still images* of the games, notwithstanding the fact that MP Web, to whom the relevant broadcasting rights had been sold by A.C. Parma, had not sub-licensed its rights, which were in fact part of the package sub-licensed to TIM's competitor H3G.

According to the Court of Milan, football events are a source of great interest for the public and any information concerning them represent real news, which may be broadcasted by virtue of the principle of the freedom of the press. Such news, which shall be transmitted exclusively for information purposes, may also include *still pictures* capturing a certain instant of the event, as long as this reporting activity is not entertaining *to the point of completely satisfying the spectator's desire to watch the sports show instead of other programmes*. This *satisfaction* would, indeed, allow the alleged information activity to compete with the clubs' licensees<sup>39</sup>.

The Court of Milan concluded that the *live* transmission of a photo representing a goal would not exhaust a spectator's interest to watch the football match, or even part of it. This ruling stressed the fragmented and disjointed characteristics of a still picture when compared to the representation of an entire playing action. According to the Milanese judge, the transmission of a picture may even stimulate the spectator to search for a more detailed and complete vision of the event in hand, the same way a brief piece of news would encourage the reader or the spectator to find out more about the event by reading other articles or exploring other sources of information.

Moreover, this reasoning would apply to live broadcasting of the image, should that be technically possible, because the freedom of the press, according to the Court, does not admit any temporal limitations to the circulation and broadcasting of the news.

This view, founding the interim decision in 2003, has been wholly confirmed by the final judgment rendered on January 5th 2006.

First of all, the judge upheld the principle according to which still images of the game do not fulfil the spectator's need to watch the game, but actually stimulate it. Consequently, it has been argued that by sending still images via MMS (*rectius*: carrying pictures taken by Ansa), Telecom does not provide entertainment, but information.

35 See prior footnote

36 Tribunale di Roma, 29th March 2003, Juventus FC, AC Milan SpA and H3G SpA v. TIM Telecom Italia Mobile and Ansa.

37 Such statements were in line with the legal definition of broadcasting rights prior to the Melandri Reform, as reported under previous par. 1.2. Today, according to the Melandri Decree, clubs

are only joint-owners of media rights. See par. 2 above.

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

39 The same line of reasoning had been followed by Corte d'Appello di Roma, Decision of 10.11.1980.



Therefore, as still images are a means to circulate news, within the limits stated above, licensing agreements between football clubs and companies concerning transmission of match images may not restrain such right of information.

The Court of Milan underlined that TIM provided the MMS service using images shot by Ansa, i.e. by a press agency, which is granted access to the Serie A stadium and authorization to take photos. What is of interest is that the Court reaffirmed the principle, which had

already been expressed in other judgements, that “*the purposes of information must be reached through legitimate informative sources*”. In short, only authorized press reporters can access the venues where the sporting event is held to collect information. Therefore, authorised reporters can send photos to telephone companies in just the same way as they normally do to the newspapers they work for. Telephone companies can in turn render such photos available to the public in real time.

*The International Sports Law Journal*

# TV Rights in Japan

by Yoshimi Ohara and Eriko Watanabe\*

## 1. What Are TV Broadcasting Rights And How Are They Protected In Japan

Japan is no exception when it comes to the increasingly lucrative and expensive nature of the business of granting rights to film live sports events and broadcast such events live or delayed (commonly referred to as TV broadcasting rights). The expectation of the audience that it have access to live footage, and the popularity of sports events in the modern era, has made sponsorship of and advertising during broadcasting of such sports events very attractive. Free to air television companies have been able to sell advertising time at premiums that would have previously been unfathomable. Paid TV companies that are able to secure exclusive rights to live broadcasts of such sports events are also able to lure a greater number of subscribers. The potential money to be made from TV broadcasting rights has thus resulted in an exponential increase in the consideration paid for these TV broadcasting rights over the last few decades. For example, the 18 million Japanese Yen paid for the right to broadcast the Rome Olympics throughout Japan in 1960 pales in comparison with the 12 billion Japanese Yen paid by Japanese broadcasters alone for the TV broadcasting rights for the Sydney Olympics in 2000 and the 5 billion Japanese Yen paid in 2002 for the rights to broadcast the Salt Lake City Winter Olympics.<sup>1</sup> It was the Los Angeles Olympics that saw the first real surge in the price paid for TV broadcasting rights and triggered the formation of Japan consortium, a media consortium between NHK and a number of commercial broadcasting stations aimed at collectively purchasing TV broadcasting rights from the organizers of large international sports events.<sup>2</sup>

### 1.1 TV broadcasting rights

So, what are TV broadcasting rights from the perspective of Japanese law? Sports athletes, teams and leagues own various intellectual prop-

erty rights with respect to their activities, such as trademark in the team's logo, and control other aspects of the team's image such as publicity and likeness of players.<sup>3</sup> However, the sports event itself is not protected by copyright in Japan unless there is some special feature, such as the copyright in the choreography of a figure skater's routine.<sup>4</sup> Granting of TV broadcasting rights is therefore different to granting a license under copyright or other intellectual property rights. Rather, the right to exclusively broadcast a sports event is actually only a contractual right granted by the owner of the right to the broadcaster.

As there is no sui generis statutory protection regime for TV broadcasting rights, such right is secured by the owners of such rights by controlling who is allowed to bring broadcasting equipment into the stadium or other location of such sports event. The exclusivity of these rights is protected by contractual arrangements between TV broadcasters and the sports team itself, the whole league, or association for that sport, depending on TV broadcasting rights arrangements made between the athlete, team, or league, as the case may be.

### 1.2 Copyright protection for distribution of international TV images via satellite

Although the sporting event itself is not protected under copyright, once such event is filmed, such footage can be protected under copyright. In the case of a large sports event, particularly an international one, an organizer of such sports event commonly appoints a host broadcaster that is responsible for preparing so called 'international TV images'. This footage is usually unedited and without commentary and is transmitted via satellite so that authorized broadcasters can edit and add their own commentary and broadcast the sports event, either live or delayed. The organizer will usually require that copyright in the footage be assigned to the organizer by such host broadcaster so that under such copyright the organizer can control which broadcasters have access to the international TV images transmitted by the host broadcasters. Copyright protection of such international TV images was made clear following a decision of the Tokyo High Court.<sup>5</sup> The facts of this case centered on the failure of the defendant to pay withholding tax to the Japanese tax authorities in connection with fees the defendant paid to a sales agent for footage of sports events, such as the US Open golf championship. The issue was whether the fees paid by the defendant to broadcast a live sporting event were regarded as copyright royalties. If so, withholding tax would be payable. However, if the payment was consideration for the granting of a contractual right, no withholding tax would be payable. It was held in this case that international TV images are protected under copyright, provided that such images are simultaneously recorded as they are transmitted via satellite. The court's reasoning was that such filming involves creative activities, such as sophisticated camera work and positioning of the camera, and meets the criteria of fixation by being simultaneously recorded as it is transmitted via satellite, which is one of the requirements for copyrightable film work. The finding of the court was, therefore, that fees paid by the defen-

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<sup>1</sup> *Nikkei Business*, p. 134, February 11, 2002.

<sup>2</sup> In 1996, the Japan Consortium purchased from the IOC TV broadcasting rights for the Olympic games from 2000 till 2008 for USD 545 million. Prof. Osamu Kasai of Chuo University Law School 'Legal issues of Professional Sports', *Japan Sports Law Association Annual*, No. 14 (2007) p. 173.

<sup>3</sup> In the case of baseball, a provision in the Professional Baseball Protocol, which provides that each team acquires the rights with respect to likeness of players for the purpose of advertising, has been broadly interpreted so as to include a right to grant a license to a game creator to use the likeness of players that belong to such team. Tokyo District Court,

August 1, 2006, Vol. 1957 *Hanrei Jiho* pp. 116-151. In the case of football, the J. League Code of Conduct of 2007 states that each athlete does not have a right with respect to likeness, name or images that are broadcasted or reported on the news. It further provides that each athlete is required to cooperate with J. League in its promotional activities for J Club, a J. League association (Art. 97)

<sup>4</sup> Copyright law protects work in which thoughts and sentiments are expressed in a creative way and which fall within the literary, scientific, artistic or musical domain (Article 2, paragraph 1, item 1 of Japan's Copyright Law) and therefore sports in general do not fall within copyrightable work.

<sup>5</sup> Tokyo High Court, September 25, 1997, 1631 *Hanrei Jiho* (1997) pp. 118-140.



dant for use of the international TV images were subject to withholding tax.

### 1.3 Rights held by the league/team and 'licensees'

As noted above, TV broadcasting rights are protected by the owners of such rights by limiting who can bring broadcasting equipment into the stadium. While the technology advances have made broadcasting easier and cheaper, this has also increased the ability for the general spectators to record, upload and publish footage and images taken by such individuals at a sporting event. One approach that has been discussed to limit such general spectator recording is to provide on the entry ticket that filming and photo taking are prohibited and enforcing such prohibition against spectators.<sup>6</sup> However, some scholars have questioned the enforceability of such prohibition and this issue has not yet been examined by the courts in Japan.

The 'licensees' of these exclusive contractual rights have even more limited recourse against those unauthorized to obtain footage and images of the relevant sports event, as the right to broadcast is purely contractual in nature and is only enforceable against the other parties to the contract. A licensee will not have any right to seek an injunction at all and even damages against an unauthorized broadcaster of the sports event, who is not a party to the TV broadcasting rights contract, can only be granted in limited circumstances, such as where there is tortious interference of contract arising from an unauthorized broadcaster knowingly interfering with the licensee's exclusive right to broadcast the event. In the case of interference of an exclusive license to TV broadcasting rights, unlike other tortious interference of contract cases, it may be relatively easy for an exclusive licensee to assert and prove the tort claims as the identity of the holder of an exclusive TV broadcasting right would be relatively widely known; however, proving damage sustained by such licensee remains a challenge. As noted above, injunctive relief, which is critical in these kinds of disputes, is not available even when an exclusive licensee successfully makes a tortious interference case as generally speaking Japanese law does not afford injunctive relief in tort cases.

## 2. Who Owns TV Broadcasting Rights and How Are They Exploited in Japan

The ownership of TV broadcasting rights in Japan varies depending on the sport.

### 2.1 J-League (football)

Japan's professional football association, J-League, provides in its code of conduct that a right to public transmission, including but not limited to television and radio/audio broadcasting rights and Internet rights, of all official J-League games are owned and controlled by J-League. It is therefore J-League that will be a party to the contract with the broadcaster.

### 2.2 Japanese baseball

Japan's baseball league, Nippon Professional Baseball, provides in its Professional Baseball Protocol that each team has the right to grant broadcasting rights by television, cable or Internet with respect to that team's home games.<sup>7</sup> In this way, each baseball team retains the TV broadcasting rights. In most cases, therefore, each team enters into a separate contract with a TV broadcaster.<sup>8</sup>

## 3. Collective Selling

In Japan, collective sales of broadcasting rights under antimonopoly law has rarely been discussed among scholars and there are no judicial precedents or previous administrative determinations. The following provides a general explanation of the Antimonopoly Law of Japan and likely antimonopoly implications of collective sales in Japan.

### 3.1 Applicable regulation

#### 3.1.1 Prohibitions under the Antimonopoly Law

The Antimonopoly Law, the competition legislation in Japan, prohibits, in essence, three general types of activities: private monopolization, unreasonable restraints of trade, and unfair trade practices.

Moreover, business concentration that may substantially restrain competition in a particular field of trade (i.e., the relevant market) in Japan or that involves unfair trade practices is prohibited under the Antimonopoly Law.

#### 3.1.2 Private monopolization

Engaging in conduct which excludes or controls the business activities of other entrepreneurs and which substantially restrains competition in a particular field of trade (i.e., the relevant market) constitutes private monopolization prohibited under the Antimonopoly Law (Art. 3, earlier part). In short, private monopolization means the abuse of economic power by a powerful entrepreneur which excludes or controls the business activities of other entrepreneurs.

#### 3.1.3 Unreasonable restraint of trade

Under the Antimonopoly Law, an agreement or understanding among competitors that substantially restrains competition in a particular field of trade (i.e., the relevant market) is prohibited as an unreasonable restraint of trade (Art. 3, latter part).

#### 3.1.4 Unfair trade practices

Article 19 of the Antimonopoly Law also prohibits unfair trade practices, i.e., conduct which is designated by the Fair Trade Commission of Japan (JFTC), the competition authority of Japan, in its notification ('Designation of Unfair Trade Practices' dated June 18, 1982; 'General Designation') as those that tend to impede fair competition. Unfair trade practices include, among other things, collective boycotts, exclusive dealing arrangements and tie-in sales.

#### 3.1.5 Approach of analysis under the Antimonopoly Law

##### 3.1.5.1 Applicable prohibitions under the Antimonopoly Law

Collective sales/joint sales of broadcasting rights (i.e., broadcasting programs) involves two major aspects from the Antimonopoly Law perspective. One is the antitrust analysis of private monopolization or unreasonable restraint of trade. Namely, if a single entity such as an association or a company in charge of a license and/or management of the broadcasting rights of sport teams has significant market power through the control of such rights, the issue is likely to be examined under the Antimonopoly Law as a private monopolization.<sup>9</sup> Moreover, if multiple significant entrepreneurs (e.g., sport teams), which have market power over the relevant market desire to conduct collective/joint sales on a contract basis, such conduct is likely to be examined as an unreasonable restraint of trade.

The other aspect is tie-in sales (i.e., unfair trade practices) where multiple broadcasting programs are sold as a package rather than making each program available individually.

##### 3.1.5.2 Article 21 of the Antimonopoly Law

While Article 21 of the Antimonopoly Law provides that the provisions of the Antimonopoly Law do not apply to activities recognized as an exercise of rights under the Patent Law, Utility Model Law, Design Law, or Trademark Law, according to the Guidelines for the Use of Intellectual Property under the Antimonopoly Law, the JFTC explicitly confirms its interpretation of Article 21 of the Antimonopoly Law that those activities that are not deemed to be a proper exercise of such rights, taking account of the purpose and effects thereof, may contravene the provisions relating to private monopolization, unreasonable restraints of trade, or unfair business practices.<sup>10</sup> The JFTC has repeatedly stated at every opportunity, based on this interpretation, that Article 21 may not be an excuse

6 J. League prohibits spectators from (i) taking photos or video footage of the games for commercial use and (ii) uploading via the internet or transmitting via other media photos, video, or audio of the games.

7 Professional Baseball Protocol 2007, Art. 44.

8 In the case of the most popular baseball

team in Japan, Yomiuri Newspaper Inc. acquired exclusive broadcasting rights from the 'Yomiuri' Giants team and therefore TV broadcasters enter into TV broadcasting license contracts with Yomiuri Newspaper Inc. directly.

9 Such conduct by multiple firms may also constitute private monopolization under the Antimonopoly Law.

where intended anticompetitive effects are foreseeable. Moreover, it seems that there are no strong objections by academic scholars against this interpretation of Article 21 of the Antimonopoly Law by the JFTC.

The issue of broadcasting rights will therefore be analyzed and determined under the applicable provisions of the Antimonopoly Law, while the nature and practices of the 'broadcasting rights' should be taken into account at each step and each aspect of the antitrust analysis.

### 3.1.5.3 Market definitions

The Merger Guidelines take an approach in defining the relevant market (both product market and geographic market) and analyzing that market which is similar to (but not identical to) the merger guidelines and practices of other jurisdictions, in using the SNIP test or a variation thereof (i.e., interchangeability of products/services such as function, purpose of use, and price of the products/services from the customers' view point).<sup>11</sup>

While, to our knowledge, there are no determinations made public by the JFTC nor court precedents addressing the definition of the relevant market for broadcasting rights in Japan, the product/service market may be defined according to the category of programs primarily focusing on the users' perceptions, such as sport game programs or possibly even narrower categories, such as baseball or football based on the perception of the audience.

### 3.1.6 Collective/joint sales by a single entity

If a single entity, such as an association (or a company in charge of a license and/or management of the broadcasting rights to be held by sport teams, if no right allocation arrangement is made), has significant market power through the control of such rights, the issue is likely to be examined under the Antimonopoly Law as a private monopolization. Namely, if collective sales of broadcasting rights 'excludes' or 'controls' others' businesses, which is determined by examining the purposes and effects of the conduct on a case-by-case basis, such collective sales are prohibited as a private monopolization.<sup>12</sup> However, a detailed analysis on a case-by-case basis is required with regard to both the anti-competitive effects and the pro-competitive effects, such as creation of 'a new packaged product', which is able to become available to the public because, for example, contracts and negotiations with each team individually is too troublesome and time consuming and such arrangement is essential to make those TV rights practically accessible by companies which desires to seek the license of such rights.

While, to our knowledge, there have been no precedents involving the collective sales of broadcasting rights in Japan to date, the JFTC has held that collective sales in a case involving a patent license may violate the Antimonopoly Law. In the given case, Company

X and nine other companies engaged in the manufacture of pachinko game machines and Association Y had a patent and other rights relating to the manufacture of pachinko machines. In the given circumstances, it was difficult to manufacture any such machines

without obtaining a license from such companies and the Association. The ten firms entrusted the management of such patent and other rights to Association Y, and Association Y managed such entrusted rights and its own rights and accordingly made it difficult for any other entity to enter the market by refusing to grant licenses. The JFTC condemned such scheme as a private monopolization prohibited under Article 3 (earlier part) of the Antimonopoly Law.<sup>13</sup> Moreover, the JFTC determined that such refusal to grant a license is not exempted from the application of Antimonopoly Law irrespective of Article 21 of the Antimonopoly Law.

### 3.1.7 Collective/joint sales by multiple entrepreneurs

Collective/joint sales by a newly incorporated company to be jointly owned are subject to the prohibitions of the Antimonopoly Law as a business concentration at the time of incorporation thereof. Namely, if such joint ownership by a newly incorporated company leads to a business concentration such as a voting right acquisition or business transfer to an entity from multiple entrepreneurs, the issue here is, in principle, whether the incorporation of such company and the collective/joint sales through such a company may substantially restrain competition in the relevant market, and will be examined under the provisions for business concentration (e.g., Art. 10 or 16 of the Antimonopoly Law). If the answer is yes, the given collective/joint sales are prohibited under the Antimonopoly Law.

The analysis with respect to business concentrations is to be made in accordance with the 'Guidelines to application of the Antimonopoly Law concerning review of business combinations' published on March 28, 2007 (the 'Merger Guidelines'). The purpose and effects (e.g., efficiencies to be achieved through collective sales such as the increased coverage of games) will be taken into account when conducting the antitrust analysis.

On the other hand, if a collective/joint sale is made as a business alliance on a contract basis, the analysis should be made under Article 3 of the Antimonopoly Law as an unreasonable restraint of trade. Namely, a business alliance among competitors (e.g., broadcasting companies or sport teams) that substantially restrains competition in a particular field of trade (i.e., the relevant market) is prohibited under Article 3 of the Antimonopoly Law. Such business alliance is subject to the 'rule of reason' analysis, and the factors provided in the Merger Guidelines<sup>14</sup> should also be used for the analysis of such a business alliance, so long as such alliance does not fall under the definition of a cartel and such alliance results in the concentration of business to some extent.

In any event, as with the discussion for private monopolization, detailed analysis on a case-by-case basis with regard to both of the anti-competitive effects and pro-competitive effects is essential.

### 3.1.8 Collective/joint sales as a package

#### 3.1.8.1 Tie-in sales under the Antimonopoly Law

Tie-in sales are defined, in general, as a practice in which a party unjustly causes a counterparty of a transaction to purchase a product/service from itself or from another party, by tying such product/ser-

<sup>10</sup> The Guidelines for the Use of Intellectual Property provide that certain restrictions by a right holder placed on a technology such as refusal to grant a license or the filing of a lawsuit to seek an injunction against any unlicensed firm using the technology are usually considered proper exercise of rights and should not be problematic under the Antimonopoly Law. However, if any such restriction is found to deviate from the legitimate purposes of the intellectual property law regime and has an adverse impact on competition, it will not be recognized as a proper exercise of rights, and may constitute a private monopolization if it substantially restrains competition in a particular field of trade.

<sup>11</sup> As with the antitrust laws/competition

laws in other jurisdictions, the Merger Guidelines provide, and the JFTC takes the approach that, in general, the relevant market should be defined on a case-by-case basis. However, the Merger Guidelines explicitly provide that the relevant product/service market is determined from the standpoint that the products in question are the same in terms of their function and purpose of use from the customers' viewpoint; and the factors to be primarily taken into account are (a) the purpose of use (application), (b) movements of price and volume, and (c) customers' perception and behavior.

<sup>12</sup> Essential facilities doctrine has been discussed in Japan but not yet discussed in court decisions or previous JFTC determinations. We are of the impression that

if broadcasting rights are collectively sold with no available alternatives, the essential facility doctrine may also be relevant to the discussion under the Antimonopoly Law, if the licensing arrangement is likely to create a bottleneck for a given business.

<sup>13</sup> Fair Trade Commission of Japan, Recommendation Decision No. 5 of 1997 on August 6, 1997.

<sup>14</sup> While the JFTC stated in its report on the economic survey of February 6, 2002, that the JFTC would make public the guidelines for business alliance, no guidelines with regard thereto have been published to date.

<sup>15</sup> In Microsoft Co., Ltd., 45 Shinketsushu 153 (JFTC, December 14, 1998), JFTC issued a cease and desist order against

Microsoft Co., Ltd. (a Japanese subsidiary of Microsoft; 'Microsoft Japan') for its sales activities regarding packaged software products. At that time in Japan, Microsoft's Excel had market power, while Word and Outlook did not. Major manufacturers of personal computers wanted to pre-install Excel onto their PCs. When Microsoft Japan sells its Excel license to these PC manufacturers for pre-installment, Microsoft Japan caused the PC manufacturers to pre-install Word and Outlook, too. As a result of this practice, Microsoft Japan could obtain the largest market share in the word-processing/scheduling software markets. JFTC held this practice to be an illegal tie-in sale.

vice to the supply of another product/service, and is considered a typical unfair trade practice in Japan. The key components of tie-in sales prohibited under the Antimonopoly Law are namely: (i) the practice must be carried out for separate products/services, (ii) the counterparty of the transaction must be 'caused (forced)' to purchase separate products/services, (iii) two (or more) products/services must be tied, and (iv) such practice must be unjustifiable.

### 3.1.8.2 Packaged sales and tie-in sales

Assuming that each program in the package is a separate product and that each program of the package includes at least one product with market power and at least one program without market power, problems may arise with respect to whether the customers who desire to purchase the program with respect to which the selling party has market power would be caused or forced, as a matter of practice, to purchase the package including the other program in which the selling party does not have market power.<sup>15</sup>

Generally speaking, however, if the purchaser has a chance to purchase the product separately, such packaged sale does not, in principle, constitute a tie-in sale prohibited under the Antimonopoly Law. However, even if each stand alone program is not available to customers for separate purchase, it should not be easily concluded that the sales of such suites cause/force customers to purchase certain programs included in the package, thereby constituting tie-in sales defined under the General Designation.

Namely, every packaged sale does not necessarily equate to an illegal tie-in. It can be understood that the packaged programs are convenient and beneficial to a customer, as packaged programs allow customers to purchase 'new products' which are closely related. Further, it is possible to conclude that the packaged sale creates a new product market if only a bulk sale, as a matter of practice, makes sales and purchases actually possible given the combination of a wide range of programs.

The International Sports Law Journal

# TV Rights in Turkey

by Özgerhan Tolunay, Şermin Tekinalp and Cem Çetin\*

## 1. Introduction

### 1.1. Sports policy and football in Turkey: a general outlook

1.1.1 Article 59 of the Turkish Constitution enacted in 1982 states that (free translation) 'The state shall take measures to develop the physical and mental health of Turkish citizens of all ages and encourage the spread of sports among the masses. The state shall protect successful athletes.' Although there is a constitutional article on sports explicitly stating the importance of sports, it is a reality that sports have not yet achieved the desired level in Turkey. On the other hand, Turkey is one of the few countries in the world which shows the State's responsibility for sport. In Turkey, sport is encouraged and supported by the State and sports clubs are given financial aid for this purpose. However, the main aim of the state is to increase the number of athletes and achieve superior success in international sports competitions. Until recently, large sports facilities and investments in Turkey were largely realised by the state. Following a considerable increase in the number of sports facilities of sports clubs and private organisations, however, sponsorship and sports marketing became popular in accordance with the industrialised sports agenda. The highest sport organisation of the State in Turkey is the General Directorate of Youth and Sport (GSGM) annexed to the Prime Ministry, which was established in 1938. Referees, provincial representatives, coaches and observers with the appointed personnel undertake voluntary duties in the organisation. Within the structure of the General Directorate, there are currently 37 separate federations, including the Turkish Football Federation (TFF) which became autonomous in 1992. This is the governing body of football in Turkey. The federation joined FIFA in 1923 and UEFA in 1962. The most important goal of the General Directorate of Youth and Sports is to ensure that citizens of all ages engage in sports for the development of their physical and mental health, support disabled citizens and encourage the state to become involved in sports. Despite all these written aims, the general image presented by the printed and audio-visual media is that the biggest and most important sport activity is football. Football has been the greatest source of entertainment for large masses.

1.1.2 The number of active sportsmen and women does not correspond with the encouraging context in the Constitution. According to the data provided by GSGM, there are two hundred thousand active sportsmen and women. There are two numerical statistical results on this issue in Turkey: the number of active sportsmen and the number of the licensed sportsmen. The data that shows the current situation is the real number of active sportsmen. Nevertheless, the data related to licensed sportsmen does not reflect reality as anyone can easily acquire a licence in Turkey. This fact can also be seen in the official data of the General Directorate of Youth and Sport. According to this data, the total number of active sportsmen is about 220,000, whereas the number of licensed sportsmen is registered as 2 million. The rise in the number of licensed sportsmen is notable especially within the last two to three years. The number of licensed sportsmen was below 1 million only two to three years ago. Sports services and activities in Turkey are carried out under the framework of Law No. 3289 dated 21 May 1986 by the General Directorate of Youth and Sport. The General Directorate of Youth and Sport, which is annexed to the Prime Ministry, is the main organisation responsible for Turkish sports. In the provinces, the General Directorate of Youth and Sport is organised at provincial directorate level as Provincial Directorate of Youth and Sport under the chairmanship of the Governors. In the Provincial Directorates, there are 'Province Directors' appointed by the Central Management and also Directors of Youth Services, Sport, Administrative and Financial Affairs and Facilities and Operating Departments under the Province Director.

1.1.3 Sports federations in Turkey are established and organised in accordance with law No. 3289 on the duties and organisation of the General Directorate of Youth and Sport. They are the most authorised official organisations in their branches. There are 57 sports federations in Turkey, all of which are autonomous. However, only the Football Federation has its own Court of Arbitration despite the autonomous structures of these federations.<sup>1</sup> These federations are affiliated to the Court of Arbitration of the General Directorate of Youth and Sport. Nevertheless, one wonders to what extent all sports federations, except the Football Federation, are autonomous.

1.1.4 The Turkish Football Federation obtained its autonomy by virtue of law no. 3461 enacted in 1988. Law no. 3461 became invalid and inoperative upon the enactment of Law No. 3183 which came into effect on 17 June 1992. The duties and organisation of the Turkish

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1 Cetin, Cem, 'Havuz Degil Felaket', Futbol Ektra, July 2005, p. 44.

Football Association were reorganised under Law No. 3183. The Turkish Football Association consists of three organisations pursuant to Law No. 3183: 'Central Management', 'Domestic Management' and 'International Management'. Central Management consists of ten departments: 1) General Assembly (Congress), 2) Presidency, 3) Board of Directors, 4) Auditing Committee, 5) Court of Arbitration, 6) Central Referees Committee, 7) Disciplinary Committees, 8) Mediation Committee, 9) Subsidiary Committees, 10) Administrative Departments. The duties and tasks of these committees are described in Law No. 3183.

### 1.2. A brief history of Turkish football

1.2.1 Turkish football has an interesting history. As the Ottoman Empire did not allow organised football, it was first introduced to Turks living in the Ottoman city Selanik (now Thessaloniki) by some Englishmen in 1875. It is also known that the game was played in the meadows of Bornova, Ismir, in 1877. Some Englishmen brought football to Istanbul with them when they left Ismir in 1895. The first Turkish team played football in 1901 with an English name 'Black Stockings'. However the police interrupted the team's first game when they lost 5-1 and arrested any players they could catch. After the foundation of the Turkish Republic, football became a major sport. The first Turkish national team match was played on 26 October 1923, ending in a 2-2 draw with the Romanian National Football Team. The first professional Football League began in Istanbul in 1959. Only four clubs - Kadykoy FC, Moda FC, Elpis and Imagine FC - participated in this League. Until the early 1980s, football clubs were mainly social rather than commercial institutions. They were privately owned by the local community, sometimes aimed at a sense of superiority or just a hobby. Two factors have driven a transformation in the structure and operation of the clubs.

1.2.2 The opening up of this previously closed sector to market forces and the effective governmental regulatory intervention. The influence of the market has been critically felt through the ascension of televised football (and professional sport generally) to the role of key software in the battle for viewers in the burgeoning multi-channel TV and related media industry. This has dramatically increased the financial value of football clubs. Rich football clubs have been the targets of wealthy businessmen as centres of power and fame. As their missions and statues were not very precisely defined or followed strictly, it has always been thought that once one became president of a sports club, one could influence economic and political centres. By 2004, there were 4,956 football clubs; 4,775 professional and 136,823 amateur players. 796 male and 20 female referees were licensed by the TFF.

### 1.3 A brief history of the Turkish sports media

1.3.1 In the early 1990s, the first privately owned television station started broadcasting to Turkey via satellite from the Federal Republic of Germany. Private entrepreneurs started investing in the electronic media sector and began turning into media conglomerates. On 8 August 1993, Parliament amended the Constitution, lifting the State monopoly on radio and television broadcasting. Today, eight cross-media groups dominate Turkey's media arena. Of these the 'Big Four' - Dogan, Merkez, Cukurova and Star - control approximately 80 percent of the market, with Dogan and Merkez the strongest players. Television in Turkey has become a big industry over the past decade. The commercial broadcasting scene in Turkey is overcrowded and there are more channels than the relatively small advertising expenditure can sustain. The strict legal provisions on ownership have proved to be inefficient. The interplay of politics, the economy and the media have led to the use of broadcasting as political or economic muscle.<sup>2</sup> The broadcasting of football matches is a political and economic issue of the media as well as sport.

1.3.2 Through entertainment programmes, television attracts wide audiences and generates many new revenue flows from direct advertisers and advertising agencies. Sports programmes are important revenue increasing devices for the commercial channels. Therefore, this globalisation of sports through the increased coverage of sporting events (particularly football) and the subsequent rise in viewing figures achieved by the sports industry, thus creating new and ever growing revenue flows, is key to the growth of a new and exciting business culture. Thus, the popularisation and prevalence of sports (primarily football) and its becoming an important industrial sector is no coincidence. Television attracts well-known brands such as Adidas, Canon, Gillette, Snickers, Coca-Cola, McDonalds and Ford which invest millions of dollars in sponsoring well-known, leading sports teams. This kind of commercialisation of sport affects the content of sports (mainly football). Instead of serious sports events and sports documentaries, magazine-based sports programmes fill the airwaves. Media's regular coverage includes season and big game previews, pre-game analysis and interviews, post-game analysis and interviews and pro- files of well-known players, coaches and others who influence the world of sports. In research conducted on four sports newspapers, Fanatik, which claims to be the market leader, disclosed very striking results about the presentation and distribution of sports news. The researchers chose a random day (Monday, 27 May 2006) and analysed Fanatik contents. More than half of the content (including TV pages, crossword, horseracing results and other sports activities like tennis, archery, yachting or equestrianism) was filled with football news. Compare the coverage when other sports enjoy more success or when the Efes Pilsen Basketball Team took on Stefanel Korac Cup in March. Only one of the sports news dailies, Taraf, led with the story on its front page. Football is king among the TV channels as well as papers. The major commercial channels virtually ignore other sports and only the government's TRT 3 does much for those with minority sporting interests. Broadcasting national sports is one of the most influential national rituals within which media operates. Some intellectuals criticise this kind of popularisation of football because it arouses rough nationalist sentiments among the public by intensifying and popularising male violence and promotes sports as a hobby and entertainment 'only for men'. The language used by the media and by fans in the stadium reflects male sexuality, masculine violence and wild nationalist terminology.

## 2. Sale of right to broadcast Turkish professional Football

### 2.1 Current commercial situation: pooling system

2.1.1 The football industry is not only shaped by the official bodies but also increasingly by stakeholders, including: supporters, local communities, sponsors, broadcasters, local authorities, national and international political institutions, players and even players' agents. The influence of supporters' trusts is growing at club level. A survey in England of supporters' trusts found that only 6 percent had links with community groups, although 20 percent had links with either social or mutual groups. Similarly, only 10 percent and 29 percent had links with ethnic minority groups and disabled groups respectively. Football clubs can bring benefits to local communities, providing both employment opportunities and revenue. However, research indicates that attaining these benefits requires strategic planning and networking by trusts. Achieving these benefits therefore requires resources and support in the form of sector-specific expertise and training. Clubs can be catalysts for social inclusion and community-based initiatives, for example, through their work in the Football in the Community Scheme. One of the features of football that distinguishes it from other industries is the supply of matches as a product of the individual clubs. This raises a number of questions about the organisation and various aspects of the current system of league organisation and regulation. We have to consider how television broadcasting of league matches is organised. Firstly, we have to shed some light on the motives for revenue-sharing within football leagues. Revenue-sharing is important for understanding why leading clubs find it in their interest to redistribute income to lagging clubs. Secondly, we have to consider the likely effects of moving from a sys-

<sup>2</sup> Tekinalp, Sermin, Prof., Camera Obscuradan Synopticona Radyo ve Televizyon, İstanbul, 2003.



tem of collective league bargaining to clubs broadcasting their matches individually. And we have to consider how the matches are owned and controlled by a broadcasting company.

2.1.2 According to Articles 29, 2(b), 10(j) of Law No. 3813 enacted on 17 June 1992, pertaining to the Regulation of Broadcasting, the Board of Directors of the Turkish Football Association is exclusively authorised to broadcast football matches on television, radio and by means of all kinds of technical devices and similar equipment, to regulate and programme such broadcasting (see also Art. 68 of the Statutes of TFF Governing the Application of the Law). While exercising this authority, the Board of Directors gives priority to the interests of the Turkish football teams and the Association. It is stated that the basis and procedures to be applied in broadcasting and the sanctions to be imposed on the broadcasting operators and the football clubs are determined by the Broadcasting Regulation that will be issued by the Board of Directors of the Turkish Football Association. Throughout this process, the broadcasting revenues are distributed to the clubs by the Turkish Football Association on the basis set out by the Board of Directors of the Association. In Turkey, broadcasting is distributed according to the pooling system. This pooling system has been effective since the mid 1990s. However, it cannot be argued that this system has been handled in accordance with its purpose.<sup>3</sup> In the pooling system, the League is deemed to be a product and the pooling system concept is based on increasing competition among the football clubs. To obtain the desired results in such a system, however, revenue obtained from television broadcasting should be distributed in accordance with the principles of equity as far as possible. The Turkish pooling system served as a model which provided some advantages for four well-known teams (Fenerbahçe, Galatasaray, Beşiktaş and Trabzonspor) until it was amended on 2005. It should be emphasised that the Broadcasting Regulation of the football matches (enacted on 18 August 2005) forms the basis of this system. The last version of this regulation dates from 16 August 2007. As we know, it finds its legal base in the Law No. 3813 and the Statutes of the TFF. This regulation gives details of the broadcasting of all football matches (official or not) by television, radio and all other means of broadcasting (Art. 1). It also regulates broadcastings from and to foreign countries (Arts. 5, 12, 14, 15, 16). According to Article 6(a), the system referred to in this study only applies to the football games in the premier professional leagues and the one below it. (Our study will therefore be limited to this aspect). The matches of the Turkish national team and the Turkish Football Cup are exclusively reserved for the TFF which organises their broadcasting freely (Art. 8). In addition, the elimination matches can be sold by the two clubs concerned, by paying a share with the TFF (Art. 11). They are not included in the pooling system. The regulation applies UEFA and FIFA rules on this subject. The rules of Law No. 3984 pertaining to Radio and Television also apply here, in particular to advertising.

## 2.2. Some comments relating to the figures of this 'pooling system': revenue-sharing from the sale of rights to broadcast in Turkish professional football

We can distinguish three periods: Between 1996-2004 After the introduction of the Pooling System, a total of USD 760 million were distributed to football clubs between 1996 and 2004. 357 million dollars of this were shared among Fenerbahçe (96.8), Galatasaray (96.4), Beşiktaş (95.1) and Trabzonspor (74.5) respectively while the remaining 403 million dollars were shared by 29 different football clubs.

Looking at the table, we can see that during the 2004-2005 season, the four large clubs acquired 50 percent of the income. In 2005 a new law was introduced, presenting the following situation:

Situation since 2005

This unfair distribution system was changed by the resolution of the Board of the Turkish Football Association on 5 July 2005. In the new Pooling System, revenue from television broadcasting is distributed among the football clubs under two main headings: 'Performance Share' and 'Participation Share'.

## Season 2004-2005

Clubs	Revenue	Parts
Fenerbahçe	17,472,974	13.25%
Trabzonspor	13,516,829	10.25%
Galatasaray	17,472,974	13.25%
Beşiktaş	17,472,974	13.25%
G. Birliği	6,068,595	4.60%
Denizlispor	5,089,064	3.86%
Ankaraspor	4,434,460	3.36%
Konyaspor	4,590,010	3.48%
Gaziantep	5,112,829	3.88%
Rizespor	4,646,613	3.52%
Malatyaspor	4,646,613	3.52%
Samsunspor	5,282,637	4.01%
Ankaragücü	5,941,995	4.51%
Kayserispor	3,841,643	2.91%
Diyarbakırspor	4,218,419	3.20%
Sakaryaspor	4,180,828	3.17%
Ystanbulspor	4,628,465	3.51%
A. Sebatspor	3,253,579	2.47%
<b>Total</b>	<b>131.871.500</b>	<b>100%</b>

The amounts are YTL (New Turkish Lira); 1 USD = 1.35 YTL; Total of the season = USD 97, 682, 593

### Performance share

51 percent of the broadcasting revenue consists of two sub sections:

- 44 percent Score Performance (only the top six clubs can take advantage of this)
- 7 percent Season Performance

### Participation share

49 percent of the total broadcasting revenue is divided into two sub sections:

- 35 percent 'Solidarity Share' (distributed equally among the clubs)
- 14 percent is the 'Champions' Share'.

Despite this new solution, we can say that there is still hegemony in Turkey.

The Championship is dominated by the three big teams of Istanbul and Trabzonspor (City of Trabzon) which share almost half of the income from television. The Turkish Super Football League has been worth between USD 95 and 120 million in the last couple of years. Nevertheless, this amount is considered to be low and insufficient when compared to the population of Turkey which is around 70 million. The reason why the economic value of the league is so small can be explained by the principle of uncertainty at not being at a desired level.<sup>4</sup> In the history of the 1st Football League extending over more than forty years, the number of teams leading or winning a Championship is limited to four. Under the present conditions, there is only a small or no chance for a fifth team in the Championship. This naturally has a negative effect on television economy. It is a matter of time whether the hegemony of the four teams will come to an end or not. The reason why the economic value of the league is so small can be explained by the principle of uncertainty at not being at a desired level.<sup>5</sup>

3 Cetin, Cem, 'Havuz Degil Felaket', Futbol Ektra, July 2005, p. 113.

4 Cetin, Cem, 'Havuz Degil Felaket',

Futbol Ektra, July 2005, pp. 46-47.

5 Tam Saha, Official monthly review, 37 TFF (2007) p. 40.

## 2.3 Television rights/Turkish Football Federation

### Recent situation

**2.3.1** Under the terms of an agreement between the Turkish Football Federation (TFF) and the television operator which obtained the exclusive rights to broadcast (Digitürk) for the 2008-2009 and 2009-2010 football seasons, an extra YTL 60 million was added to the agreed price in the initial contract. Indeed, the new executive team of the TFF, elected at the beginning of 2008, endeavours to create additional financial resources in order to implement large-scale projects. For the last seven years, the partner of the TFF, Digitürk, has held the right to broadcast football games in Turkey. This right will be contested again in 2010. Digitürk paid an amount exceeding USD 1 billion to benefit from this right at the beginning of its contract.

**2.3.2** The fact of paying this extension of YTL 60 million (approx. USD 50 million) without being obliged by the contract there, reveals a particular interest shown by the management of the television operator in the right to broadcast the football games of the teams with the highest ranking at the time of contesting the contractual period of 2010- 2014. In fact, Digitürk considers that the sixth position occupied by Turkey in Europe after England, France, Spain, Germany and Italy in income obtained by the sale of the televised rights is too low. The President of the TFF himself has stated that this additional income will be used to improve the financial position of the clubs and to carry out the required infrastructure investments in Turkish football.<sup>6</sup> The clubs of Anatolia, i.e., the other clubs in the first league apart from the four clubs with most of the television rights, require a different distribution which will support them better from 2010. On this subject, one should consider the formula of two broadcasting companies, similar to the system created in England in 2001. Besides Digitürk, the name of D-Smart is often quoted as the second broadcaster. Indeed, considering the increasing needs of the clubs, more income should be generated by selling the broadcasting rights of the football games and ensuring a better distribution among the clubs of Anatolia and 'the four big ones'. The system of two broadcasters would make it possible to achieve this goal.<sup>7</sup>

### 3. Current legal situation of the sports media in Turkish professional football: juridical question

Like everywhere, there are also three essential questions in Turkey:<sup>8</sup> The question of ownership: who owns the broadcasting rights: the Football Association, the clubs, the payers or jointly? The question of exploitation: are the rights sold individually or collectively? What about competition law regarding the acceptability of collectively selling the broadcasting rights? To answer these questions, from the specific angle of the nature of the legal relationships between the various persons concerned with the broadcasting rights and their consequences, it is advisable to search for answers in the legislation, jurisprudence or the doctrines.

We should emphasise here that the Turkish legislator does not answer these questions, at least it does not regulate their legal nature and more particularly the broadcasting rights of the sporting events. It consequently falls on jurisprudence to find answers to these questions. To our knowledge, with the exception of 'a jurisprudential source' indicated at the end of this article, there is no decision covering our subject in a specific way. With regard to the Turkish doctrines,

6 Tam Saha, Official monthly review, 43 TFF (2008) p. 77.

7 Tam Saha, Official monthly review, 42 TFF (2008) pp. 60-61.

8 Continuing this study, we will not consider the sale of rights for radio ('voice'), so that we will only study 'television rights'.

9 See European Commission, 2003, Section 6.5.1, 'League rights and individual football clubs rights'.

10 Olivier Sidler, 'Exklusivberichterstattung

fiber Sportveranstaltungen im Rundfunk' (Diss.) (Fribourg 1995), p. 131.

11 Martin Schimke, Sportübertragungsrechte in der Europäischen Union aus kartellrechtlicher Sicht, in Martin Schimke, ed., *Sport in der Europäischen Union*, Vol. 19 (Heidelberg 1996) p. 173.

12 C. Veljanovski, 'Is Sports Broadcasting a Public Utility?', Paper presented at the IEA Seminar on the Economics of Sport, London, October, 2000.

these only contain works of a general nature on the Sports Law, without specifically dealing with the questions concerning us here (see Bibliography appearing at the end of this chapter). As a starting point, we therefore took the doctrines and jurisprudence existing outside Turkey, in particular in Europe, to outline answers to the questions indicated above. Before considering them, it is essential to try to define the concept of 'television rights' in sport. Regardless of the definition of 'broadcasting rights' in each individual contract or the legislative texts relating to the broadcasting of sporting events, it is nevertheless possible to define them as follows: 'television rights' are the right to film, broadcast and sell the images of one or more specifically determined sporting event(s) (Art. 3(d) of the Broadcasting regulation of the TFF). It is possible to distinguish three categories of rights of exploitation:

Primary level (live broadcasts of single or several matches, also for example pay TV, free-to-air, Internet, mobile phones 3G/UMTS, etc.), secondary level (to record the events to distribute them later, for example on video, CD-ROM, etc.) and third level (to sell on magnetic or numerical media and supply them to the sponsors as well as the use of the images on Internet, etc. - sale, publicity) (Broadcasting Regulations of the TFF, Art. 3). As we have indicated above, the Law states that the broadcasting rights of football matches in the professional league on television belong exclusively to the TFF. This legal provision specifies well the business model chosen for Turkey (pooling system), but leaves open questions of a legal nature indicated above without providing answers.

### 3.1 The question of ownership

**3.1.1** The first issue concerns the ownership of broadcasting rights: should the association (TFF) be regarded as the sole owner of broadcasting rights or do the rights belong to both the home and visiting clubs? Is co-ownership of rights between the clubs and the federation also possible?<sup>9</sup> This leads to the issue of 'who produces the service (spectacle): the clubs, the association or both?' One could even affirm that the players themselves produce the spectacle (service). The possible titularity of the television rights of the sportsman who takes part in a sporting event could be based on the intellectual property or those of the personality, particularly regarding its right to the image. However, it is considered that with some exceptions, the sporting events are generally not protected by the principle of intellectual property.<sup>10</sup> Article 23 ss. of the Turkish Civil Code protects the personality in general, without defining the contents of it or establishing a catalogue of the relevant rights. One might therefore wonder whether this provision also protects the activity of the sportsman during the course of a match watched by the public. The answer to this question is no. Indeed, the sportsman is regarded as a public person; he must agree to be filmed during the exercise of his sporting activity. For a game in the football championship, according to the terms of the Turkish Civil Code, the home club can also be considered as producing the spectacle and thus the holder of the television rights (Art. 762 ss.). However, it must be concluded that a football game only acquires important commercial value thanks to the participation of the visiting club and the fact that it forms part of the context of a championship. According to Turkish Codes of Obligations (Contract Law), it is also possible to see in this activity an act of leasing the rights of the clubs (home and/or visiting club) to the sporting federation which organises the championship. It is as plausible to affirm that the sporting federation which organises the championship could be regarded as co-organiser of all league games (= co-holder of the television rights).<sup>11</sup>

**3.1.2** In the light of the above considerations and the doctrines and practice existing in this field, in our opinion it is advisable to refer to the following criteria when determining the ownership of the rights: who produces the spectacle (service), could be based legally on a cession of the rights in order to acquire the rights to broadcast? From this point of view, the value of the spectacle does not stem from the independent activities of each club but from the existence of a recognisable brand in the form of an organised competition.<sup>12</sup> In addition, the

organiser (TFF) bases itself on a legal cession founded on the law. It is consequently possible to make the following synthesis that, in Turkey, considering the legal situation, the clubs are, in principle, the owners of the rights, but that selling the television rights does take place collectively while passing by the federation (TFF). We repeat: pursuant to one special law enacted in 1992, instead of the clubs, only the Turkish Football Federation is authorised to sell the television rights in different leagues.

3.1.3 One might also wonder whether the TFF does not make itself the creator of the spectacle so that it could claim ownership of the rights arising from the competition that it organises. The answer to this question is: No. Indeed, like the sportsman, the TFF does not create in accordance with the concept of 'Work' as defined by the principles of intellectual property in general.<sup>13</sup> Its right is based not on intellectual property, but as we saw, but on a legal cession. On the basis of this transfer, through associative regulations and directives, the federation obliges the clubs to accept the chosen chain of television (currently Digitürk). Independently of the legal obligation for the clubs, according to the German doctrines, the organiser of a sporting event can claim the right to regulate access to the sporting events freely and ensure that this regulation is respected. This right is called the 'Hausrecht = Owner at home'. By this right, a federation organising the sporting events would be able to introduce, associatively or contractually, the obligation of concluding a contract with a certain chain of television, for example.<sup>14</sup>

### 3.2 The question of exploitation: are the rights sold individually or collectively and on an exclusive basis or not?

The second central issue concerning the marketing of sports rights for professional football games in Turkey are collective selling (3.2. 1) and exclusivity (3.2.2).

#### 3.2.1 Collective selling

The central marketing (collective selling) of 'television rights' has several benefits:

Firstly, it reduces transaction costs and represents a more efficient way of selling the broadcasting rights. For the media operator, central marketing makes it easier to acquire a complete 'rights package' covering the whole season.

Secondly, the clubs need each other in order to create an appealing product, the value of which will be higher when there is greater uncertainty of outcome. Individual selling increases the spread in club revenues. Of course, the sale of individual rights does not preclude revenue sharing among clubs, but it does make it more difficult in practice.

When rights are sold collectively, the federation can distribute funds from richer clubs to poorer ones, as a way of achieving competitive balance. In Turkey, as apparent in the 'pooling system', this always supports the large clubs despite the corrections made during some years in favour of the Anatolian clubs.

#### 3.2.2 Exclusivity

(The following considerations formed the basis of allocating the exclusivity of the 'television rights' to a certain broadcasting company in Turkey):

'Exclusive deals are a widespread practice in the sports rights market. Obviously, the aim is to guarantee the value of a programme and, in terms of the property owner, to derive maximum value from broadcasters. Exclusivity has a particular importance in the case of sport because rights lose most of their value once there is no longer uncertainty over the result.'

There is a second reason why broadcasters accept to pay an 'exclusivity premium' when rights are sold exclusively: owners are able to

extract a larger share of economic surplus compared with non-exclusive rights deals.

#### 3.2.2.1 What is the legal nature of the contract of 'exclusive selling of broadcasting rights' concluded between the organiser of a sporting event and a television broadcaster?

As explained above, the right in Turkey to determine the broadcasting candidate and the allocation procedure are the subjects of a law and the associative regulations. However, these specific provisions do not say anything about the legal nature of the exclusive contract concluded between the TFF and a television broadcaster.

We will now examine the principal points of such a contract in order to obtain an answer. The object of the contract is the right to exclusively broadcast professional football games. This exclusivity can be relative or absolute. The exclusivity is relative when one television broadcaster has the right to broadcast sporting event live or otherwise before other television broadcasters. This absolute exclusivity exists when the organiser gives the rights to only one television broadcaster to exploit the sporting events which are the subject of the contract. In Turkey, it is also the absolute exclusivity which prevails for the sale of the broadcasting rights in the professional football. In addition, the contract relates to the price to be paid by the broadcasting company for obtaining these rights. Also to be incumbent on the broadcasting company is the obligation to film and to broadcast the sporting event. There is also a 'Guarantee' in favour of the broadcasting company concerning the single titularity of the rights and also a guarantee against any claim on behalf of a third person. The contract also regulates the rights to record and broadcast sporting events under good conditions: in particular with respect to accreditation of journalists and technicians, the sites for the material, lighting for a perfect televisual production, etc. Considering these elements, we can conclude that the nature of the legal relationships in Turkey governing the exclusive contract concluded between the TFF and a television company derives from the contractual field (in our opinion, it is not an agreement arising from the Public Law).

3.2.2.2 We should emphasise that neither the Turkish Code of Obligations nor the Turkish Commercial Code, applicable from contractual matter, explicitly govern the 'Contract for the sale of rights to broadcast sporting events', nor do they define it. Is it a Simple Commercial Partnership (according to the Turkish Contract Law = for example: consortium) or other contract subject to the provisions of the Turkish Code of Obligations? In our opinion, this is a contract arising from the Turkish Private Law subject to the provisions of the Turkish Code of Obligations, but not a Simple Commercial Partnership.

3.2.2.3 The contract of exclusive rights to broadcast professional football games are also subject to the provisions of the Turkish Code of Obligations. However, it is not a contract belonging to the catalogue of 'Named Contracts' envisaged by the Turkish Law (Named contracts: this term means a contract which is expressly designed and specifically regulated by the Turkish Legislation). That is important, because if the contract belongs to the category of 'Named Contracts', in the case of gaps in the law, it is possible to fill them by referring to the rules of the nearer contract(s). From the brief study of the elements examined above, we can conclude that in Turkish Law the 'Contract of exclusive rights to broadcast professional football games' has the character of an 'Unnamed Contract'. The 'Unnamed Contracts' could be either mixed (they assume the character of two or several named contracts), or 'sui generis' (in other words, without legislative model). Like Sidler<sup>15</sup>, we consider that the 'Contract of exclusive rights to broadcast professional football games' is a 'sui generis' contract. Indeed, it is only possible to speak from the 'Mixed Contracts' when all the essential elements of one contract can be found in the definitions of various named contracts, which is not the case in Turkish Law.

<sup>13</sup> See also WIPO Treaties by 'Intellectual Property and Sports', ASDA Annual Conference, Lausanne, November 13, 2001.

<sup>14</sup> Sidler, *op. cit.*, pp. 131, 147 and 149.

<sup>15</sup> Sidler, *op. cit.*, p. 166.



### 3.3 What about competition law regarding the acceptability of collective selling, on an exclusive basis, of broadcasting rights?

When a federation obtains the television rights which the clubs hold, on an exclusive basis and under the terms of a legal or statutory provision, the question arises as to whether such a situation violates the rules of unfair competition and antitrust law. In Turkey, the answer to this question is both simple and complicated. It is simple because Turkey has a law protecting free competition (Law No. 4054) enacted on 7 December 1994 and partially modified thereafter. This Act regulates the situation as in other European countries. It would then be enough to refer to the applications of these countries in order to obtain the answer. But this is where the problems start. Indeed, hesitations appear with regard to determining whether and up to what point in Turkey this law could be also applicable in the field which interests us here. While seeking to find answers to these hesitations, we noted that so far no decisions have been made either by the ordinary courts or the arbitration court in Turkey, nor in legal publications.

3.3.1 The purpose of Law No. 4054 is (free translation) 'to prevent harmful economic and social consequences of cartels and other restraints of competition in Turkey and to thereby further competition in the interest of a free market system in the field of commerce of the goods and services' (Art. 1). This Act will apply to enterprises (private or public) operating in the field of service provision and trade of goods which agree on cartels or other matters of competition, exercise market power, or participate in combination of enterprises. The Act particularly applies to practices by market dominant enterprises which prevent other enterprises from entering or competing in the market or disadvantage other market participants (Arts. 2 and 3). When one examines the concept of 'enterprise' within the meaning of the Turkish law, one notes that the activity of the TFF clearly corresponds with this concept defined in the law (Art. 3, lit 4). Moreover, the activity of the TFF in the field of centralised and exclusive selling of television rights also corresponds with the definition of the 'dominant position' defined in the law (Art. 3, lit 3). In our opinion, the law also includes the federation and the clubs whose budget figures are in USD million. Consequently, one football federation which negotiates the broadcasting rights of football games on the market in the name of its members (clubs), undoubtedly falls under Law No. 4054, any violations of which would be sanctioned.

3.3.2 Should one however conclude without hesitation that the TFF must always be subject to Law No. 4054 and cease its activity in the field which interests us here? Or, although the TFF does not benefit from the existence of any justifying reasons or the exemptions accepted by the law itself or by other legal sources existing in Turkey from which it could be prevailed? In Article 5, Law No. 4054 describes various exemptions allowing companies or activities to escape its fields of application.

Such exemptions include:

- technical progress offered by the activity in question (al. 1, ch. a);
- a benefit obtained for consumers (al. 1, ch. b);
- an interest not to restrict the activity more than necessary by interested companies in order to achieve the aims in ch. a) and ch. b) (al. 1, ch. d).
- Other reasons include:
- technological progress;
- the public economic interest.

3.3.3 Does the activity deployed by the TFF in broadcasting football games cover these exemptions? There is also another legal aspect which could be taken into consideration. Indeed, in Turkish law, the rights granted to the TFF arise from a specific law for football and its application regulations. This unit constitutes a *lex specialis* compared to Law No. 4054 regulating competition policy which has the nature of *lex generalis*. Law No. 3138 about TFF and its regulations specifically enacted for football could derogate this to a *lex generalis*, escaping its fields of application. This aspect also constitutes an argument reinforcing the idea of the exemption which can be granted to the activi-

ty of the TFF with respect to Law No. 4054. However, the specific situation of the TFF is not expressly described by Law No. 4054 as being an exception. Is this a 'qualified silence' of the Turkish legislator wanting to give privileges to the TFF which is also a reflection of a political decision, or is this a gap in the law to be filled by the judge? In the absence of clear legislative, jurisprudential or doctrinal answers in Turkish law, it is difficult to come to a conclusion about the admissibility (licit or not) of the position granted to the TFF regarding broadcasting rights.

3.3.4 We nevertheless feel that the decisions taken by the various authorities of the European Communities (EC) within the framework of EC competition law solutions could help us find answers to these questions. Turkey is now starting negotiations to become a member of the EC. It may find it very beneficial to adopt the same position as the EC when it considers legislation in the field which we are considering here. On this subject, we should point out the position taken by the European Commission in 2003 about the UEFA case. Experts in Turkey say that the solutions would and should be the same in Turkey. For that reason, we can confirm that collective selling and exclusivity by TFF in the field of television rights for Turkish football are now acceptable in Turkey according to its legislation.

3.3.5 Indeed, the legislative situation in Turkey is already familiar with the exemptions which are recognised by EC legislation (Art. 85(3) of the Treaty). It means for example: technical progress offered by the activity in question, a benefit obtained to the consumers, an interest not to restrict the activity more than necessary for interested companies, etc. We can say that the current situation in Turkey also fulfils the other requirements envisaged by the EC in order to admit, at least for the moment, the exemptions recognised by the Treaty prohibiting any enforceable or unenforceable agreements and concerted practices between enterprises which distort free competition or create a market dominant position. Among these additional reasons for exemption admitted by the various EC institutions, one meets in Turkey the requirements for transparency in invitations to tender and of attributing the television rights on an exclusive basis for a reasonable duration.<sup>16</sup>

### 3.4 A 'jurisprudential' source

To our knowledge, no decisions have been delivered by ordinary courts or judgments by the Court of Arbitration for Football (CAF) of the TFF in Turkey in the matter which interests us in this chapter. I.e., the legal nature of the relationships between the parties, the question of ownership of the broadcast images, conformity of the current situation to the Turkish competition law, etc. We have, however, a principle judgment of the Court of Arbitration for Football (CAF) of the TFF from 8 April 1999 which touches on the broadcasting of football games in Turkey through sound or image.<sup>17</sup> However, this sentence does not deal with the essential legal questions indicated above but it does provide invaluable indications about the legislative situation (laws and regulations) that exists in the country as regards broadcasting of football games through sound or images.

We summarise the facts:

The three larger football clubs in Turkey, i.e., Fenerbahçe, Galatasaray and Beşiktaş, appeal by their joint request of the 1 April 1999 to the Court of Arbitration for Football of the TFF (competent authority on the matter according to the statutes of the TFF) and are asking for the partial or entire abrogation of certain articles of the former 'Broadcasting Regulation of professional football games'.<sup>18</sup> These articles primarily concerned the national provisions (Law, Statutes of the TFF, in particular Articles 10(J), 29, Broadcasting regulation at that time, in particular Arts. 4, 5, 7, 8, 11 and 14) and the provisions

<sup>16</sup> Stephen Weatherill, 'The Sale of Rights to Broadcast Sporting Events under EC Law', 3-4 *The International Sports Law Journal* (2006) p. 3.

<sup>17</sup> Sentence No. 1999/48, No. of inscription 1999/45.

<sup>18</sup> Regulation published in the Official Gazette of 20 March 1999, No. 23645.



of the UEFA. They were the provisions concerning the exclusive right of the TFF in the field of broadcasting. The sentence does not indicate the reasons on which the clubs are based.

**3.4.1** In its decision, the Court of Arbitration for Football initially states that the request of these three clubs should be judged in the light of the dispositions of the Turkish Constitution, the national laws concerned and particularly Law No. 3813 specially conceived for the operation of the TFF. The enacted rules on behalf of the FIFA and the UEFA should be also taken into account. This unit is deemed by the Court to be 'Football legislation' (Futbol Hukuku). The court says that 'the application of this 'Football legislation' is subject to the surveillance of the Court of Arbitration of the TFF, which must act according to the rules of Justice (adalet) and Equity (nasalet)'.<sup>19</sup> The CAF points out that, pursuant to Article 26 of Law No. 3813, the football clubs 'are attached' to the TFF and that the aforementioned law and the principles which result from this law apply to the clubs. According to the Article 30 of the same law, the statutes and regulations of the TFF enacted on the basis of rights conferred by the law on the national football federation, would constitute the special implementation of rules and would bind the football clubs directly. According to the court 'the TFF is responsible 'for managing as well as possible' the football activity in Turkey in the interests of the nation and to this end has the right to enact the necessary implementation rules'. In its sentence, the CAF thereafter cites some imperative rules of the UEFA which are applicable with regard to the national federations' members of the UEFA.

**3.4.2** Among the imperative national norms, the CAF then cites Article 29 of Law No. 3813: 'It is the federation which has the right to regulate and to programme the broadcasting of football games by means of television and the radio. The agreements reached on this subject between the clubs and the broadcasting companies are subject to the monitoring, the control and the approval of the federation'. The Court notes thereafter that by enacting the 'Regulation on the broadcasting of football games', the Turkish federation was based on Article 10, Ch. J of the law which gives it a legal base to be able to act in this field. Furthermore, the Court states that the TFF has behaved in accordance with the statutes of the UEFA. Consequently, the lawful competence of the TFF in this field should be recognised.

**3.4.3** According to the Court 'This regulation would relate to all the commercial and financial rights arising from such broadcasting'.

The Court continues by emphasising that  
'... on the basis of capacity which is conferred to him, the TFF decided:

- on the one hand, to grant the broadcasting rights of all football matches of the League to only one television channel and to fix the distribution rules of income between the clubs concerned (the pooling system) and
- to keep the monitoring, the control and the approval of the individual agreements made between the clubs and the broadcasting companies concerning the other matches than the football games of the League.'

It should be mentioned with regard to this sentence that the Court considered that Articles 5(2) and 8(3) of the 'Broadcasting regulation of football games' which restrict freedoms of the clubs did not violate the legal principles existing in the country and which, for this reason, the Articles 5(2) and 8(3) are to be preserved in the Regulation. A member of the Court, however, had reservations with regard to the articles in question and declared that 'on the one hand these articles were to limit the exercise of civil rights (in particular contractual freedom) while on the other hand these articles removed from the clubs their most elementary rights to give up exercising a right.' In spite of these reservations and on the basis of the majority vote of the other members, the aforementioned articles were preserved in the Regulation and, to our knowledge, have not yet been subject to another request for abrogation. There is the same situation for the dis-

positions of the Broadcasting Regulation which confers a 'dominant position' on TFF in the market of broadcasting the images of sporting events. Moreover, called on this subject, the Court unanimously rejected the abrogation of those articles.

#### 4. Conclusions

By exceeding the geographical boundaries of Turkey and also regarding the main issues of popular sports and sports media, we wish to raise some topics which concerned us and also request, at international level, investigations and solutions. If we return now to Turkey, we can say that Turkey is following international developments with a two to three year delay. The questions which were discussed elsewhere must now be answered in Turkey too, which are as follows:

Is pooling of television rights necessary in order to redistribute of TV money and guarantee a competitive balance? In the country, the football cake is estimated at USD 600 million per year (officially USD 450-500 million). This situation shows that Turkey does not yet have the share it deserves in the European cake, i.e., 5 percent. Indeed, if one compares the country's gross national product with those of the 52 Member States of the UEFA, Turkey is ranked fairly highly, in 11th position. This means that the Turkish football cake will probably develop substantially.<sup>20</sup> In addition, we can conclude that Turkey does not yet have a structure making the sport less dependent on TV, ensuring competitive balance, preventing unfair competition and stimulating efforts as well plans at financial, intellectual, sportsman and sporting culture level. Independently of this situation, we can affirm that, comparing individual club ownership and the trading model 'Pooling of the Television rights', both the empirical evidence and economic estimations show an overall advantage in favour of the latter. Therefore, our preference also tends towards this model, although not without some amendments.

What is the line between sports information (freedom of the press) and sports spectacle? Does Television (or other media) have a right to film and distribute images of a sporting event? If the answer is affirmative, it would no longer be obliged to buy the broadcasting rights. This right, which does not exist expressly, could be deduced from the Turkish Constitution, from the freedom of expression and press. In our opinion, neither pursuant to the terms of Article 10 ECHR nor the dispositions of the Turkish Constitution, we would be able to deduce a right in favour of television to be able to film and to broadcast sporting events (see also the exceptions indicated in Article 10(1) in fine ECHR). As for the freedom of press, it only protects products from printing, such as newspapers or books. Neither does this freedom apply to radio or television.<sup>21</sup> Nevertheless, we can conclude that with respect to broadcasting rights, the situation and the solutions could also change in time in line with the Constitutional Rights in Turkey.

What happens if sports clubs or federations own a broadcasting company? This aspect should be seriously considered and studied with respect to compatibility of current legislation; see the question raised below. To our knowledge, it is not this question but particularly the 'number of partners' of the TFF which can acquire the right to broadcast football games which is currently important in the country.<sup>22</sup>

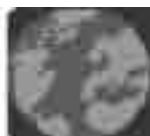
What should be the future relationship between sports and the new media? Finally, we would like to draw your attention to the new technologies which are being introduced and which will also influence television rights in sport, such as TV by mobile phone, 3G/UMTS (large bundle), the telecommunication highway, (broadcasting by internet), etc. This will also require reflection on the way in which the rights of broadcasting are sold, particularly with respect to the idea of the territory of diffusion (see Broadcasting regulation of TFF, Arts. 12-14). This will also raise the question whether the 'dominant position' of the TFF ensured by Law No. 3813 can continue or whether it will be necessary to find other constitutional, legislative and contractual solutions. It is certainly legitimate to ask whether the current legal situation in Turkey makes it possible to implement the necessary changes.

19 Sentences of the CAF, 1998-2003, p. 30.

20 Tam Saha, Official monthly review, 37 TFF (2007) p. 40.

21 Sidler, op. cit., p. 129.

22 Tam Saha, Official monthly review, 42 TFF (2008) p. 61 et seq.



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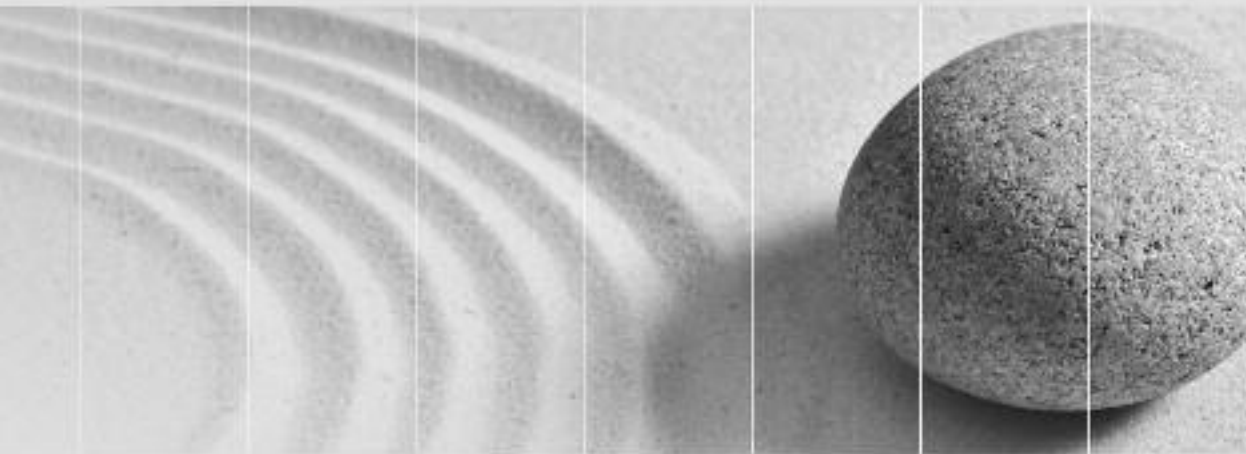
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# Sports Betting and European Law

by Marios Papaloukas\*

## 1. The establishment of the principle of proportionality in gambling cases<sup>1</sup>

A study of the handling of sports betting cases by the European Court of Justice would not be complete without examining the handling of gambling in general by the ECJ. There are two ECJ decisions that ought to be mentioned at this point, although neither of them is of sports content, they played a major role in sports betting case law as all subsequent ECJ decisions relating to sports betting are based on them.

The first relevant case concerning the issue of betting that came before the ECJ was the eminent *Schindler* case.<sup>2</sup> In this case the Schindlers, acting as independent agents for a German lottery, dispatched to the UK, certain advertisements and application forms for a lottery organised in Germany urging the recipients to participate. The envelopes also contained a pre-printed reply envelope. Many Member States argued that because the scheme was, objectively, a gambling one and involved unsecured winnings and because participation in the game is in the realm of entertainment, the activity should not be considered an economic activity within the meaning of the Treaty.<sup>3</sup>

The ECJ<sup>4</sup> rejected these views and made it clear that such activity is, in fact, economic and indeed, that lottery activities are not related to goods but to services and fall therefore within the scope of the freedom of the provision of services. The fact that the participants' winnings are not secure isn't enough for the whole activity to be deemed non economic. The agent works on profit and the amount of money raised by the organiser of the game is not all awarded to the winner. With regard to the subject of entertainment, the ECJ has made very interesting parallels with the amateur sport,<sup>5</sup> where the nature of entertainment does not negate the fact that it falls within the rule of the freedom of the provision of services.

Finally, with regard to allegations that gambling is dangerous and should be prohibited, the Court responded that, in contrast with other illegal activities such as illegal drugs, the policy of the Member States is generally not to prohibit gambling but rather to monitor its availability to the public.<sup>6</sup> The European Union has not yet decided whether or not to adopt legislative measures to orchestrate the legislation of the Member States<sup>7</sup> regarding gambling; it is evident that there is uncertainty about the extent of discretion enjoyed by Member States<sup>8</sup> with regard to limiting the availability of gambling services.<sup>9, 10</sup>

However, the ECJ has accepted that there are three reasons that may justify, not an absolute prohibition but the restriction of gambling and its control by the State and one argument that justifies a special treatment of gambling. Firstly, the ECJ has accepted that there are moral, religious and cultural aspects that "prohibit" making gambling a source of private profit. Secondly, gambling involves a

high risk of crime or fraud, given the size of the amounts at stake, particularly when operated on a large scale. Thirdly, it is the incitement to spend which may have damaging effects on the individual and social consequences. On the other hand gambling may make a significant contribution to the financing of benevolent or public interest activities such as social work, charity work, and sport or culture.<sup>11</sup>

The ECJ, therefore, concludes that those particular factors justify national authorities having a sufficient degree of latitude in determining what is required in order to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess, not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.<sup>12</sup>

The next case that came before the Court was *Läära*.<sup>13</sup> In its ruling the ECJ seems to come to answer the question of whether or not a Member State has the right to prohibit the service of gambling to individuals while maintaining the right itself to monopolistically provide such services through a public body. The Member State party argued that the relevant legislation was passed in order to limit the exploitation of human passion for gambling, prevent infringement risks and crimes involving fraud and ensure that activities are authorized only if they are designed to collect money for charitable projects or to strengthen benevolent purposes.<sup>14</sup>

The ECJ, based on the reasoning in paragraph 61 of *Schindler* held, however, that the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling, forms part of the national authorities' power of assessment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially, to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely with reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.<sup>15</sup>

Therefore, in its rationale the ECJ referred also to the principle of proportionality; the ECJ indicated that the question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators

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1 N. Emiliou, "The Principle of Proportionality in European Law: A Comparative Study", (Kluwer Law International, 1996).

2 Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR I-01039.

3 See Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR I-01039, para. 16.

4 See The Case for State Lotteries, A Report for the European Lotteries and Toto Association by London Economics, September 2006.

5 See Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR I-01039, para. 34.

6 See Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR I-01039, para. 32.

7 See Institut Suisse de Droit Compare, "Study of Gambling Services in the Internal Market of the EU, Final Report", European Commission 14-6-2006.

([http://ec.europa.eu/internal\\_market/services/docs/gambling/study1\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf))

8 See The Case for a Single European Gambling Market, A Report by Europe Economics, 4. March 2004.

(<http://www.eer.co.uk/download/eesingmark.pdf>)

9 See A. Littler, "Regulatory Perspectives on the Future of Interactive Gambling in the Internet Market", European Law Review, issue 2, 2008, 211-229.

([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1123863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123863))

10 See European Parliament resolution of 10 March on the integrity of online gambling

(<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+Vo//EN>)

11 See Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR I-01039, para. 60.

12 See Case Her Majesty's Customs and

Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR I-01039, para. 61.

13 See Case Markku Juhani Läära Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd vs. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21st September 1999, [1999] ECR I-06067.

14 See Case Markku Juhani Läära Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd vs. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21st September 1999, [1999] ECR I-06067, para. 32.

15 See Case Markku Juhani Läära Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd vs. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish



concerned is a matter to be assessed by the Member States subject, however, to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.<sup>16</sup>

## 2. The Zenatti and Gambelli cases

The ECJ followed the same policy of providing greater freedom of action in the next decision concerning *Zenatti*.<sup>17, 18</sup> This decision was the first involving sport. In this case, however, the principle is implied not only in one paragraph in the decision but is stated clearly throughout the decision.

The ECJ, in this case, explained that the Treaty provisions on freedom to provide services do not preclude national legislation reserving for certain bodies the right to take bets on sporting events, if the legislation can actually be justified by the social policy objectives in order to reduce the harmful consequences of such activities and, also if the restrictions imposed are not disproportionate in light of these objectives. Consequently, apart from proving that public interest does exist, it should also be considered whether the same amount of public interest could be achieved if fewer restrictions were imposed on the freedom to provide gambling services.

In the *Gambelli* case<sup>19, 20</sup> the ECJ, after conducting a general overview of the relative case law to date<sup>21</sup>, refers to previous case law in order to confirm the rule of the principle of proportionality, which must be taken into account when setting the restrictions on freedom to provide services and freedom of establishment. It states that the restrictions on gambling imposed by a Member State should:<sup>22</sup>

- be justified by imperative requirements in the general interest,
- be suitable for achieving those objectives,
- not go beyond what is necessary in order to achieve this.

## 3. The clarification of the term «not go beyond what is necessary»

After having clarified the implementation of the first two of the above mentioned elements of the principle of proportionality, the ECJ states some additional requirements. The ECJ establishes a general condition, which should be considered after the determination of the terms of the principle of proportionality, and two special conditions that should be considered simultaneously with the first and second terms of the principle of proportionality.

The general requirement is based on the fact that the restrictions provided by the Member state should be imposed indiscriminately, in the sense that they should apply in the same manner and with the same criteria to operators established in that country and to those who come from other Member States<sup>23</sup>. The importance of this criterion is, however, questioned if we consider those Member States where gaming services are provided monopolistically by the state.<sup>24</sup>

Insofar as concerns the first of the terms of the principle of proportionality, although the measures should be justified by imperative requirements in the general interest, however, in cases where the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce the availability of

betting facilities in order to justify measures in restricting gambling.<sup>25</sup>

Finally, in *Gambelli*, the ECJ ruled on the second of the terms of the principle of proportionality that while restrictions on the activity of gambling should be practical enough to ensure that the public needs are met, restrictions should also serve to limit betting activities in a consistent and systematic manner.<sup>26</sup>

## 4. The Lindman and Placanica cases

After having clarified the terms of the principle of proportionality, there were still notions in the *Gambelli* rule, which needed further clarification. First, the reasons of general interest the Member States pleaded on could not be vague, and the Court had to make Member States specify the reasons they vaguely referred to in order to impose restrictions on freedom to provide lottery services. In the *Lindman* case<sup>27, 28</sup> the opportunity was seized to address this issue. Thus, the Court ruled that the reasons which may be invoked by a Member State by way of justification for an imposed restriction on betting must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State.<sup>29</sup>

It was then ruled that a Member State's vague allegations about public interest were not sufficient and that the Member State should bring forward statistics or other data enabling conclusions as to the gravity of the risks of gambling and the causal relationship between these risks and the participation of its nationals in gambling services organized in other Member States.<sup>30</sup>

However, as demonstrated in the *Gambelli* case, the general requirement that the Court accepted as necessary, i.e. that the legislation of the Member State restrictions should apply in the same manner and with the same criteria to operators, who are established in this country and those from other Member States, cannot be applied in those Member States where gaming services are provided by the state monopoly.<sup>31</sup>

In 2004, the *Placanica* case<sup>32, 33</sup> *prima facie* appears to signal the end of state monopolies in gambling; this is not correct however. The ECJ ruled out a state regulation according to which entrepreneurs wishing to provide gambling services were required to apply for a license. This decision, however, was based on the fact that the state regulation using the argument of general interest imposed far more restrictions than was necessary to achieve the purposes sought, whereas the same general interest could be protected with less stringent restrictions. Thus, the Member State, by excluding, for transparency reasons, all the profit-making companies from the right to receiving a licence, violated the principle of proportionality.

Therefore, since the ECJ decision in *Placanica* did not exclude *expressis verbis* the monopoly in providing betting services, does this mean that each Member State reserves the right, invoking reasons of general/public interest, to retain the exclusive provision of these services for itself? Can the principle of proportionality accommodate this?

## 5. Beyond Placanica case (The Bwin Liga case)

The rationale of the decision in the *Placanica* case leaves little room for doubt. Short of a complete ban on any gambling services, a State

State), C-124/97, Judgment of 21st September 1999, [1999] ECR I-06067, paras 35-36.

16 See Case Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd vs. Kihlakunnansyyttäjät (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21st September 1999, [1999] ECR I-06067, para 39.

17 See Case *Questore di Verona v Diego Zenatti*, C-67/98, Judgment of 21st October 1999, [1999] ECR I-07289.

18 See . Papaloukas, "Sport: Case Law of the Court of Justice of the E.C. ", (Papaloukas Editions, 2008), pp. 42.

19 See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-

243/01, Judgment of 6th November 2003, [2003] ECR I-13031.

20 See . Papaloukas, "Sport: Case Law of the Court of Justice of the E.C. ", (Papaloukas Editions, 2008), pp. 125.

21 See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR I-13031.

22 See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR I-13031, para. 65.

23 See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR I-13031, para. 70.

24 See A. Littler, "Regulatory Perspectives

on the Future of Interactive Gambling in the Internet Market", European Law Review, issue 2, 2008, 211-229.

25 See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR I-13031, para. 69.

26 See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR I-13031, para. 67.

27 See Case Diana Elisabeth Lindman, C-42/02, Judgment of 13th November 2003, [2003] ECR I-13519.

28 See . Papaloukas, "Sport: Case Law of the Court of Justice of the E.C. ", (Papaloukas Editions, 2008), pp. 181.

29 See Case Diana Elisabeth Lindman, C-

42/02, Judgment of 13th November 2003, [2003] ECR I-13519, para 25.

30 See Case Diana Elisabeth Lindman, C-42/02, Judgment of 13th November 2003, [2003] ECR I-13519, para 26.

31 See A. Littler, "Regulatory Perspectives on the Future of Interactive Gambling in the Internet Market", European Law Review, issue 2, 2008, 211-229.

32 See Joined cases Criminal proceedings against Massimiliano Placanica, C-338/04, C-359/04 and C-360/04, Judgment of 6th March 2007, [2007] ECR I-01891.

33 See . Papaloukas, "Sport: Case Law of the Court of Justice of the E.C. ", (Papaloukas Editions, 2008), pp. 309.

when regulating on sports betting has four hypothetical choices, which in order of rigour are:

1. State monopoly.
2. State controlled licensing under certain conditions.
3. Licensing based on formal procedures.
4. Absolute freedom to provide betting services.

According to the third requirement of the principle of proportionality the state provision should not exceed what is necessary to achieve the objectives intended in the general interest. In order not to exceed what is necessary there should not be another, more flexible way to regulate the matter that can achieve the same public interest objectives. It has now become even more difficult for Member States, imposing state monopoly, to present convincing arguments that the best way to protect public interest is by imposing the most radical measure from the point of view of competition rules, i.e. a state monopoly and not by using any other more flexible measure.

However the ECJ found a way around this argument, that can be found in the Placanica case. The Court ruled that it is possible that a policy of controlled expansion in the betting sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming - and, as such, activities which are prohibited - to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.<sup>34</sup> This argument however was referring to the imposition of a licensing system as an efficient mechanism enabling operators active in the betting and gaming sector to be controlled and not a system of monopoly. The same argument was used by Advocate General Bot in his opinion in the Bwin Liga case.<sup>35</sup> But contrary to the Placanica case, this case was not about the imposition of a licensing system but about the imposition of a state monopoly on betting.

## 6. Conclusions - The future in sports betting

Since the Attorney General's opinion in the Bwin Liga case was adopted by the Court,<sup>36</sup> could this mean that state monopolies can be justified as a means of restricting gambling? Is this the end of the principle of proportionality?

One should not forget that in the Bwin Liga case the State monopoly in Portugal was imposed through a public company and not through a private company as for example is the case in Greece. In

that sense the Bwin Liga decision does not mean that all sports betting State monopolies in Europe will be preserved. Even in cases where the purpose for the imposition of a monopoly was to impose a restriction in the expansion of betting, a monopoly granting a license to a single private company aiming to profit, seems to go beyond what is necessary to achieve its purpose. There are a few pending references before the ECJ. The Winner Wetten<sup>37</sup> and SOBO Sport cases<sup>39, 40</sup> are concerning Germany and it is likely that the ECJ will soon have to deal with the case of Greek monopoly in sports betting.<sup>41</sup> It will be very interesting to see which State monopolies in sports betting can pass the test of the principle of proportionality.

However, there are also initiatives from other European Institutions. On the 10th of March 2009, the European Parliament voted on the integrity of online betting.<sup>42</sup> This resolution included, firstly, the observation «*that the protection of the integrity of sports events and competitions requires cooperation between sports rights owners, online betting operators and public authorities at national, as well as EU and international level*». It also refers to the risk of an uncontrolled non-state provision of betting services.<sup>43</sup>

This resolution may be useful at this stage in order to observe the direction, which the ECJ will move in. If we take into account that online betting does not relate, exclusively, to sport, the interest in sport in this text can be interpreted as a harbinger of developments in ECJ case law in the area of sports betting.

Member States have been called on to ensure that organizers of sporting competitions, betting operators and regulating authorities collaborate to take measures in order to address the risks associated with illegal betting and match-fixing in sport and, to explore the establishment of a workable, equitable and sustainable regulatory framework to protect the integrity of sports.

Finally, this resolution stresses that sports bets are a form of commercial exploitation of sport. Member States are thus urged to protect their sports games from any commercial use where permission has not been granted, especially by granting the sports organisers' rights, and to implement regulations ensuring equitable economic revenue for all levels of professional and amateur sports.<sup>44</sup>

It seems therefore that the ECJ will most probably continue on the path that it has so far taken by applying the proportionality principle in future cases. It seems unlikely that it will distinguish sports betting cases from other betting cases and, based on the specificity of sport,<sup>45</sup> justify a greater flexibility when it comes to the rules of free market and competition.<sup>46</sup>

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34 See Joined cases Criminal proceedings against Massimiliano Placanica, C-338/04, C-359/04 and C-360/04, Judgment of 6th March 2007, [2007] ECR I-01891, para 55.

35 Case Liga Portuguesa de Futebol Profissional, Baw International Ltd vs. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, C-42/07, opinion of Advocate General Bot delivered on 14 October 2008, paras 85-88.

36 See C-42/07 Decision 8th of September 2009.

37 See Reference for a preliminary ruling from the Verwaltungsgericht Köln

(Germany) lodged on 9 October 2006 - Winner Wetten GmbH vs. Mayor of Bergheim, C-409/06.

38 See . Papaloukas, "Sport: Case Law of the Court of Justice of the E.C. ", (Papaloukas Editions, 2008), pp. 322.

39 See Reference for a preliminary ruling from the Verwaltungsgericht Stuttgart (Germany), lodged on 2 August 2007 - SOBO Sport & Entertainment GmbH v Land Baden-Württemberg, C-359/07.

40 See . Papaloukas, "Sport: Case Law of the Court of Justice of the E.C. ", (Papaloukas Editions, 2008), pp. 324.

41 See <http://www.winneronline.com/>

articles/090216\_article\_stanleybethshutagain.html

42 See European Parliament resolution of 10 March on the integrity of online gambling, The Schaldemose Report.

(<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+Vo//EN>)

43 See Betfair's Corporate Statement on the Schaldemose Report.

(<http://corporate.betfair.com/BETFAIR%20CORPORATE%20STATEMENT%20ON%20THE%20SCHALDEMOSE%20REPORT.pdf>)

44 See paras. 8 -10 of the European Parliaments Resolution 2008/2215, (<http://www.mrgc.org.mt/docs/AlternativeMotionResolutionDraft.pdf>)

45 See the White Paper on Sport ([http://ec.europa.eu/sport/white-paper/whitepaper8\\_en.htm](http://ec.europa.eu/sport/white-paper/whitepaper8_en.htm))

46 See M. Papaloukas, "Betting on Sports Events", Paper presented at the 15th World IASL Congress on Sports Law taking place in Warsaw, Poland, 19-21 November 2009.

[http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=sports\\_law](http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=sports_law)

# Sport Betting and its Regulation in China

by Huang Shixi\*

Gambling or betting has a long history in China, and it is common for people to bet and enjoy themselves through playing poker or mahjong. In any event, betting is closely associated with lottery, and those people who buy lotteries may have a sense of betting mentally.

Generally speaking, the betting industry is divided into three main markets: the lottery market, the betting market, and casinos (including video lottery games). Most countries have sports lottery laws and regulations, but the countries that legalize sports betting and casinos are limited. Because of these legal limitations and enormous financial attractions, illegal betting emerged in some countries, and has caused a lot of problems, such as match fixing or bribery. Similar problems have occurred in China. This contribution will mainly discuss the sports lottery regulations and the illegal sports betting in China.

## 1. The Development of Sports Gaming in China

China has long waged a war against illegal gambling on its territory, despite the fact that it has a significantly long history of legalized gambling: the very first forms of this type of activity emerged there some three thousand years ago, and the first state lotteries were held in the Tang Dynasty.<sup>1</sup> As the fascination with games of chance grows, China has to consider the possibility of liberalizing the gaming industry, or clamp down even harder on its illegal forms.

For a long time, gambling was considered a harmless social activity that brought people together for some excitement and interaction. China's first modern casinos emerged in the treaty port cities and the international settlement of Shanghai.<sup>2</sup> When the People's Republic of China was founded in 1949, the newly established communist regime banned all forms of gambling activity, including lottery, because they were considered to be capitalist practices, it was immoral and a throwback to colonial days, with the result that it went underground until about twenty years ago, when the present state-run lottery system was established.

The taboo ended in 1984 when the organizers of the Beijing International Marathon held a lottery to raise funds for the event. Other official organizations followed and, three years later, founded the China welfare lottery. As the welfare lottery gathered steam, sports officials won approval in 1994 for the China sports lottery. Sports-related lotteries under the aegis of the China Sports Lottery Administrative Center (CSLAC) were introduced, including both traditional formats and sports-related lotteries, such as scratch-and-win lotteries, seven stars, listing 3/5, sports lotto, football lottery and basketball lottery.

Although gambling is becoming a popular leisure activity in China, up to now only a few legal lottery games existed,<sup>3</sup> while other types of gambling still remain banned. This policy is now lending to a rise in gambling tourism<sup>4</sup> and the spread of illegal gaming, which involves online betting, underground casinos, and private lotteries.

Furthermore, internet-based illegal lottery selling is on the rise in recent years, posing a threat to the operation of the lottery market. Thus, four government ministries — Finance, Public Security, Civil Affairs, Information Industry — and the General Administration of Sport, jointly launched a campaign to crack down on illegal lottery selling on the internet to fight lottery-related fraud in 2007. The bulletin listed some of the illegal activities, such as selling private lotteries under the name of state-run lotteries, providing illegal channels for sports gambling, and underground Mark Six and lottery-related fraud.<sup>5</sup>

In the end of 2008, a new and better kind of "lottery" emerged in the 6th China Wuhan International Horse Racing Festival, China's Hubei Province, which, as the Chinese media put it, is a horse lottery, but this is only a trial race. Prior to 1949, Wuhan was home to a thriving horse race lottery business, established by the British in the 19th century. It has long been keen to revive its position as China's "horse racing city." Although the central government has approved the establishment of regular horse racing in Wuhan, and was mulling over the introduction of gambling on the races in the near future, there was no concrete information on when or whether it will begin.

## 2. The Related Policy and Regulations on China Sports Lottery

Although China gave the green light to its lottery industry in 1984, and founded the sports lottery in 1994, it did not promulgate any laws and regulations about sports lotteries until the end of the 20th century. This practice was opposite to other countries that have legalized sports lotteries. Lack of laws and regulations on lottery supervision has become a significant factor that has impeded the sound development of the lottery industry. The Chinese government has made several lottery regulations in recent years, but only one specifically governs China's lottery market.

Nonetheless, there were still some regulations or bulletins about sports lotteries adopted by the Chinese government.

### 1. Provisional Measures on the Management of Sports Lottery Welfare Funds (1998)

Based on the Circular of the State Council on Further Strengthening Administration of Lottery Market, and in order to strengthen the lottery public welfare management, the General Administration of Sport, the Ministry of Finance and People Bank of China issued these Provisional Measures jointly. These are the only regulations which specifically targeted sports lotteries.

### 2. Circular of the State Council on Further Standardizing the Administration of Lotteries (2001)<sup>6</sup>

In order to control the unauthorized and private lotteries and expand the use of lottery welfare funds, the State Council issued this circular in October 2001, which stressed the State Council's responsibility for approving and administering the lottery-related questions, and highlighted the separate and cooperative liabilities among the Ministry of Finance, the Ministry of Civil Affairs and the General Administration of Sport.

### 3. Provisional Regulations on the Management of Lottery Distribution and Sales (2002)<sup>7</sup>

This provisional regulation was issued by the Ministry of Finance in 2002, but it's only a ministerial rule. Apart from the management of lottery distribution and sales in this regulation, it also includes safety management and lottery supervision rules. Regrettably, underground gambling and illegal lottery were still popular in some parts of China, the regulations did not play an effective role in the fight against illegal lottery and betting.

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1 Stina Björkell, All bets are on! - Lottery games and gambling in China, available at <http://www.radio86.co.uk/explore-learn/business-china/4991/all-bets-are-on-lottery-games-and-gambling-in-china>, 2009-10-21

2 Stina Björkell, *ibid*.

3 China sports lottery was founded in 1994.

4 Betting in Hong Kong on horse racing and soccer, and in Macau for casino

gambling horse and greyhound racing, is allowed as these are Special Administrative Regions (SAR) that have grown up independently under separate rule before returning to China late last century. These places attracted many mainland Chinese (including some top governmental officials) to bet in the name of tourism.

5 Xinhua News, China cracks down on Internet-based illegal lotteries(11/08/07), <http://www.china-embassy.org/eng/gyzg/t379313.htm>, 2009-06-10.

6 The State Council [2001]35.

7 The Ministry of Finance [2002] 13.

#### 4. Regulations on Administration of Lotteries (2009)<sup>8</sup>

Actually, China began drawing up a national regulation more than a decade ago, and this has been delayed year after year due to divergences among different government departments, such as the Ministry of Finance, Ministry of Civil Affairs and General Administration of Sport. Up to 2009, the State Council of China adopted Regulations on Administration of Lotteries (hereinafter the "Regulations"), which makes explicit stipulations about each aspect of lotteries, such as the distribution, sales, announcement of results and fund management.

The Regulations will enhance supervision of the fast-growing lottery industry and stamp out fraud, which has been on the rise since the country launched its first lottery two decades ago. According to the Regulations, no individual, organization or government department could sell lotteries without permission from the State Council. The China Welfare Lottery Administrative Center and the sports lottery administrative center of the China General Administration of Sport, both state-run, are the only two legitimate lottery outlets.

Lottery funds should cover lottery prizes and management funding for lottery sellers. The rest should be spent on the improvement of public welfare, according to the draft, quoting that a percentage of the revenue would be decided by State Council financial departments.<sup>9</sup> Individuals or government departments violating the regulation by selling lotteries unauthorized by the State Council would be fined and face criminal charges. Their illegal gains would be confiscated.<sup>10</sup>

The newly adopted Regulations showed that the Chinese government will exercise greater central control over China's growing lottery market. Nevertheless, the existing rules and regulations are still not enough to deal with the lottery problems.

### 3. Sports Lottery-Related Cases Analysis

Considering the lack of efficient laws and regulations about sports lottery supervision and the temptation of top prizes as well, some unexpected fraud cases happened in the selling and distribution of sports lotteries. One of the most representative cases is the Baoma lottery case sentenced by Xi'an court.

In 2004, several people were found guilty of manipulating a scratch-and-win sports lottery in the northwestern city of Xi'an and were sentenced to varying terms in prison. During the fraud incident, a contractor of lottery tickets cheated his way to top prizes - a BMW and 120,000 yuan - by marking lottery tickets and employing four people to falsely claim the prizes, while claiming that the real top prize winner lottery was fake. After judicial intervention, the real lottery top prize winner Liu Liang, a young migrant worker, finally received the prize that was due and accepted apologies from local sports authorities.<sup>11</sup> At that time, China had only a provisional regulation on the management of lottery distribution and sales which was issued in 2002. After this case, calls for publishing regulations or even a law on lottery supervision were voiced again.

From an international perspective, during October and November 2007, International Criminal Police Organization (Interpol) associated with the police forces from China, Hong Kong, Macau, Singapore, Indonesia and Malaysia initiated Operation "SAGA" Phase 1 (Soccer Gambling) to combat rampant illegal bookmaking and offshore bet-

ting, and resulted in more than 400 arrests after raids on 272 illegal gambling dens estimated to have handled more than 680 million US dollars' worth of bets. Between May 1 and June 30, 2008, Interpol conducted a second operation "SAGA" targeting illegal soccer gambling across Asia and resulting in more than 1,300 arrests and the seizure of over 16 million US dollars.<sup>12</sup>

Apart from sports lottery crimes, there were several other welfare lottery-related cases in China. The frequency of lottery-related crimes indicates that there might be some problems in China's lottery management system. The state monopoly on the lottery industry may be an important reason.

### 4. The Challenge of Illegal Sports Betting and the Future Possibility to Legalize Sports Betting

China began to issue sports lotteries nearly twenty years ago, and most of the sports lotteries are computerized, or based on some foreign football matches' results. Because China's football lottery should not bet on the future results of domestic matches, and China has a long history of gambling in the world, the result was that some Chinese gamblers began to bet on Chinese football matches. Some football athletes, team managers and even sports officials were also involved in illegal football betting or match-fixing, the only aim of which was to earn more and more money.

At the end of 2009, Chinese police officials began to investigate illegal sports betting, match-fixing and corruption in Chinese professional football matches. In addition to some football players and clubs' managers, three top officials of the China Football Association (CFA) were arrested for alleged match-fixing and bribery, they are CFA head Nan Yong, former deputy chairman Yan Yimin, and Zhang Jianqiang, former director of the association's referee committee.<sup>13</sup> So far, more than 20 officials, players, and club managers, have been arrested or detained on suspicion of either match-fixing or illegal gambling. Underground illegal soccer gambling in China is experiencing a massive crack down after a number of scandals surfaced involving bribery and alleged match-fixing.

As to the three CFA top officials, although CFA is nominally a private sports association, it is also a state agency in China. Almost all of the CFA top officials were appointed by the General Administration of Sport. For example, Nan Yong simultaneously served as the director of Football Administration Centre of the General Administration of Sport, the vice chairman of CFA, and director of China Super League Commission before arrest. In fact, the Football Administration Centre and the CFA are the same agency with two different "brands." This is the main characteristic of China's sport administration system, and would inevitably lead to sports-related corruption.

The Ministry of Public Security said that it would fully support the sport authority's campaign to fight corruption in soccer. Apart from continuing its investigation into serious criminal cases, the Ministry would coordinate with the sport, supervisory and judicial organs to set up an anti-gambling mechanism in a bid to create an environment for fair play in Chinese soccer.<sup>14</sup> Although this anti-gambling campaign involves the football officials and athletes only, and it seems to have nothing to do with the sports lottery at first sight, it will have great influence on the development of China sports lottery. After all, it cracked down on illegal sports betting and the underground lottery in China. For lottery administrators, it may be a better choice to legalize some kind of sports lottery. For one thing it can enhance national revenue and reduce crime violation. For another it can meet Chinese bettor's requirements, as betting has a long history in China and has in fact become one kind of Chinese culture, such game ways as poker or mahjong can usually be used as betting tools.

When the author was finishing this paper, another piece of good news about horse-racing lotteries attracted Chinese bettor's attention. The State Council, China's Cabinet, encouraged Hainan in early January to "explore and develop" pari-mutuel sports lotteries and instant sports lotteries on large international events, in an effort to develop the island province into a global tourist resort. Hainan has started exploring ways to introduce betting-type lotteries on major international competitions, including horse racing in Hong Kong.

8 Decree of the State Council of the People's Republic of China (No.555).

9 See articles 33-37, Regulations on Administration of Lotteries (2009).

10 Article 38, Regulations on Administration of Lotteries (2009).

11 Wang Lewen, Xian: Lottery Incidents Showed Legal Deficiency, *People's Daily*, April 2, 2004, at 5; Yin Chao, The Appeal Period Expired in Baoma Lottery Case, Yang Yongming Appealed while Jia Anqing No, available at <http://news.xinhuanet.com/legal/2004-12/16/content.html>, last visited January 31, 2005.

12 See Philip Tam, Sports Betting Market Development in Asia, <http://en.starlott.com/pdf/sports-betting-development-in-asia.pdf>, 2009-11-11.

13 Xinhua, Three top soccer officials arrested on fixing charge, [http://www.chinadaily.com.cn/sports/2010-03/02/content\\_9524911.htm](http://www.chinadaily.com.cn/sports/2010-03/02/content_9524911.htm), 2010-03-02.

14 Xinhua, Three top soccer officials arrested on fixing charge, [www.chinadaily.com.cn/sports/2010-03/02/content\\_9524911.htm](http://www.chinadaily.com.cn/sports/2010-03/02/content_9524911.htm), 2010-03-02.



Furthermore, a lottery research center has been set up by the provincial government and a research group has also been established by state authorities.<sup>15</sup>

## 5. Conclusion

Compared with the rapid development of the sports lottery industry, if China's laws and regulations about this subject were out of date, such situation would block the lottery industry's healthy development. The lack of efficient lottery laws and regulations would further facilitate underground sports betting and illegal lotteries, and lead to criminal violations. So, the China government should make more suitable laws and regulations about sports lottery, and try to control illegal betting.

As the lottery has been a consistent revenue earner for the government and can solve some person's employment problem, in a way, China should expand its sports lottery varieties and legalize some so-called western sports betting (such as a horse racing lottery). At the same time, China should encourage private capital to invest in the lottery industry and break up the state-run lottery monopoly. Real competition in the Chinese lottery industry may decrease the corruption and match-fixing found in China's sports arena.

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15 Qi Xiao, Hainan to pilot lottery on horse racing, [www.chinadaily.com.cn/](http://www.chinadaily.com.cn/)

[china/2010-02/25/content\\_9504450.htm](http://china/2010-02/25/content_9504450.htm), 2010-2-26.

# Sports Betting in Singapore

by Lau Kok Keng\*

From football to Formula 1, betting on sporting events is increasingly commonplace. This article provides an insight into the history, legislative framework and pertinent issues in the dynamic area of sports betting.

Sports betting involves making predictions of the outcomes of sporting events through wagering. Sporting events on which bets are commonly offered include football, motor racing, horse-racing, basketball, baseball, golf, rugby and boxing. Outcomes arising from these events on which bets may be offered may range from the final score and winner of the match or championship, to details such as first player to score and number of fouls committed during the game.

The legality of sports betting, and the extent of permitted sports betting activity, varies from country to country. Even in countries which have legalised sports betting, there nonetheless exists a huge parallel underground betting environment. In addition, the online sports bookmakers and betting exchanges who are licensed in offshore jurisdictions also provide additional avenues for sports betting in competition with state operators.

Proponents of legalised sports betting argue that having a flutter on a sporting activity is not only relatively harmless, but may also increase interest and fan support in the sport. In addition, the revenues from legalised sports betting may even be channelled back into funding the development of the sport. On the other hand, opponents of sports betting are concerned that it may compromise the integrity of participants in the sport (*ie* players, coaches and officiators), even if match fixing is equally prevalent (if not more) in countries which have refused to legalise sports betting.

## History and evolution

Gambling has existed in Singapore since the early colonial days. For instance, in the 1820s, the colonial police was said to have been funded using gambling revenue. However, illegal gambling was rife and dominated the gambling industry.

The Betting Act (Cap 21) was enacted in 1960 to suppress illegal common betting-houses, betting in public places and bookmaking, while the Common Gaming Houses Act (Cap 49) was passed in 1961 to suppress illegal common gaming houses, public gaming and public lotteries. In 1968, the post-independence Government established the state operator Singapore Pools<sup>1</sup> to counter illegal betting and to channel proceeds of sales to benefit the community.

Up to 1999, legalised gambling in Singapore was limited to the Singapore Sweep lottery, 4D and Toto games operated by Singapore Pools, horse-racing conducted by the Singapore Turf Club, and certain types of gaming in private clubs (*eg* jackpot machines). All other forms of gambling were illegal.

In 1999, to support and maintain the viability of Singapore's first local professional football league - the S-League - following Singapore's withdrawal from the Malaysia Cup tournament, Singapore Pools introduced legalised football betting on S-League games. Proceeds from betting on S-League matches are channelled back into the league to fund the development of its football clubs.

In 2002, sports betting was extended beyond local S-League games. In recognition of the popularity of betting on foreign football matches, Singapore Pools began to offer legalised betting on matches played in the World Cup 2002. Sports betting was subsequently further extended to allow for legalised betting on the English Premier League, other international matches, and to other European and Asian football leagues as well.

The opening up of sports bets was mirrored by other developments in gambling. In April 2005, in a Ministerial Statement made in Parliament, the Singapore Government announced its decision to lift its ban on casinos in the city state, and to allow for two casinos to be established as part of the "Integrated Resorts" in Singapore. These Integrated Resorts, the first of which is due for completion in early 2010, will be the first ever legalised casinos in Singapore, and will be significant milestones in the gambling landscape in Singapore. To pave the way for the operation of the two Integrated Resorts, the Casino Control Act was passed in 2006.

In September 2008, Singapore hosted a Formula One race for the first time. In line with this historic event, legalised sports betting was further extended to allow Singapore Pools to offer betting on the Formula One races beginning with the Australian Grand Prix held in Melbourne in March 2008.

Though not as prevalent and entrenched as mass appeal lottery games such as 4D and Toto, sports betting has today gained widespread acceptance in Singapore. A survey conducted by the Ministry of Community, Youth and Sports in 2008 revealed that about 9% of the respondents in Singapore engaged in sports betting on a regular basis, and that the average amount spent by each of them on this form of betting is about S\$ 160 a month.<sup>2</sup> Legalised sports betting in Singapore is currently administered by the Singapore Totalisator Board.

## Sports betting operators

As of 1 April 2004, the Singapore Totalisator Board (or Tote Board) acquired Singapore Pools from Temasek Holdings. Following this, the

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2 Report on Survey of Participation In Gambling Activities Among Singapore Residents, 2008 at [www.mcys.gov.sg/MCDSFiles/Resource/Materials/GamblingSurveyReport2008.pdf](http://www.mcys.gov.sg/MCDSFiles/Resource/Materials/GamblingSurveyReport2008.pdf)

1 Singapore Pools is currently the only legal lottery and sports betting operator in Singapore.

Tote Board holds the legal right to operate (a) horse-racing and totalisator operations through its agent and proprietary club, the Singapore Turf Club; and (b) 4D, Toto, Singapore Sweep, football betting and motor racing through its agent and wholly-owned subsidiary, Singapore Pools. The Tote Board oversees the operations of Singapore Pools and the Singapore Turf Club. Surplus earnings are channelled by the Tote Board towards worthy causes that serve the needs of the community.

Under the Singapore Totalisator Board Act (Cap 305A), the functions of the Tote Board include, amongst others: (a) to operate totalisators in accordance with any approved scheme; and (b) to operate and conduct (by means of a totalisator or otherwise) such lottery or other betting or gaming activities as may be prescribed, in accordance with any scheme which the Minister may, subject to such conditions as he may impose, authorise. Accordingly, the Tote Board is empowered to provide assistance and advice relating to racing, betting and gaming in Singapore and to distribute moneys forming part of the fund of the Tote Board which is not required in the exercise of its functions for public, social or charitable purposes and for the promotion of culture, art and sport generally in Singapore.

### Legislative framework

Sports betting is prohibited in Singapore under the Betting Act (Cap 21), unless an exemption is granted by the Minister.

#### *The Betting Act*

The Betting Act is described as “[a]n act to suppress common betting-houses, betting in public places and bookmaking”. First enacted in 1960, it prohibits betting or wagering on any event or contingency relating to any horse-race or other sporting event.

Section 3(1) of the Betting Act provides that any person who is involved in certain ways (as defined in the Betting Act) in a “common betting-house” or “betting information centre” shall be guilty of an offence. The terms “common betting-house” and “betting information centre” are given very broad definition under the Betting Act, and they are intended to capture a wide range of activities relating to horse-race and sports betting in Singapore. However, the Betting Act does not contain any express provisions dealing with online sports betting, the legality of which is briefly discussed later in this article.

#### *Exemptions from the Betting Act*

Prior to the Tote Board's acquisition of Singapore Pools from Temasek Holdings in 2004, Singapore Pools was granted the right to operate, *inter alia*, football betting in Singapore by way of statutory exemptions from the provisions of the Betting Act. Each type of football betting activity had to be separately exempted, as each new sports betting product had to be approved by the Minister before Singapore Pools was allowed to offer it to the public. The Singapore Turf Club on the other hand was granted the right to operate, *inter alia*, betting on horse-racing via the corresponding exemptions.

With the acquisition of Singapore Pools by the Tote Board, the Tote Board took over the rights to operate sports betting (including betting on horse-racing) in Singapore. Singapore Pools became an agent of the Tote Board in conducting sports betting operations, and new statutory exemptions under the Betting Act were gazetted to reflect this change. Under the Betting (Singapore Totalisator Board - Exemption) Notification 2004, the Tote Board and its officers were exempted from the provisions of the Betting Act in respect of the promotion, organisation, administration or operation of betting on football matches, while Singapore Pools, its officers and authorised agents were similarly exempted where the betting is promoted, organised, administered or operated for or on behalf of the Tote Board. Additional exemptions were gazetted subsequently to allow Singapore Pools to offer legalised betting on Formula 1 racing.

### Online sports betting

Singapore Pools does not offer any online sports betting currently. However, there is a proliferation of private bookmakers such as Ladbrokes, William Hill, Sportingbet and Bwin with a presence on

the internet who offer sports bets to a worldwide customer base. Although licensed offshore, these operators remain unlicensed in Singapore, as no exemptions have been granted for them to offer bets to Singapore residents. Nonetheless, this has not stopped residents here from accessing their websites to place bets on sports events with these operators. Indeed, as these private operators do not have any requirements to contribute to good causes, unlike state operators, they are able to offer better odds to the punter, and are viewed as providing more value for the betting dollar. Internet betting is also more convenient as compared with having to join the queues at physical betting outlets, although phone betting offered by Singapore Pools has gone some way to overcome any such inconvenience.

Despite the growing popularity of online betting in Singapore, the Betting Act does not appear to have any provisions which expressly prohibit online sports betting in Singapore. The stance taken by the Government appears to be that the playing and operation of online gambling websites is illegal in Singapore.<sup>3</sup> However, the provisions of the Betting Act may not necessarily support this position. There is some uncertainty as to whether an internet betting site hosted outside of Singapore would fall within the definition of a “common betting-house” or a “betting information center”, given that the definitions of the respective terms strongly suggest the involvement of physical premises and not virtual ones. Neither is it likely that a user's home from which access to the betting website is gained can be said to be either a “common betting-house” or a “betting information center”. The mere act of accessing an internet betting website to place wagers from one's own home would appear insufficient, by itself, to make one's home either a common betting-house or a betting information center since under ordinary circumstances, a home is not primarily used for betting.

However, if a user places bets for various other persons as an agent, or frequently and habitually places bets or wagers, a court might find that the user's home is a place kept or used for habitual betting, which may then fall within the offence provision. In addition, the definition of “bookmaker” in the Betting Act is arguably broad enough to include entities operating internet betting websites. As such, placing bets with an internet sports bookmaker from one's own home may potentially amount to an offence under s 5(1), which states that any person who bets or wagers with a bookmaker in any place or by any means (a phrase potentially wide enough to include betting or wagering over the internet), shall be guilty of an offence. This is provided the act of betting is considered to have occurred in Singapore. One argument that can be made is that in the case of betting websites hosted outside of Singapore, betting does not occur in Singapore, but rather, is concluded at the place where the transactional server is hosted. The validity of such an argument however, remains untried and untested, and unaddressed by any legislation as yet.

### Online payment services

Even if online betting does not fall within any offence provisions of the Betting Act, there are other restrictions which may impact upon the operations of internet betting websites which are accessible to residents in Singapore. One such restriction would involve payment for bets and winnings.

The most significant developments relating to online payment restrictions affecting the gambling industry have occurred in the United States, a jurisdiction which boasts stringent gambling laws. In 2006, the US Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”), which makes it illegal for its financial institutions to transfer money to offshore gambling websites or to online payment service providers used by such websites. As a result of the UIGEA, many non-US based betting websites blocked access to US residents, and shifted their attention to Asian jurisdictions.

Notwithstanding that the UIGEA is US legislation, it has consistently been applied against non-US residents since its enactment, prompting questions over its extra-territorial effect. For example, in August 2009, Canadian resident Douglas Rennick was indicted in the US on charges of bank fraud, money laundering and illegal gambling. Rennick was accused of having opened bank accounts in the US

under various corporate names for purposes of using the accounts to receive funds from offshore internet gambling operators. In another case in January 2007, the co-founders of NETeller (considered by many online gamblers to be the best option for transferring, withdrawing and depositing funds and which is widely supported by major online casinos), John Lefebvre and Stephen Eric Lawrence, were arrested in the US and charged with the intent to promote illegal gambling by transferring billions of dollars for US Internet gamblers. Both of them were Canadian citizens.

In Singapore, there is as yet no legislation equivalent to the UIGEA. However, many banks have a policy of disallowing the use of their credit cards for online gambling. These include United Overseas Bank, Citibank, HSBC, Amex, Maybank and OCBC Banks. Indeed, only DBS and Standard Chartered Bank do not block customer wagers.

### Advertising

Subtle forms of advertising for offshore internet sports bookmakers and betting exchanges have gained momentum in Singapore over the years - for example, Betfair and Ladbrokes have, in the past, taken to distributing complimentary products such as beer mats and mugs, and displaying memorabilia such as team-autographed jerseys "kindly donated" by them, in pubs and bars. Both Betfair and Ladbrokes have also had representatives based in the country in the recent past, albeit performing marketing functions for the region without targeting Singapore residents. The current level of tolerance for offshore bookmakers' marketing and publicity attempts here was highlighted when Betfair hosted the Asian Poker Tour 2006 in Singapore, not least because the event was supported by the Singapore Tourist Board, but also noticeably because it was held here during the same time that the World Lottery Association's 2006 Convention was hosted by the state lottery Singapore Pools.

The advertising prohibitions in the Betting Act may be difficult to extend to online gambling for the reason that no gambling takes place in physical premises. Moreover, gambling advertisements online are not clearly prohibited by the Media Development Authority or the Broadcasting Act. In contrast, the state operator (the Singapore Totalisator Board) which upholds Responsible Gambling policies is heavily restricted by internal policies and governmental restrictions from seeking to expand its customer base by way of advertising and product diversification.

### Conclusion

Legalised sporting betting forms an important source of revenue for the sports industry in Singapore. Indeed, the S-League is largely funded by the SCORE! betting business. Revenue derived from legalised sports betting can, in turn, be distributed and channelled to sports development, raising sporting standards and increasing the level of public awareness of and interest in the beneficiary sports. Legalised sports betting revenue can also be used to fund community projects such as the building of arts/entertainment centres and stadia, especially where private funding and enterprise is wanting.

While the anti-gambling movement may see sports betting as being no different from other forms of gambling and as equally detrimental to the moral fibre of society, the regulation of sports betting does go a long way in minimising any negative social impact it may have on its participants, while at the same time, serve to benefit the community in ways that would justify its continued endorsement by the Government.

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<sup>3</sup> See for example: "Internet betting on S-League games illegal", *The Straits Times*, published on 31 May 2004

# Regulation of Sports Lotteries and Betting in Switzerland

by Jérôme de Montmollin and Dmitry A. Pentsov\*

## 1. Introduction

The regulation of lotteries, in particular, sports lotteries, and betting in Switzerland may be viewed as a classic example of how gambling, one of the strongest individualistic human passions, could be used to serve the public good. Despite a recent slight decrease in the receipts from lotteries and betting, these revenues still remain a primary source of the financing of sport in the country. Out of 2.73 billion Swiss francs spent in 2007 in Switzerland by its residents on lotteries and sports betting in general (on average, 360 Swiss francs per resident), *Swisslos* and *Loterie Romande*, two principal lotteries and sports

betting operators in the country, have transferred 523 million Swiss francs to Cantonal funds of lotteries and sport as well as to sportive associations, whereas the analogous figures for a record 2006 year were 2.8 billion Swiss francs (on average, 374 Swiss francs per resident) and 586 million Swiss francs respectively.<sup>1</sup> In relative figures, this means that currently the proceeds of lotteries accounts for approximately 80 per cent of the budget of the Swiss Olympics,<sup>2</sup> for more than half of the sports budget of the Swiss Cantons as well as for 15% of the budget of Swiss Sport Assistance.<sup>3</sup>

Therefore, the purpose of this Chapter is to present the system of

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<sup>1</sup> See, Office fédéral de justice: Moins d'argent dépensé pour les loteries et les paris, Communiqués, OFJ, 06.08.2008, text in French is available at: <http://www.ejpd.admin.ch> (last visited Oct. 31, 2009).

<sup>2</sup> Swiss Olympics is an umbrella association of Swiss sport federations, which represents both Olympic and non-Olympic disciplines. It was created on January 1, 1997 as a result of a merger between Swiss Sport Association (ASS) and the Swiss Olympic Committee (COS) with the simultaneous integration

of the National Committee for the Elite Sport (CNSE). See, Swiss Olympic - l'Association fédérative du sport suisse, text in French is available at: [http://www.swissolympic.ch/fr/desktopdefault.aspx/tabid-3242/4236\\_read-25026/](http://www.swissolympic.ch/fr/desktopdefault.aspx/tabid-3242/4236_read-25026/) (last visited Oct. 31, 2009).

<sup>3</sup> See, Loterie Romande: Les loteries et le sport: un partenariat vital, text in French is available at: [http://www.loterie.ch/data/info/380/193\\_LoRo\\_factsheetSport\\_12.06.pdf](http://www.loterie.ch/data/info/380/193_LoRo_factsheetSport_12.06.pdf) (last visited Oct. 31, 2009). Swiss Sport

Assistance ("l'Aide sportive Suisse") is a non-profit public benefit organisation. Since January 1, 2004 it focuses on the support of the young athletes who participate in high-level sport. In order to achieve this goal, it raises funds from the population and the economy. See, L'Aide sportive: qui sommes-nous?, text in French is available at: [www.aidesportive.ch/fr/l\\_aide\\_sportive/qui\\_sommes\\_nous\\_/index.cfm](http://www.aidesportive.ch/fr/l_aide_sportive/qui_sommes_nous_/index.cfm) (last visited Oct. 31, 2009).

regulation of sport lotteries and betting in Switzerland and to explain how it achieves such remarkable results. There is no specific legislation on sports lotteries and betting in the country, and they are governed by legislation applicable to all types of lotteries, including sports lotteries, as well as betting. Consequently, this Chapter, first offers a brief historic overview of the creation of the general regulatory framework for lotteries and commercial betting in the country. After providing a snapshot of the current state of the market of sports lotteries and betting in Switzerland and its major participants, the Chapter continues with the consecutive presentations of the existing system of state licensing and supervision of lotteries and betting, starting in each case with the discussion of the meanings of “lottery” and “betting”, their characteristic features and distinctions from similar institutions, illustrated by decisions of the Swiss Supreme Court (“*Tribunal fédéral*”), the highest Court authority in the country. The Chapter concludes with the outline of proposed reforms to the existing regulatory framework providing, in particular, a brief overview of the draft Federal Lotteries and Betting Law of 2002,<sup>4</sup> and of the current state of this reform.

## 2. Constitutional foundations and history of lotteries and betting regulations in Switzerland

### 2.1. Constitutional foundations of the existing system of regulation

The existing system of regulations of lotteries and commercial betting in Switzerland reflects the confederative structure of the country and the distribution of the legislative competence in the area of gambling and lotteries between the Swiss Confederation and the 26 Swiss Cantons. Under the Swiss Federal Constitution of 1999, Swiss Cantons are sovereign to the extent that their sovereignty is not limited by this Constitution and exercise all rights which are not delegated to the Confederation.<sup>5</sup> In accordance with the Federal Constitution, the legislation on gambling and lotteries belongs to the domain of the Confederation.<sup>6</sup> As a result, the lotteries and betting in general, including sports lotteries and sports betting, are regulated in

Switzerland primarily on the Federal level, namely, by the Federal Lotteries and Commercial Betting Law of 1923,<sup>7</sup> and the Ordinance of 1924 to this Federal Law,<sup>8</sup> whereas the individual Cantons have adopted their respective laws,<sup>9</sup> regulations<sup>10</sup> or decrees of the cantonal government,<sup>11</sup> implementing the provisions of the Federal legislation. In addition to that, all 26 Cantons have ratified the Inter-Cantonal Convention on the supervision, licensing and distribution of profits from the lotteries and betting operated at the inter-Cantonal level or in the whole territory of Switzerland, which entered into effect on July 1, 2006 (“CILP”).<sup>12</sup> Furthermore, the French-speaking Cantons have also ratified the 9th Convention concerning *Loterie Romande* of 2005,<sup>13</sup> whereas the German-speaking and Italian-speaking Cantons - the Inter-Cantonal Convention on the organisation of lotteries (IKV) of 1937.<sup>14</sup>

### 2.2. Historical origins of the existing system of regulation

Viewed from an historical perspective, the origins of the existing system of regulation of lotteries and betting in Switzerland could be traced to the first half of the XIX Century. By that time the lotteries were exclusively governed by the Cantons, and all Swiss Cantons had already adopted some statutory provisions aimed at preventing the flow of lotteries, in particular, foreign lotteries, and combating the abuses associated with their conduct.<sup>15</sup> Nevertheless, the need was already felt that Federal regulation in this area was required.

Although the Cantonal legislation may have been effective in preventing abuses in individual cases, it was unable to prevent economic and moral evils caused by lotteries, in their different forms, throughout the population and the country at large.<sup>16</sup> While the territorial effect of these *Cantonal* provisions was, by definition, confined to the territory of the respective Canton, the enterprises organising lotteries usually conducted their operations beyond Cantonal borders. Thus, the lottery permitted in a single Canton could have produced its effects throughout the whole country. Furthermore, for the same reasons, the Cantonal legislation proved to be inefficient in stopping the

4 Draft Federal Lotteries and Betting Law of 2002 (*Loi sur les loteries, Lot*), text in French is available at: [www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetzgebung/lotteriegesezt.Par.0005.File.tmp/entw-1g-f.pdf](http://www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetzgebung/lotteriegesezt.Par.0005.File.tmp/entw-1g-f.pdf); English translation is available at: [http://www.ejpd.admin.ch/etc/medialib/data/gesellschaft/lotterie.Par.0024.File.tmp/entw\\_Lotterien\\_und\\_Wetten-e.pdf](http://www.ejpd.admin.ch/etc/medialib/data/gesellschaft/lotterie.Par.0024.File.tmp/entw_Lotterien_und_Wetten-e.pdf) (last visited Oct. 31, 2009).

5 Federal Constitution of Swiss Confederation, dated April 18, 1999, Art. 3 (*Constitution fédérale de la Confédération suisse du 18 avril 1999*), text in French is available at: <http://www.admin.ch/ch/f/rs/1/101.fr.pdf> (last visited Oct. 31, 2009).

6 Federal Constitution, Art. 106(1).

7 Federal Lotteries and Commercial Betting Law, dated June 8, 1923. (*Loi fédérale sur les loteries et les paris professionnels (LLP)*, du 8 juin 1923), RO 39 361; RS 935.51, text in French is available at: [www.admin.ch/ch/f/rs/9/935.51.fr.pdf](http://www.admin.ch/ch/f/rs/9/935.51.fr.pdf) (last visited Oct. 31, 2009).

8 Ordinance to the Federal Lotteries and Commercial Betting Law, dated May 27, 1924 (*Ordonnance relative à la loi fédérale sur les loteries et les paris professionnels (OLLP)*, du 27 mai 1924), RO 40 249; RS 935.511, text in French is available at: <http://www.admin.ch/ch/f/rs/9/935.511.fr.pdf> (last visited Oct. 31, 2009).

9 For example, Canton of Bern: Law on the lotteries, dated May 4, 1993 (*Loi sur les loteries*, du 4 mai 1993), text in French is available at: [http://www.sta.be.ch/belex/f/9/935\\_52.html](http://www.sta.be.ch/belex/f/9/935_52.html) (last visited Oct. 31, 2009); Canton of

Fribourg: Law on lotteries, dated December 14, 2000 (*Loi sur les loteries*, du 14 décembre 2000), text in French is available at: [appl.fr.ch/v\\_off\\_bdlf\\_courant/fra/9581.pdf](http://appl.fr.ch/v_off_bdlf_courant/fra/9581.pdf) (last visited Oct. 31, 2009); Canton of Valais: Law on the implementation of the Federal Lotteries and Commercial Betting Law, dated November 11, 1926 (*Loi concernant l'exécution de la loi fédérale sur les loteries et les paris professionnels*, du 11 novembre 1926), text in French is available at: [http://www.vs.ch/Public/public\\_lois/fr/pdf/935.5.pdf](http://www.vs.ch/Public/public_lois/fr/pdf/935.5.pdf) (last visited Oct. 31, 2009); Canton of Vaud: Law concerning putting into effect in the Canton of the Federal Law of June 8, 1923 on the Lotteries and Commercial Betting, dated November 17, 1924 (*Loi relative à la mise en vigueur, dans le canton, de la loi fédérale du 8 juin 1923 sur les loteries et paris professionnels (LVLLP)*, du 17 novembre 1924), text in French is available at: [www.rsv.vd.ch](http://www.rsv.vd.ch) (last visited Oct. 31, 2009).

10 For example, Canton of Bern: Ordinance concerning the lotteries (OL), dated October 20, 2004 (*Ordonnance sur les loteries (OL)*, du 20 octobre 2004), text in French is available at: [www.sta.be.ch/belex/f/9/935\\_520.html](http://www.sta.be.ch/belex/f/9/935_520.html) (last visited Oct. 31, 2009); Canton of Fribourg: Regulations on the implementation of the Law on lotteries, dated May 1, 2001 (*Règlement d'exécution de la loi sur les loteries*, du 1 mai 2001), text in French is available at: [appl.fr.ch/v\\_off\\_bdlf\\_courant/fra/95811.pdf](http://appl.fr.ch/v_off_bdlf_courant/fra/95811.pdf) (last visited Oct. 31, 2009); Canton of Geneva: Regulations on the implementation of

the Federal Lotteries and Commercial Betting Law, as well as on the collection of the tax for the poor (*Règlement d'exécution de la loi fédérale sur les loteries et les paris professionnels, ainsi que sur la perception du droit des pauvres (RaLLP)*, du 9 mai 1952), text in French is available at: [www.ge.ch/legislation/rsg/f/s/rsg\\_13\\_15P03.html](http://www.ge.ch/legislation/rsg/f/s/rsg_13_15P03.html) (last visited Oct. 31, 2009); Canton of Valais: Regulations on the implementation of the law concerning the implementation of the Federal Lotteries and Commercial Betting Law, dated May 13, 1937 (*Règlement d'exécution de la loi concernant l'exécution de la loi fédérale sur les loteries et paris professionnels*, du 13 mai 1937), text in French is available at: [www.vs.ch/Public/public\\_lois/fr/pdf/935.500.pdf](http://www.vs.ch/Public/public_lois/fr/pdf/935.500.pdf) (last visited Oct. 31, 2009); Canton of Vaud: Regulations concerning lotteries, tombolas and lotos, dated June 21, 1995 (*Règlement sur les loteries, tombolas et lotos (RLoto)*, du 21 juin 1995), text in French is available at: <http://www.rsv.vd.ch> (last visited Oct. 31, 2009).

11 For example, Canton of Valais: Decree concerning the organisation and the exploitation of the lotteries, dated October 1, 1937 (*Arrêté concernant l'organisation et l'exploitation des loteries*, du 1er octobre 1937), text in French is available at: [www.vs.ch/Public/public\\_lois/fr/pdf/935.501.pdf](http://www.vs.ch/Public/public_lois/fr/pdf/935.501.pdf) (last visited Oct. 31, 2009).

12 See, Inter-Cantonal Convention on the Supervision, Licensing and Distribution of Profits from the lotteries and betting operated at the inter-Cantonal level or in

the whole territory of Switzerland, dated January 7, 2005 (*Convention intercantonale sur la surveillance, l'autorisation et la répartition du bénéfice de loteries et paris exploités sur le plan intercantonal ou sur l'ensemble de la Suisse (CILP)*, du 7 janvier 2005), text in French is available at: [www.geneve.ch/legislation/rsg/f/s/rsg\\_13\\_14.html](http://www.geneve.ch/legislation/rsg/f/s/rsg_13_14.html) (last visited Oct. 31, 2009).

13 The 9th Convention concerning *Loterie Romande*, dated November 18, 2005 (*9e convention relative à la Loterie Romande (C-LoRo)*, du 18 novembre 2005), text in French is available at: [www.geneve.ch/legislation/rsg/f/s/rsg\\_13\\_15.html](http://www.geneve.ch/legislation/rsg/f/s/rsg_13_15.html).

14 Inter-Cantonal Convention on the organisation of the lotteries, dated May 26, 1937 (IKV) (*Convention intercantonale du 26 mai 1937 sur l'organisation des loteries (IKV)*), text in French is available at: [http://www.be.ch/gr/VosData/Gwd/Tagblatt%202002/11%20NovemberSession/Beilagen/20021205\\_171451/Annexe%2029%20Arr%EAt%20GC%20Convent%20intercant%20org%20loteries%20Prop.pdf](http://www.be.ch/gr/VosData/Gwd/Tagblatt%202002/11%20NovemberSession/Beilagen/20021205_171451/Annexe%2029%20Arr%EAt%20GC%20Convent%20intercant%20org%20loteries%20Prop.pdf) (last visited Oct. 31, 2009).

15 See, Message du Conseil fédéral à l'Assemblée fédérale concernant le projet de loi fédérale sur les loteries et les entreprises analogues, du 13 août 1918, Feuille Fédérale, 1918, volume IV, pp. 343-344.

16 See, Rapport de la Commission du Conseil des Etats concernant la révision de la constitution fédérale, du 30 septembre 1865, Feuille Fédérale, 1865, volume III, No. 46, pp. 643, 660.



growing flow of foreign lotteries, in particular, German ones into Switzerland.<sup>17</sup> As a result, the protection offered by the Cantonal legislation in many instances was insufficient. Thus, the need was felt that only a Federal legislator could, in a satisfactory manner, rectify the existing situation with lotteries, by means of adopting provisions which would supplement the protection already offered by Cantonal legislation.<sup>18</sup>

One of the first efforts aimed at the introduction into Switzerland of the regulation of lotteries on the Federal level was the resolution adopted by the Swiss Society of Public Benefit (*"Société suisse d'utilité publique"*) in its annual meeting held in 1862.<sup>19</sup> This resolution, in particular, requested the introduction of the statutory prohibition of gambling, including lotteries.<sup>20</sup> In 1863, the government of the Canton of Argovie took certain steps aimed at the conclusion of an inter-Cantonal treaty (*"concordat"*) for the prohibition of gambling, including lotteries. The Swiss Federal Government (*"Conseil fédéral"*) subsequently submitted this draft treaty to the examination of the commission composed of the delegates representing Cantons. This commission held several meetings in 1863-1864 under the presidency of the head of the Federal police and justice department.<sup>21</sup>

Although certain difficulties emerged during the commission's deliberations, the agreement was reached along the main lines of the draft. In particular, the Cantons of Uri and Schwyz, which at that time had state lotteries, expressed their willingness not to renew the concessions related to these lotteries. While the state lotteries in these two Cantons were created for the purpose of raising funds necessary for the assistance to the poor, they were subsequently taken over by private people. While these persons apparently benefited from the largest share of the lotteries' profits (around 640,000 Swiss francs), the share of the Cantons was reduced only to an annual fee of an amount between 7,000 and 10,000 Swiss francs.<sup>22</sup>

The work on the draft treaty was interrupted in 1865 by the introduction of the project of the partial revision of the Federal constitution of 1848. Following the proposal of Dr. Blumer, Federal Judge and member of the Council of States (*"Conseil des Etats"*), an upper Chamber of the Swiss Federal Parliament (*"Assemblée fédérale"*), Article 59b was introduced into the project. This Article provided for the competence of the Confederation to adopt legislative provisions against the professional operation of lotteries and gambling in the whole territory of Switzerland. Taking into account that the draft inter-Cantonal treaty did not appear capable of achieving this goal, the need for centralisation of the legislation in this area was further emphasised by the report of the Commission of the Council of States, dated September 30, 1865.<sup>23</sup> Nevertheless, the proposed article was rejected by the popular vote, held on January 14, 1866, which also resulted in the termination of the activities of the commission working on the draft inter-Cantonal treaty.

Despite the rejection of this proposal, the Federal Government had not lost sight of the issue. Correspondingly, the next project of complete revision of the Federal constitution also included Article 31 relating to gambling houses and lotteries, which provided, in particular, the competence of the Confederation to take necessary measures concerning lotteries. Although the new project was also rejected by the popular vote, held on May 12, 1872, this Article was included without modifications as Article 35(3) of the Federal Constitution, finally adopted on May 29, 1874.<sup>24</sup>

Following the introduction into the Federal constitution of the competence of the Confederation in the area of lotteries, the Federal Parliament started taking measures against foreign lotteries offered in Switzerland, initially focusing its efforts on the regulation of their distribution through Swiss postal channels. Thus, the Federal Law on the postal monopoly of 1894 included a special article providing that the post did not have an obligation to transport open shipments containing lotteries (offers of tickets, drawing lists etc.), which were not authorised in Switzerland by the competent authority.<sup>25</sup> Furthermore, the Federal Law on the Swiss post of 1910 has expended the application of these measures to those sealed shipments where it was possible to conclude that they contained the announcements of lotteries.<sup>26</sup> Nevertheless, since these measures could only reduce the postal distribution of the announcements, their overall effect was limited. On the other hand, the insufficiency of the Cantonal legislation in the area of lotteries had become more and more apparent, in particular, because of the constant development of the lotteries and their derivatives, notably loans with drawings (*"emprunts à primes"*).<sup>27</sup>

Reflecting the growing public sentiment of the necessity for a more extensive Federal regulation in the area of lotteries, Mr. Müri and Mr. Mächler, two members of the National Council (*"Conseil national"*), a lower Chamber of the Swiss Federal Parliament, introduced, on September 27, 1911, a postulate addressed to the Swiss Federal Government. Under their postulate, the Federal Government was invited to produce a report dealing with the question of whether public interest required the adoption, in the near future, of a Federal law against the abuses associated with lotteries, giving effect to Article 35(3) of the Federal Constitution, with the principal aims of: (i) complete prohibition of lotteries in the strict sense of the word; (ii) provision of a legal basis for mixed lotteries, notably, to raffles; and (iii) placement of lotteries of general interest under the supervision of the Confederation.<sup>28</sup>

On September 28, 1911, the Federal Government accepted the postulate, and the Federal Department of Justice and Police subsequently appointed Dr. Blumenstein, law professor at the University of Bern, to prepare the draft law with the explanation for motives. Following the completion of the draft in December of 1912, in the beginning of 1913 its printed version was submitted to all Cantonal governments, Federal departments of finances and posts as well as to various other interested parties. Having received the comments, the Federal Department of Justice and Police submitted the draft for the consideration of the consultative commission, which, in addition to Dr. Blumenstein, included the Prosecutor-General, a former president of the Directorate of the Swiss National Bank, as well as Parliamentary members, governmental officials, Federal Judges and practicing lawyers.

Several years of the commission's work culminated on August 13, 1918, when the Federal Government submitted to the Federal Parliament the draft Federal law on the lotteries and analogous institutions.<sup>29</sup> Following the consideration of the draft at the Parliament, the Federal Lotteries and Commercial Betting Law was finally adopted on June 8, 1923. It entered into effect on July 1, 1924 together with the Ordinance to the Federal Lotteries and Commercial Betting Law, which was adopted on May 27, 1924.

### 2.3. The Federal Lotteries and Commercial Betting Law and the Ordinance to this law: general overview

Following its recent amendments,<sup>30</sup> the Federal Lotteries and Commercial Betting Law currently consists of 33 Articles subdivided into five Chapters. Part One ("Interdiction") of Chapter A ("Lotteries")

17 See, Gérald Mouquin, La notion de jeu de hasard en droit public (Genève, 1980), p. 30.

18 See, Message du Conseil fédéral, du 13 août 1918, p. 344.

19 See, Message du Conseil fédéral, du 13 août 1918, p. 344.

20 See, Message du Conseil fédéral, du 13 août 1918, p. 344.

21 See, Message du Conseil fédéral, du 13 août 1918, p. 344.

22 See, Message du Conseil fédéral, du 13 août 1918, p. 344.

23 See, Rapport de la Commission du Conseil des Etats, du 30 septembre 1865, pp. 659-660.

24 See, Message du Conseil fédéral, du 13 août 1918, p. 345.

25 Federal Law on the postal monopoly, dated April 5, 1894, Art. 12 (*Loi fédérale sur la régie des postes, du 5 avril 1894*), Feuille Fédérale, 1894, vol. II, No. 20, pp. 511-525.

26 Federal Law on the Swiss post, dated

April 15, 1910, Art. 15 (*Loi fédérale sur les postes suisses, du 5 avril 1910*), Feuille Fédérale, 1910, vol. II, No. 15, pp. 199-242.

27 See, Message du Conseil fédéral, du 13 août 1918, p. 346.

28 See, Message du Conseil fédéral, du 13 août 1918, p. 347-348.

29 See, Message du Conseil fédéral, du 13 août 1918, p. 343.

30 Law of June 17, 2005 on the Federal Administrative Tribunal (*Loi du 17 juin 2005 sur le Tribunal administratif fédéral (LTAF)*), RO 2008 3437 3452, text in French is available at: [http://www.admin.ch/ch/f/rs/c173\\_32.html](http://www.admin.ch/ch/f/rs/c173_32.html) (last visited Oct. 31, 2009); Federal Law on the formal updating of the Federal law, dated March 20, 2008 (*Loi fédérale relative à la mise à jour formelle du droit fédéral, du 20 mars 2008*) RO 2008 3437, 3452, text in French is available at [www.admin.ch/ch/f/as/2008/3437.pdf](http://www.admin.ch/ch/f/as/2008/3437.pdf) (last visited Oct. 31, 2009).

contains the definition of “lottery”<sup>31</sup> and establishes the general prohibition on the lotteries.<sup>32</sup> It also interdicts to organise and to conduct lotteries prohibited by this law, indicating that the “conduct lotteries” includes acts aimed at attaining the goals of the lottery such as the dissemination of information and announcements, promotion, issuance of tickets, their distribution, placement and sale of tickets, coupons and drawing lists, drawing, delivery of gains and the use of proceeds.<sup>33</sup> On the other hand, Part One names the types of lotteries which are not subject to this prohibition, namely the lotteries organised on the occasion of a recreational gathering, when the lots do not consist of cash and the issuance and drawing of tickets, as well as the delivery of prizes, have direct connections to this recreational gathering (the so-called “*tombolas*”).<sup>34</sup> This Part also names those types of lotteries which are exempted from this prohibition - the lotteries serving public interest goals or a charitable purpose and loans with prizes, to the extent that their organisation and operation are permitted.<sup>35</sup>

Part Two (“Exceptions to the interdiction”) of Chapter A allows the Cantonal authorities to authorise in their territory the lotteries having a public interest goal or a charitable purpose<sup>36</sup> and outlines the conditions for granting such licenses.<sup>37</sup> Part B of the law (“Commercial betting”) establishes a general prohibition on the organisation of commercial betting, related to horse races, regattas, football games and similar competitions and for running of an enterprise of this type,<sup>38</sup> providing, also a non-exhaustive list of prohibited activities.<sup>39</sup> This list of prohibited commercial betting activities includes: (i) placing information and announcements of the enterprises conducting commercial betting activities, regardless of whether they are made in an oral or in a written form, by means of posters, newspaper articles, newspaper advertisements, sending letters or booklets by any other means; (ii) offering premises on the basis of lease or any other legal title in view of the operation of these enterprises; and (iii) acting as an employee of these enterprises or in an analogous capacity.<sup>40</sup>

At the same time, the law allows the Cantonal legislation to authorise totalisator betting involving horse races, regattas, football games and similar competitions taking place in the territory of the respective Canton.<sup>41</sup> These provisions have been included into the law with the aim of making impossible the exercise, in Switzerland, of bookmaker’s activities while allowing the Cantons to authorise the negotiation and conclusion of totalisator bets. Since the participants should be able to evaluate, by themselves, the chances of winning these totalisator bets are not, by their nature, a pure lottery.<sup>42</sup>

Part C of the law (“Measures concerning postal traffic”) imposes restrictions on the transmission by post of lotteries,<sup>43</sup> magazines and newspapers essentially serving to distribute the announcements of lotteries,<sup>44</sup> as well as on the transmission of communications originating from the betting enterprises.<sup>45</sup> Part D (“Penal provisions and procedure”) prescribes various penalties for the violation of the law<sup>46</sup> and provides for the competence of the Cantons to prosecute and adjudicate the violations of this law.<sup>47</sup> Finally, Part E of the law (“Transitory and final provisions”) provides for the possibility of the Federal Government to adopt provisions and take other measures necessary for the implementation of this law, and for its authority, by means of adopting regulations, to make the enterprise analogous to lotteries also subject to the provisions of the law.

The Ordinance to Federal Lotteries and Commercial Betting Law provides for the competence of the Police Office of the Federal

Department of Justice and Police to handle the matters entrusted to the Federal administration by virtue of the Law and the Ordinance,<sup>48</sup> define the information which shall be provided by the Cantons to the Police Office, on an annual basis, with respect to the lotteries having a public interest goal or a charitable purpose where the total amount of tickets exceeds fifty thousand Swiss francs<sup>49</sup> as well as describe the operations which shall be assimilated to lotteries within the meaning of the Federal Law.<sup>50</sup>

### 3. Current state of the market of lotteries and betting in Switzerland and its major participants

#### 3.1. Lotteries

Since January 1, 2003, all large inter-Cantonal or national lotteries in Switzerland (with target amounts of over one hundred thousand Swiss francs) have been operated on a monopoly basis by two lottery companies - *Interkantonale Landeslotterie*, offering lotteries under the “*SwissLos*” brand in the German-speaking and Italian-speaking part of Switzerland (“*SwissLos*”),<sup>51</sup> and *Loterie Romande*, offering lotteries in the French-speaking part of Switzerland.<sup>52</sup> As of that date, there major operators, namely *Interkantonale Landeslotterie*, the *Sport-Toto-Gesellschaft* and *SEVA* merged to form the new *Interkantonale Landeslotterie*.<sup>53</sup> The origins of this monopoly could be traced to the economic crisis of the 30-s of the XX Century, when the Cantons relied upon their competence to authorise lotteries having a public interest goal or a charitable purpose provided for in the Federal Lotteries and Commercial Betting Law and, consequently, exclusively entrusted certain companies with the task of organising lotteries.<sup>54</sup>

The players mainly have access to the products of major lottery operators at their official sales points such as news-stands, kiosks, post offices, bars and restaurants, tobacconists etc. In addition to the major number lottery which is drawn on Wednesdays and Saturdays and the Euro Millions lottery, countless types of scratch cards and tear-off envelopes are also available.<sup>55</sup>

In line with the requirements of the Federal Lotteries and Commercial Betting Law that the Cantons may only authorise lotteries serving public interest goals or charitable purposes,<sup>56</sup> the money received from the lotteries goes to the Cantons. Depending on their own regulations and the amount involved, the competent financial body of each Canton (Cantonal Parliament, governing council, specially designated agency or distribution commission) will then distribute it in the form of grants to organisations running projects related to culture, nature and heritage conservation, education, social welfare, health, business promotion, tourism or sport.<sup>57</sup>

On the other hand, small lotteries (with a target amount of less than one hundred thousand Swiss francs) have a limited geographical reach (local, regional or in some cases Cantonal). They are generally held by small-scale organisers in connection with a wide variety of projects and events as a means of partly financing them or raising their appeal.<sup>58</sup> Unlike the proceeds received from the big lotteries, the proceeds from the small lotteries are not transferred to the Cantons, but are directly used by organisations or associations to finance the public utility or charitable projects.<sup>59</sup>

#### 3.2. Betting

Similarly to the organisation and operation of inter-Cantonal and national lotteries, sports betting on the inter-Cantonal and national

31 LLP, Art. 1(2).

32 LLP, Art. 1(1).

33 LLP, Art. 4.

34 LLP, Art. 2.

35 LLP, Art. 3.

36 LLP, Art. 5.

37 LLP, Art. 6 - 13.

38 LLP, Art. 33(1).

39 LLP, Art. 33(2).

40 LLP, Art. 33(2).

41 LLP, Art. 34.

42 See, Message du Conseil fédéral, du 13 août 1918, p. 362.

43 LLP, Art. 35.

44 LLP, Art. 36.

45 LLP, Art. 37.

46 LLP, Art. 38 - 45.

47 LLP, Art. 47.

48 OLLP, Art. 1.

49 OLLP, Art. 5.

50 OLLP, Art. 43.

51 See, <http://www.swisslos.ch> (last visited Oct. 31, 2009).

52 See, <http://www1.loterie.ch> (last visited Oct. 31, 2009).

53 See, Federal Department of Justice and Police: Lotteries, text in English is available at:

[http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref\\_lotterien\\_und\\_wetten/ref\\_lotterien.html](http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_lotterien.html) (last visited Oct. 31, 2009).

54 See, Claude Rouiller, *Jeux de lotteries et paris sportifs professionnels*, *Revue de droit administrative et de droit fiscal*, 2004, No. 5, p. 429, 436.

55 See, Federal Department of Justice and Police: Lotteries, text in English is available at: [www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref\\_lotterien\\_und\\_wetten/ref\\_lotterien.html](http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_lotterien.html) (last visited Oct. 31, 2009).

56 LLP, Art. 5.

57 See, the Federal Department of Justice and Police: Use of proceeds, text in English is available at: [www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref\\_lotterien\\_und\\_wetten/ref\\_verwendung\\_der.html](http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_verwendung_der.html) (last visited Oct. 31, 2009).

58 See, Federal Department of Justice and Police: Lotteries, text in English is available at: [www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref\\_lotterien\\_und\\_wetten/ref\\_lotterien.html](http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_lotterien.html) (last visited Oct. 31, 2009).

59 Département fédéral de justice et police:

level in Switzerland is currently operated by the same two companies - *SwissLos* and *Loterie Romande*. They organize sport totalisator betting (Toto-R and Toto-X) as well as the bookmaking game *Sporttip* throughout the country.<sup>60</sup> In addition to that, in the French-speaking part of Switzerland the *Loterie Romande* offers "*Pari mutual urbain romand*" ("*PMUR*") betting on horse races in Switzerland and abroad.<sup>61</sup> Unlike lotteries, where the proceeds are explicitly reserved for public benefit or charitable purposes, the Federal Lotteries and Commercial Betting Law does not prescribe similar requirements with respect to the sports betting. Nevertheless, the proceeds from the sports betting are still allocated to the cantons as well as to the Swiss Olympic pursuant to the statutes of the operators or contractual arrangements.<sup>62</sup> In their turn, the Cantons distribute the money received from commercial betting operators for sport-related purposes in accordance with their respective Cantonal legislation.<sup>63</sup>

#### 4. Regulation of lotteries, including sports lotteries

##### 4.1. The meaning of "lottery" and its characteristic features

The "lottery" is defined in the Federal Lotteries and Commercial Betting Law as any operation which offers, in exchange for the payment or at the time of the conclusion of a contract, a chance to receive a material advantage consisting in lot, where the acquisition, the amount or the nature of this lot, in accordance with the plan, depend upon a chance resulting from drawing of certificates or numbers or from a similar procedure.<sup>64</sup> In addition to that, the Ordinance to the Federal Lotteries and Commercial Betting Law assimilates to lotteries:

- all operations using the so-called "snowball" method (avalanche, Hydra, Gella, Multiplex). The operations falling under this definition are those operations which make the delivery of goods, distribution of prizes or receipt of other benefits by a certain person dependant upon that person's success in involving other people in the same operation.<sup>65</sup>
- competitions of all types which admit to the participation only those persons who made a payment or concluded a contract and which makes the receiving of a prize or its amount dependent, to a significant degree, upon chance or circumstances unknown to the participants;<sup>66</sup>
- installation and exploitation of vending machines or gaming machines which distribute neither money nor objects substituting money, where the acquisition, the nature or the value of the prize promised in exchange for a payment or at the conclusion of a contract depend, to a significant degree, upon chance.<sup>67</sup>

The decisions of the Swiss Supreme Court concerning lotteries traditionally distinguish four characteristic features of lotteries, namely:

- placement of a stake or conclusion of contract;
- chance of receiving material advantage, that is to say, gain;
- intervention of a chance which determines, on the one hand, whether the gain is acquired and, on the other hand, what is its amount or nature; and
- existence of planning.<sup>68</sup>

The *stake* is understood by the Swiss Supreme Court as a monetary value which the player transfers in exchange for receiving the right to participate in the drawing in the hope of obtaining the gain. Even an amount of several centimes would constitute a stake, which, after all, could be hidden behind another performance having material value.<sup>69</sup> On the other hand, when the participation in the drawing is not connected with any stake or with the conclusion of a contract, such drawing is neither a lottery nor an operation analogous to lotteries. It is further required that the gratuitous nature of drawing and the equality of chances of the participants appear in a clear and indisputable manner. From this perspective, the crossword competition published in a newspaper where the solutions shall be communicated to its organisers either by phone for an extra charge (0.86 Swiss francs per minute) or by postal card with identical chances of winning shall not be considered as operation analogous to lotteries.<sup>70</sup>

The *material advantages* are not limited to monetary advantages, such as sums of money or tangible goods. They also include non-monetary benefits and free trips.<sup>71</sup>

The *intervention of chance* plays different roles in lotteries and in operations analogous to lotteries. While in the first case the allocation of gains shall exclusively depend upon such chance, in a second case it would be sufficient that the allocation of gains depends upon chance or circumstances unknown to the participants to a "significant degree", and not "exclusively".<sup>72</sup> From this perspective, the contest where the participants have to reply to the questions requiring certain knowledge and effort on their part, but the number of prizes is lower than the potential number of correct answers and, therefore, the correct reply does not, by itself, guarantee the winning of the prize, could still be qualified as "competition analogous to lottery".<sup>73</sup> By the same token, even when, by chance, the number of correct answers does not exceed the number of winners, determined in advance, since the value of offered prizes was different, the allocation of the most valuable prizes would still depend upon chance.<sup>74</sup>

Finally, according to the Swiss Supreme Court, the condition of the existence of *planning* is satisfied when there is a plan which, in advance, exactly determines the prizes distributed by the organiser so that it could exclude its own risk.<sup>75</sup> This was, for example, the case

Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 9 (section 1.2.5.1), text in French is available at: <http://www.ejpd.admin.ch/etc/medialib/d/ata/gesellschaft/gesetzgebung/lotteriergesetz.Par.0002.File.tmp/ber-lg-f.pdf> (last visited Oct. 31, 2009).

60 See, Federal Department of Justice and Police: Betting, text in English is available at: [http://www.bj.admin.ch/bj/en/home/themen/gesellschaft/lotterien\\_und\\_wetten/wetten.html](http://www.bj.admin.ch/bj/en/home/themen/gesellschaft/lotterien_und_wetten/wetten.html) (last visited Oct. 31, 2009).

61 See, [http://www.pmur.ch/fr/pages\\_cours/index.php](http://www.pmur.ch/fr/pages_cours/index.php) (last visited Oct. 31, 2009).

62 See, Claude Rouiller, Les jeux et les paris sportifs envisages comme sources de financement des clubs - Questions choisies, in *Temi scelti di diritto dello sport* (2008), p. 12.

63 See, e.g., Canton of Valais: Decree concerning the distribution and utilisation of proceeds from Sport-Toto, dated June 10, 1998 (*Arrêté concernant la répartition et l'utilisation du fonds du Sport-Toto, du 10 juin 1998*), text in French is available at: [http://www.vs.ch/Public/public\\_lois/fr/p](http://www.vs.ch/Public/public_lois/fr/p)

[df/935.700.pdf](http://www.vs.ch/Public/public_lois/fr/p) (last visited Oct. 31, 2009).

64 LLR, Art. 1(2).

65 OLLR, Art. 43(1).

66 OLLR, Art. 43(2).

67 OLLR, Art. 43(3).

68 See, e.g., Decision in the case of *Padorex S.A. c. Conseil exécutif du canton de Berne*, dated June 12, 1959, ATF 85 I 68; Decision in the case of *Minet c. Préfecture du district de Zurich*, dated March 8, 1973, ATF 99 IV 25; Decision in the case of *Ministère public du canton de Neuchâtel c. Jaeger*, dated November 7, 1977, ATF 103 IV 213; Decision in the case of *D. c. Préfecture du district de Zurich*, dated September 10, 1997, ATF 123 IV 175; Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213; Decision No. 6S.23/2006 in the case of *X. und Y. gegen Staatsanwaltschaft des Kantons Aargau*, dated March 31, 2006, ATF 132 IV 76; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du*

*tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

69 See, e.g., Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213, 215; Decision No. 2A.11/2006 in the case of *X. AG gegen Bundesamt für Kommunikation sowie Eidgenössische Rekurskommission für Infrastruktur und Umwelt*, dated April 13, 2006, ATF 132 II 240, 242; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

70 Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213.

71 Decision in the case of *D. c. Préfecture du district de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178.

72 See, Decision in the case of *Minet c.*

*Préfecture du district de Zurich*, dated March 8, 1973, ATF 99 IV 25, 32; Decision in the case of *D. c. Préfecture du district de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178; Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213, 215; Decision No. 6S.23/2006 in the case of *X. und Y. gegen Staatsanwaltschaft des Kantons Aargau*, dated March 31, 2006, ATF 132 IV 76, 80; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

73 Decision in the case of *D. c. Préfecture du district de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178.

74 Decision in the case of *D. c. Préfecture du district de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178.

75 See, Decision in the case of *Padorex S.A. c. Conseil exécutif du canton de Berne*, dated June 12, 1959, ATF 85 I 68;



when the organiser clearly defined the limits on the amounts of money and goods offered, by establishing twenty-one prizes, namely: (i) the first prize - trip by air to London, spending the night there at a first class hotel plus two entry tickets to the premiere of the "GoldenEye" movie; (ii) second to sixth prizes - free use of a BMW car during a week-end; (iii) seventh to sixteenth prizes - compact-discs; and (iv) seventeenth to twenty-first prizes - certain multiple-use tools.<sup>76</sup> On the contrary, when the organiser of a lottery promises a prize to every participant, without the possibility of determining in advance their number, it assumes the risk of being obliged to pay significant amounts of money without the possibility of estimating these amounts in advance.<sup>77</sup>

## 4.2. The distinction between lotteries and similar institutions

### 4.2.1. Lotteries and games of chance

Under Swiss law the lotteries may be viewed as a form of games of chance ("jeux de hasard"). This follows from the definition of "games of chance" in the Federal Games of Chance and Casinos Law of 1998,<sup>78</sup> according to which the "games of chance" are those games which offer, through placing a stake, the possibility of gaining money or obtaining other material advantages, where this possibility depends solely or essentially upon chance.<sup>79</sup> Since the lotteries also offer the possibility of winning material advantages, which depends upon a chance,<sup>80</sup> they would also fit under this definition.<sup>81</sup>

Despite the "chance" nature of lotteries, the Swiss federal legislator took a differentiated approach with respect to the regulation of games of chance in general and the regulation of lotteries in particular. This approach started with Article 35 of the Federal Constitution of 1874, which drew a distinction between the regulation of casinos ("maisons de jeu") and that of lotteries.<sup>82</sup> Following the same approach, instead of submitting all games of chance to a single law, the Federal Legislator instead opted in favour of adopting two separate laws - the Federal Lotteries and Commercial Betting Law of 1923 and the Federal Casinos Law of 1929.<sup>83</sup> This differentiated approach has been maintained with the adoption of the Federal Games of Chance and Casinos Law of 1998. Consequently, this law specifically excludes from its application the lotteries and commercial bets, governed by the Federal Lotteries and Commercial Betting Law,<sup>84</sup> considered as a special law (*lex specialis*) with respect to the general law of 1998.<sup>85</sup>

Since under the Federal Games of Chance and Casinos Law the games of chance shall be subject to a number of restrictive requirements, notably, the requirement of their conduct in specially designated places (casinos)<sup>86</sup> as well as the requirement to obtain a licence for the establishment and operation of a casino,<sup>87</sup> drawing a clear dis-

tinction between games of chance in general and lotteries, their particular form becomes very important, especially in practice. Such distinction has been traditionally drawn by the Swiss courts on the basis of the criteria of planning, meaning that the lotteries can be distinguished amongst other games of chance by the existence of the plan of drawing.<sup>88</sup> Nevertheless, the validity of distinction between games of chance in general and lotteries, in particular, is currently tested in light of recent technical developments, in particular, the appearance of automatic touch-screen lottery machines.

Since 1999, these lottery machines, called "Tactilo" in the French-speaking part of Switzerland, have been offered by *Loterie Romande*. The machines, connected to the computer of *Loterie Romande*, the lottery organiser in Lausanne, are equipped with a slot for inserting coins, totaliser of credits, printing device allowing printing winning tickets and a touch screen, where the player may view the tickets of various lotteries and virtually scratch them.<sup>89</sup> Consequently, although the prizes are allocated in accordance with the plan of drawing, from the point of view of players, as well as from the point of view of their operation, these automatic machines are not very different to slot machines, subject to the requirements of the Federal Games of Chance and Casinos Law of 1998, notably the prohibition of their operation outside the casinos.

The question as to whether these *Tactilo* lottery machines fall under the scope of the Federal Games of Chance and Casinos Law of 1998 or the Federal Lotteries and Commercial Betting Law of 1923 has been controversial in Switzerland for a long time.<sup>90</sup> Most recently, by its decision of December 21, 2006, the Federal Casinos Commission prohibited the operation of the *Tactilo*-type machines outside of the casinos which have obtained a licence.<sup>91</sup> The Cantons, together with *Loterie Romande*, *Swisslos*, several foundations and associations benefiting from the financial support of *Loterie Romande*, as well as bodies entrusted with the distribution of proceeds from the lotteries, subsequently challenged this decision to the Federal Administrative Court. On September 14, 2007, this Court declared the appeal of the foundations, associations and distributing bodies as non-receivable.<sup>92</sup> As concerns the Appeal of the Cantons, *Loterie Romande* and *Swisslos*, as of October 31, 2009, this case was still pending before the Swiss Federal Administrative Court.<sup>93</sup>

### 4.2.2. Lotteries and derivative financial instruments

Under Swiss law, derivative financial instruments, or derivatives, are financial contracts whose price derives from: (a) underlying property assets such as shares, bonds, commodities or precious metals; or (b) reference rates such as currencies, interest rates and indices.<sup>94</sup> Since

Decision in the case of *Minet c. Préfecture du district de Zurich*, dated March 8, 1973, ATF 99 IV 25; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

76 Decision in the case of *Bruggmann c. Ministère public du canton d'Argovie*, dated March 30, 1936, ATF 61 I 46; Decision in the case of *D. c. Préfecture du district de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178.

77 Decision of the Swiss Supreme Court No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 75-76 (citing Anne Catherine Imhoff-Scheier, *La validité des jeux-concours publicitaires envoyés par correspondance*, *Revue de droit Suisse*, 1985, vol. 104, pp. 25, 39).

78 Federal Games of Chance and Casinos Law, dated December 18, 1998 (*Loi fédérale sur les jeux de hasard et les maisons de jeu (Loi sur les maisons de jeu, LMJ)*, du 18 décembre 1998), text in

French is available at: [www.admin.ch/ch/fl/rs/9/935.52.fr.pdf](http://www.admin.ch/ch/fl/rs/9/935.52.fr.pdf) (last visited Oct. 31, 2009). The Law is supplemented by the Ordinance concerning games of chance and casinos, dated September 24, 2004 (*Ordonnance sur les jeux de hasard et les maisons de jeu (Ordonnance sur les maisons de jeu, OLMJ)*, du 24 septembre 2004), French text is available at: <http://www.admin.ch/ch/fl/rs/9/935.521.fr.pdf> (last visited Oct. 31, 2009).

79 LMJ, Art. 3(1).

80 LLP, Art. 1(2).

81 The draft Federal Lotteries and Betting Law defines lotteries as those games of chance which have the following four characteristic features: (i) are not held in casinos; (ii) take place during a pre-determined period of time; (iii) there are multiple players; and (iv) at least a portion of the prize fund is distributed in such a way that one player's success can or does reduce the other player's winnings or chances of winning. See, draft Federal Law on the lotteries and betting, Art. 3(1).

82 See, Jean-François Aubert, Pascal Mahon, *Petit commentaire de la Constitution*

fédérale de la Confédération suisse du 18 avril 1999 (2003), p. 813-814.

83 Federal Casinos Law, dated October 5, 1929 (*Loi fédérale sur les maisons de jeu, du 5 octobre 1929*).

84 LMJ, Art. 1(1).

85 See, Message relatif à la loi fédérale sur les jeux de hasard et les maisons de jeu (*Loi sur les maisons de jeu, LMJ*), du 26 février 1997, *Feuille Fédérale*, 1997, volume III, No. 20, pp. 137, 151.

86 LMJ, Art. 4(1).

87 LMJ, Art. 10.

88 Decision in the case of *Bruggmann c. Ministère public du canton d'Argovie*, dated March 30, 1936, ATF 61 I 46.

89 The French translation of the words "touch screen" is "écran tactile". This is where the name "Tactilo" comes from.

90 See, Commission fédérale des maisons de jeu: Appareils automatiques de jeu de loterie, text in French is available at: <http://www.esbk.admin.ch/esbk/fr/home/themen/lotteriespielautomaten.html> (last visited Oct. 31, 2009).

91 See, Commission fédérale des maisons de jeu: La Commission des maisons de jeu interdit les appareils de type "Tactilo"

(Communiqué, CFMJ, 09.01.2007), text in French is available at: [www.esbk.admin.ch/esbk/fr/home/dokumentation/medienmitteilungen/2007/2007-01-09.html](http://www.esbk.admin.ch/esbk/fr/home/dokumentation/medienmitteilungen/2007/2007-01-09.html) (last visited Oct. 31, 2009).

92 Decision No. B-1077/2007 of the Federal Administrative Court, dated September 14, 2007, text in French is available at: [http://relevancy.bger.ch/php/taf/http/checkpdf.php?filename=2007/b\\_01077\\_2007\\_2007\\_09\\_14\\_t.pdf&lang=fr&type=azabvger](http://relevancy.bger.ch/php/taf/http/checkpdf.php?filename=2007/b_01077_2007_2007_09_14_t.pdf&lang=fr&type=azabvger) (last visited Oct. 31, 2009).

93 See, Commission fédérale des maisons de jeu: Appareils automatiques de jeu de loterie, text in French is available at: <http://www.esbk.admin.ch/esbk/fr/home/themen/lotteriespielautomaten.html> (last visited Oct. 31, 2009).

94 Ordinance concerning stock exchanges and securities trading, dated December 12, 1996, Art. 5 (*Ordonnance sur les bourses et le commerce des valeurs mobilières (OBVM)*, du 2 décembre 1996), text in French is available at: [www.admin.ch/ch/fl/rs/9/954.11.fr.pdf](http://www.admin.ch/ch/fl/rs/9/954.11.fr.pdf) (last visited Oct. 31, 2009).

95 Federal Law on stock exchanges and securities trading, dated March 24, 1995 (*Loi*



the value of the derivatives depends upon the movements of the market prices to their underlying assets, the derivatives are similar to the lotteries in the sense that the gain from them also depends upon intervention of forces beyond the control of their purchasers. Taking into account that derivatives in Switzerland are governed by a set of laws and regulations, distinct from those governing the lotteries, notably, the Stock Exchange Law and the Ordinance concerning stock exchanges and securities trading,<sup>95</sup> the existing similarity between lotteries and derivative financial instruments makes it necessary to draw a clear distinction between them.

This distinction, in a sports context, has been addressed by the Swiss Supreme Court in 2007 in a case involving *Nomura Bank International PLC* and *Credit Suisse SA*.<sup>96</sup> This case focused upon the legal status of the derivative instrument entitled “a one year 13.5% CHF Equity Yield Note in Swiss francs with “Coupon Bonus” in connection with the Football World Cup” issued by *Nomura Bank* on the occasion of the 2006 Football World Cup in Germany and distributed in Switzerland by *Credit Suisse*. The instrument consisted of two parts - the Note with a nominal value of one thousand Swiss francs and the Coupon Bonus. Upon the Note’s maturity, the investors should have received a 13.5% interest on its nominal amount plus the principal payment the amount of which depended upon the fluctuations of shares of five companies sponsoring the World Cup (Deutsche Telekom, McDonald’s Corp., Philips Electronics NV, Procter & Gamble and Toshiba Corp.).<sup>97</sup>

The “Coupon Bonus”, an integral part of the instrument, provided for the payment of additional interest, depending upon the performance of the Swiss national football team in the World Cup. This, in case the Swiss team reached the quarter-final, the investor would have received an additional 1% interest (14.5% in total), the semi-final - an additional 3% (16.5% in total) and the final - additional 7% (20.5% in total). Should the Swiss football team become the World Champions, the investor would have received an additional 15% interest (28.55% in total). The description of the instrument published by Credit Suisse also emphasised that this instrument was not considered as an investment into a mutual fund and was not subject to the legislation on the investment funds or to the supervision of the Swiss Federal Banking Commission.<sup>98</sup>

The case started when the Department of Economy, Housing and Tourism, together with the Administrative Court of the Canton of Vaud classified this instrument as betting, prohibited by the Federal Law on Commercial Betting and Lotteries. *Nomura Bank* and *Credit Suisse* then lodged an Appeal to the Swiss Supreme Court, asking the Court to annul the decision of the Cantonal Administrative Court and to confirm that the Note was not subject to the requirements of this Federal Law and the Ordinance to the Law.<sup>99</sup>

The Swiss Supreme Court rejected the Appeal. The Court came to the conclusion that the Note possessed the characteristics of the game of chance and, consequently, was subject to the requirements of the Federal Games of Chance and Casinos Law, unless it could be quali-

fied as the lottery or as commercial betting, permitted under the Federal Law on Lotteries and Commercial Betting. As concerns the possible classification of the Note as “lottery”, the Court decided that the proposed instrument did not fall under the definition of lotteries and operations analogous to lotteries.<sup>100</sup>

First, until the end of the subscription period, the banks did not know how many investors would purchase their products and in what quantities. Furthermore, until the end of this period the banks could not have known what would be the results of the Swiss national team at the 2006 Football World Cup. In the Court’s view, the results of these types of competitions are the events where the probability can not be calculated in abstract. Although the statistical data of the past performance of the participating teams could give certain indications, it is impossible to provide an incontestable evaluation of the probability of the victory of the competitors. Under these circumstances, the Supreme Court established that by promising to any investor the prize in the form of “Coupon Bonus” and by submitting themselves, to a significant degree, to the chance or at least to the circumstances unknown to them and to the investors, the banks assumed the risk to pay the prizes, the exact amounts of which were not known to them at the moment of subscription. Thus, the Court came to the conclusion that the banks did not have the pre-existing plan of the distribution of gains in the sense of the Federal Law on Lotteries and Commercial Betting and the Ordinance to this Law and, consequently, that the proposed instruments were not “lotteries” or “operations analogous to lotteries”.<sup>101</sup>

#### 4.3. State licensing of lotteries

##### 4.3.1. Competent authorities

Under the Federal Law on Lotteries and Commercial Betting, the legislation of each Canton shall designate a single body in charge of granting licenses to organise and to conduct lotteries in the territory of this Canton.<sup>102</sup> For example, in the Canton of Fribourg, such licenses are granted by the Service of Commerce Police,<sup>103</sup> in the Canton of Geneva - by the Service of Commerce of the Department of Economy and Health,<sup>104</sup> whereas in the Canton of Vaud - by the Cantonal Commerce Police of the Service of Economy, Housing and Tourism of the Department of the Economy.<sup>105</sup>

When the lottery is organised on an inter-Cantonal level or on the whole territory of Switzerland, it needs a prior approval (“homologation”) from the Lottery and Betting Commission (“*Commission des loteries et paris*” or “*Comlot*”), created pursuant to the Inter-Cantonal Convention.<sup>106</sup> Once this prior approval is granted, the Cantonal authorities shall render the decision concerning the operation of the lottery within 30 days from the day of the notification of the approval and shall communicate their decision to the Commission.<sup>107</sup> The license granted by the Cantons shall not contain any additional charge or condition related to the game which derogate from the preliminary approval. Only those charges or conditions which strengthen the preventive measures decided upon by the Commission may be allowed.<sup>108</sup>

*fédérale sur les bourses et le commerce des valeurs mobilières (LBVM)*, du 24 mars 1995), text in French is available at: <http://www.admin.ch/ch/f/rs/9/954.1.fr.pdf> (last visited Oct. 31 2009).

96 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC* et *Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce* ainsi que *Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

97 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 69.

98 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 70. The supervisory functions of the Federal Banking Commission have been subsequently taken over by the Federal Supervisory Authority over the financial

markets (“*l'Autorité fédérale de surveillance des marchés financiers*” or FINMA). See, Law on the federal authority of supervision over the financial markets, dated June 22, 2007 (*Loi sur l'Autorité fédérale de surveillance des marchés financiers*, du 22 juin 2007 (LFINMA)), text in French is available at: [www.admin.ch/ch/f/rs/9/956.1.fr.pdf](http://www.admin.ch/ch/f/rs/9/956.1.fr.pdf) (last visited Oct. 31 2009).

99 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 70.

100 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 76.

101 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 76.

102 LLP, Art. 15(1).

103 The application form for the licence of the lottery in the Canton of Fribourg could be found on the Website of the

Service of Commerce Police (“*Service de la police du commerce*” or “*SPoCo*”) at: <http://admin.fr.ch/fr/data/pdf/spoco/demandeloteriefri.pdf> (last visited Oct. 31, 2009).

104 RaLLP, Art. 2(1). The application form for the licence of the lottery in the Canton of Geneva could be found on the Web-site of the Service of Commerce of the Department of Economy and Health (“*Service du commerce du Département de l'économie et de la santé*”) at: <http://etat.geneve.ch/des/site/economie/service-du-commerce/master-list.jsp?componentId=kmelia889> (last visited Oct. 31, 2009).

105 LVLLP, Art. 3(1). The application form for the licence of the lottery in the Canton of Vaud could be found on the

Web-site of Cantonal Commerce Police of the Service of Economy, Housing and Tourism of the Department of the Economy (“*Police cantonale de commerce du service de l'économie, du logement et du tourisme du Département de l'économie*”) [www.vd.ch/fileadmin/user\\_upload/organisation/dec/selt/pcc/fichiers\\_pdf/loteries\\_o8o43o\\_formulaire.pdf](http://www.vd.ch/fileadmin/user_upload/organisation/dec/selt/pcc/fichiers_pdf/loteries_o8o43o_formulaire.pdf) (last visited Oct. 31, 2009).

106 CILP, Art. 14. According to Article 5 of the CILP, this Commission is composed of five members, two of which come from the French-speaking part of Switzerland, two - from the German-speaking part of Switzerland, and one - from the Italian-speaking part of Switzerland.

107 CILP, Art. 15.

#### 4.3.2. Persons eligible to obtain the license to conduct a lottery

##### 4.3.2.1. General requirements

According to the Federal Law on Lotteries and Commercial Betting, the license to run lotteries can be granted only to the public law corporations and institutions as well as to the associations of persons and private law foundations which have their seat in Switzerland and which present all guarantees with respect to the correct running of the lottery.<sup>109</sup> The Law also prohibits the transfer of the license by its holder to a third party.<sup>110</sup>

As was pointed out by the Swiss Supreme Court in 2000 in the case of *Hockey Club La Chaux-de-Fonds SA*, the Federal Law on Lotteries and Commercial Betting enumerates the categories of the possible holders of the license to conduct lotteries in a restrictive manner. Furthermore, as concerns private law entities, only legal entities pursuing purely public benefit goals or charitable purposes may be eligible for such licenses, with the exclusion of commercial entities. Consequently, according to the Supreme Court, it would be openly contrary to the goals pursued by this law to grant the license to run a lottery to a joint-stock company, which intends to finance, through the conducting of this lottery, its main activities, such as the operation of a professional hockey team in the national hockey league.<sup>111</sup> Thus, in view of this decision of the Swiss Supreme Court, under the current law, sports clubs in Switzerland, organised in the form of a commercial entity, would not be eligible to run their own lotteries even though they may intend to use its proceeds for the improvement of their sporting results.

##### 4.3.2.2. Inter-Cantonal and national lotteries monopoly

Inter-Cantonal lotteries and national lotteries in Switzerland currently may be organised by only two Swiss lottery companies - *Loterie Romande*, which operates in the French-speaking part of Switzerland, and *Swisslos*, which operates in the German and Italian-speaking parts. In the French-speaking part of Switzerland this monopoly is currently based on the 9th Convention related to the *Loterie Romande*,<sup>112</sup> whereas in the German and Italian-speaking parts of Switzerland - on the Inter-Cantonal Convention on the Organisation of Lotteries of (IKV) of 1937.<sup>113</sup> While there have been several attempts in recent years to challenge this monopoly in the Swiss Supreme Court, on the grounds that it violates the freedom of commerce and industry provided for by the Federal constitution,<sup>114</sup> in particular, by the Association for the Environment and Development, so far, the challenges have not been successful.<sup>115</sup>

##### 4.3.2.3. Conditions for obtaining the license

Under the Federal Law on Lotteries and Commercial Betting, the licenses to organise and to conduct lotteries may be granted only when their organiser offers, to the purchasers of tickets sufficient guarantees from the point of view of the security and protection of their rights, and when the total amount of the prizes is appropriately proportionate to the value of tickets to be issued.<sup>116</sup> The license may be subjected to certain security conditions. In particular, it is possible to require that certain designated persons domiciled in Switzerland take responsibility for the correct operation of the lottery and that the prizes are deposited with the public administrative body.<sup>117</sup>

Under the law, the operation of the lottery shall be completed within the maximum period of two years and, when the drawing is conducted in several series, within the maximum period of three years.

When the competent body of the Canton issues the license, it shall prescribe for each lottery the period of its operation within these limits.<sup>118</sup> When there are valid reasons, upon the organiser's request the competent body may also extend the period of the lottery's operation for one additional year.<sup>119</sup>

The Federal Law on Lotteries and Commercial Betting also provides for the authority of the Cantons to regulate the operations of the lotteries in greater detail,<sup>120</sup> as well as to subject the lotteries with public benefit goals or with charitable purpose to more stringent requirements, as well as to completely prohibit them.<sup>121</sup> Thus, for example, in the Canton of Geneva, the application for a license to conduct a lottery can be refused in the following cases: (a) the previous activities and the morality of the applicants do not offer sufficient guarantees; (b) the conditions prescribed by the Cantonal regulations or by the Federal Law are not complied with or the general organisation does not present sufficient moral and financial guarantees; (c) there is a risk that a very large number of lotteries or requests for public charity bothers or presents excessive demands for contributions of the population; (d) the conditions of the previous license have not been respected; and (e) the applicant already received the license during several consecutive years; when the applicant regularly benefits from the subventions of public authorities or allocation from the proceeds of other lotteries or analogous operations, or when he regularly addresses the public by means of collection at home, sales on the streets, or by means of sending postal cheques or letters.<sup>122</sup>

#### 4.4. The State supervision of lotteries

The supervision over the organisation and the conduct of the lotteries at the inter-cantonal or the national level is exercised by Comlot.<sup>123</sup> In particular, Comlot exercises the supervision over the observance of the legal requirements and conditions related to licenses. When the conditions of the license are no longer complied with, Comlot may withdraw this license.<sup>124</sup>

On the other hand, the supervision over the organisation and the conduct of the lotteries within the Canton is exercised by the Cantonal authorities. For example, in the Canton of Geneva, the Service of Commerce of the Department of Economy and Health may withdraw the license when, after its issuance, the Service receives information that there are facts related to its organisers which would have prevented the issuance of this license if these facts were known to the Service, or if the legal requirements concerning lotteries or the legal conditions prescribed by the Service have not been complied with by the organizers.<sup>125</sup> By the same token, in the Canton of Vaud, the license may be withdrawn by the Department of the Economy in the case of repeated violations of the Federal or Cantonal requirements concerning lotteries.<sup>126</sup>

#### 5. Regulation of sports betting

##### 5.1. The meaning of "betting" and its characteristic features

The Federal Law on Lotteries and Commercial Betting does not contain a definition of "betting". Consequently, in order to establish the meaning of this term it is necessary to analyse the decisions of the Swiss Supreme Court on the subject of betting. According to the Court, the betting is characterised by the following three elements:

- placement of a stake or conclusion of contract;
- chance of receiving material advantage, that is to say, gain;
- intervention of a chance which determines, on the one hand,

<sup>108</sup> CILP, Art. 15.

<sup>109</sup> LLP, Art. 6(1).

<sup>110</sup> LLP, Art. 6(2).

<sup>111</sup> Decision No. 2P.280/2000 in the case of *Hockey Club La Chaux-de-Fonds SA*, dated June 18, 2001, text in French is available at: <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht.htm> (last visited Oct. 31, 2009).

<sup>112</sup> C-LoRo, Art. 1.

<sup>113</sup> IKV, Art. 3.

<sup>114</sup> Federal Constitution, Art. 32.

<sup>115</sup> Decisions No. 1A. 183/1998 and 1P.488/1998 in the case of *Association Environnement et Développement c. Département de la justice, de la police et des affaires militaires du canton de Vaud*, dated March 30, 1999, *Revue de droit administratif et de droit fiscal*, 2000, part I, p. 132-140; Decision No. 2A.59/2001 in the case of *Interkantonale Landeslotterie c. Association Loterie Umwelt & Entwicklung ainsi que Zurich, canton, Conseil d'Etat et Tribunal*

*administratif*, dated June 14, 2001, ATF 127 II 264, *Journal des Tribunaux*, 2004 I 167-172; Decision No. 2A.32/2003 in the case of *Interkantonale Landeslotterie, Regierungsrat des Kantons Zürich gegen Trügerverein Lotterie Umwelt & Entwicklung, Verwaltungsgericht des Kantons, Zürich*, dated August 4, 2003, text in German is available at <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm> (last visited Oct. 31, 2009).

<sup>116</sup> LLP, Art. 7(1).

<sup>117</sup> LLP, Art. 7(2).

<sup>118</sup> LLP, Art. 8(1).

<sup>119</sup> LLP, Art. 8(2).

<sup>120</sup> LLP, Art. 15(2).

<sup>121</sup> LLP, Art. 16.

<sup>122</sup> RaLLP, Art. 6.

<sup>123</sup> CILP, Art. 20.

<sup>124</sup> CILP, Art. 20.

<sup>125</sup> RALLP, Art. 7.

<sup>126</sup> LVLLP, Art. 9(1).

<sup>127</sup> Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 77.

whether the gain is acquired and, on the other hand, what is its amount or nature (in particular, the accuracy of the forecast made with respect to the outcome of a competition or an event).<sup>127</sup>

Furthermore, the Swiss Supreme Court draws a distinction between two types of betting: (i) totalisator betting ("*pari au totalisateur*") and (ii) betting with bookmakers ("*paris à la cote*"). Totalisator betting involves the pooling of stakes placed by the bettors. This type of betting is present where the winner receives the pool of stakes or where the pool is divided amongst winners in accordance with the pre-determined variable odds.<sup>128</sup>

On the other hand, in the betting with bookmakers its participants define the rates of return in relative values, which are multiples or fractions of the stake. The organiser, generally, determines the rates of return and accepts the bets (usually in the book, which explains where the expression "bookmaker" comes from), assuming the role of "opposite bettor" against other participants and guaranteeing the gains.<sup>129</sup> Although the prohibition of this particular type of betting in Switzerland was one of the aims of the adoption of the Federal Lotteries and Commercial Betting Law,<sup>130</sup> and this law allows the Cantons to authorize, on their territory only, totalisator betting,<sup>131</sup> in recent years several Cantons have authorised the conduct of the betting with bookmakers.<sup>132</sup>

## 5.2. The meaning of "commercial betting"

While prohibiting only commercial betting, the law does not define the meaning of "commercial". According to the Swiss Supreme Court, betting shall be considered as commercial when it is exercised as an economic activity in return for a regular revenue. The Court views as "commercial" betting which possesses certain organisation, allows for its repetition and generates revenue for its operator. This revenue does not necessarily have to result in net profits or in the increase of the organiser's assets; the mere proceeds or receipts would be sufficient in this regard.<sup>133</sup> Consequently, the Swiss Supreme Court qualified as "commercial" the totalisator betting organised by an association from the Canton of Ticino on the outcome of the greyhound races with the aim of receiving regular revenue, since this betting had to be repeated in the future, even occasionally.<sup>134</sup>

On the contrary, betting activities limited in terms of their duration and range of participants, where their operator generates no revenue for himself but simply administers the betted amounts, prior to their redistribution in full, should not be considered as commercial betting. Thus, for example, betting organised amongst office staff or among friends or relatives during the football European Cup on the outcome of the matches may be entirely compatible with the requirements of the Federal Lotteries and Commercial Betting Law.<sup>135</sup>

## 5.3. The distinction between betting and similar institutions

### 5.3.1. Betting and lotteries

Betting is similar to lotteries in the sense that its three characteristic features, namely: (i) the placement of a stake or the conclusion of a contract, (ii) the chance of winning, and (iii) the intervention of chance for the determination of the gain and its amount, are also present in lotteries. Unlike lotteries, however, betting is not conducted according to a pre-determined plan of the distribution of gains.<sup>136</sup> Therefore, betting does not have the fourth characteristic feature of lotteries - the existence of planning.

Another difference between lotteries and betting is that they have different mechanisms for the determination of their results, leading to the different roles of the participants' personal knowledge and abilities. On the one hand, in lotteries the results are determined by means of drawing. Since drawing depends entirely upon a chance, lotteries leave no place for such knowledge and abilities. On the other hand, in betting the results are determined by reference to the outcome of competitions and other similar events. Thus, by placing a bet, the bettor is making a certain prognosis as to its outcome. While the element of chance in betting is also present, the abilities of the bettor and his/her personal knowledge of the similar events or the respective strength of the teams participating in this competition facilitates, to a certain degree, making a correct prognosis and, correspondingly, increases his/her chance of winning.<sup>137</sup>

### 5.3.2. Betting and games of chance

Similarly to lotteries, betting also offers the possibility of winning material advantages, which depends upon a chance. Thus, under Swiss law, betting shall also be viewed as a form of "game of chance", because it fits under this definition in the Federal Games of Chance and Casinos Law of 1998.<sup>138</sup> On the other hand, the distinction between the games of chance, in general, and betting in particular, may be drawn on the basis of different roles of the participants' personal knowledge and abilities in the determining of the respective results. Unlike other games of chance, the outcome of which normally depends upon pure chance, betting allows participants to influence its results by means of relying upon their abilities and knowledge of the respective events.<sup>139</sup>

### 5.3.3. Betting and derivative financial instruments

Betting is similar to derivative financial instruments in the sense that the bettors also bear certain risk of financial loss. In view of the decision of the Swiss Supreme Court in the case of *Nomura Bank International Plc.*, it is the nature of this risk which allows drawing a distinction between the derivatives and betting. In the first case, this risk depends upon the performance of the underlying assets and, therefore, has an economic force behind it. In the second case, this risk primarily depends upon the outcome of a certain competition or an event and, therefore, by its nature, it is no longer economic risk but predominantly gaming risk.<sup>140</sup>

## 5.4. The state licensing of commercial betting

### 5.4.1. Competent authorities

Although the Federal Lotteries and Commercial Betting Law allows the Cantons to authorise totalisator betting involving horse races, regattas, football games and similar competitions taking place in the territory of the respective Canton,<sup>141</sup> certain Cantons did not take advantage of this possibility and simply prohibited all commercial totalisator betting on their territory. Such direct prohibition has been included, for example, in the legislation of the Canton of Geneva,<sup>142</sup> the Canton of Vaud<sup>143</sup> and the Canton of Valais.<sup>144</sup> On the other hand, in those cases, when commercial totalisator betting is permitted by the Cantonal legislation, for example, in the Canton of Fribourg,<sup>145</sup> the license is granted by the Cantonal authorities of the respective Canton (in the Canton of Fribourg - the Service of the Trade Police).<sup>146</sup>

Similarly to the lotteries, when the commercial betting is organised on an inter-Cantonal level or on the whole territory of Switzerland, it

128 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 78.

129 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 78.

130 See, Message du Conseil fédéral, du 13 août 1918, p. 362.

131 LLP, Art. 34.

132 See, Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 21.

133 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 78.

134 Decision of the Swiss Supreme Court in

the case of *Associazione ticinese per le corse dei levrieri c. Consiglio di Stato del Cantone Ticino*, dated April 3, 1981, ATF 107 Ib 391.

135 See, Lotteries and Betting Commission ("*Comlot*"): Betting, text in English is available at:

<http://www.comlot.ch/e/topics-information/bets> (last visited Oct. 31, 2009).

136 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 77.

137 Cf. Claude Rouiller, *Jeux de loteries et paris sportifs professionnels*, Revue de

droit administrative et de droit fiscal, 2004, No. 5, p. 429, 440.

138 LMJ, Art. 3(1).

139 The draft Federal Lotteries and Betting Law defines betting as those games of chance which have the following three characteristic features: (i) are not operated in casinos; (ii) there are multiple players; and (iii) winning depends on correctly forecasting the outcome of an event or contingency. See, draft Federal Law on the lotteries and betting, Art. 3(2).

140 Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC*, p. 80.

141 LLP, Art. 34.

142 RaLLP, Art. 22.

143 LVLLP, Art. 13.

144 Law on the implementation of the Federal Lotteries and Commercial Betting Law, Art. 14.

145 Law on the lotteries, Art. 7(1).

146 Law on the lotteries, Art. 4.



needs prior approval (“*homologation*”) by Comlot.<sup>147</sup> Once this prior approval is granted, the Cantonal authorities shall render the decision concerning the operation of the commercial betting within 30 days from the day of the notification of the approval and shall communicate their decision to Comlot.<sup>148</sup> As in the case of the lotteries, the license to conduct commercial betting granted by the Cantons shall not contain any additional charge or condition related to the game which derogate from the preliminary approval. Only those charges or conditions which strengthen the preventive measures decided upon by Comlot may be allowed.<sup>149</sup>

#### 5.4.2. Persons eligible to obtain the license to organise commercial betting

##### 5.4.2.1. General requirements

The Federal Lotteries and Commercial Betting Law does not specifically prescribe any requirements with respect to the eligibility to obtain a license for organising commercial betting. Correspondingly, in those Cantons where commercial betting is permitted, such requirements are established by the Cantonal legislation. For example, in the Canton of Fribourg, similarly to the eligibility requirements to organise lotteries, the license to organise commercial betting can be granted only to the public law corporations and institutions as well as to the associations of persons and private law foundations which have their seat in Switzerland and which present all guarantees with respect to the correct operation of the betting.<sup>150</sup>

##### 5.4.2.2. Inter-Cantonal and national commercial betting monopoly

Similarly to the monopolistic position of *Loterie Romande* and *Swisslos* with respect to the organisation of inter-Cantonal or national lotteries, commercial betting on the inter-Cantonal and national levels in Switzerland also could be organised only by these two operators. Although the Swiss Supreme Court so far has not specifically addressed the issue of validity of commercial betting monopoly, former President of this Court expressed the view that the Court decisions concerning the lottery monopoly could be equally applicable to the commercial betting monopoly on the inter-Cantonal and national levels.<sup>151</sup> Therefore, it seems unlikely that any eventual efforts to challenge the existing commercial betting monopoly of *Loterie Romande* and *Swisslos*, on the grounds that it violates the constitutional freedom of commerce and industry would be successful.

##### 5.4.3. Conditions for obtaining the license

In those Cantons, where commercial betting is permitted, the conditions for obtaining a license are prescribed by the Cantonal legislation. In the Canton of Fribourg, for example, the organiser of commercial betting has to establish regulations governing participation in the betting as well as approved terminals and programmes corresponding to the type of envisaged activities.<sup>152</sup> The amount of gains shall depend upon the amount of placed bets, provided that, in any case, at least 70% of the bets shall be distributed to the winners.<sup>153</sup> In addition to that, the license in the Canton of Fribourg is subject to a 6% tax calculated on the basis of the total amount of bets.<sup>154</sup>

tion to that, the license in the Canton of Fribourg is subject to a 6% tax calculated on the basis of the total amount of bets.<sup>154</sup>

#### 5.5. The state supervision of commercial betting

Similarly to the supervision over the inter-Cantonal and national lotteries, the supervision over the organisation and the conduct of the commercial betting at the inter-cantonal or the national level is exercised by Comlot.<sup>155</sup> In particular, Comlot exercises the supervision over the observance of the legal requirements and conditions related to the licenses. When the conditions of the license are no longer complied with, the Comlot may withdraw this license.<sup>156</sup>

On the other hand, the supervision over the organisation and the conduct of commercial betting, within the Canton, is exercised by the Cantonal authorities. In the Canton of Fribourg, for example, the supervision over the observance of the requirements of the law on lotteries, including those related to commercial betting, is exercised by the Service of Trade Police.<sup>157</sup> This Service may withdraw the license to conduct commercial betting when the holder of the license does not respect the obligations imposed by the law on lotteries or by the regulations to this law;<sup>158</sup> when any of the conditions for the issuance of this license are no longer complied with;<sup>159</sup> or when the holder of the license does not pay the required amount of tax.<sup>160</sup>

#### 6. Regulation of lotteries and sports betting conducted via the Internet

In the absence of any special law or regulations, the conduct of lotteries and sports betting in Switzerland, via the Internet, shall be subject to the same requirements of the Federal Law on Lotteries and Commercial Betting and the Ordinance to this Law as those applicable to conventional lotteries and commercial betting, notably, the general prohibition on lotteries,<sup>161</sup> the interdiction to organise and conduct lotteries, including the interdiction of their announcement,<sup>162</sup> the general prohibition on the commercial betting,<sup>163</sup> the need to obtain Cantonal licenses for lotteries having a public interest goal or a charitable purpose,<sup>164</sup> as well as the need to obtain Cantonal licenses for totalisator betting involving horse races, regattas, football games and similar competitions taking place in the territory of the respective Canton, when it is permitted by the Cantonal legislation.<sup>165</sup> By “announcement” Comlot also understands the placement of links which point to websites run by illegal, i.e. unauthorised Swiss or foreign operators.<sup>166</sup>

Since the license to conduct lottery and commercial betting at the inter-Cantonal or national level in Switzerland currently is granted only to *Loterie Romande* and *Swisslos*, all other internet-based lottery or commercial betting services in the country are illegal. Consequently, any person, other than these two lottery operators, who offers lottery or commercial betting activities in Switzerland and/or advertises these activities via the internet may be reported by the Comlot to the criminal prosecution authorities. On the other hand, it is not an offence to make use of the lottery or commercial betting activities offered on the internet as a player.<sup>167</sup>

#### 7. Sanctions for violations of the legislation concerning lotteries and commercial betting

##### 7.1. Penal sanctions under the Federal Lotteries and Commercial Betting Law

Federal Law on Lotteries and Commercial Betting prescribes the following penal sanctions for violations of its provisions concerning the organisation and conduct of the lotteries and commercial betting:

- for organising and running the lotteries prohibited by virtue of this law - imprisonment or an arrest for a three-month period or a fine in the amount of up to ten thousand Swiss francs, or both;<sup>168</sup>
- for commercial peddling (“*colportage*”) of authorised lotteries’ tickets - a fine in the maximum amount of one thousand Swiss francs;<sup>169</sup>
- for violation of the provisions of laws, ordinances or decisions concerning the organisation and conduct of the lotteries - a fine in the amount of up to one thousand Swiss francs;<sup>170</sup>
- for placing, negotiating or offering possibilities for placing of pro-

147 CILP, Art. 14.

148 CILP, Art. 15.

149 CILP, Art. 15.

150 Law on the lotteries, Art. 7.

151 See, Claude Rouiller, *Jeux de lotteries et paris sportifs professionnels*, p. 456.

152 Law on the lotteries, Art. 13.

153 Law on the lotteries, Art. 14.

154 Law on the lotteries, Art. 14.

155 CILP, Art. 20.

156 CILP, Art. 20.

157 Law on the lotteries, Art. 4(2).

158 Law on the lotteries, Art. 16(a).

159 Law on the lotteries, Art. 16(b).

160 Law on the lotteries, Art. 16(c).

161 LLP, Art. 1(1).

162 LLP, Art. 4.

163 LLP, Art. 33.

164 LLP, Art. 5.

165 LLP, Art. 34.

166 See, Lotteries and Betting Commission

(“Comlot”): Internet, text in English is available at:

<http://www.comlot.ch/e/topics-information/internet> (last visited Oct. 31, 2009).

167 See, Lotteries and Betting Commission

(“Comlot”): Internet, text in English is available at:

<http://www.comlot.ch/e/topics-information/internet> (last visited Oct. 31, 2009).

168 LLP, Art. 38(1). On the other hand, according to Article 38(2) of the LLP, placing a stake in the lottery is not punishable. Therefore, persons buying tickets of the lotteries which have not been authorised or participating in the lottery through the internet could not be held responsible under the LLP.

169 LLP, Art. 40.

170 LLP, Art. 41(1).



hibited bets on a professional basis or for running of an enterprise of this type - imprisonment or arrest for a period of up to three months or to a fine in the amount of up to ten thousand Swiss francs, provided that these two sanctions may be combined.<sup>171</sup>

In addition to these penalties, the Judge may also order the confiscation of the lotteries' tickets, prizes, coupons, lists of drawings and the amounts received as payments to the extent that these amounts are still available, as well as booklets and any other advertising materials assisting with the prohibited operations.<sup>172</sup> In case the person previously convicted of the violation to the law commits a new violation of this law within three years from the date of entry into force of the previous judgment, the Judge may increase the amount of penalty up to its double amount or, in cases provided for in Articles 40 and 41 of the law, to combine imprisonment with the monetary fine.<sup>173</sup> Finally, when the above violations are committed by a legal entity or partnership in the process of carrying out its commercial activities, the bodies of this legal entity, which committed the violation, or the partners who committed the violation, shall be liable.<sup>174</sup>

## 7.2 Sanctions under Cantonal legislation

In addition to sanctions prescribed by the Federal Lotteries and Commercial Betting Law, Cantonal laws may also prescribe sanctions for violations of the legislation concerning lotteries and commercial betting. For example, in the Canton of Fribourg, to the extent that the violation is not already punishable by virtue of the Federal Lotteries and Commercial Betting Law, the person who exercises the activities governed by the Cantonal law on lotteries without the required license or violates the obligations imposed by Articles 8-10, 13 and 14 of this law, may be subject to a fine in the amount of up to ten thousand Swiss francs or in the amount of up to ten thousand Swiss francs in case of repeated violation within two years from the first violation.<sup>175</sup> Similarly, in the Canton of Vaud, to the extent that the violation is not already punishable by virtue of the Federal Lotteries and Commercial Betting Law, any violation of the LVLLP, its implementation decrees, as well as the conditions imposed and the measures of execution taken by the competent authority, may be subject to a fine in the amount of up to five hundred Swiss francs and, in case of repeated violation, in the amount of up to one thousand Swiss francs.<sup>176</sup>

## 8. Proposed reform of lotteries and betting regulations in Switzerland

### 8.1. The necessity for the reform

The process of the reform of lotteries and betting regulation in Switzerland started on April 4, 2001, when the Swiss Government decided to fully revise the Federal Lotteries and Commercial Betting Law.<sup>177</sup> Following this decision on May 31, 2001, the Federal Department of Justice and Police set up a commission of experts entrusted with the duty of revising the Law.<sup>178</sup> The proposed revision had, in particular, the following objectives:

- taking into account the evolution of values in the area of games of chance, technical developments as well as the opening and the internationalisation of the gaming market;
- ensuring the protection of players against the possible dangers and harmful influence associated with the games of chance, taking into account the public interest;

- taking into account the financial needs of public formations without making unilateral transfers in one or another direction.<sup>179</sup> The need for the revision of the law was further strengthened by a number of its deficiencies, the most important of which include:
- the absence of any separate regulation with respect to the major lottery operators which currently occupy monopoly position in inter-Cantonal and national lotteries markets;<sup>180</sup>
- the absence of provisions against money laundering activities, whereas it could not be excluded that the lotteries market with its annual turnover of 1.4 billion Swiss francs offers possibilities for money laundering;<sup>181</sup>
- the absence of a clear distinction between the games of chance in general and the lotteries, their particular form, which became evident in the course of the *Tactilo* case;<sup>182</sup>
- the loss of the dissuasive effect of the penalties, prescribed by the law, in particular, monetary fines, to such extent that some foreign lottery operators even considered them as an ordinary operational cost.<sup>183</sup>

In addition, the growing demand and the technological developments have encouraged the authorisation of the games, to which compatibility with the existing law could raise certain doubts. For example, the Swiss number lottery with its fixed prizes for correctly guessing three or four winning numbers has renounced using the strict plan of gains distribution. Consequently, if during one of the drawings of the Swiss number lottery an unusually high number of players obtained three or four winning numbers, its organiser might be obliged, by reason of announced fixed prizes, to distribute more money than it received as stakes. This situation would be contrary to the condition of planning, which requires the exact determination of the organiser's potential exposure.<sup>184</sup>

Furthermore, sport betting already offered on the national level as well as PMUR betting offered in the French-speaking Cantons and the French-speaking part of the Canton of Bern with respect to the competitions or events taking place outside Switzerland, did not comply for a long time with the requirements of the law, which allows only for the authorisation of totalisator betting involving competitions or events taking place in the territory of the respective Canton.<sup>185</sup> Moreover, since several Cantons already authorised commercial betting based on the principle of "bookmaking", the prohibition of this type of commercial betting was also no longer observed.<sup>186</sup> Consequently, the law, adopted almost 80 years ago, no longer reflected the existing realities of the lotteries and commercial betting market.

### 8.2. Draft Federal Lotteries and Betting Law: an overview

The work of the commission of experts culminated in October of 2002, when the draft Federal Lotteries and Betting Law<sup>187</sup> and the accompanying report<sup>188</sup> were presented to the Federal Department of Justice and Police. The draft law included a number of principles on which the existing system of regulation was based, such as the requirement of using net proceeds of lotteries for the public benefit or charitable causes, expanded to explicitly include also the proceeds from commercial betting,<sup>189</sup> the need to obtain authorisation for organisation and operation of lotteries and commercial betting,<sup>190</sup> and the competence of the Cantons in the area of their regulation.<sup>191</sup> In the Commission's view, only the limited access of operators to the market

171 LLP, Art. 42.

172 LLP, Art. 43.

173 LLP, Art. 44.

174 LLP, Art. 45.

175 Law on the Lotteries, Art. 17.

176 LVLLP, Art. 18(1).

177 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, at 4 (section 1.1).

178 See, Département fédéral de justice et police: Le DFJP nomme la commission d'experts pour la révision de la loi sur les loteries (Communiqués, DFJP, 31.05.2001), text in French is available

at: [www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2001/2001-05-31.html](http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2001/2001-05-31.html) (last visited Oct. 31, 2009).

179 Département fédéral de justice et police: Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, at 20 (section 1.1).

180 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 20 (section 1.3.2.1).

181 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 22 (section 1.3.2.4).

182 Rapport explicatif relative au projet de

la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 22 (section 1.3.2.5).

183 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 22 (section 1.3.2.8).

184 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 21 (section 1.3.2.2).

185 LLP, Art. 34.

186 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 21 (section 1.3.2.2).

187 Draft Federal Lotteries and Betting Law of 2002 (*Loi sur les loteries, Lot*), text in

French is available at: [www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetzgebung/lotteriegesezt.Par.0005.File.tmp/entw-ig-f.pdf](http://www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetzgebung/lotteriegesezt.Par.0005.File.tmp/entw-ig-f.pdf); English translation is available at: [www.ejpd.admin.ch/etc/medialib/data/gesellschaft/lotterie.Par.0024.File.tmp/entw\\_Lotterien\\_und\\_Wetten-e.pdf](http://www.ejpd.admin.ch/etc/medialib/data/gesellschaft/lotterie.Par.0024.File.tmp/entw_Lotterien_und_Wetten-e.pdf) (last visited Oct. 31, 2009).

188 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002.

189 Draft Federal Lotteries and Betting Law, Art. 7(1).

by means of licensing would allow limiting the competition and to ensure sufficient proceeds in favour of public benefit goals or charitable purposes.<sup>192</sup>

On the other hand, the draft law introduced into the existing system of regulation in Switzerland a number of major innovations, including the different requirements for major operators<sup>193</sup> and small operators,<sup>194</sup> the authorisation for major operators to organise commercial betting with bookmakers,<sup>195</sup> the possibility of access to lotteries and betting authorised under the law by means of a public electronic communication network such as the internet, television or the telephone network only for people physically present in Switzerland,<sup>196</sup> as well as the significant increase to the amount of monetary fines, including imprisonment for a period of up to five years or a fine in the amount of up to two million Swiss francs for serious offences.<sup>197</sup>

### 8.3. Current status of the reform

Following the submission by the Commission of Experts of the draft law on lotteries and betting and the accompanying Report, the Swiss Government authorised the Federal Department of Justice and Police to circulate this Report amongst interested parties, for consultation.<sup>198</sup> During this process of consultation, the polarised opinions have been expressed and the two totally opposing directions of future reform have been suggested. On the one hand, the Conference of the Cantonal administrators in charge of the lotteries, the Cantons as well as two major lottery operators (*Intercantonale Landeslotterie* and *Loterie Romande*) opted in favour of preserving the existing situation (Cantonal monopoly) and against limited liberalisation for the major operators. They also demanded the non-imposition of strict limits on the organisation of games (the payout ratio not exceeding 75 per cent), the reduction of the Federal tax and the non-submission of lotteries and betting operators to the requirements of the legislation against money laundering.<sup>199</sup> On the other hand, certain umbrella associations (Swiss Association of Entrepreneurs ("*Union patronale Suisse*"), Economiesuisse, Swiss Association of Trade Unions ("*Union syndicale suisse*")), mutual assistance and environmental protection organisations, as well as the representatives of casinos and the slot machines industry expressed their support for the liberalisation of the market, criticising the draft for consolidating the existing monopoly in the area of lotteries and, thus, exclusively benefiting the Cantons and their two lottery operators.<sup>200</sup>

Following the conclusion of the discussion, the Government accepted the proposal of the Conference of the Cantonal administrators in charge of the lotteries to allow the Cantons themselves to rectify the existing deficiencies in the area of lotteries, on a voluntary basis, by means of concluding an inter-Cantonal convention. Consequently, the Government has temporarily suspended the revision of the Federal Lotteries and Commercial Betting Law, entrusting

the Federal Department of Justice and Police with determining whether the objectives set by the Conference would be attained and whether the measures would be sufficient.<sup>201</sup>

On January 7, 2005, the Specialized Conference on the lotteries market and the lotteries law adopted the Inter-Cantonal Convention on the Supervision, Licensing and Distribution of Profits from the lotteries and betting operated at the inter-Cantonal level or in the whole territory of Switzerland, which entered into effect on July 1, 2006.<sup>202</sup> This Convention harmonised the licensing and supervision of the lotteries and commercial betting market in Switzerland, providing, in particular, for the creation of Comlot, entrusted with the duty of homologation of the new games and supervision over the lotteries and commercial betting operated in the inter-Cantonal or national levels.<sup>203</sup> The Convention also provided for the creation of the Appeals Commission as the highest inter-Cantonal judicial authority entrusted with the resolution of disputes under the Convention.<sup>204</sup>

Acting in accordance with the mandate of the Government, in May of 2008 the Federal Department of Justice and Police presented the Report on the situation in the area of lotteries and betting.<sup>205</sup> In the Department's view, it was necessary to leave sufficient time to the Cantons to implement the measures which have been decided upon by them, as well as to solidly establish their new structures. Thus, the profound evaluation of the situation in the area of lotteries and betting should not take place until the information on the effects of measures taken by the Cantons would become available.<sup>206</sup> The Government took note of the Report and agreed with this recommendation. Consequently, the evaluation of the measures adopted by the Cantons have been postponed until 2011, and the Federal Department of Justice and Police has been entrusted with the task to follow the developments until then, whereas the revision of the Federal Lotteries and Commercial Betting Law has also been suspended until that time.<sup>207</sup>

### 9. Conclusion

The system of regulation of sports lotteries and betting in Switzerland produces a very positive impression. The general prohibition on the organisation of lotteries and commercial betting together with the system of state licensing of lotteries having a public interest goal or a charitable purpose, as well as the existing monopoly on the conduct of lotteries and commercial betting in the Inter-Cantonal and national level allow, on the one hand, limiting the negative effects of these games, and, on the other hand, using the proceeds from these games for good causes, including the support of sport in the country. Moreover, although the revision of the Federal Lotteries and Commercial Betting Law has been temporarily suspended, it still may be expected that the allocation of the proceeds from lotteries and commercial betting to the public benefit would be preserved in any revised system of regulation.

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190 Draft Federal Lotteries and Betting Law, Art. 6.

191 Draft Federal Lotteries and Betting Law, Art. 5.

192 Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 25 (section 1.4.1.2).

193 Draft Federal Lotteries and Betting Law, Art. 9-13.

194 Draft Federal Lotteries and Betting Law, Art. 14-15.

195 Draft Federal Lotteries and Betting Law, Art. 17.

196 Draft Federal Lotteries and Betting Law, Art. 8.

197 Draft Federal Lotteries and Betting Law, Art. 50(2).

198 See, Département fédéral de justice et police: Moderniser la législation sur les loteries. Consultation relative au projet de loi élaboré par une commission d'experts (Communiqués, DFJP, 09.12.2002), text in French is available at: [www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2002/2002-12-09.html](http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2002/2002-12-09.html) (last visited Oct. 31, 2009).

199 See, Département fédéral de justice et police: L'orientation générale de la révision de la loi sur les loteries est contestée (Communiqués, DFJP, 20.08.2003), text in French is available at: [www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2003/2003-08-20.html](http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2003/2003-08-20.html) (last visited Oct. 31, 2009); see also, Département fédéral de justice et police: Synthèse des résultats de la procédure de consultation relative au projet de loi fédérale sur les loteries et les paris (Juin 2003), text in French is available at: [www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetzgebung/lotteriegesezt.Par.0008.File.tmp/ve-ber-f.pdf](http://www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetzgebung/lotteriegesezt.Par.0008.File.tmp/ve-ber-f.pdf) (last visited Oct. 31, 2009).

200 See, Département fédéral de justice et police: L'orientation générale de la révision de la loi sur les loteries est contestée (Communiqués, DFJP, 20.08.2003), text in French is available at: [www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2003/2003-08-20.html](http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2003/2003-08-20.html) (last visited Oct. 31, 2009).

201 See, Département fédéral de justice et police: La révision de la loi sur les loteries est provisoirement suspendue (Communiqués, DFJP, 19.05.2004), text in French is available at: <http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2004/2004-05-19.html> (last visited Oct. 31, 2009).

202 See, Inter-Cantonal Convention on the supervision, licensing and distribution of profits from the lotteries and betting operated at the inter-cantonal level or in the whole territory of Switzerland, dated January 7, 2005 (*Convention intercantonale sur la surveillance, l'autorisation et la répartition du bénéfice de loteries et paris exploités sur le plan intercantonal ou sur l'ensemble de la Suisse (CILP)*), du 7 janvier 2005).

203 CILP, Art. 7.

204 CILP, Art. 10.

205 Département fédéral de justice et police: Report du Département fédéral de justice et police sur la situation en matière de loteries et paris, du 15 mai 2008, text in French is available at: <http://www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetzgebung/lotteriegesezt.Par.0011.File.tmp/ber-ejpd-loterie-f.pdf> (last visited Oct. 31, 2009).

206 Report du Département fédéral de justice et police sur la situation en matière de loteries et paris, at 8 (section 4).

207 See, Département fédéral de justice et police: Loteries et paris: les mesures prises par les cantons seront évaluées ultérieurement (Communiqués, DFJP, 30.05.2008), text in French is available at: [www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2008/2008-05-30.html](http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2008/2008-05-30.html) (last visited Oct. 31, 2009).

# Discrimination against EU Nationals in Amateur Sports

by Georg Engelbrecht\*

1. In a pending dispute between three basketball clubs in Aachen and the regional basketball league *Westdeutscher Basketball-Verband e.V.* (WBV), which is responsible for the second regional basketball league in Nordrhein-Westfalen, Germany, issues were raised concerning potential discrimination against EU nationals. The question is whether the federation as the regional member federation of the German national basketball federation DBB is allowed to restrict the number of non-national players in any one game to only two non-German players. On 3 November 2009 the legal committee of the WBV decided in the first instance that such a provision is contrary to Community Law, more in particular Articles 18, 45 TFEU (successors to 12 and 39 EC) and Article 7 (2) of Regulation 1612/68/EEC. In its decision the legal committee referred to the Kolpak case<sup>1</sup> and to the opinion of the Commission of 3 February 2006<sup>2</sup> in answer to Petition 215/2002 of the German football player Rüdiger Hartmann who was discriminated against at that time in the *Real Federación Española de Fútbol* (RFEF). The German WBV case is now pending in the second instance before the DBB legal committee.

2. The present author, without directly being involved in this case, out of interest asked the Commission to give their opinion about possible discrimination against EU nationals in amateur sports. The Commission's official reply dated 1 February 2010 and given by Mr. Adam Tyson, Head of Unit of the Directorate General for Education and Culture Unit or, reads as follows:

*"Thank you for your letter of 1 December 2009 concerning possible discrimination against (non-German) EU nationals in (mainly) amateur sports.*

*You will no doubt be aware that following the entry into force of the Lisbon Treaty, the competence of the European Union in the area of sport has been extended. To reply to your specific question, the Commission considers that following a combined reading of Articles 18, 21 and 165 of the Treaty on the Functioning of the European Union (TFEU), the general EU principle of prohibition of any discrimination on grounds of nationality applies to sport for all EU citizens who have used their right to free movement. This principle concerns amateur sport as well as professional sport, which falls more specifically under the provisions related to internal market freedoms, such as Article 45 TFEU on free movement of workers or Article 56 TFEU on freedom to provide services, in so far as the considered sport activities constitute an economic activity.*

*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. A citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 21 of the Treaty in all situations which fall within the scope *ratione materiae* of EU law (C-184/99, Grzelczyk, paragraphs 31 to 33). Following the provisions of Article 165 TFEU, sport activities as a whole fall into the scope of EU law and amateur sport is therefore covered by these provisions.*

*Moreover, according to Article 7(2) of Regulation 1612/68/EEC, migrant workers have to be treated equally with nationals of the host country concerning access to employment, as well as working conditions and social advantages. As regards the definition of a social advantage*

*under Article 7(2) of Regulation (EEC) 1612/68, the Court has held that this covers all advantages: both financial benefits (C-249/83, Hoeckx, C-85-96, Martinez Sala), which, in a way, supplement the income of the migrant worker, as well as non-financial advantages (C-59/85, Reed, C-137/84, Mutsch). In particular, the ECJ has analysed whether the granting of an advantage to a worker and his family members would facilitate their integration into the host Member State. With reference to this approach by the ECJ, the Commission considers that the practice of amateur sport constitutes a social advantage in the meaning of Article 7(2) of Regulation (EEC) 1612/68 on freedom of movement for workers within the Community.*

*It is established case-law that sport federations and regulations must respect the fundamental rights guaranteed by the Treaty, and in particular the principle of non-discrimination on grounds of nationality (C-36/74, Walrave; C-13/76, Donà; C-415/93, Bosman). Moreover, rules regarding equality of treatment forbid not only overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, such as residency, lead in fact to the same result (Case 152/73, Sorgiu).*

*If it appears that sport regulations are in breach of EU law and that Member States are responsible for the acts taken by sport associations, the Commission, as guardian of the Treaty, has the option of opening infringement procedures following the conditions set out in Article 258 TFEU. Moreover, any citizen who considers that sport regulations are incompatible with EU law can use the means of redress available at national level. National Courts may refer points of European law to the European Court of Justice if they so wish".*

3. On 30 November 2009, a similar issue was raised in a question to the European Parliament (EP) by Mr. Jörg Leichtfried, who is an Austrian Member of the EP:<sup>3</sup>

*"The rules of the Austrian Bowling Association (ÖSKB) include stipulations about foreign players' eligibility to take part in bowling competitions in Austria. In Austrian team competitions, a maximum of two non-nationals can play; in four-player competitions, one non-national can be included. No distinction is made between nationals of EU countries and other foreigners. Because bowling clubs in border areas in particular include many players from neighbouring EU countries, these rules regularly have an inappropriately severe impact.*

*(1) Are the rules in question compatible with current EC law?*

*(2) If not, what will the Commission, as guardian of the Treaties, do to help ensure that the applicable law prevails?"*

4. The same issue is currently a topic for discussion in Switzerland as well, judging by an article by Astrid Epinay entitled "*Ausländerklauseln im Amateursport - ausgewählte rechtliche Fragen unter besonderer Berücksichtigung des Freizügigkeitsabkommens Schweiz-EU*".<sup>4</sup> Epinay, comparing the case-law of the CJEU (ECJ) to Article 12 EC and the case-law of the Swiss Federal Tribunal to Article 2 of the Treaty on Freedom of Movement between the EC and Switzerland, arrives at the conclusion that protection against discrimination in amateur sport is the same as protection against discrimination in professional sport in accordance with the principles of Bosman, Deliège, Lehtonen, Kolpak, Simutenkov, etc., and that these principles have direct effect against private sports federations. The District Court of Bern, Judgment of 13 June 2008<sup>5</sup> has decided that, since it would be legitimate to safeguard the national character of amateur sports events, it is sufficient to only stipulate that the majority of the athletes in one team is Swiss, but to restrict the portion of non-nationals to only two athletes would be discriminating.

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1 C-438/00 Kolpak.

2 CM/601213DE.doc PE 326.256/rev.V.

3 www.europarl.europa.eu/sides/

4 December 2008, Cahiers fribourgeois de droit européen no 5, Institut de Droit Européen.

5 SpuRt 2008, 253.



5. Further, the CJEU (ECJ) in the Trojani case<sup>6</sup> with regard to social benefits held that “a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit”.

6. Even the provisions in Partnership Agreements between the Community and third countries concerning non-discrimination, e.g. Article 23 (1) of Partnership Agreement between the Community and Russia, have been held to have direct effect without any further implementing measures being required to that end.<sup>7</sup>

7. The problem therefore does not so much lie in the law, but rather in the enforcement of the protecting rights, given that appeal bodies of a sport federation or special sports arbitration courts are not allowed to refer such cases to the CJEU (ECJ) for a preliminary ruling under Article 267 TFEU (234 EC), as this right is reserved for state courts only.

8. This means that the Commission has to be informed in other ways of relevant cases occurring within the Member States so that the Commission, as “the Guardian of the Treaty” may act, either by intervening at the government level of such a Member State or even by bringing the case to Luxembourg. The issue will further benefit from the Commission’s recent launch of an invitation to tender for a study on the equal treatment of non-nationals in individual sports competitions.<sup>8</sup> This study was planned in Action 40 of the Pierre de Coubertin action plan annexed to the White Paper on Sport adopted by the Commission on 11 July 2007 and is currently being carried out.

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<sup>6</sup> Case C-456/02, paragraph 43.

<sup>7</sup> ECJ, Case C-265/03 Igor Simutenkov, paragraph 23; see also C-162/00 Pokrzeptowicz-Meyer, paragraph 22.

<sup>8</sup> Public contract No EAC/19/2009, [http://ec.europa.eu/sport/news/news792\\_en.htm](http://ec.europa.eu/sport/news/news792_en.htm).

# Civil Liability in Sport: Aaron Ramsey

by Adam Whyte\*

On the Saturday the 27th of February 2010, in Stoke City FC’s Britannia Stadium, Aaron Ramsey broke his leg: A compound double fracture of his tibia and fibula. He was grotesquely injured following a collision with Ryan Shawcross, a promising young English centre half, who was called up for International duty for a friendly match just days after.

The ball was ricocheting off players in the centre of midfield until it felt to Shawcross whose heavy touch left him second favourite to reach the bobbling ball. Aaron Ramsey reacted quickest to the ball and disposed the defender. A standard passage of play in any high paced English football match, however the ensuing moments were anything but customary.

Having lost the ball Shawcross attempted to clear it or win it back through force by lashing it, kicking through the air with such ferocity that when the laces of his left leg impacted with Aaron Ramsey’s standing leg, the young Welsh players’ standing appendage snapped in half.

It was a very unpleasant moment, a disturbingly graphic scene which was not shown many times on television due to the visual vulgarity of the events.

The situation brought up many concerns: Would the player play again? If yes, when? What sort of sanctions would Ryan Shawcross receive? What would be the reaction of those within the game of football? What can be done to take this nasty brutal side of football out of the game?

However, the most pertinent question that needed to be discussed if not resolved was whether or not any liability existed for the actions of the Stoke City player in the events leading to Aaron Ramsey’s horrific injury.

Sport has generally been regarded as autonomous and allowed to self-govern and self-regulate. The instances of intervention and “pitch invasion” by the courts are few and far between. However, a precedent for establishing liability in Sport does exist and recently manifested itself in the Ben Collett v. Gary Smith & Middlesbrough FC case wherein Ben Collett, a promising Manchester United player, was

awarded damages for career ending injuries suffered as a result of an “over the ball” challenge by Gary Smith of Middlesbrough FC when the player was 18 years of age.

If one were to prove that Ryan Shawcross was negligent in his actions on the football pitch and Stoke City liable for the actions of their employee during the course of his employment, according to English law the test for negligence would have to be satisfied.

The criteria which must be present in order to establish negligence are that:

1. The accused party owed the claiming party a duty of care.
2. The accused party must have acted without the necessary standard of care.
3. There must be damage suffered
4. There must be causation proved with relation to the damage

In this situation one could assume that all of the football players on the pitch as co-dependent professionals owe each other a duty of care; duty not to injure the other participating parties. Lord Atkin famously said in *Donoghue vs. Stevenson*<sup>1</sup> that a duty of care is owed to your neighbor<sup>2</sup> and it is clear that professionals on the same pitch could and should be regarded as “neighbors”.

By using the “but for test<sup>3</sup>” for establishing causation it is quite simple to establish that the actions of Ryan Shawcross were causative for the injury suffered by Aaron Ramsey. That is to say, but for the actions of Ryan Shawcross, Aaron Ramsey would not have gotten injured at that moment of time.

Aaron Ramsey has, will, or probably will suffer harm<sup>4</sup>. He will have experienced a substantial amount of pain. He will miss the opportunity to earn any playing related bonuses for the amount of time spent out injured. Aaron Ramsey might suffer both emotionally and mentally as a result of the tragedy. The Arsenal player might never play professional football again, or at least professional football at the highest level, which would result in a loss of prospective earnings<sup>5</sup>. The actions of Shawcross might even affect Aaron Ramsey’s everyday life, he might not be able to walk again, or he might be in substantial pain<sup>6</sup>.

However, the most difficult prong of the common law negligence test to satisfy is whether or not the Stoke player acted with a reasonable standard of care. The tackle put in by Ryan Shawcross against

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Aaron Ramsey can be described using a variety of terminology. However, when establishing whether or not the player conducted himself with a reasonable standard of care, comes down to whether or not the tackle was a hard and committed, or dangerous and reckless.

There was most certainly no intent to cause harm in the tackle of Ryan Shawcross otherwise we would be discussing the criminal and not civil liability implications of the actions of the Stoke City player. However, one could say that the player acted with reckless disregard about the health and safety of his fellow professionals.

The Stoke City player is an experienced professional having played for the Manchester United Reserves and several years of first team football in the English Premier League. Ryan Shawcross must have known, or at least should have known, that when he lost control of the ball in the midfield against Arsenal, he was not going to win it back.

Therefore, one can assume that out of frustration or in order to intimidate the opposition, he lashed out with tremendous power in order to win back the ball or to cause damage to any opponents who got in the way of his swinging pendulum. A professional of his high level and quality perhaps should have known that his actions were not committed but were reckless. He should have known that kicking in such a manner in that situation was likely to cause damage to his opponent. The question may be whether or not the reasonable man<sup>7</sup> would decide that damage was reasonably foreseeable at the time of the event<sup>8</sup>.

Aaron Ramsey has suffered damage as a result of the possibly negligent actions of Ryan Shawcross; he certainly has a potential claim against the player and perhaps the player's employers, Stoke City. Furthermore, Arsenal may suffer damage as a result of the decrease in

value of one of their assets as a result of the negligent actions of the opposing player and club. However it remains to be seen whether or not the courts are again willing to "invade the playing pitch" and protect the livelihood of professional athletes.

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- 1 *Donoghue v Stevenson* [1932] AC 562
- 2 Lord Atkin stated in his leading judgment: "Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question."
- 3 *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 - In tort it must be established that the defendant's tortious conduct caused or materially contributed to the damage to the claimant before the defendant can be found liable for that damage. In order to determine factual causation, courts adopt the same "but for" test used in criminal cases: "but for" the defendant's tortious conduct, would the claimant's loss have occurred.
- 4 Harm may be physical, purely economic, both physical and economic, as well as emotional or mental.
- 5 A type of damage awarded to Ben Collett as a result of his career being prematurely ended by the "over the ball" tackle of Gary Smith.
- 6 However, each of the claims which are made conditionally are subject to delay. I.e. He might never walk again, are damages which can only be awarded if they eventually realized. One cannot be penalized for potential harm.
- 7 *Vaughan v. Menlove* (1837) 3 Bing. N.C. 467, 132 E.R. 490 (C.P.) Standard of care described as whether the individual "proceed[ed] with such reasonable caution as a prudent man would have exercised under such circumstances."
- 8 As stated in the opinion, 'Reasonable risk' cannot be judged with the benefit of hindsight. As Lord Denning said in *Roe v Minister of Health* [1954] 2 All ER 131 - "The past should not be viewed through rose coloured spectacles."



# Transparency in Transfers

by **Angus Bujalski\***

Transparency was the watchword for football regulators towards the end of 2009, and this looks set to continue into 2010. It is under this banner that FIFA seems prepared to recast its role as regulator of the use of third parties in international player transfers. In March 2010, FIFA will complete the roll-out of its Transfer Matching System (TMS) and at the same time, seems set to rethink the way it regulates dealings with agents. Rather than regulating the agents themselves, FIFA proposes to concentrate on regulating the players and clubs in their dealings with third parties, meaning that the obligations sit with, and the sanctions bite on, only the players and clubs rather than on any third parties.

The issue of transparency is rarely out of the news, from the Financial Action Task Force's report on "Money Laundering through the Football Sector" in July 2009 to more recent developments regarding payments to agents. Although it is the implementation rather than the announcement which is news, the English FA now requires Premier League clubs to publish annually the amounts paid to agents in the preceding 12 months. The first set of figures for the 12 months to 30 September 2009 were widely publicised and analysed. Further, two recent cases in England, namely Kevin Keegan's case for constructive dismissal before the League Managers' Arbitration Tribunal, and Hull City's action against former chairman Paul Duffen, have brought to the fore the less savoury side of payments by clubs to intermediaries.

## Transfer Matching System

The idea behind the TMS is, in the words of Marco Villager, FIFA's director of legal affairs, "centrally [to] control all international player transfers by recording all relevant data". This data, including the money spent and received, commissions paid and the bank accounts

used, is recorded by the clubs involved on a centralised web-based tool. This aims to make international transfers more transparent so that all payments can be matched up and ensure fraudulent payments cannot be hidden. It is intended, perhaps as early as 2012/13, that the TMS will also operate as a clearing house through which all payments will be made, allowing for more centralised supervision of all payments. A similar system currently operates in England, where all monies paid by English clubs to overseas clubs, and all monies paid to agents, are paid through the FA's designated bank account. FIFA has stated very clearly that the TMS is designed to prevent abuses, such as agents representing minors, the use of unlicensed agents, or money laundering in football.

As part of this roll-out, FIFA has introduced the electronic international transfer certificate (ITC). This is designed to speed up the international transfer process. Historically, ITCs were issued by fax between the member associations of the clubs involved, which left FIFA inundated with paperwork as it manually registers every transfer. From 5 October 2009, if both associations involved in the international transfer are already participating in the TMS, an electronic ITC will be used, and paper certificates will no longer be accepted.

Currently 108 associations (including all 53 associations within UEFA) and 1,263 clubs are participating, with global roll-out planned for March 2010. In a circular of 23 September 2009 to its members, however, FIFA stated that compliance with the TMS was "rather disappointing" and reminded its members that it would refer cases of non-compliance to the FIFA Disciplinary Committee. Villager is quoted as saying that "sanctions must be harsh", and that FIFA would

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provide state authorities and even Interpol with all relevant information should they have any suspicions about any transfers or payments.

### FIFA as Regulator of Agents

It has been reported recently in UK newspapers that FIFA intends to end its role as worldwide regulator of football agents. This has been described as “turning the global transfer market into a free-for-all”, or even worse as a move taking football “back to the wild west”. Contrary to those reports, however, this represents not an abandonment of regulation but a change of emphasis. FIFA intends to focus on regulating clubs and players, who already fall within its remit, rather than agents.

Payments made as part of an international transfer will be disclosed under the TMS and so illegal payments to any third party (whether to an agent or other intermediary) will be spotted. Sanctions will apply only to clubs and players, and so the logic is that the threat of financial or even sporting sanctions will be so great that clubs and players only make legitimate or permitted payments. In this way, FIFA believes that it will gain adequate control over the use of intermediaries. Precisely what powers FIFA will have vis-à-vis players and clubs is yet to be set out, but FIFA will have to recast its existing framework considerably. As they currently stand, the FIFA Players’ Agents Regulations place very few obligations on clubs and players. By contrast, while the English FA Football Agents Regulations regulate agents as well as players and clubs, they do place obligations on clubs in their use of third parties, such as Regulation J5 which prevents a club, a club official or a manager from having an interest in an organisation through which an agent conducts business. It seems likely that FIFA will either have to expand its Regulations on the Status and Transfer of Players, where the bulk of the obligations on clubs and players lie, to include relations with third parties and so abandon the Players’ Agents Regulations or entirely redesign the latter as the vast majority of the current provisions will be redundant.

It will be important for FIFA to remember that national regulation by individual associations has grown up under the framework set up by FIFA. The FIFA Players’ Agents Regulations require each national association to make their own regulations, and although the nature of implementation has varied as a result of national law, if FIFA’s framework changes, there will be a knock-on impact upon national regulation and the national regulations may continue to diverge.

If FIFA’s proposals are carried, it seems probable that, FIFA will only play a role in the regulation of the use of intermediaries in international transfers and play no role in directly regulating the role of intermediaries in other parts of the game. Indeed, there is an argument that the FIFA Players’ Agents Regulations never really did regulate this. The FA Football Agents Regulations set out relatively clear definitions of a “Transaction” (meaning a transfer) and a “Contract Negotiation” (meaning a negotiation or renegotiation of a player’s employment contract) which both include ancillary work and make it clear that the proposed Transaction or Contract Negotiation need not be completed for the regulations to apply. By contrast, the FIFA Players’ Agents Regulations talk about “transactions” in a more general sense and arguably do not include contract negotiations and renegotiations where a player is staying with the same club. As such, rules and regulations of national federations do, and as a result of FIFA concentrating on international transfers only, will have to continue to go much further. They must regulate the nature of representation agreements, and cover other transactions such as contract negotiations or the financial interests in players’ commercial activities. These other aspects could not be so easily, if at all, caught through the TMS and therefore it would be up to national bodies to regulate these activities. In some ways, this is less of an issue for the larger, particularly European, associations. For example, the English FA has shown itself at some level better able to deal with regulatory breaches by agents. By way of comparison, there is already a great backlog of cases at FIFA, including the complaint from the English FA about the presence of Pini Zahavi at an unauthorised meeting between Chelsea and Ashley Cole, who was then at Arsenal. The FA’s contention is that this meeting constituted a breach of Article 22 of the FIFA Players’

Agents Regulations. Given that Zahavi was an agent registered in Israel, the FA at that time had no jurisdiction (as the event occurred before the FA Football Agents Regulations were in force), and so referred the case to FIFA. It is more than three years since the FA’s complaint, but FIFA has commented only that the case is currently “ongoing”. By contrast, Cole’s representative, Jonathan Barnett, fell under the jurisdiction of the FA who acted more promptly and fined him £100,000 and suspended him for 18 months.

If FIFA moves away from an international framework, there will nevertheless be problems for those associations who do and will continue to regulate agents. For example, the FA Football Agents Regulations depend upon overseas agents being licensed by a national organisation in compliance with the FIFA Players’ Agents Regulations. If such a global licensing framework no longer exists, then enforcement of breaches of national regulations by agents registered or based overseas will require closer collaboration between national organisations. If the nature of national regulations diverge without a centralised FIFA framework, then enforcement may prove increasingly difficult. In the absence of this framework, then the liberalisation resulting from the EU Services Directive, which was due to have been implemented in all EU member states by 28 December 2009, risks eroding the abilities of national associations in the EU to implement regulations capable of meaningful cross-border enforcement. For example, Dutch law does not require a Dutch national to hold a licence to be an agent, so in the absence of a FIFA requirement for the Dutch FA to licence agents, it could be the case that no Dutch agents are registered, thereby compromising those associations whose regulations depend upon the concept of overseas agents being licensed in their own state. In other words, a Dutch agent could operate in, say, France without a licence which would be mandatory for a French agent to operate there. Enforcement of any breaches of French regulation by that Dutch agent could prove difficult in the absence of a licensing regime in his own state. A failure to set out such a framework could force associations to seek to regulate all agents who act within its jurisdiction, leading to a greatly increased administrative burden.

### Disclosure of Agents’ Fees

These proposals come at an interesting time, since payments made to agents are once again in the news. An interesting point emerged from Kevin Keegan’s ultimately successful claim for constructive dismissal against Newcastle United in the League Managers’ Arbitration Tribunal. Dennis Wise, then the club’s Executive Director (Football), confirmed that the club had signed Ignacio Gonzalez, a player no one at the club had seen play, and footage of whom was only available on a grainy YouTube video, not for sporting reasons but for the club’s “commercial interests”. This, according to the club, meant that signing this player on loan would be a “favour” to two influential South American agents who would look favourably on the club in the future. The court found that this loan deal cost the club nearly £1,000,000 in wages. Although the club did not make any payments directly to the agents, the inference is clear that the agents benefited indirectly at a cost to the club.

All the more pertinent, then, has been the implementation of the requirement for all Premier League clubs to publish the amount of money spent on agents in the last 12 months. These amounts can be tracked by the FA as all payments to agents are made through the FA.<sup>1</sup> A similar system has been in place for the Football League since 2004. According to Brian Mawhinney, the chairman of the Football League, the “figures show a downward trend in the amounts going to agents and an upward trend in the number of clubs not paying agents at all. I think it is wrong to look at a particular set of figures. The strength of the process is that it gives a sense of what is happening over a period of time.” Although newspapers have devoted many column inches to the absolute £70.7 million that was paid out from 1 October 2008 to 30 September 2009, a similar analysis holds true as for the

<sup>1</sup> Regulation G10 of the FA Football Agents Regulations.

Football League. It is difficult to analyse this information in abstract, since it includes amounts paid to agents on deals done in previous years. This may help to explain why some clubs, who appeared to have had relatively quiet transfer dealings over those 12 months, such as Liverpool, paid so much in agents' fees. A further muddying of the waters comes from provisions of the FA Football Agents Regulations themselves. Although, broadly, the principle underlying those Regulations is that an agent may only act for one party in a transaction,<sup>2</sup> and may only be remunerated by that party,<sup>3</sup> where an agent acts for a player, a club is permitted to pay that agent through periodic deductions from the player's salary<sup>4</sup> (but this too may only be paid through the FA<sup>5</sup>). Notwithstanding that the agents are, technically, paid by the player, any amounts paid by the clubs on behalf of the players were counted in the totals published by the clubs and the FA, and so the figures published include amounts paid technically both by clubs and by many players. It is, however, very important to include these amounts technically paid by the players. The practice for the net pay of players to be agreed, and then for this figure to be "grossed up" to include the amounts a player is due to pay his agent (resulting, of course, in additional taxation costs for the club), effectively holds the player harmless for the salary deductions. These payments are, therefore, in effect a cost to the club and, as such, including them helps to give a truer picture of the costs incurred to clubs in its dealing with agents. Last summer the FA relaxed its rules allowing for dual representation, provided certain procedures are followed.<sup>6</sup> Nevertheless, club and player each remain responsible for remuneration of the agent in respect of the services each has received from him.

As with the Football League, it will be interesting to see how these figures change with time, although figures from the Premier League are perhaps more susceptible to being skewed by individual events such as high-value individual transfers, or the buy-out of a club leading to a large amount of transfer activity. By way of example, and not altogether surprisingly, Manchester City comfortably topped the table of expenditure on agents for the last year.

A current case in the English courts, brought by Hull City against

its former chairman, Paul Duffen, demonstrates that those involved may not only be subject to the jurisdiction of football regulators. The club allege Mr Duffen's services company received payments from agents in return for which Mr Duffen procured that the club contracted with these agents. Here, the club is relying on its contractual arrangements with Mr Duffen as well as general company law relating to fiduciary duties he owed to the club in his capacity as a director. New and codified duties in relation to the duties of directors as set out in the UK Companies Act 2006 mean that directors of football clubs are subject to very strict duties, with both civil and criminal penalties. The situation for company directors is very different to that of a player or a manager. The standard form player contract of the Premier League and the mandatory dispute resolution clause which must appear in a Premier League manager's contract<sup>7</sup> require any disputes between club and player or manager to be settled by arbitration. Directors and other employees are not usually accorded this luxury, however, and so this and other sorts of disputes must be settled through the courts. Civil penalties are severe. It is well established that a director is directly liable to account for any profits he has made through a breach of his fiduciary duties to the company.<sup>8</sup> Criminal penalties are also severe. A failure by a director to disclose his personal interest in a transaction carries a penalty, potentially, of an unlimited fine.<sup>9</sup> The UK Fraud Act 2006 has also created the specific offence of fraud by abuse of position,<sup>10</sup> punishable by an unlimited fine or imprisonment for up to 10 years.<sup>11</sup>

If Hull City's allegations are correct, then it may be that Mr Duffen was in breach of the FA Football Agent Regulations in addition, specifically in relation to notifying any relationship between his service company and the agents used by Hull City. This may well be academic, since the sanctions of the court would far outweigh any sanctions of the FA and be of wider significance outside football.

## Conclusions

It is hard for anyone to argue that an increase in transparency cannot be a good thing for football. It may well be that the days of brown paper envelopes are disappearing, but it is evident that illegal payments are still being made. With the increasing numbers of international transfers, any system to keep track of payments can only be a good thing. Hopefully the TMS will be able to cope with the increasing volume of international transfers and also that it will robust enough to act as a clearing house for all funds in the coming years.

How FIFA's new proposals on regulating the use of third parties will interact with existing domestic regulation is yet to be seen, but FIFA must recognise that national regulation has grown up on the basis of the framework FIFA itself set out. As such, it is vital that FIFA not only considers the existing regulation set up by national associations and the impact that any changes in its own regulation will have on them, but also that sets out adequate procedures and protocols for associations to deal with one another on the use of third party intermediaries. FIFA cannot afford to let the good work done by those associations be undone by failures to enforce internationally.

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<sup>2</sup> Regulation C1.

<sup>3</sup> Regulation G1.

<sup>4</sup> Regulation G5.

<sup>5</sup> Regulation G5(c)(ii).

<sup>6</sup> Regulation C4.

<sup>7</sup> See Appendix 8 of the FA Premier League Rules.

<sup>8</sup> *Flitcroft's Case* (1882) ChD 519.

<sup>9</sup> Section 183 Companies Act 2006.

<sup>10</sup> Section 4 Fraud Act 2006.

<sup>11</sup> Section 1(3) Fraud Act 2006

*From left to right: Prof. Richard Parrish (United Kingdom), Samuli Miettinen (UK/Finland), Dr Ozgerhan Tolunay (Switzerland/Turkey) and Dr Robert Siekmann (The Netherlands), speakers at the TAIEX workshop on the Impact of the EU Acquis on Sport, University of Ankara, 17 February 2010.*



# Sporting Just Cause and the Relating Jurisprudence of FIFA and CAS

by Georgi Gradev\*

The FIFA Regulations on the Status and Transfer of Players (the Regulations)<sup>1</sup> stipulate that a contract between a professional and a club may only be terminated: 1) on expiry of the term of the contract or by mutual agreement (Art. 13); or 2) if there is “just cause” (Art. 14); or 3) for “sporting just cause” (Art. 15).

On 10 August 2007, the FIFA Dispute Resolution Chamber (DRC) had to address, for the first time, the question whether a professional had terminated the employment contract prematurely on the ground of sporting just cause in the sense of Art. 15 of the Regulations. The latter article, as well as the pertinent formal DRC Decision<sup>2</sup> and final award passed by the Court of the Arbitration for Sport (CAS)<sup>3</sup> are subject of this contribution.

## The Regulations

Art. 15 of the Regulations (edition 2009) provides as follows:

*“An established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the player’s circumstances in the appraisal of such cases. The existence of a sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered”.*

## The Commentary on the Regulations<sup>4</sup>

FIFA maintains in the Commentary that there are only two mandatory conditions for a player to be entitled to claim sporting just cause: (i) that the player is recognized as an established player; and (ii) that he has not appeared in 10% of the Official Matches of his club during the Season.

With respect to (i), FIFA defines the term “established player”, as a player who has terminated and completed his training period and whose level of football skills is at least equal to or even superior to those of his teammates who appear regularly.

Regarding (ii), FIFA clarifies that: a) “appearance” is to be understood as being fielded and thus, actively taking part in a game. In this respect, it is not the number of appearances in games but the minutes effectively played therein that is relevant; and b) the championship, as well as national and international cup matches, is to be taken into account to establish the percentage of games played.

The existence of sporting just cause must always be established by the competent deciding body. If sporting just cause does not exist, this means that the employment relationship has been terminated without just cause and consequently, Art. 17 of the Regulations applies.

According to FIFA, the term “player’s circumstances” (e.g. the player’s position on the pitch, any injuries or suspensions sustained by a player that have prevented him from playing over a certain period of time as well as any situation that may justify, from a sporting point of view, the fact that the player has not been fielded on a regular basis) is not to be considered as an independent criterion, but it should be seen in the context of the prerequisite “established player”.

No sporting sanctions will be imposed on the player, terminating the contract for sporting just cause. However, compensation may be payable to the club, unless the player can prove that the club has completely neglected him from a sporting point of view.

Lastly, FIFA points out that a player, who seeks to rescind an employment contract for sporting just cause outside the 15 days following the last Official Match of the Season, is liable to imposition of sporting sanctions and to pay compensation to the club for damages incurred by the latter as a result of the contract being terminated incorrectly. With regards to the “sanctions” issue, FIFA maintains that “the closer it is to the end of the main registration period, the harder the sanction may be”.

## Interim conclusions

Beforehand, I wish to underline that the Commentary is no more than a guideline for the interpretation of the Regulations.<sup>5</sup> Therefore, it is the real intent and wording of Art. 15 of the Regulations that matters.

Obviously, Art. 15 of the Regulations provides a legal basis exclusively to the player (not to the club) for a unilateral termination of the employment contract. In so far as participation in Official Matches is the essential purpose of a professional player’s activity<sup>6</sup>, it is my understanding that Art. 15 is designed, first and foremost, to secure the player’s right to an effective employment<sup>7</sup> and to provide protection for the player’s professional career, which is relatively short.

Traditionally, the employer’s duty to provide work applies only to those who are paid on a commission or piecework basis, or an exceptional category of employee who needs to work in order to establish and enhance a professional reputation, for instance, an actor or a singer<sup>8</sup>, or a football player or coach. In view of the latter, in the case CAS 2005/A/909-910-911-912, award of 9 March 2006, in par. 9.9 CAS has ruled as follows:

*“It is also to be reminded that the employer has under Swiss Law the obligation to protect the employee’s personality (Art. 328 of the Swiss Code of Obligations hereafter “CO”). The case law has deduced thereof a right for some categories of employees to be employed, in particular for employees whose inoccupation can prejudice their future career development. The employer has to provide these employees with the activity they have been employed for and for which they are qualified. The employer is therefore not authorised to employ them at a different or less interesting position than the one they have been employed for (Rémy Wyler, Droit du Travail, Stämpfli, Berne 2002, p. 235; Le Contrat de travail, Code annoté, op. cit., n° 1.21 ad art. 328”.*

It is my personal opinion that there are three cumulative conditions for a player “to be entitled” to claim sporting just cause: (i) “established player”; (ii) “10% appearance”; and (iii) “15-day term”.<sup>9</sup>

With respect to (i), according to Art. 1.1 of Annex 4 of the Regulations, training compensation is payable “for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21”. Therefore, in any event, “the conclusion of a player’s training period occurs when the play-

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<sup>1</sup> The Regulations are published on [FIFA.com](http://FIFA.com), as well as all other FIEA-related documents cited hereinafter.

<sup>2</sup> cf. DRC No 871322, decision of 10 August 2007.

<sup>3</sup> cf. CAS 2007/A/1369, award of 6 March 2008.

<sup>4</sup> cf. p. 41 to 43 of the Commentary.

<sup>5</sup> For the exact role of the Commentary, please see FIFA Circular No 1075.

<sup>6</sup> cf. ECJ Case C-415/93, “Bosman”, judgment of 15 December 1995, par. 120, the 2nd sentence.

<sup>7</sup> cf. also CAS 2007/A/1369, paras. 142, 146, 168 and 218 (cf. *infra*).

<sup>8</sup> cf. *Sports Law, Third Edition*, Gardiner, James, O’Leary, Welch and others, p. 489.

<sup>9</sup> cf. also Frans de Weger, THE JURISPRUDENCE OF THE FIFA DISPUTE RESOLUTION CHAMBER, p. 96-97, par. 8.4.1.



er reaches the age of 21".<sup>10</sup> It is also possible that the player terminates and completes his "training period" before his 21<sup>st</sup> birthday. The examples provided in footnote 149 of the Commentary facilitate the comprehension of the football stakeholders with respect to the earlier conclusion of the player's establishment:<sup>11</sup>

*"CAS 2003/O1527: a player signed his first professional contract at the age of 17. In his first season as a professional, he played 15 times with the first team. Moreover, at that time, he was noticed for his good technical skills and speed. Therefore, it was considered that the player had terminated his training period before his second season as a professional player at the age of 18.*

*CAS 2004/A1594: a player was considered by his training club as "the most talented player who played at all ages at the highest level in the country of the training club and in the national teams at all ages". Moreover, the player was described by his training club as a "regular player for the club". Finally, for the four-year loan of the player at the age of 18, a six-figure USD sum was paid for each year. Therefore, it was considered that the player's training was terminated at the age of 17, when he, in fact, signed a five-year contract with his training club".*

As to (ii), for the calculation of the "10% appearance" "it is not the number of appearances in games but the minutes effectively played therein that is relevant".<sup>12</sup> Following a grammatical rather than a teleological interpretation of Art. 15 "could defeat the intention underlying the approval of this provision, which essentially seeks to protect players from being prevented from actively continuing with their professional careers and from keeping up their levels of competitiveness".<sup>13</sup>

Regarding (iii), the "15-day term" is a compulsory prerequisite for the admissibility of the player's claim on the ground of sporting just cause, but it bears no relevance when determining whether sporting just cause is in fact present or not. It is clear from the language of the last sentence of Art. 15 that the player is prevented from invoking a sporting just cause to part with the club beyond the 15 days deadline from the last official match of the Season. Otherwise, the effects of Art. 17 of the Regulations apply in full.

Furthermore, it is very important to emphasize that Art. 15 does not provide for a mandatory termination notice to be served to the club. It follows that the issue of proceedings on the basis of sporting just cause before the competent judicial body, within the 15 days timeframe from the end of the Season, completely satisfies the requirements of the criterion "15-day term".<sup>14</sup> Pursuant to Swiss law, subsidiarily applied by FIFA and CAS in case of a loophole in the Regulations, save for disputes where the parties have explicitly agreed upon the application of another national law in advance, "[f]or valid reasons, ... the employee, may ... terminate the employment relationship without notice. He shall justify the termination of the contract in writing if so requested by the other party".<sup>15</sup> In this respect, the following example of CAS case-law is indicative:<sup>16</sup>

*"By his agent's letter of 14 March 2006 the Appellant notified FIFA that he considered the Contract to be terminated with immediate effect and that he was thinking of entering into a new contract with another club. As of 15 March 2006 the Appellant no longer appeared for training and otherwise no longer fulfilled his obligations under the Contract. Instead he travelled to Antalya on 15 March 2006 and left Turkey shortly afterwards. The letter of 14 March 2006 must therefore be considered to be a termination of the Contract by the Appellant".*

10 cf. CAS 2007/A/1369, par. 132 (cf. *infra*).

11 cf. also the last example on p. 6 of FIFA Circular No 769.

12 cf. fn. 66 of the Commentary; see also CAS 2007/A/1369, par. 147 (cf. *infra*).

13 cf. CAS 2007/A/1369, par. 146 (cf. *infra*).

14 It is worth noting, in this connection, that the "[p]arties affected by the opening of proceedings must be notified thereof without delay" (cf. Art. 6.3 of the FIFA General Procedural Rules, the 2nd sentence).

15 cf. Art. 337 par. 1 of the Swiss Code of Obligations.

16 cf. CAS 2006/A/1100, award of 15 November 2006, par. 8.2.

17 cf. Definition 9 of the Regulations.

18 cf. DRC No 47936, "Webster", decision of 4 April 2007, paras. II.21-26.

19 cf. also CAS 2007/A/1369, par. 149 (cf. *infra*).

20 cf. FIFA Circular No 769, p. 14-15.

21 cf. Definition 7 of the Regulations.

22 cf. DRC No 871322, decision of 10 August 2007, paras. II.20-24.

As far as the term "player's circumstances" is concerned, from the one hand, it indeed pertains to the prerequisite "established player" (e.g. the age of the player, the number of games played in the previous season(s), any senior national team experience and the compensation paid for the player's registration, if any, are among the main criteria to be considered when determining whether the player is established or not), and, on the other hand, it concerns also the "10% appearance" condition (e.g. any injuries or suspensions sustained by a player that have prevented him from playing over a certain period of time will surely influence the count). For these reasons, I agree with FIFA that the criterion "player's circumstances" has, as its standing purpose, to give assistance in determining whether a player is "established" and has appeared in fewer than 10% of the playing time of his club and that it cannot be considered as an independent factor to establish the existence of sporting just cause, but rather it has to be subordinated in relation to the "established player" and "10% appearance" heads.

In continuation, one must keep in mind that "Season" is "the period starting with the first official match of the relevant national league championship and ending with the last official match of the relevant national league championship".<sup>17</sup> Evidently, the notion of "Season" does not encompass the national and international cup matches.<sup>18</sup> Therefore, any cup match played after the end of the Season could not be included in the calculation of the 10% of the playing time and the 15 days regulatory time limit.

Equally, due attention should be paid to the notion of "Official Matches", as defined in Definition 5 of the Regulations, which does not cover any friendly and trial matches.

Finally, it is noteworthy that in some occasions compensation may be payable to the club, unless the player can prove that the club was not interested in his services - for e.g. if the player was dropped in the second team of the club for the entire Season, provided that Art. 15 of the Regulations applies only to established professionals, who, as a general rule, are hired by the club to be fielded in first team action. The latter implies, by the way, that any second team match must be excluded from the percentage of games played.<sup>19</sup> "In the event it is determined that compensation is payable, the amount must obviously be less than the compensation due in the case of an unjustified contractual breach, since the club is at least in part responsible for the breach, and should, in principle, not exceed the salary remaining until the end of the contract".<sup>20</sup>

## The jurisprudence of FIFA

On 20 August 2004, the player T, born in 1984, and the club K entered into a contract, valid until 31 December 2008. 4 days after the last official match of K in the 2006 season, played on 26 November 2006, FIFA received a petition from T, requesting, *inter alia*, the termination of his contract with K for sporting just cause. T alleged, *inter alia*, participation in 4 matches (198 min.) out of 34 first team matches (3090 min, incl. 30 min. extra time played in a Cup game) and that he is an established player. T also explained that he appeared in 1 second team match of K, which must not count.

K replied, *inter alia*, that T is not an established player and appeared in 11.76% of the official matches. K requested from FIFA, primarily, to order T to return to K, or, alternatively, to establish that T terminated the contract without just cause during the "Protected Period"<sup>21</sup> and as a result, to condemn T to pay compensation to K and to entail a sporting sanction on him. The FA of K informed FIFA that K played 34 official matches, 30 Championship matches and 4 Domestic Cup matches, and T participated in 5 matches, being effectively fielded 245 min.

DRC, first of all, retained its jurisdiction to hear the dispute between T and K. Subsequently, DRC concluded that edition 2005 of the Regulations is applicable to the merits. DRC then made the following pertinent considerations, *inter alia*:<sup>22</sup>

*"In continuation, the members of the Chamber deemed important to emphasize that for the sake of good order the determination of sporting just cause has to be measured accurately and carefully. Therefore this legal remedy authorizing to terminate a labour relationship with a valid reason has to be set at high level and under clear and objective conditions in order to preserve the legal security.*

Equally, the deciding authority was eager to emphasize that it is the first time it had to address the question whether a professional has terminated the relevant employment contract prematurely on the grounds of sporting just cause in the sense of art. 15 of the Regulations, and thus, no jurisprudence has been established so far.

Yet the Chamber remarked that under the Regulations and following a grammatical interpretation of the relevant provision, the sporting just cause is established mainly taking in consideration a floor of 10 % of the official matches in which the player in question participated and not the minutes.

Furthermore, the members of the Chamber checked carefully the information at disposal in the matter at stake, in particular the report submitted to FIFA by the National Football Union and they concluded that the player T participated in 5 of the 34 official matches that K played.

Consequently, the Chamber deemed that there is not sporting just cause in the matter at stake since 5 matches out of 34 is more than 10 % that the limit required by art. 15 of the Regulations”.

On account of the above, among other considerations, DRC decided unanimously that T dissolved the contract with K without just cause during the protected period and T is thus liable to pay compensation to K, as well as to imposition of a 4-month restriction on his eligibility to participate in any official matches, which “sanction shall take effect as from the first day of the registration of the player with a new club”.

### The jurisprudence of CAS

On 31 August 2007, T appealed against the DRC Decision to the CAS. In his final decision, the CAS Sole Arbitrator, at first, upheld his jurisdiction to decide the dispute at stake. Furthermore, CAS placed reliance on the provision of Art. 60.2 of the 2007 FIFA Statutes, which reads, *inter alia*, that “CAS shall primarily apply the various regulations of FIFA ... and, additionally, Swiss law”, and confirmed “that the edition of the FIFA Regulations applicable to this case is the 2005 edition”.

With respect to the essential question “Did the player have [sporting] just cause to terminate the employment contract with the Club and was the said termination effected in the legally prescribed manner”, CAS made the following relevant and notable considerations, *inter alia*:

“123. It is accordingly necessary for four requirements to be complied with before a player can terminate his Employment Contract on the grounds of sporting just cause:

1. That the player is an established professional;
2. That he has played in less than 10% of the official matches in which his club was involved in the sporting season in question;
3. The player's personal circumstances; and
4. That he terminates his employment contract during the 15 days following the final official match in the season of the club with which he was registered.

#### A.2.1) An established Professional

130. The Single Arbitrator is of the opinion that the “established professional” concept needs to be filled out not only on the basis of the player's age, but also on the basis of his sporting level as demonstrated during his career, in terms of an acceptable standard in the light of the specificity of sport, the player legitimate expectations and what is expected of the player in terms of sporting performance.

131. The applicable sporting regulations, i.e. the criteria considered therein, must also be taken into consideration in this interpretative exercise. Article 1 of Annexe 4 of the FIFA Regulations provides a general indication, when it provides that compensation for training “shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21”.

132. The Single Arbitrator interprets this provision so that there is a presumption that the conclusion of a player's training period occurs when the player reaches the age of 21.

135. Accordingly, in the light of the consideration above and considering that:

- a. the Player came to Europe from Nigeria with a professional sports contract at the age of 17;
- b. in the 2003/2004 sporting season the Player had played in 27 games (1988 minutes)...
- c. the Player was transferred to the Club in 2004 for a transfer fee of USD 550,000;
- d. during the 2006 sporting season the Player received a monthly salary of USD 12,500, in addition to the other terms of the contract;
- e. the Player played in 19 matches (1087 minutes) for the Club in the 2005 season; and
- f. the Player was 22 years old when he rescinded his contract unilaterally, in the light of all the facts, the Sole Arbitrator considers that the Player was already an established professional on the 27th of November 2006 and this requirement in article 15 of the FIFA Regulations is accordingly complied with.

#### A.2.2) Participation of the Player in less than 10% of the Official Matches played by the club

139. In the commentaries, FIFA appears to admit a teleological interpretation of the provision, i.e. an interpretation, which takes the objective of the provision into consideration, rather than a strictly literal application of article 15.

141. The provision and specifically the question of the calculation of a 10% participation in official matches must accordingly be considered in the light of the ratio of article 15, even if this leads to a consequence other than would have been obtained via a literal analysis of the said provision.

142. In the Single Arbitrator's opinion, the aim of this article is to permit a player to terminate his employment contract unilaterally if he is in a situation in which he is prevented from exercising his professional activity with a reasonable frequency and is, as such, prevented for progressing professionally.

143. In football, as in most sporting activities, regular competitive play is fundamental for the player's development and for the maintenance of his physical and technical skills.

145. If read literally, the limits imposed by this provision could be easily avoided by any club in relation to any player, for this it would suffice to put the player on the field in 10% of its official games, while only allowing him to play for 1 minute in each of these matches.

146. This interpretation could defeat the intention underlying the approval of this provision, which essentially seeks to protect players from being prevented from actively continuing with their professional careers and from keeping up their levels of competitiveness.

147. It is therefore admitted that participation by the player in more or less 10% of the official matches played by his club during a certain sporting season is calculated, not only by taking the number of matches in which the player did in fact play, but according to the time he was playing on the field.

148. Another aspect of the arithmetic calculation of the 10% requirement also needs to be clarified, i.e. what is the basis of the calculation, or what is the total number of games of the team, which must be taken into consideration?

149. First of all, it is necessary to expressly exclude matches played by second teams, or “B” teams, from this calculation. As this provision applies only to established professionals, the Single Arbitrator considers that it makes no sense to include such games in the calculation of either the total Official Matches played by the club, or in which the player played.

150. The Single Arbitrator considers in this regard that the first team games, which are relevant for the purpose of the calculation of the 10% envisaged in article 15 of the FIFA Regulations, does not have to correspond to all official matches played by the team during a certain sporting season. For there are certain games in which a player is not eligible to play and which should not be included in the calculation, i.e.:

- a. matches in which a player cannot play because he has been dis-

qualified for unsporting behaviour, which has also been punished by the club internally, and

- b. matches in which a player was not eligible to play because of illness or injury, which was not a direct or indirect consequence of his professional activity as a football player.

158. Although the Player played in 14.28% of the Club's official games for which he was eligible (4 out of 28 possible games), he only played for 7.76% of the minutes he was eligible to play (198 out of 2550 possible minutes).

159. According to the Single Arbitrator's interpretation of article 15 of the FIFA Regulations, he considers that notwithstanding the letter of the law, the meaning of the provision is that actual time played rather than the number of games should be considered.

160. In the light of the above, the Single Arbitrator considers that the second requirement in article 15 of the FIFA Regulations is complied with.

#### A.2.3) Player's circumstances

161. Many of what the Single Arbitrator considers to be the player's circumstances have already been considered in the preceding point, i.e. with regard to his legitimate aspirations to develop his skills and advance in his professional career.

164. The aspirations and personal circumstances of each player vary not only according to age, but also according to his career progress and obviously according to his position on the field.

165. A player, who is hired as a second goalkeeper must be willing to play only when the first goalkeeper is injured or, at most, in cup matches. A third goalkeeper must be willing to pass a whole season without ever playing.

167. Furthermore, the Single Arbitrator must take into consideration that it has not been proved that he ever, during the 2006 season, expressed the slightest discontent with regard to the lack of opportunity in his team's games or that he informed the Club that he wished to play in more first team games.

168. The Player's right to an effective occupation and to participate actively in competitions, to his technical, tactical and physical development cannot, in the Single Arbitrator's view, limit the freedom of action of clubs' technical departments, i.e. the club manager, in each game, to put on the field the players, which, in his opinion, is best suited to obtaining a positive result.

171. A player is not always in a physical and psychological condition in order to compete. The integration of a player in a team is not always consolidated. A player is not always able to become integrated within the culture of a club and to have relations of friendship and camaraderie with the other players, i.e. a player does not always integrate in what is commonly known as the "changing room". All these are factors and circumstances, which should be taken into consideration in the evaluation of the "effective occupation" of a player and the management of the team's performance that is required of the team's manager. We know from practical experience that a good player does not always do well in all teams and all clubs and that it is possible that the root cause of the non-integration or lack of motivation of a player may lie outside the club. This justifies the fact that the player may not be fielded in certain games or even that the player agrees to accept and agree to this treatment, because the player considers that he is not in good physical or psychological condition or that other players in the same team are performing better, in order to achieve a good result for the team.

172. For all of the reasons detailed above and in order to preserve contractual stability, the termination of an employment contract for sporting reasons cannot be accepted on the basis of mere compliance with the formal requirements referred to above, unless the player has during the performance of his employment contract made the Club aware of his dissatisfaction with the fact that he is not actively participating in the team's games. Silence can communicate a sense of resignation, acceptance or even accommodation to the situation and give the impression he lacked motivation.

174. A player, who demonstrates by act or omission, during a sporting

season that he is resigned to his position as an unused player, cannot subsequently avail himself of the said situation in order to justify the termination of his contract on the grounds of sporting just cause.

176. It must accordingly be considered that the Player's personal circumstances justified his intention to leave the Club, but that the Player should, in some way, during the season, have manifested his discontent with the way he was being treated by the Club, i.e. the fact that he was little used in first team games. Thus, the Single Arbitrator considers that the "player's circumstances" requirement in Article 15 of the FIFA Regulations is not complied with.

#### A.2.4) That the player terminates his employment contract during the 15 days following the last official game of the season the club with which he is registered

177. The notice of the Player's intention to terminate the Employment Contract on the grounds of sporting just cause was given in a fax sent to the [National] FU and FIFA ... on the 27th of November 2006.

178. According to the general provisions of the law, notice of the rescission of a contract is effective once it is known to the other party, unless the other party intentionally placed itself in a position in which it could not become aware of the said notice.

182. Despite the fact that the Club, at the hearing, acknowledged that it had become aware, during the days following the sending of the communication dated 27 November 2006, that contacts were being made between the Player and FIFA, it is also true that it stated that it had been unaware of the exact nature of the contents of the said contacts/communications and of what it was that the Player wanted from FIFA.

183. The termination of a contract involves compliance with rigorous formal and material requirements with regard to the giving of notice thereof to the other party, given the inherent seriousness of the rescission of a contract and the particularly relevant consequences thereof. In this case it has not been proved that the notice was sent directly to the Club, or that the Club had direct notice of the contents thereof on the date on which the Player states he sent the notice. It is stressed in the latter regard, that in the notice sent by the Player, the Club appears only as a party to which the notice is notified and not as the party to which the notice is addressed, as is required. Finally it is also noted at the material level that the terms of the communication sent are imprecise as to the formalisation of the termination of the contract on sporting grounds. The communication sent does not amount to a clear formalisation of the decision to terminate the contract, but is rather a request for the termination of the contract, which is addressed to the persons to whom the communication itself is addressed. It appears that the Player was awaiting some confirmation, as can be inferred from the first paragraph of the said communication...

184. Accordingly, as the sporting season ended on the 26th of November 2008, the unilateral termination of the Employment Contract by the Player on the grounds of sporting just cause would have to have been received by the club no later than the 12th of December 2006.

185. In the light of the above, the Single Arbitrator considers that the Player did not terminate his Employment Contract with the Club within the 15-day period following the Club's final Official Game in the season and that the final requirement for the unilateral termination of the Employment Contract on the grounds of sporting just cause provided in article 15 of the FIFA Regulations has not been complied with.

#### A.2.5) Conclusion

186. The Single Arbitrator considers with regard to the sporting just cause for the unilateral termination of the Employment Contract invoked by the Player, that:

- a. the Player was already an established professional on the 27th of November 2006;
- b. the Player had a match play time of less than 10% of the time for which he was eligible to play for his team during the 2006 season;



- c. *the player's personal circumstances do not, in this case, justify the unilateral termination of the Employment Contract on the grounds of sporting just cause; and*
- d. *the Player also failed to rescind his Employment Contract with the Club during the 15-day period following the Club's last official game of the season.*

187. *This being so and as the requirements of article 15 of the FIFA Regulations are cumulative and two of them have not been complied with, the Single Arbitrator accordingly upholds the DRC Decision appealed against, although not on entirely the same ratio as is stated therein, and dismisses the claim for the unilateral rescission of the Employment Contract between the Player and the Club on the grounds of sporting just cause*".

In addition to the above-made considerations, CAS also acknowledged, *inter alia*, the following:

218. *In the submissions made at the hearing by counsel for the Club, the Club stated that the only rights the Player could claim were the right "to train and be paid his salary". The Single Arbitrator considers, with all due respect, that there is one other right in addition to those mentioned, which also merit the protection of the law, i.e. the right to play and compete, or rather the right to an effective occupation, which right underlies the rule in article 15 of the FIFA Regulations.*

222. *The Player ceased to work for the Club on the 27th of November 2006*".

On account of the above-made considerations, among others, the CAS Sole Arbitrator decided to partially reform the DRC Decision, significantly reducing the due compensation and awarding interest of 5% per year accrued since 27 November 2006. In addition, CAS upheld the 4-month ban imposed on T's eligibility to play in any official matches, which "*sanction shall take effect as from the first day of the registration of the player with a new club*".

### General conclusions

The leading jurisprudence of FIFA and CAS does not provide the football stakeholders with an unambiguous answer how to implement the provision of Art. 15 of the Regulations in the reality.

DRC made its ruling "*mainly taking in consideration a floor of 10 % of the official matches in which the player in question participated and not the minutes*", including in the final calculation a second team game played by the player.

CAS shed light on the interpretation of the criteria "established player" and "10% appearance" and added new aspects to Art. 15, establishing, *inter alia*, that: 1) in any case, "*the conclusion of a player's training period occurs when the player reaches the age of 21*"; 2) "*participation by the player in more or less 10% of the official matches played by his club during a certain sporting season is calculated, not only by taking the number of matches in which the player did in fact play, but according to the time he was playing on the field*", as well as that "*it is necessary to expressly exclude matches played by second teams, or "B" teams, from this calculation*"; 3) "the player's circumstances" has to be regarded as a sovereign criterion; and 4) the player is required to send a termination notice, within "*the 15 days following the last official match of the season of the club with which he is registered*", directly to the club. CAS went on further to state that the semantic construal of Art. 15 would deprive it from its essential purpose - i.e. "*to protect players from being prevented from actively continuing with their professional careers and from keeping up their levels of competitiveness*".

In a nutshell, an established player, i.e. a player who has already reached 21 years-of-age or has completed and terminated his training period before that age, who has participated in less than 10% of the playing time of the first team official matches of his club during the season, ending with the last official match of the relevant national league championship, paying particular attention to his position on field and the various circumstances surrounding his professional activities, behavior, disciplinary record and health condition throughout the last season, may rely upon a sporting just cause to terminate the employment contract, within the preclusive term of 15 days following the end of the season, by serving a written notice directly to the club before action and the issue of proceedings. In such case, disciplinary sanctions will not be inflicted on the player, though financial compensation may be due to the club.

The International Sports Law Journal

# Compatibility of the FIFA 6+5 Rule with EU Law

by Daniel Kusch\*

## I. Introduction

In the following article the author would like to prove the compatibility of the FIFA 6+5 rule with EU law by taking into account European case law, shortly compare it with the homegrown players rule promoted by UEFA and comment on the conclusion reached by "leading European legal experts" of the Institute for European Affairs (INEA) regarding the FIFA 6+5 rule, which was presented in February 2009.

## II. The FIFA 6+5 rule

The 6+5 rule, passed by resolution in May 2008 at the 58. FIFA Congress in Sydney, states that at the beginning of each match, each club must field at least six players who are eligible to play for the national team of the country the club is located. It shall be introduced with the following 2010/2011 season step by step, starting with 4+7 till full implementation till the 2012/2013 season, in order to grant the clubs a reasonable amount of time to adapt their squads. Neither

restriction will be on substitutes to avoid non-sportive constraints on the coaches, which means that the clubs could end a match with 3+8, nor on the number of non-eligible players under contract with the clubs.<sup>1</sup> Main aims of the rule are the safeguarding of development and training of young domestic players, the protection of the national teams and the harmony and balance between national team football and club football.<sup>2</sup> Comparable to this aims, the UEFA homegrown players rule has the object, to promote training for young players and consolidate the balance of competitions. All of them seem to be legitimate objectives of general interest, as they are bound to sporting activity. But do these rules also comply with EU law?

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1 <http://www.fifa.com/aboutfifa/federation/bodies/media/>

newsid=783657.html#fifa+congress+sup-ports+objectives, lastly seen on 31.01.10.  
2 <http://www.fifa.com/aboutfifa/federation/president/news/newsid=762500.html>, lastly seen on 31.01.10.



### III. Compatibility with EU law

FIFA President Joseph Blatter outlined his point of view with following words: "Contrary to what may have been said, the 6+5 rule does not contravene the European Labor Law on the freedom of movement. Clubs will still be free to take on as many foreign players as they want. When a match kicks off however, they will have to have six players on the pitch who are eligible for the national team of the country in question." The answer to this opinion was already given by the ECJ in the famous Bosman case.<sup>3</sup> The court held that "the fact that those clauses concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned."<sup>4</sup>

The legal experts of INEA reached a conclusion similar to Blatter's point of view: The fielding of players not eligible for the national team can be regulated and limited, as the 6+5 rule is compatible with European law. INEA sees the key aim of the 6+5 rule in the creation and assurance of sporting competition and the main intention summed up as "sport must remain sport".<sup>5</sup> The rule, to their view, serves to protect national identities, thus underlining football's place as a part of national cultures and is merely a rule of the game "declared in the general interests of sport in order to improve the sporting balance between clubs and associations and so ensure appropriate sporting competition between clubs and associations" and as such does not impinge on the core area of the right to freedom of movement. As far as the Bosman ruling is applicable at all, the report of INEA finds that the arguments that were relevant at the time no longer apply, "because the situation has not developed in the way the ECJ [...] expected".<sup>6</sup> The "experts" argue that the same applies to players who are not eligible for the national team of any European country. But is this argumentation right?

To start with the facts, the truth really is that the "match-experience" of young domestic players in today's competitions is at a very low level. The good and very young upcoming players do not get the chance to show their skills in competition matches and to be honest this deficit of "match-experience" within their own national league is not compensated by an increase in "match-experience" in the leagues of foreign member states. Only few player at young age entered to other European leagues with a certain success and a satisfactorily amount of matches played. This lack of "match-experience" leads to negative consequences to the performance of the national teams in the big 5 football leagues, because of the problem of the development and training of the young talented players. In opposite to this fact, the leagues profit from the liberalization of the player market, because foreign stars entering into the leagues lead to higher reputation and economic growth, for example in regard to merchandising and TV rights.

As these facts are commonly known, politics all over Europe, as

well as European bodies as the ECJ, the European Counsel, Commission and Parliament have explicitly acknowledged the training and development of young players as legitimate goals in sports.<sup>7</sup> The special social role and the specificity of sports have been mentioned first in the Nice Declaration on Sport of December 2000.<sup>8</sup> The White Paper on Sport<sup>9</sup> points out that the specificity has been recognized and established, also by various decisions of the European Court of Justice (ECJ), like for example Bosman, as mentioned above, Walrave and Koch<sup>10</sup> or Meca-Medina<sup>11</sup> The ECJ held in the Walrave-ruling in 1974 that "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" and mentioned the Treaty provisions on the free movement of workers (Article 45 Treaty on the Functioning of the European Union<sup>12</sup>) and on the free provision of services (Article 56 TFEU) apply when such economic activity has "the character of gainful employment or remunerated service". This was the first of the ECJ rulings regarding sport, but through the years the ECJ passed more rulings with different outcomes, as we outlined in class. As mentioned in Walrave the ECJ referred to rules "of purely sporting interest", but in the Bosman-case reference to "non-economic grounds, concerning the sport as such" were made. As the author does not want to mention all decisions regarding to sports, he'll only focus on the latest ones. In the Piau case<sup>13</sup>, the ECJ mentioned the "scope of the specific nature of sport" and lastly in Meca-Medina it referred to "purely sporting considerations", which leads to the test of "necessity" and "proportionality" and the applicability of Art. 81 and Art. 82 EC (now Art. 101 and Art. 102 TFEU). Not going into detail of the Meca-Medina case, it should be mentioned that the ECJ established an approach for the infringement of European competition law by association rule. It is even taking regulations into account, which are exclusively connected to sports and not business (provisions of doping prevention). For the compatibility of association rules the overall context and the purpose of the respective rule are relevant and restrictions have to proportionate and inherent to the purpose of the rule.<sup>14</sup> As Piau and Meca-Medina both were brought by the Court of First Instance, it seems clear that a kind of guidance and clarification was needed and the question was, if the Meca-Medina decision will lead to a completely new EU legislation in favor of the specificity of sports. Taking into account this specificity of sport, the Treaty of Lisbon strengthens this position. As the Treaty of Lisbon entered into force on 01.12.09, sport itself has been adapted as primary EU law for the first time. Art. 6 e and Art. 165 TFEU say that the competence of the Union in the field of sport is limited to a support, coordination and supplementation of the measures of the member states (Art. 6 TFEU) and the Union contributes to the promotion of the European dimension of sports and, while doing this, respects the specific characteristics, the voluntary structure and the social dimension of the sports sector (Art. 165 I TFEU). According to section 2 of the Article, Union action shall be aimed at "developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen."

According to INEA the 6+5 rule would not infringe EU law, as it is not based on nationality, but on the eligibility to play for a national team.<sup>15</sup> Ján Figel' has the opinion that even by rephrasing to refer to "those eligible to play for the national team", the rule still implies as a quota-based system based on nationality, because obviously only nationals could play for the national teams.<sup>16</sup> There is no doubt that the 6+5 rule leads to an increase in the "match-time" of young domestic players in general, but the main question to the author is, if there is a clear difference between the 3+2 rule before Bosman times and the actual 6+5 rule of FIFA. At first sight, there is no explicit difference between the former 3+2 rule, which was a quota system, existing in many national leagues and UEFA club competitions before the Bosman ruling. This quota system meant that only a limited number of foreign players could play in a particular match, in this case of 3+2, only 3 foreign players (plus 2 "assimilated" foreign players) could play for a team in UEFA club competition. This rule was abolished in the

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

4 Case C-415/93, *Bosman* [1995] ECR. I-4921, at [120].

5 INEA, Expert Opinion regarding the Compatibility of the "6+5 Rule" with European Community Law, p. 187.

6 INEA, Expert Opinion regarding the Compatibility of the "6+5 Rule" with European Community Law, p. 188.

7 Cf. Case C-415/93, *Bosman* [1995] ECR. I-4921, at [106]; European Parliament, Resolution on the Future of Professional Football in Europe, 29th of March 2007, at [34]; European Commission, White Paper on Sport, p. 6.

8 [http://ec.europa.eu/sport/information-center/doc/timeline/doc244\\_en.pdf](http://ec.europa.eu/sport/information-center/doc/timeline/doc244_en.pdf), lastly seen on 31.01.10.

9 [http://ec.europa.eu/sport/white-paper/index\\_en.htm](http://ec.europa.eu/sport/white-paper/index_en.htm), lastly seen on 31.01.10.

10 Case 36/74, *Walrave and Koch* [1974] ECR. I-405.

11 Case C-519/04 P, *Meca-Medina and Majcen* [2006] ECR. I-6991.

12 In the following: TFEU.

13 Case T-193/02 *Piau/Commission* [2005] ECR. II-209.

14 Ruben Conzelmann, Models for the Promotion of Home grown Players for the Protection of National Representative Teams, *The International Sports Law Journal* 2008/3-4, p. 28.

15 INEA, Expert Opinion regarding the Compatibility of the "6+5 Rule" with European Community Law, p. 135.

16 Ján Figel', the European Commissioner for Education, Training, Culture and Youth, who is also responsible for sport issues in an interview at EPL talk on 4th of April 2009.



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Bosman case, as the proportionality of the 3+2 nationality clause was denied. The 6+5 rule adopted by FIFA allows the clubs to field at least six domestic players in the starting team. To the authors point of view, this limitation is directly contrary to the Bosman ruling, held by the ECJ in 1995, where the ECJ stated at point 15 very clear that those restrictions are in breach of European law: "...Article 48 (now Article 45 TFEU) of the Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States." This ruling of the ECJ is surely applicable, as it is the basis for the following decisions made by the Court.

Other EU law cases dealing with comparable restrictions and nationality clauses are the ones of Kolpak<sup>17</sup> (2003) and Simutenkov<sup>18</sup> (2005). In the Kolpak case, where the Deutscher Handball Bund (DHB) and the Slovak handball player Maros Kolpak where involved, the ECJ stated that a nationality clause of DHB is invalid in respect to Mr. Kolpak, because of Art. 38 (1) of the association agreement between the European Community and Slovakia. Two years later the Court came to the conclusion that an association rule that limits the number of Russian professional players in games, under the condition that they are legitimately employed with a member state football club is contrary to Art. 23 (1) of the association agreement between the European Community and Russia. Another famous association agreement is the one between the European Community and the ACP states (Cotonou agreement), which also grants special rights to player coming from those countries.<sup>19</sup> But in the author's opinion, these rights or regulations are comparable, but not the same as the freedom of movement of Art. 45 TFEU. They only prohibit discriminations according to the work conditions, whereas the provisions of Art. 45 TFEU could prohibit the whole access to the European market.

Regarding the 6+5 rule, contrary to the INEA report, the author holds that minimum quotas as the old 3+2 and the new FIFA 6+5 rules are direct discriminations. According to the EU law those can only be justified within narrow bounds mentioned in Art. 45 (3) TFEU or by the unwritten justification of the "pressing reasons of public interest".<sup>20</sup> Regarding the written justifications, the existence of an actual and sufficient danger to a foundational societal interest as required in Art. 45 (3) TFEU is very hard to proof in connection with possible deficits of training for young players. Although the ECJ has recognized the maintenance of a sportive balance within a league and the training of younger players as pressing interests in the Bosman ruling<sup>21</sup>, the Court has pointed out that merely non discriminatory and indirectly discriminatory rules could be justified by the "pressing reasons of public interest".<sup>22</sup> Moreover the Court stated, that direct discriminatory rules, like the UEFA 3+2 rule could only be justified by written clauses that are included in the EC Treaty's provisions.<sup>23</sup>

EU Commissioner Vladimír Špidla already agreed with the author's point of view at 28th May 2008, shortly before the Euro Cup 2008 started by stating that the Commission is showing a red card to the 6+5 rule proposed by FIFA.<sup>24</sup> "Professional football players are workers, therefore the principle of nondiscrimination and the right to

free movement apply to them. The Bosman case was very clear on this issue. The 6+5 rule would constitute direct discrimination on the basis of nationality, which is unacceptable to the Commission. If Member States allowed the application of the 6+5 rule they would be in breach of the Treaty and the Commission would have to take the Member States to court."

Additionally UEFA has the same point of view regarding the rule. UEFA President Michel Platini stated that UEFA "totally shares the philosophy and objectives of 6+5" and fully supports the resolution presented by FIFA, but according to the Bosman ruling "6+5 is considered illegal within the European Union".<sup>25</sup>

#### IV. UEFA Homegrown player rule

Different from the FIFA 6+5 rule is the homegrown player rule from UEFA, which was introduced as agreed at UEFA's Ordinary Congress in April 2005 in Estonia and incorporated into the 2006/07 UEFA regulations. This rule requires clubs to include at least eight homegrown players out of 25 into their squads. In this rule homegrown players are defined as players who, regardless of their nationality or age, have been trained by their club or by another club in the national association for at least three years between the age of 15 and 21.<sup>26</sup> Among experts, this rule is sometimes named as 4+4 rule, because the minimum of eight home grown players includes four players, who were trained by their club, plus four players, who were trained by another club in the national association.

#### V. No direct discrimination based on nationality

The UEFA rule does not contain any nationality conditions and applies in the same way to all players and all clubs participating in competitions organised by UEFA.

Having this in mind, contrary to the 6+5 rule, the homegrown players rule does not lead to direct discrimination based on nationality. Vladimír Špidla sees the same point in his message mentioned above, but states that there's still a risk of indirect discrimination based on nationality because it is often easier for young national players to have access to training facilities in a club in a Member State than for players arriving from other Member States.

As INEA also mentioned that "sport must remain sport", FIFA President Joseph Blatter unalterable tries to convince politics and the EU of FIFA's approach, referring expressly to the mention of the specificity of sport in the new European Treaty. Blatter refers to the Lisbon Treaty, which to the authors mind reflects the specificity or autonomy of sports, compared to the purely economic orientations of the fundamental freedoms and the competitive order.

#### VI. Conclusion

Although the author thinks that the regulatory autonomy of sporting associations is recognized and supported under European law and the Treaty of Lisbon clearly strengthens the position of FIFA and other sporting associations or federations as the freedom of associations has been increased in the value, the FIFA 6+5 rule and the minimum quotas are difficult to justify and specificity of sports cannot be used as a justification to a general exemption from the application of EU law. Quotas are still explicitly related to the nationality as the 3+2 rule did before Bosman, which consequently leads to a direct discrimination. The view that the 6+5 rule could at most constitute indirect discrimination, because it is not directly based on the nationality of professional football players and merely considers entitlement to play for the national team, is not correct and cannot be justified to the authors mind. This opinion undergoes the facts of the 6+5 rule, which requires clubs to field at least six domestic players in the starting team. This without any doubt is a direct discrimination on the basis of nationality. As this is a clear fact the arguments that any possible indirect discrimination can be defended on the basis of compelling reasons of general interest, by mentioning the "Cassis formula" is groundless and not justifiable. In other words, if FIFA tries to force clubs and associations to implement the 6+5 rule, European Law will be opposed. In order to reach the goal of a balanced competition in club football, FIFA or UEFA in Europe should consider the introduc-

17 Case C-438/00, *Kolpak* [2003] ECR. I-4135.

18 Case C-265/03, *Simutenkov* [2005] ECR. I-2579.

19 [http://ec.europa.eu/development/geographical/cotonouintro\\_en.cfm](http://ec.europa.eu/development/geographical/cotonouintro_en.cfm), lastly seen on 31.01.10;  
<http://www.acpsec.org/en/conventions/cotonou/accord1.htm>, lastly seen on 31.01.10.

20 Case C-415/93, *Bosman* [1995] ECR. I-4921, at [104].

21 Case C-415/93, *Bosman* [1995] ECR. I-4921, at [104 f.].

22 Case C-388/01, *Commission/ Italy* [2003] ECR. I-721, at [19 f.]; Conzelmann, p. 30.

23 Case C-484/93, *Svensson and Gustavsson*

[1995] ECR. I-3955, at [15]; Case C-388/01, *Commission/ Italy* [2003] ECR. I-721, at [19 f.].

24 Message by Commissioner Vladimír Špidla on 28th of May 2008 regarding the 6+5 rule proposed by FIFA.

25 UEFA President Michel Platini in his speech at the 58. FIFA Congress in Sydney.

26 <http://www.uefa.com/uefa/keytopics/kind=65536/newsid=276829.html>, lastly seen on 31.01.10.

27 <http://www.uefa.com/uefa/keytopics/kind=128/newsid=903895.html>, lastly seen on 31.01.10.

28 <http://www.fifa.com/aboutfifa/federation/releases/newsid=1121324.html>, lastly seen on 31.01.10.



tion of a salary cap for teams participating at club competitions like UEFA Champions League or Copa Libertadores. Another significant possibility could be the implementation and adaption of licensing systems on world wide level. A big step into the right direction will be the introduction of the financial fair play into the UEFA Club Licensing System<sup>27</sup>, which will lead to a limitation of the debts, especially carried out by English and Spanish clubs. The author does not see a possibility of the adoption and implementation of the 6+5 rule by FIFA without the intergration of profound changes, as it is a direct discrimination based on nationality. Further an improved cooperation and interaction of FIFA and the EU, as it seems to proceed<sup>28</sup>, could

be helpful in order to reach an adequate result in regard to a common interest. To finally decide the problem, only the European Court of Justice can make a final decision on this matter, possibly with a preliminary ruling regarding to Art. 267 TFEU. Taking the Meca-Medina decision into account, there is a certain possibility that the ECJ would qualify minimum quotas, as the FIFA 6+5 rule, relevant as coordination to competition in the European Market. And if FIFA does not turn in, a court's decision will probably be the only possible solution, because the 6+5 rule of FIFA does not comply with EU law, neither at first, nor at second sight.

The International Sports Law Journal

# Morality Clauses in Sports Merchandising Agreements

by Ian Blackshaw

## Introductory Remarks

Sport is a multi-billion dollar global business and there is much, therefore, to play for both on and off the field of play. The sale of broadcasting rights to major sporting events brings in mega sums to their organisers. The licensing and sale of official merchandise relating to these events or to high profile sports personalities<sup>1</sup> also provides another very valuable source of income. In fact, sports merchandising is worth some \$150 billion in global sales and the US, Far East and Europe represent some 85% of the global sports merchandising market.<sup>2</sup>

As Nick Couchman, an expert in this particular field of practice, has well remarked:

*"Capturing the intangible value associated with sport .... And successfully converting it into sales of consumer products is... an extremely diverse and highly creative process."*<sup>3</sup>

Of course, not only is it necessary to be creative in an artistic and business sense, but also in a legal sense, by negotiating and drafting the corresponding contractual agreements.

As mentioned, there is so much money in sport nowadays and, despite the Olympic motto that it is the taking part not the winning that counts,<sup>4</sup> which is more honoured in the breach than in the observance nowadays, sadly, it is not just a question of winning, but also winning at all costs. This has led over the years to the increasing use of performance enhancing drugs and, spearheaded by the International Olympic Committee, there is an ongoing war on drugs in sport and their elimination. In fact, a revised Anti Doping Code has been introduced by the World Anti Doping Agency (WADA),

effective as of 1 January, 2009, to combat this problem and keep sport clean.<sup>5</sup> However, there are still plenty of drugs cheats around!

So, what happens if a well-known sports person, who is associated with the promotion, endorsement and sale of your goods and services, tests positive for a banned substance; is found guilty of this offence; and sanctioned with a ban from competition?<sup>6</sup> Or, likewise, commits some other disciplinary offence and is punished for it. Or, equally, your sports personality shows lack of form or performance. How do any of these situations affect the reputation of your business and the value of your brand? And also the value of your sports merchandising deal? What can you do about it to limit any potential damage to your company. This article seeks to answer these vital questions!

Before doing so, however, some general remarks about the drafting and the main provisions of Sports Merchandising Agreements would not be inappropriate.

## Sports Merchandising Agreements Generally

Sports merchandising is an integral part of the sports marketing mix and, it has been well said that, if a commercial deal generally makes business sense, it also makes legal sense and it is relatively easy, therefore, to draw up the corresponding legal agreement - and, where necessary, enforce it. All the commercial and financial arrangements need to be covered by clearly drafted provisions to avoid any legal challenges to the validity of the agreement on the grounds of its uncertainty. Otherwise, the parties may find themselves with a void agreement, which they cannot rely on or legally enforce. Clarity is the name of the game!

Whilst on the subject of effective drafting, the following general principles should be borne in mind:

- Before starting to draft an agreement, the whole design of the document should be worked out (remember, the agreement will be looked at and interpreted as a whole);
- Nothing should be omitted or included at random;
- The order of the agreement should be strictly logical;
- The ordinary and usual technical language should be followed; and
- Legal language, should, as far as possible, be precise and accurate.

Sir Ernest Gowers of 'Plain Words' fame gave the following advice (in rather quaint terms and as much valid today as when it was issued) on making the meaning clear in a legal document:

*"The inevitable peculiarities of the legal English are caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one the further you are likely to get from the other..... it is accordingly the*

\* Prof. Ian Blackshaw is an International Sports Lawyer and Academic and Honorary Fellow of the ASSER International Sports Law Centre.

1 Cashing in on their valuable image rights: see 'Sports Image Rights in Europe', Blackshaw, Ian & Siekmann, Robert, 2005, TMC Asser Press, The Hague, The Netherlands.

2 Industry figures; and, on the subject of sports merchandising and marketing generally, see Chapter 11 by Blackshaw, Ian in 'Sports Law' by Gardiner, Simon et al, Third Edition, 2006, Cavendish Publishing, London, United Kingdom.

3 Couchman, N, 'Introduction' (1999) 1 Sports and Character Licensing 3.

4 The full text of the Olympic motto is as follows: "The most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well."

5 See WADA official website at: [www.wada-ama.org](http://www.wada-ama.org).

6 See, for example, the case of the UK sprinter Dwain Chambers, discussed by Ian Blackshaw in several contributions on the TMC Asser International Sports Law website at: [www.sportslaw.nl](http://www.sportslaw.nl).

*duty of the draftsman.... To try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that might be put on them, and to take precautions accordingly. He must avoid all graces, not be afraid of repetitions, or even of identifying them by aforesaid, he must limit by definition words with a penumbra dangerously large, and amplify with a string of near-synonyms words with a penumbra dangerously small; he must eschew all pronouns when their antecedents might possibly be open to dispute, and generally avoid every potential grammatical ambiguity..... All the time he must keep his eye on the rules of legal interpretation and the case-law on the meaning of particular words, and choose his phraseology to fit them."*

It should be added that, under the rules of interpretation (technical term: *construction*) according to English Law, the aim is to discover the intention of the parties from the language they have used in their written agreement, and, in that process, giving the words used their ordinary and natural meaning. Unlike the practice on the European Continent under the Civil Law system, only on an exceptional basis in Common Law countries, where there is ambiguity or contradiction on the face of the document, may the Courts call on parol evidence (that is, oral external evidence) in order to discover the intention and meaning of the parties to the agreement.

In this connection, particular care should be taken with the use of Recitals (the so-called 'Whereas' clauses). These should be very carefully drafted, stating the background to and the reason(s) for the Agreement. For example, Recitals are important in the case of a Trade-mark Licence Agreement (which is what a Sports Merchandising Agreement essentially is), where there has been a previous dispute regarding the mark. If the 'operative part' of the Agreement is ambiguous or in conflict with the Recitals, the Recitals will prevail when it comes to determining the meaning of the Agreement as a whole. So, watch out!

One further point: in the interests of clarity, the draftsman should use

- a 'definition/interpretation clause', especially to define 'terms of art'; and also use
- Annexes/Appendices for technical information, which is particularly useful in Merchandise Agreements (e.g. to define and calculate complex royalties arrangements).

Likewise, the products that are the subject of the agreement also need to be well defined, as well as the territory and the distribution channels through which they may be sold.

Also, it is advisable to include a 'dispute resolution clause', especially if the parties wish to refer any disputes arising under, out of, or in relation to their agreement to CAS (the Court of Arbitration for Sport) in respect of which there are standard clauses provided by CAS for such purposes. In this connection, the possibility of settling any disputes through mediation should also be expressly included. However, in such a case, a time limit for attempting mediation should also be included, say, 30 days.

Another point: use so-called 'boiler plate' clauses carefully and only where, according to the particular circumstances of the case, they are appropriate and add something to the meaning and effect of the agreement - and do not detract from it. For example, the so-called 'Entire Agreement' clause, which expressly excludes from the agreement, *inter alia*, any and all representations or warranties (both oral and written) given before the agreement was signed and which may have induced one of the parties to enter into the agreement in the first place (e.g. a feasibility study).

The so-called 'severance' clause is particularly useful in the case of a Sports Merchandising Agreement containing territorial restrictions on the exploitation of the rights granted (especially when part of a wider geographical licensing programme), in order to avoid the entire Agreement being held to be void on anti-competition grounds.

Also, a general point: be careful of using the phrase 'best endeavours' in relation to obligations undertaken in the Agreement. This phrase has been interpreted by the Courts quite onerously: 'leaving no

stone unturned'! This, according to the particular circumstances, could turn out to be quite a heavy financial burden on the party concerned to discharge.

Finally, it is essential to include all the terms and conditions of the Agreement in writing, including any subsequent amendments or revisions, and not rely on any verbal promises or 'side agreements'. For, as Sam Goldwyn, of Metro Goldwyn Mayer fame once remarked: '*oral contracts are not worth the paper they are written on!*'

## Morality Clauses

Such a Clause may be couched in the following terms:

*"The Sports Personality shall, at all times, during the term of this Agreement act and conduct himself/herself in accordance with the highest standards of disciplined and professional sporting and personal behaviour and shall not do or say anything or authorize there to be done or said anything which, in the reasonable opinion of the Licensor, is or could be detrimental, whether directly or by association, to the reputation, image or goodwill of the Company or any of its associated companies. The Sports Personality shall not, during the term of this Agreement, act or conduct himself/herself in a manner that, in the reasonable opinion of the Company, offends against decency, morality or professionalism or causes the Company, or any of its associated companies, to be held in public ridicule, disrepute or contempt, nor shall the Sports Personality be involved in any public scandal."*

As will be seen, this clause is widely drafted and covers a wide range of contingencies involving the behaviour and conduct of the sports personality and the effect it may have on the grantor of the rights (the Company) and its business. So-called 'disrepute' and 'public scandal' provisions may need some objective definition/refinement to avoid any claims that they are void for uncertainty. In this regard, the use of the phrase "in the reasonable opinion of the Company" helps. Furthermore, some precision can also be added by including a list of situations that would constitute bad behaviour within the meaning and scope of the clause, such as, testing positive for a banned substance. It should be expressly stated that any such list is not exhaustive but merely illustrative, by using the time-honoured phrase: "..... including, but not limited to, the following behaviour on the part of the Sports Personality:....." In any case, in practice, the provisions and the application of these Morality Clauses to actual cases are always discussable!

Any breach of the provisions of this Clause may trigger termination of the Sports Merchandising Agreement. And, in fact, the clause will need to be read with the provisions in the rest of the Agreement dealing with its termination. So, let us now look at the sort of termination provisions that should be included in the Agreement.

Such a clause may run as follows:

"Termination

The Company may forthwith terminate this Agreement by giving written notice upon failure on the part of the Sports Personality to perform any of his/her obligations under this Agreement."

The main thrust of the termination clause is the right to terminate in the event that the sports personality is in breach of any of the provisions of the Merchandising Agreement, including his/her obligations under the Morality Clause. It should be noted, however, that this is a right, and not an obligation, and, as such, only to be exercised by the aggrieved party at its sole discretion.

In practice, it is advisable to discuss - without any delay - a terminable situation that has arisen with the sports personality and evaluate the effects - immediate, short-term or long-term - of any breach. Is the breach so serious and fundamental that the only course of action is to terminate the Sports Merchandising Agreement? Or is the breach remediable within a short period of time, say, twenty-one days, with little or no long-lasting damaging effects? In other words, can the parties agree on a suitable damage limitation exercise to keep the relationship alive? All this will depend upon the nature and extent of the breach, as well as the overall objectives of the merchandising programme itself; and also the effect of the breach on any ongoing pro-

motional/advertising campaign, amongst other commercial and financial considerations.

Of course, if the parties agree to continue with the agreement, a waiver clause will need to be included in the Merchandising Agreement to ensure that any waiver on one occasion does not set a precedent and oblige the aggrieved party to waive any future breach of the agreement in the same or other circumstances. The standard clause - one of the so-called 'boilerplate clauses' - is in the following terms:

*"The failure by either party to enforce at any time or for any period any one or more of the terms or conditions of this Agreement shall not be a waiver of them or of the right at any time subsequently to enforce all terms and conditions of this Agreement."*

To reinforce the termination provisions, it is useful to include in the Recitals a reference to the particular personal characteristics and attributes of the sports personality, which are the basis for entering into the Agreement, thus making it an *intuitae personae* one. In other words, if these characteristics, for any reason, cease to exist there are grounds for termination of the Agreement. Again, at the discretion of the aggrieved party.

All this goes to show that, as with any kind of legal Agreement, all its contractual provisions need to hang together and not be in conflict or at variance with one another. In other words, the Agreement needs to be viewed as a whole to ensure that its provisions are inter-related.

### Concluding Remarks

Nowadays sports personalities have entered into many lucrative Sports Merchandising Agreements around the world; and, to maintain their sports marketing potential value, are subject to many pressures - not least performance ones - and, for a variety of reasons, are liable to fall from grace at any time. It is prudent, therefore, to include a so-called 'Morality Clause' in their Sports Merchandising Agreements, together with the corresponding termination provisions.

Whether and when to invoke such a Clause is a matter to be determined at the time of any breach and according to its nature and actual or likely effect on the commercial situation - both immediate and longer term. Each case needs to be decided on its own particular merits and according to the particular facts and circumstances.

However, what is clear is that, without such a Clause, it may prove problematic to deal with such a situation in an effective and timely manner!

The International Sports Law Journal

## The "Olympic cases": CAS 2008/A/1622-1623-1624, FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA

by Pere Lluís Mellado and Michael Gerlinger\*

### 1. Introduction

The „Olympic Cases” (CAS 2008/A/1622-1623-1624) concerned a rather simple question, i.e. whether professional football clubs had a statutory obligation to release their players for the 2008 Olympic Games in Beijing or not. Nevertheless, the issue was highly disputed between clubs, federations and in the media.

In particular the fact that only shortly prior to the opening ceremony of the Olympic Games in Beijing the legal proceedings started, led to an intensive and controversial public debate on the release of players. The first match of the Olympic Men's football tournament was supposed to take place on 7 August 2008, but only on 23 July 2008, 15 days in advance, FIFA issued a Circular Letter (No. 1153) with respect to the legal basis of an obligation to release. In fact, in such Circular Letter FIFA referred to customary law as legal basis, while the respective FIFA Regulation on the Status and Transfer of Players (hereinafter "Transfer Regulations") did not provide for such obligation.

Already in January 2008, it was common understanding between many club lawyers that the Transfer Regulations explicitly declare the release for the Olympic Games as "not mandatory". Article 1 para. 2 and 3 of Annex 1 to these Regulations stipulate that clubs are not obliged to release their players for matches scheduled on dates not listed in the coordinated international match calendar, with the exception of a duty to release on basis of a special decision by the FIFA Executive Committee. Since, at that time, there was clearly no special decision of the FIFA Executive Committee, neither were the Games included in the international calendar, club officials did not visualize any problems with having to release players in August.

Real problems started, when the federations that were taking part in the Olympic Men's football tournament, called their players for the Games. In the case of FC Barcelona, the Argentinian federation AFA informed the club with letter of 27 June 2008 that it requests the player Lionel Messi for the Games, while the club, having finished the league season 2007/2008 only in 3rd place, needed to play the extremely important Champions League qualification during the Games in Beijing.

And this was precisely the heart of the problem: Since the 2008 Olympic Games were not included in the international calendar, two different competitions took place at the same time, and while AFA needed the player Lionel Messi for winning the Olympic Men's football tournament, FC Barcelona, which was obliged to continue paying the player's salary, needed to win the Champions League qualification and, of course, wanted to keep the star of the team for those matches.

### 2. Discussions between the clubs and federations

Most of the federations started to call their players at the end of June/beginning of July 2008. Since the clubs were convinced that there was no legal obligation to release their players, they mostly only released players that were not part of the club's line-up and informed the federations accordingly that they would not release line-up-players.

Some federations replied immediately referring to an alleged obligation to release all players requested. Discussions started quite quickly, FIFA and the European Club Association (ECA) called on all parties to find solutions and many compromises were reached within the next weeks.

However, there were still cases that could not be solved between the clubs and the federations individually. In case of FC Barcelona and Lionel Messi, the issue was very difficult: As mentioned earlier, the team was supposed to play in the qualifying round of the UEFA Champions League for the 2008/2009 season in August (on 12/13 and 26/27 August) at the same time as the Beijing Olympics of 2008. At the time, it was essential for the club to be able to play those games with all of its players (and especially such an important one as Lionel Messi) for any setback could leave the team out of the forthcoming edition of Europe's premier club competition.

Trying to defend its interests without provoking a conflict, the first thing the club did was go to the Spanish Football Federation RFEF for advice on the issue. RFEF, in turn, approached FIFA, who, on 27

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May 2008 responded in writing to RFEF to expressly state that the Beijing Olympics were not part of the international match calendar; and that the release of players aged over 23 years was not an obligation and the release of those under 23 had always been an obligation on the basis of “customary law”. In other words, the Olympics were not expressly included in the international calendar, but in accordance with the custom up until that point, the release of players of under 23 years was considered an obligation.

Convinced that the club was right, FC Barcelona sent AFA a letter on 11 June 2008, in which, along with the response from FIFA, it informed them that it was reserving the right not to release the player on the basis of current Transfer Regulations. AFA did not reply. Instead, on 27 June 2008, AFA sent an official call-up to the player requesting that he joins his national team on 7 July 2008.

In order to prevent any consideration that the player was refusing to join his national team, FC Barcelona wrote to AFA on 2 July 2008 saying that it was not releasing the player, duly justifying the decision on the basis of the Transfer Regulations and also basing the decision on the club's own sporting needs. At the same time, contact was initiated with AFA in order for both institutions to reach an agreement, with such proposed solutions as, for example, Lionel Messi playing the first game of the qualifying round of the UEFA Champions League and joining the Argentina team on a later date. All of these proposals were rejected by AFA.

Foreseeing that there would be no agreement, the club decided to move a step further (the Olympic Games were only a month away) and wrote to the Secretary General of FIFA to explain the situation and requesting a clarification on the club's right not to release the player. FIFA, at first, reiterated its position of 27 May 2008 without additional arguments, which is why the club asked for a detailed position on the legal situation.

On 15 July 2008, Lionel Messi reported back to FC Barcelona after his holidays and started preseason training with the rest of the squad. A few days later, on 23 July 2008 (fifteen days before the start of the Olympics), FIFA issued the above mentioned Circular Letter N° 1153, in which FIFA recognised the uncertainty regarding the obligation to release players, and by means of a chronological review of the regulations and principles that FIFA had issued since 1988, indicating that the tournament was deliberately not included in the international match calendar, reiterating that the release of players was an obligation “on the basis of customary law”.

The next day, while the player was taking part in a preseason match for FC Barcelona and the deadline was reached for him to report to the Argentinian national team, FIFA announced that it would be submitting the issue to the Single Judge of the Players' Status Committee in order to jointly resolve the requests from SV Werder Bremen, FC Schalke 04 and FC Barcelona.

In late July the events happened fast. On 28 July 2008, FC Barcelona sent its final report of arguments to the Single Judge. The decision was expected shortly after.

### 3. Decision of the FIFA Emergency Committee

A very specific element of the procedures was that during above discussions and prior to the CAS procedure, FIFA actually issued a decision on the release of players. On 29 July 2008, the FIFA Emergency Committee, which - according to Article 33 of the FIFA Statutes - is competent to decide matters requiring immediate settlement between two meetings of the FIFA Executive Committee, “confirmed” the application of customary law.

The Committee referred to a longstanding and undisputed practice and “concluded” that an obligation to release existed.

It pointed out that it was contacted to “deliberate” about such obligation, and indeed, the Single Judge deciding upon above requests of FC Barcelona, FC Schalke 04 and SV Werder Bremen explicitly referred to the conclusions of the Emergency Committee.

### 4. The CAS procedure

The decision of the Single Judge of the FIFA Players' Status Committee, confirming an “obligation to release on basis of customary

law”, was then issued on 30 July 2008 and submitted to FC Barcelona, FC Schalke 04 and SV Werder Bremen the same day. All players involved, Messi, Rafinha and Diego, were supposed to play on 7 August 2008, Rafinha and Diego with Brazil against Belgium and Messi with Argentina against Ivory Coast. This meant that only one week was left for the proceedings.

For this reason and very quickly, all parties cooperated and agreed with CAS on a schedule for an expedite procedure, a practice which CAS uses quite often for such urgent “admission cases”. According to such schedule, the Appellants' submissions were submitted on Thursday 31 July 2008, FIFA's response on Monday, 4 August 2008. The hearing took place on Tuesday, 5 August 2008 and the decision was finally issued on 6 August 2008, the day before the matches.

The proceedings are a perfect example, how fast and tailored to the specific event CAS can act. The fast proceedings allowed a decision within only 6 days. Since the players, however, were already in China, the clubs needed to decide what to do with the decision they achieved. Asking the players to return would have meant additional travelling back to Europe, not knowing whether the players would be able to play for the clubs at top level after the tiring journeys.

FC Barcelona decided to find a solution, which would allow the player to stay with the Argentinian team while protecting the club's interests, in particular securing a proper insurance. For this reason, the club contacted AFA and agreed on those appropriate measures in the night of 6 to 7 August 2008. Messi stayed, played, scored and won the tournament with Argentina. FC Barcelona, without Messi, qualified for the Champions League, won the title as well as all other titles it could achieve in season 2008/2009. A perfect story.

But let's turn to the CAS decision itself:

### 5. The CAS decision

In its decision, the Panel first defines the question to be answered explicitly as:

“Do/Did the Appellants 1 to 3 have a legal obligation to release their players Rafinha, Diego and Messi to participate in the Olympic Games 2008 with their national teams?”

It then turns to the above mentioned provision in the Transfer Regulations, stipulating the two possibilities of making the release mandatory, i.e.

- The coordinated international match calendar and
- A special decision by the FIFA Executive Committee.

The coordinated international match calendar was created by FIFA in 2000 and applied as from 1 January 2002, in order to harmonize the different matches and tournaments and to prevent situations as in this case. The idea was to create a clear calendar of official matches, when no other official matches could take place. If there are dates blocked in the calendar for international matches and tournaments, no national or international club competitions can be played at the same time, so there would be no collision of matches. This principle helped a lot to avoid conflicts between club matches and national team matches and is highly appreciated in particular by the clubs.

However, the second option for a mandatory release, a special decision of the FIFA Executive Committee, would not be able to avoid such conflicts, since even if the Executive Committee decides to make the release mandatory, club competitions could take place. This is why clubs recommend elaborating the calendar further instead of taking special decisions. On the other hand, an overloaded calendar would make it impossible to play club competitions. If the period of the Olympic Games, for example, would have been included in the calendar, UEFA would have had no time to play Champions League Qualification.

The same problem of conflicts would apply, if there was a mandatory release based on customary law. Also in this case, club competitions could take place at the same time, resulting in a conflict between the national team matches and the club matches.

The Panel shortly referred to the fact that the Men Football Tournament of the Olympic Games 2008 in Beijing had not been included in the calendar. It then turned to the above decision of the



FIFA Emergency Committee dated 29 July 2008. The Panel denied the existence of a special decision, since there was no urgency within the meaning of Article 33 of the FIFA Statutes, which is why the Emergency Committee would not have been competent to take such a special decision anyway.

Before assessing the application of customary law, the Panel confirms that no other written legal regulation would support an obligation to release the players, since the Transfer Regulations are exhaustive in this respect. It also clarifies that the unique character of the Olympic Games might have an impact on the application of customary law, but could not itself be a legal basis for the release of players.

The essential part of the CAS decision is the assessment and exhaustive clarification on the application of customary law in sports. There is no doubt that the general principle of customary law can also apply to the regulations of sports federations (e.g. CAS 2004/A/589 SK Rapid Wien v/ FC Crvena Zvezda & FIFA). However, there are three basic requirements that have to met for such application, i.e.

- a loophole in the law, which may be supplemented by customary law
- a constant and consistent practice (*inveterata consuetudo*) and
- a conviction of the members that the practice is binding (*opinio necessitatis*).

Without a loophole, customary law cannot apply. The Panel makes quite clear that customary law may only complement or help to interpret sports regulations. It cannot apply *contra legem*. If there is a specific rule on the legal question to be answered, customary law cannot derogate such rule. The Panel did not further investigate the existence of a loophole at this stage, since the other requirements for customary law did not apply. If it had investigated further, it would have probably come to the conclusion that already this requirement was missing. As outlined earlier, Article 1 para. 2 and 3 of Annex 1 to the Transfer Regulations clearly state that clubs are not obliged to release their players for matches scheduled on dates not listed in the coordinated international match calendar, with the exception of a duty to release on basis of a special decision by the FIFA Executive Committee. A loophole would have only existed, if the regulations did not foresee any legal consequence for matches not listed in the calendar or not subject to a special decision. Then, maybe customary law could explain the legal consequence of such fact. However, the regulations clearly say, what the legal consequence is, i.e. that “it is not compulsory to release players” for such matches. Any application of customary law, leading to a compulsory release, would be *contra legem*.

With respect to the constant and consistent practice, the Panel analyzed the Parties submissions on past Olympic Games. If there had been a consistent practice to release players, even without the clubs’

will to do so and even if there was no integration in the calendar or a special decision, there could have been such practice. But the Appellants outlined that

- at least at the Olympic Games in Athens 2004, FIFA included the Olympic Football Tournament in the calendar and
- on many occasions, the Technical Reports of FIFA on the Games reported problems with clubs that didn’t release their players, without FIFA sanctioning them.

The fact that many clubs released their players **voluntarily** to the Games could, on the other hand, only show a constant practice of voluntary release, while it was quite clear that a **compulsory** release was not applied, neither by the clubs, nor by FIFA. On this basis, the Panel concluded that there was no constant and consistent practice.

And also the third requirement, a conviction of the members that the practice is binding, could not be established by the Panel. A consistent practice could only lead to the existence of customary law, if the members of the respective sports organization consider such practice as mandatory. Since a FIFA regulation was concerned, the Panel examined, as far as submitted by the Parties, the conviction of FIFA’s members, i.e. the national associations’ and their members’, the clubs’. Besides the above mentioned fact that many clubs refused to release players in the past, the Panel explicitly refers to a letter by the German Football Federation DFB of 17 July 2008, which it sent to the Brazilian Federation CBF. In such letter, DFB states that it did not see any legal basis for a mandatory release, which is why even amongst FIFA’s direct members, the issue was not clear at all, which even the FIFA Emergency Committee concluded.

For this reason, the Panel also denied the existence of “*opinio necessitatis*”. In fact, none of the requirements for the application of customary law was met.

## 6. Conclusion

The case is an important part of CAS jurisprudence in two aspects: It did not only clearly and exhaustively explain the application of customary law on sports regulations. It also serves as a proof for the necessity and advantage of specialized sports arbitration: The fast and effective proceedings as well as the specific knowledge of the Panel in sports helped to solve the case only shortly before the Olympic Games started. In addition, the Panel, in its “Epilogue” also tried to find a balance between the importance of the Olympic Games and the rights of the clubs and recognized the importance and spirit of the Games. In such light, it asked for cooperation between all Parties. If, for example, Messi would wish to play for Argentina, the Parties should try to find a solution. They did. They won.

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## TENTH ASSER INTERNATIONAL SPORTS LAW LECTURE

### *“The ECJ’s Verdict in the Bernard Case on Training Compensation in Professional Football”*

T.M.C. Asser Institute, The Hague  
28 May 2010

- Chair:** Dr Marjan Olfers, Law Faculty, Free University of Amsterdam
- Speakers:** Frans de Weger, ForzaFides, Amsterdam  
Prof. Dr Stefaan van den Bogaert, Law Faculty, University of Leiden  
Prof. Dr Frank Hendrickx, Law Faculty, University of Leuven  
Dr Steven Jellinghaus, Law Faculty, University of Tilburg

# Comment on CAS 98/200 AEK Athens and Slavia Prague v. UEFA

by Ivan Cherpillod\*

## I. Background

ENIC plc is an English company which had invested in several European football clubs. In 1997, it acquired controlling interests in AEK, Slavia and Vicenza. In the 1997/98 European football season, these three clubs took part in the UEFA Cup Winners' Cup and all qualified for the quarter final. Thus, three out of eight clubs left in the same competition belonged to a single owner.

ENIC and UEFA met together to discuss the issue of multi-club ownership in football. ENIC proposed a "code of ethics" but this was not considered as a viable solution by UEFA. After internal consultation, UEFA preferred a rule which had the effect to prevent clubs under common control to play in the same competition.

A few days after having sent the UEFA Cup regulations for the season 1998/99 to its member associations (regulations which at that time did not contain any limitation regarding multi-ownership), UEFA adopted the Contested Rule. It provides that *"in the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition"*<sup>1</sup>. Further, to determine which of two - or more - commonly owned clubs should be admitted, UEFA decided that the club with the highest "club coefficient" (i.e. a coefficient based on the club's results of the previous five years) would be admitted (and if the club coefficients were the same, the club with the highest national association coefficient based on the previous results of all the teams of the national association would be admitted; and in case of equal national association coefficients, lots would be drawn).

In application of the Contested Rule and these additional criteria, UEFA informed AEK Athens that it was not admitted to the UEFA Cup (Slavia Prague had the highest club coefficient). Thus, AEK had to be replaced by the club which had ranked immediately below AEK in the Hellenic championship.

AEK and Slavia Prague proposed to submit the case to CAS, and UEFA agreed.

## II. CAS decisions

The Claimants AEK and Slavia first sought an interim order petitioning their admission to the 1998/99 UEFA Cup. This interim order has been granted by the President of the CAS Ordinary Division, who

considered that the Contested Rule had been enacted too late, i.e. shortly before the start of the 1998/99 season and *after* the Cup Regulations had been sent - *nota bene* - without any restriction regarding multi-ownership. Therefore, CAS admitted that the Claimants could legitimately expect that no restriction was going to be adopted for that season. In CAS' view, the late adoption of the Contested Rule amounted to a violation of the rules of good faith and procedural fairness. However, this decision was only made for the duration of the 1998/99 season, without prejudice as to the validity of the Contested Rule.

In its final award of August 20, 1999, CAS confirmed the validity of the Contested Rule but decided that it could not be implemented until the end of the 1999/2000 football season - on the ground that commonly controlled clubs and their owners should have some time to determine their course of action.

## III. Applicable law

As per Article R45 of the CAS Code, the dispute had to be decided *"according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law"*.

The Claimants argued that the Contested Rule violated Swiss civil law: violation of the UEFA Statutes because it allegedly created different categories of members; breach of the principle of equal treatment (alleged discrimination between clubs which were under common control and other clubs); disregard of the Claimants' right to be heard; unjustified violation of the Claimants' personality; violation of EC competition law and Swiss competition law (restriction of competition; abuse of a dominant position), violation of EC provisions on freedom of establishment and free movement of capital, and general principles of law.

The parties agreed that Swiss law applied and that CAS should apply EC competition law and Swiss competition law if the dispute fell within the scope of these laws.

The Panel went a little further and considered that EC competition law had to be taken into account even if the parties had not agreed on its applicability. It held that Article 19 of the Swiss Act on Private International Law applied here. According to that provision, a foreign mandatory rule must be also "taken into consideration", even if the law applicable to the merits is different, provided that three conditions are met: (a) the foreign mandatory rule is a so-called *loi d'application immédiate* (rules which have to be applied irrespective of the law applicable to the merits of the case); (b) there is a close connection between the subject matter of the dispute and the territory where the mandatory rule is in force; (c) it is necessary to take that rule into account to protect overriding interests (which must be legitimate from a Swiss law point of view).

CAS considered that these conditions were met: the rules of law of competition are typical examples of mandatory rules; most of the strongest football clubs taking part in UEFA competitions are located in the EC (and this was true for AEK, but not for Slavia Prague at that time); and the underlying values of the Swiss Federal Act on Cartels and of European law of competition are the same, which means that the rules of EC law on competition are compatible with the values supported by the Swiss legal system.

However, it is far from being certain that EC law on competition could have been applied by CAS in the absence of agreement between the parties on this point. First, if the conditions set forth by Article 19 of the Swiss Act on Private International Law are met, this does not lead to direct application of the foreign mandatory rules: the court is only invited to "take into account" these rules, which is different; in

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<sup>1</sup> More precisely, the rule establishes that:

- (1) no club participating in a UEFA club competition may, either directly or indirectly:
  - (a) hold or deal in the securities or shares of any other club, or
  - (b) be a member of any other club, or
  - (c) be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or
  - (d) have any power whatsoever in the management, administration and/or sporting performance of any other club.
- (2) No person may at the same time, either directly or indirectly, be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA competition.

- (3) In the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition. In this connection, an individual or legal entity has control of a club where he/she/it:
  - (a) holds a majority of the shareholders' voting rights, or
  - (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or
  - (c) is a shareholder and alone controls a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club in question.
- (4) The Committee of the UEFA Club Competitions will take a final decision with regard to the admission of clubs to these competitions. It furthermore reserves the right to act vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition.

particular, it is conceivable that they may be applied only in part<sup>2</sup>. Second, as suggested by the German text of this provision, it may be the case that the legitimate and overriding interests which may trigger the application of the foreign mandatory rules are only those of *a party*<sup>3</sup> (e.g. if one of the parties cannot fulfil its obligations without incurring the risk of being severely sanctioned for having breached such foreign mandatory rules<sup>4</sup>).

Be it as it may, it is certain that the rules of European law of competition were applicable to UEFA insofar as the Contested Rule would have been restrictive of competition on the European market: in particular, these rules could be applied to UEFA by the European authorities - and as a matter of fact the European Commission has rendered a decision on the compatibility of the Contested Rule with EC law on competition in furtherance of a complaint which had been lodged by ENIC plc<sup>5</sup>.

Further, it must be reminded that an arbitral tribunal with seat in Switzerland cannot decline its jurisdiction to apply the rules of foreign (especially EC) competition law if either party pleads the nullity of its (e.g. contractual) obligation on the ground that it contravenes such rules<sup>6</sup>. However, whether they are applicable or not is a different question.

## IV. Merits

### A. Protection of the "integrity of the game"

Both parties agreed that it was necessary to protect the integrity of the game.

However, the Claimants argued that match-fixing was rather unlikely, especially if the common owner is a corporation listed on the stock exchange. They suggested that a code of ethics or some rules governing the transfer of players would be sufficient to preserve the integrity of the game.

The Panel did not follow this view and pointed out that "*integrity, in football, is crucially related to the authenticity of results, and has a critical core which is that, in the public's perception, both single matches and entire championships must be a true test of the best possible athletic, technical, coaching and management skills of the opposing sides*"<sup>7</sup>. In other words, the main issue regarding the "integrity of the game" was whether multi-ownership within the same football competition could be perceived by the public as affecting the authenticity of sporting results or, put in a different way, whether the public could perceive a conflict of interest which might alter the competitive process when two commonly owned clubs play in the same sporting event.

The Panel answered positively to this question. In its Award, it held that "*even assuming that multi-club owners, directors or executives always act in compliance with the law and do not try to directly fix any match, there are situations when the economic interests of the multi-club owner or parent company are at odds with sporting needs in terms of public perception of the authenticity of results*"<sup>8</sup>. In particular, fans might doubt whether transfers of players between commonly owned clubs would occur in the sole interest of their club rather than in the interest of the other club. Further, club executives are in a position to make choices which may either positively or negatively influence performance of players<sup>9</sup>. In addition, if unrelated third clubs end up in a qualification group together with two commonly owned clubs, it may be the case that the teams need a draw to the detriment of the third club; in such a case, the situation of the conflict of interest is quite obvious.

Against this background, the Panel held that a problem of conflict of interest exists in multi-club ownership situations. As it had been stated before the European Parliament by Mr. Karel Van Miert, who was EC Commissioner for competition policy at that time, "*clearly, if clubs with the same owner can take part in the same competitions, whether national or international, doubts may arise as to whether the outcome is really undecided in advance*"<sup>10</sup>.

However, this conclusion was not sufficient to admit the validity of the Contested Rule: it just meant that "*ownership of multiple clubs competing in the same competition represents a justified concern for a sports regulator and organizer*"<sup>11</sup>.

## B. Swiss civil law

### 1. Compliance with UEFA Statutes

The Claimants first argued that the Contested Rule created different categories of UEFA members. They considered that they should be treated as "indirect members" of UEFA, because they are members of their respective national association which, in turn, is a UEFA member. In furtherance of this argument, they claimed that UEFA breached its own Statutes because the creation of different categories of members would have required a modification of the UEFA Statutes, which was in the power of the UEFA Congress - not of the Executive Committee, which had adopted the Contested Rule.

The Panel left open the question to know if the clubs could be considered "indirect members" of UEFA. It held that the Contested Rule did not create different categories of member clubs but merely established conditions of participation in UEFA competitions, something which was in the power of the Executive Committee<sup>12</sup>.

### 2. Right to submit arguments before adoption of the Contested Rule?

The Claimants also argued that they should have been granted the possibility to present their arguments to UEFA before adoption of the Contested Rule. This argument was again based on the assumption that the clubs were "indirect members" of UEFA.

The Panel considered that a right to a legal hearing existed only "*in the event of administrative measures or penalties adopted by a sports-governing body with regard to a limited and identified number of designees*"<sup>13</sup>. Further, if the Claimants' argument had to be followed, this would have meant that UEFA should consult with tens (or even hundreds) of thousands of clubs before passing a resolution which could affect such "indirect" members. The Panel concluded therefore that it could be advisable for a regulator or legislator to hear the views of those who would be potentially affected by a new regulation, but it could not be a legal requirement.

### 3. Rules of procedural fairness (as regards the entry into force of the Contested Rule)

The Panel agreed with the opinion expressed by the President of CAS Ordinary Division in its interim order that UEFA violated the principle of procedural fairness by adopting the Contested Rule too late and after the Cup Regulations for the 1998/99 season had been issued without any restriction regarding multiple ownership (thus creating a legitimate expectation that no such restriction would be enacted for that season). Therefore, the Panel ratified the CAS Procedural Order which had temporarily stayed the application of the Contested Rule for that season.

However, as pointed out by the Panel, this violation of the principle of procedural fairness was of a transitory nature and, as a result, could not render the Contested Rule unlawful on its merits with respect to all future football seasons<sup>14</sup>.

### 4. Principle of equal treatment

The Claimants also argued that the Contested Rule violated the principle of equal treatment by creating different categories of members. This argument, which was also based on the assumption that clubs were indirect members of UEFA, had already been discussed<sup>15</sup>.

### 5. Personality of the clubs

The Claimants further invoked Article 28 of the Civil Code, which

<sup>2</sup> See Dutoit, *Droit international privé suisse*, 4th ed., Basel 2005, Art. 19 N 5.

<sup>3</sup> Several authors in the Swiss legal literature consider however, in accordance with the French text of Article 19, that it is also possible to justify the application of foreign mandatory rules by general interests: see e.g. Dutoit, Art. 19 N 1. This point has been left open in the Swiss Federal Supreme Court decision ATF 130 III 620.

<sup>4</sup> Cf. Vischer, *Zürcher Kommentar zum IPRG*, 2nd ed. Zurich 2004, Art. 19 N 23.

<sup>5</sup> See V below.

<sup>6</sup> Swiss Federal Supreme Court decision 118 II 193.

<sup>7</sup> CAS Award, at para. 25.

<sup>8</sup> CAS Award, at para. 45.

<sup>9</sup> On this point, see CAS Award, at para. 39 and following.

<sup>10</sup> Answers given by Mr. Van Miert on behalf of the Commission to parliamentary questions nos. E-3980/97, 0538/98, P-2361/98.

<sup>11</sup> CAS Award, at para. 48.

<sup>12</sup> Award, at para. 52 and following.

<sup>13</sup> CAS Award, at para. 58.

<sup>14</sup> Award, at para. 60 and following.

<sup>15</sup> See Section I above.



provides for protection of personality in broad terms: any breach of the rules protecting personality “is unlawful unless it is justified by law, by the consent of the victim, or by an overriding public or private interest”<sup>16</sup>.

The Panel expressed doubts as to the applicability of this provision in the present case. These doubts might have been unjustified: in the field of high-level sports, it has been decided that this protection includes a right to sports activity and, for professional sports, a right to develop an economic activity<sup>17</sup>. However, the Panel considered that in any event, the public’s perception of a conflict of interest potentially affecting the authenticity of results would constitute an “overriding interest” in the meaning of Article 28 CC which justified the Contested Rule.

### C. European Community competition law

The Claimants complained that the Contested Rule violated Articles 81 and 82 of the EC Treaty: in their opinion, this Rule was a decision by an association of undertakings, or an agreement between undertakings, which affected competition in the football market, and in various ancillary football services markets, “by preventing or restricting investments by multi-club owners in European clubs, by changing the nature, intensity and patterns of competition between commonly controlled clubs and the others, and by enhancing the economic imbalance between football clubs”<sup>18</sup>. As regards the application of Article 82, the Claimants argued that UEFA (being the only body empowered to organize European competitions) dominates the European professional football market and the ancillary football services markets and abused of its dominant position by restricting competition in an unnecessary, disproportionate and discriminating manner.

#### 1. Sporting exception?

UEFA first responded that the Contested Rule was not caught by competition law because it was a rule of a merely sporting character (to protect the integrity of the game). This view could be supported by the jurisprudence of the European Court of Justice, which stated in the *Walrave* and *Donà* cases that “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”<sup>19</sup>.

The Panel agreed that a sporting exception exists, “in the sense that some sporting rules or practices are somewhat capable of, as the Court puts it, ‘restricting the scope’ of EC provisions”<sup>20</sup>. In his view and in the light of the Court’s jurisprudence, a sporting rule would not be caught by EC law if (a) it concerns a question of sporting interest having nothing to do with economic activity, (b) it is justified on non-economic grounds, (c) it is related to the particular nature or context of certain competitions, and (d) it remains limited to its proper objective<sup>21</sup>.

CAS however considered that the Contested Rule, by dealing with the question of ownership of clubs taking part in UEFA competitions, addressed the economic status of clubs which are involved in econom-

ic activities. Therefore, the Contested Rule could not be viewed as having nothing to do with economic activities, and it could not be covered by this “sporting exception”<sup>22</sup>.

#### 2. Is UEFA an “undertaking”?

Then the Award addressed the question whether UEFA could be viewed as an undertaking or as an association of undertakings in the meaning of Articles 81 and 82. The Panel agreed that “a good part of UEFA’s activities is of a purely sporting nature, particularly when it adopts measures as a mere regulator of sporting matters”<sup>23</sup>. However, UEFA is also involved in economic activities (e.g. contracts relating to television rights). As regards these activities, UEFA is an undertaking in the meaning of competition law, and the same applies as regards its members (national federations). Therefore, the Panel concluded “that UEFA, with respect to the economic activities in which it is engaged and in which national federations are engaged, is at the same time an undertaking and an association of undertakings”<sup>24</sup>.

The Award also examined whether UEFA could be viewed as an “association of associations of undertakings” (or if it could be considered merely as a regulator above the clubs rather than some kind of trade association of clubs engaged in economic activities). In the *Bosman* case, Advocate General Lenz considered that UEFA was an association of associations of undertakings, acting as an instrument of professional clubs’ cooperation, notwithstanding the fact that many amateur clubs are also members of the national federations<sup>25</sup>. But the Panel emphasised the difference between a league of professional clubs and a national football federation: the latter represents all their member clubs, including many amateur clubs, while the former should be viewed as a proper trade association (it being reminded that national leagues are not direct members of UEFA and that the most important of them had constituted their own independent association). As said by the Panel, “within UEFA, representatives of national federations should be regarded less as delegates of the clubs engaged in economic activities than as delegates of amateur or grassroots clubs”<sup>26</sup>. However, in the absence of concrete evidence in this respect and despite the doubts it had expressed, the Panel decided - for the purpose of the competition law analysis but without excluding the possibility that UEFA might not be an association of “club undertakings” through which clubs coordinate their economic behaviour - that UEFA should be considered as “an association of ‘club undertakings’ whose decisions and rules concerning club competitions constitute a medium of horizontal cooperation between the competing clubs”<sup>27</sup> thus clearly falling under the scope of Article 81 para. 1.

#### 3. Market definition

As regards the market definition, the Claimants suggested the existence of a “European football market” which would comprise the supply of all football matches played in Europe and a variety of related “ancillary football services markets” (market for capital investment in football clubs, players market, media rights market, sponsorship, advertising and merchandising market). The Panel rejected this definition: “the notion of a general European football market is too ample, and the other related markets are too heterogeneous to be included therein. Given that the definition of a market should be determined primarily by interchangeability (or substitutability) from the consumers’ viewpoint, it is implausible to regard all European football matches as interchangeable. (...) Furthermore, if the products of the European football market are the European matches, most of the various other markets mentioned by the Claimants are certainly related in some way or another to the supply of such football matches, but they cannot be ‘comprised’ within that market”<sup>28</sup>.

Rather, the Panel considered that there are several “football markets” in which professional football clubs operate, which are clearly segmented in both their product and geographic dimensions. As regards the market more directly related to, and potentially affected by, the Contested Rule, it has been defined by CAS as the “market for ownership interests in football clubs capable of taking part in UEFA competitions”<sup>29</sup>. In the opinion of the Panel, the Contested Rule was “only indirectly related, if at all, to the various other markets suggested by the

16 Translation by the author.

17 Federal Supreme Court decision ATF 134 III 193.

18 CAS Award, at para. 77.

19 Case 36/74, *Walrave*, in *E.C.R.* 1974, 1405, para. 4; case 13/76, *Donà*, in *E.C.R.* 1976, 1333, para. 12. See also case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 76: “the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of the sporting activity from the scope of the Treaty”.

20 CAS Award, at para. 82.

21 CAS Award, *ibid.*

22 Further, the Panel expressed doubts as to the possibility to operate a distinction between sporting questions and economic issues: see the examples discussed in para. 84 of the Award.

23 CAS Award, at para. 87.

24 CAS Award, *ibid.*

25 Opinion delivered on 20 September 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 256.

26 CAS Award, at para. 92.

27 CAS Award, at para. 94.

28 CAS Award, at para. 98.

29 CAS Award, at para. 101, with reference to some US antitrust cases: *NASL v. NFL*, 505 F.Supp. 659 (S.D.N.Y. 1980), reversed 670 F.2d 1249 (2d Cir. 1982); *Sullivan v. NFL*, 34 F.3d 91 (1st Cir. 1994); *Piazza v. MLB*, 831 F.Supp. 420 (1993).

30 CAS Award, *ibid.*



Claimants, such as the market for players, the sponsorship market, the merchandising market, the media rights market and the market for gate revenues<sup>30</sup>. The effects on these markets had therefore to be considered only on a subsidiary basis to the said principal relevant market, concerning ownership interests in European professional football clubs.

As to geographic market definition, the Panel concluded quite logically that the relevant geographic market extended to whole Europe (more precisely to the territories of the European federations affiliated to UEFA).

#### 4. Compatibility with Article 81

In the absence of evidence that the true object of the Contested Rule was an anti-competitive one, the Panel examined if its effect could appreciably restrict competition by preventing or restricting investment by multiple owners in European clubs. In accordance with the EC case-law<sup>31</sup>, CAS tried to define how the market for ownership interests would have evolved in the absence of the Contested Rule.

Assuming that multi-club control could be expected to expand, in particular if single club owners would feel a necessity to improve their position by acquiring additional clubs, the Panel found that such an expansion would lead to a decrease in the number of club owners, and thus in the number of undertakings on the market; club ownership could concentrate into fewer hands, it being reminded that new entrants on the market would have been hindered by a sporting barrier (in the European sporting system, any new club has to go through the pyramidal structure of national championships for several years before attaining a top professional level, so that entry into the market could be achieved only by acquiring already existing clubs). In a scenario which CAS qualified as being too extreme, this process of concentration could lead to an oligopoly with undesirable effects on competition (e.g. price increase for tickets or pay television subscriptions). However, this showed that in the absence of the Contested Rule, *“the number of undertakings on the market would sooner or later decline while the effects on prices, although scarcely noticeable in the short term, would in due course tend to show an increase”*<sup>32</sup>. In conclusion, the Panel held that, *“in the absence of the Contested Rule, competition on the relevant market and on other football markets would initially probably remain unaffected and, when affected, it would be restricted. In the light of this a contrario test, the Panel finds that the actual effect of the Contested Rule is to place some limitation on mergers between European high level football clubs, and thus to increase the number of undertakings on the relevant market and on other football markets; accordingly, the Contested Rule preserves or even enhances economic competition between club owners and economic and sporting competition between clubs”*<sup>33</sup>.

As a consequence, CAS held that either the Contested Rule had no effects on the relevant market or, if it had, it would *“exert a beneficial influence upon competition, insofar as it tends to prevent a potential increase in prices for ownership interests in professional football clubs (and to prevent potential price increases in other football markets as well)”*<sup>34</sup>. The Award states that *“the Contested Rule, by discouraging merger and acquisition transactions between existing owners of clubs aspiring to participate in UEFA competitions, and conversely by encouraging investments in such football clubs by the many potential newcomers, appears to have the effect of preserving competition between club owners and between football clubs rather than appreciably restricting competition on the relevant market or on other football markets”*<sup>35</sup>. The Panel referred to the situation in England, where - despite the fact that the

Premier League had enacted a rule which was even stricter<sup>36</sup> - clubs could successfully attract capital investment.

The Claimants also argued that the Contested Rule favoured the rich and strong clubs over the weak and poor ones, and thus impaired the pattern of economic competition. However, on the basis of its previous findings, the Panel considered that polarization of market power between bigger and smaller clubs would continue or even increase in the absence of the Contested Rule. The provision of *“incentives for actual or potential club owners to invest their resources in only one high level club, as the Contested Rule tends to do, is conducive to an economic and sporting balance, rather than an imbalance, between football clubs”*<sup>37</sup>. Hence, the Contested Rule has pro-competitive effects.

Further, the Contested Rule could not be viewed as being capable of affecting the quality of the sporting product offered to consumers: the quality of the entertainment provided to European football fans could not be significantly impaired by the Contested Rule, which provides that the excluded club has to be replaced by the club which, in the same national championship, ranked immediately below the excluded club<sup>38</sup>.

#### 5. Proportionality (less restrictive alternatives?)

Even if the Panel was convinced that the Contested Rule did not appreciably restrict competition, it examined if it could be viewed as being disproportionate. The Claimants contended that the objective of protecting the integrity of European football competitions could be attained by less restrictive means, such as a code of ethics and criminal penalties to prevent match-fixing. However, as it had been pointed out before<sup>39</sup>, the “integrity question” raises the issue whether consumers could perceive a possible conflict of interests, capable of affecting the authenticity of results, when commonly controlled clubs participate in the same competition. In this respect, *“rules bound to protect public confidence in the authenticity of results appear to be of the utmost importance”*<sup>40</sup>, CAS said.

With regard to any possible “less restrictive alternative”, the Panel observed that the Contested Rule proscribes only the participation in the same UEFA competition of commonly controlled clubs: commonly controlled clubs may participate in different UEFA competitions. Further, the Contested Rule does not prevent the acquisition of shares - up to 49% of the voting rights - in a large number of clubs participating in the same competition. Moreover, the Panel held that the Contested Rule could not be substituted by a *posteriori* sanctions such as disciplinary or criminal sanctions applying to match-fixing: such sanctions could not alter the public’s perception of a conflict of interests in case of two commonly owned clubs participating in the same UEFA competition.

The Claimants had also proposed, as an alternative, that UEFA should conduct a “fit and proper test” to determine if a person or legal entity could become the owner of a club. However, this could not represent a viable alternative (difficulty to find out objective requirements, administrative and legal costs - risk of being sued for economic and moral damages after publicly declaring someone as being not a fit and proper person). Further, a rule requiring intrusive ethical examination of clubs’ owners, directors and executives could hardly be characterized as a “less restrictive” alternative<sup>41</sup>.

The Claimants also pointed out that some other rules preventing the participation of commonly owned clubs in the same competition allowed for the possibility to obtain derogation from the respective sports governing body. However, the Panel noted that no such approval had ever been granted in practice; further, denial of derogation would lead to expensive litigation, while an authorization could always lead to suspicion from the part of the public, for the reasons already described.

Other possible solutions proposed by the Claimants have been considered as being inappropriate. In particular, a requirement that multi-club owners divest their ownership interests in all but one of the owned clubs solely for the period of the UEFA competition, through the establishment of an independent trust to which control of commonly owned clubs could be transferred for the duration of

31 Cf. e.g. case 42/84, *Remia*, in E.C.R. 1985, 2545, para. 18.

32 CAS Award, at para. 117.

33 CAS Award, at para. 118.

34 CAS Award, at para. 119.

35 CAS Award, *ibid*.

36 It does not allow any person or corporate entity, except with the prior written consent of the Board (which had never been granted so far), to “directly or indirectly hold or acquire any interest in more

than 10 per cent of the issued share capital of a Club while he or any associate is a director of, or directly or indirectly holds any interest in the share capital of, any other Club”: Award, at para. 120.

37 CAS Award, at para. 122.

38 CAS Award, at para. 123.

39 See IV A above.

40 CAS Award, at para. 129.

41 CAS Award, at para. 133.

UEFA competitions or through the appointment of an independent nominee who would exercise the owner's voting rights in its sole discretion, has been seen as being "not only complex to administer but also quite intrusive upon the clubs' structure and management; in any event, the true problem would be that the interim suspension of control or voting rights does not modify the substantial ownership of a club, and thus does not exclude the underlying continuance of a conflict of interest"<sup>42</sup>. Lastly, regulations restricting bonuses and transfers of players would have addressed only some aspects of the conflict of interest but the problems related to the allocation of resources by the multi-club owner among its clubs would still exist (as seen before, club executives are in a position to make choices which may either positively or negatively influence performance of players) and such regulations would not have taken into account the interest of third clubs (unrelated third clubs ending up in a qualification group together with two commonly owned clubs)<sup>43</sup>.

In conclusion, the Panel held that the Contested Rule did not violate Article 81 of the EC Treaty: it "is an essential feature for the organization of a professional football competition and is not more extensive than necessary to serve the fundamental goal of preventing conflicts of interest which would be publicly perceived as affecting the authenticity, and thus the uncertainty, of results in UEFA competitions"<sup>44</sup>.

#### 6. Abuse of a dominant position?

The Panel admitted that UEFA could exert a dominant market power in the market for the organization of pan-European football matches and competitions. However, the Claimants were not actually or potentially competing with UEFA on that market. In the present case, the relevant product market was the market for ownership interests in football clubs capable of taking part in UEFA competitions. With respect to that market, UEFA is a mere regulator, and national federations are not present on that market either. Thus, there is no dominant position of UEFA on the relevant market.

As to a possible abuse on a neighbouring market, the Panel analysed the EC case-law as requiring that the dominant undertakings had to be active on both the market of dominance and the neighbouring non-dominated market - which was not the case here<sup>45</sup>.

Anyway, with respect to Article 82 of the EC Treaty, the Claimants relied on essentially the same arguments as for Article 81, and the Panel had already rejected them (no restriction of competition, proportionality, absence of discrimination). CAS thus denied the existence of any abuse of a dominant position.

#### D. Swiss competition law

The Claimants also relied on the provisions of Swiss law of competition (articles 5 and 7 of the Federal Act on Cartels). However, the arguments were the same as those discussed in application of European law of competition, and thus were rejected under Swiss law as well<sup>46</sup>.

The Panel however noted that "the envisaged oligopoly scenario is much more likely within a small market such as Switzerland, where there are not many teams aspiring to participate in UEFA competitions; indeed, there are only twelve clubs in the Swiss first division. Therefore, the described pro-competitive effect of the Contested Rule is even amplified within the Swiss market"<sup>47</sup>. Against this background, CAS con-

cluded that the Contested Rule could not be viewed as being restrictive of competition on the Swiss market.

#### E. European community law on the right of establishment and on free movement of capital

In case the Contested Rule could be seen as restricting the freedom of establishment or the free movement of capital, the Panel observed that it did not institute any discrimination based on a person's (or corporation's) nationality. Thus, the Contested Rule could be admissible insofar as it pursued legitimate interests with proportionate means - issues which had already been addressed by the Panel.

#### F. General principles of law

The Claimants also relied on the "general principles of law" and argued again that the Contested Rule was the expression of some abusive behaviour. As CAS had already considered that the Contested Rule was justified to protect the authenticity of the game, this argument has been rejected. The Award however contains some interesting developments which must be reminded here:

*"The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law. Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are. Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles - a sort of lex mercatoria for sports or, so to speak, a lex ludica - to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national "public policy" ("ordre public") provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such lex ludica"*<sup>48</sup>.

#### V. Epilogue: decision rendered by the European Commission

In February 2000, ENIC plc filed a complaint against UEFA with the European Commission and reiterated the arguments based on EC law of competition which AEK and Slavia Prague had brought before CAS. The European Commission rejected this complaint in a decision which may be summarized as follows<sup>49</sup>.

First, the Commission declared that professional football clubs were undertakings in the meaning of Article 81 para. 1 of the Treaty. Thus, national federations can be viewed as associations of undertakings, and the Commission considered UEFA as an association of associations of undertakings, notwithstanding the fact that a large number of amateur clubs are also members of the national federations<sup>50</sup>. In addition, UEFA is also an undertaking for certain activities such as the organisation of European club competitions, said the Commission.

The Commission confirmed that the object of the Contested Rule was not to distort competition: its main purpose is to "ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competition between the participants, as consumers may suspect that teams with a common owner will not genuinely compete"<sup>51</sup>.

As to the effect of the rule, the Commission held that "without the UEFA rule, the proper functioning of the market where the clubs develop their economic activities would be under threat, since the public's perception that the underlying sporting competition is fair and honest is an essential precondition to keep its interest and marketability. (...) For instance, should two clubs under joint control or ownership meet at a certain stage of the competition, the public's perception of the authenticity of the result would be jeopardised"<sup>52</sup>. Like CAS, the Commission also

42 CAS Award, at para. 135.

43 CAS Award, at para. 33 and following, 43 and 135.

44 CAS Award, at para. 136.

45 CAS Award, at para. 143.

46 The existence of a sporting exception had not been discussed under Swiss law of competition: the only exemption from the law on cartels which had been admitted under Swiss law related to the "rules of the game" (mainly those applying on the pitch), which are not subject to the law on cartels. The Contested Rule could not be assimilated to a "rule of the game", and the parties concurred

in this respect. Whether a (much broader) "sporting exception" existed under Swiss law remained undecided: the Panel had already decided that the existence of any "sporting exception" could not have the effect that the Contested Rule would be exempted from the application of the law of competition (Award, at para. 84).

47 CAS Award, at para. 149.

48 CAS Award, at para. 156.

49 Case COMP/37 806 ENIC/UEFA.

50 It is reminded that CAS expressed some doubts on this point: see IV C 2 above.

51 Decision, at para. 28.

52 Decision, at para. 32.

noted that the Contested Rule could not be viewed as preventing investment in football clubs insofar as it is limited to prohibiting more than one club with the same ownership from participating in the same UEFA competition. Further, the Contested Rule does not prevent investors from acquiring an interest in clubs: below the level of majority control, clubs remain free to play in the same UEFA competition. The Commission also mentioned that even stricter rules had been adopted in some Member States, so that the Contested Rule seemed to “constitute a prolongation of the national rules and their natural corollary”<sup>53</sup>. The Commission also agreed like CAS that a code of conduct could not constitute a workable alternative. As to a system “which would allow the football regulator to analyse a specific common-owned club’s participation on a case by case basis only, [it] would not enable clubs (or spectators) to know in advance whether or not they would be likely or able to participate in a UEFA competition and would not be a workable alternative to the UEFA rule either”<sup>54</sup>.

The Commission therefore concluded that the Contested Rule was “inherent to the very existence of credible UEFA competitions” and did not go “beyond what is necessary to ensure its legitimate aim of protecting the uncertainty of the results and giving the public the right perception as to the integrity of the UEFA competitions with a view to ensure their proper functioning”<sup>55</sup>. Therefore, it could not be viewed as a restriction of competition.

As to a possible application of Article 82 of the Treaty, the Commission also concluded that the Contested Rule was neither discriminatory nor disproportionate, in the absence of any less restrictive alternative.

## VI. Conclusions

By its in-depth analysis of the market issues, this CAS Award is undoubtedly one of the landmark cases in this field. CAS’ views as regards law of competition have been largely followed by the European Commission - which is quite illustrative of the quality of this Award.

As always, some questions remain open. In particular, it must be noted that “control” is defined by the Contested Rule as the acquisition of a majority of the voting rights - while it is quite clear that *de facto* “control” may be achieved with much less voting rights, at least in certain instances. In this respect, it is reminded that some national rules are much stricter. Therefore, it may be the case that a stricter rule should be needed. However, as long as the public does not perceive the acquisition of a lower interest in (two or more) clubs as a situation which would lead to conflicts of interests as those described by CAS in the present case, there is perhaps no need for a stricter rule. Further, the threshold applied by the Contested Rule allows for investment in several football clubs up to 49 % of the voting rights and may hence be viewed as permitting some flexibility so as not to discourage investment in football clubs.

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<sup>53</sup> Decision, at para. 35.

<sup>54</sup> Decision, at para. 36.

<sup>55</sup> Decision, at para. 47.

# AJ Auxerre v. Philippe Mexès and AS Roma CAS Award\*: Commentary

by Juan de Dios Crespo Pérez\*\*

## Preamble

Philippe Mexès had a very good relationship with the then Auxerre coach, the famous and renowned Guy Roux, who usually treated his players like his sons but when a father gives you his word you normally understand that he is going to comply with.

And this is what happened when Mexès thought that Roux had given him the possibility to be transferred to a club of his choice at the end of season 2003-2004. But a word is not a written contract and Roux denied the chance to his “son” to leave Auxerre so easily and he asked for a huge transfer fee.

This was sensed by Mexès like a treachery and then the Mexès saga began...which will involved not only the player and Auxerre but also AS Roma, his future club in a case that was to transform the FIFA Regulations of 2001 into the revamped 2005 which are quite the same as today. So the saga was not just another case but really a leading one.

## Introduction

Before engaging in an analysis of the AJ Auxerre, hereinafter “Auxerre”, Philip Mexès, hereinafter “Mexès” or “the Player”, and AS Roma, hereinafter “Roma”, cases it is best to clarify that there were three cases with the same facts but different party interests all heard together on the 11th of March 2005.

\* Arbitrage TAS 2004/A/708 Philippe Mexès c. Fédération Internationale de Football Association (FIFA) & TAS 2004/A/709 AS Roma c. FIFA & TAS 2004/A/713 AJ Auxerre c. AS Roma & Philippe Mexès, sentence du 11 mars 2005; TAS 2005/A/902 & 903 P. Mexès

& AS Roma c. AJ Auxerre and AJ Auxerre c. P. Mexès & AS Roma; TAS 2005/A/916 AS Roma c. FIFA

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1. Philippe Mexès & AS Roma v. Fédération Internationale de Football Association (FIFA) & AJ Auxerre (and vice versa) for the sporting sanction of FIFA against the player. (TAS 2004/A/708/709/713).
2. AJ Auxerre c. AS Roma & Philippe Mexès (and vice versa) for the indemnity to be paid to Auxerre (TAS 2005/902 & 903)
3. AS Roma v. FIFA for the sporting sanction of FIFA against that club (TAS 2005/A/916).

Each of the three cases had to deal with Philippe Mexès prematurely terminating his employment contract with Auxerre in France, and subsequently signing a playing contract with Roma in Italy.

## Facts

Philippe Mexès, born on the 30th of March 1982 in Toulouse, France, had been with the French club Auxerre from the age of 15. On the 13th of May 1998 Philippe Mexès signed a youth contract with Auxerre for 5 years. On the 20th of June 2000, Philippe Mexès replaced this youth contract by signing a professional football player’s contract for a period of 5 years.

On the 15th of December 2002 Auxerre and Mexès agreed to extend the contract by one year, thus concluding at the end of the 2005-2006 season, the Player’s salary was improved and the Club agreed to pay the Player a transfer bonus if he moved to another club. This was crucial to the dispute between the Parties, and will be discussed thoroughly later on in this commentary.

During the course of the employment contract, the Player asked the Club what transfer fee they would demand, if the contract was amicably terminated before its expiration date. The Club did not



respond to the Player with a figure and just reminded him that he was under contract with the Club until the 30th of June 2006 and they would expect him to satisfy said contractual obligations.

On the 24th of May 2004 Roma informed Auxerre that they were interesting in signing the player and they intended to make an offer for the Player's services. On the 4th of June 2004, Roma made an offer of EUR 4,500,000 to Auxerre for the Player.

Auxerre told Roma that this offer was way below their valuation of the Player and therefore would not agree to the transfer for this amount of compensation. They added that the Player would remain under contract with the Club until the 30th of June 2006.

On the 11th of June 2004, Philippe Mexès made an appeal to FIFA requesting to be released from his contract on the basis of Article 42<sup>1</sup> of the Regulations on the Status and Transfer of Players, hereinafter "RSTP", 2001 edition. Less than 24 hours later, Roma and Mexès signed a 4 year long contract from the 2004/2005 season to the 2007/2008 season.

Despite formal demands issued by the Club on the 21st of June 2004 and 1st of July 2004, the Player refused to attend training sessions with AJ Auxerre.

### FIFA Dispute Resolution Chamber Decisions

On July 8th 2004 Auxerre filed a complaint to the FIFA DRC, requesting that their Panel hear a dispute regarding a breach of contract and inducement to breach contract by Mexès and Roma respectively.

On the 31st of August 2004 the DRC rendered a decision regarding the validity of Mexès' contract with Roma, and any sporting sanctions which might apply to the player and the Club. M

They determined that the Player would not be eligible to play for Roma for 6 weeks after the commencement of the Italian Championship on the 12th of September 2004. The DRC also determined that the alleged inducement for the Player to breach his contract would be ruled upon at separate disciplinary proceedings, and that any sanction given as a result of said inducement would be awarded after the other disciplinary proceeding. None of the parties were happy with the sporting sanction to the player and then appeal to the CAS (first Mexès case).

On the 13th of May 2005, the FIFA DRC decided that Mexès would have to pay Auxerre EUR 8,000,000 for breach of contract. The FIFA DRC considered the objective criteria which were set out in Article 22.1 of the RSTP 2001 edition.

They took note of the higher salary Mexès would be receiving at Roma, and that Mexès had received 7 years of training, from the age of 15 to 22, at a Club with an excellent reputation for training players<sup>2</sup>. They stated that the remaining value of the Player's contract with Auxerre was EUR 2,403,614. The DRC stated that they based their decision on the special circumstances of the case and objective criteria. Furthermore, Roma were found to be jointly and severally liable for the compensation payable to Auxerre because the DRC decided that they induced the Player to breach his contract.

Each of the Parties was unhappy with their decision. Auxerre believed the valuation of the Player to be closing to EUR 18,000,000<sup>3</sup>, while the Club and Player were both unhappy with the amount of compensation they would have to pay and the length of the sporting sanctions they would receive.

1 Dispute Resolution Chamber will have to determine whether one of the parties has committed a unilateral breach of contract without just cause.

2 One should assume that the DRC made mention of this in order to demonstrate that Mexès would not have the opportunity to play at such a high level and earn so much money, but for the fantastic training he received while playing at AJ Auxerre.

3 Their valuation was supported by the assertion by *Gazzetta dello Sport* on the 31st of August 2004, where they publish the value of about 500 players, that

Philippe Mexès worth EUR 17,000,000.

4 Jurisprudence on this issue of "chance of success on appeal" was established in CAS 2003/O/482 Ariel Ortega v Fenerbahçe SK & FIFA

5 The representatives of the Player in their submissions stated in their Stay of Decision order that the "chances of success... are *prima facie* reasonable in the sense that they cannot be discounted."

6 Defined in the Regulations

7 [http://www.thefreelibrary.com/Publication+of+CAS+awards:+\(per+March+2006\).-a0169017238](http://www.thefreelibrary.com/Publication+of+CAS+awards:+(per+March+2006).-a0169017238)

On the 3rd of September 2004, Mr. Mexès and Roma each submitted an appeal against the decision of the FIFA DRC to the CAS in Lausanne, Switzerland, in accordance with Article 60.1 of the RSTP 2001 edition. (Second Mexès case).

Meanwhile, the case against AS Roma for inducing the breach of contract of the player continues and was finally decided by the DRC on the 23rd of June 2005, and sanctioned the Italian club with a prohibition of acquiring any new players during two transfer windows. This decision was appealed by AS Roma before the CAS. (Third Mexès case).

### Commentaries

#### CAS Decision First Mexes Case (Sporting Sanction to the Player):

##### *Stay of Decision*

Before the CAS held its final hearing on the dispute, they had to hold a preliminary hearing to decide whether or not to stay the decision of the FIFA DRC, effectively postponing any bans until after final judgment had been passed.

The Parties, following the lines of the CAS jurisprudence that the stay of the decision should be granted because:

There was a **chance of success on appeal**, that is to say, that the chance of having the decision overturned on appeal could not be discounted<sup>4</sup>.

On the **balance of interests** of the Parties. Which means that Auxerre and FIFA would not be suffering any significant damage.

The premature execution of the decision would be the Parties at the risk of suffering **irreparable harm**. In other words, if the Player and Club were set to receive suspensions from playing and registering players, but were later found to be innocent they would receive suspensions for offenses which they were not guilty of.

In light of the magnitude of the irreparable harm and the proximity in time of the final hearing, the CAS Panel elected to grant the petition for the stay of decision.

##### *Final Award - Contract Extension & Protected Period*

The CAS had to rule upon was whether or not Player had in fact breached his contract within the "Protected Period"<sup>6</sup>. This was necessary in order to determine if sporting sanctions should apply to the parties, and what level of compensation would be awarded to the aggrieved party.

The CAS felt that due to the prolongation of the playing contract, and the extension of the playing contract, Philip Mexès and Auxerre had effectively reset the timer on the Protected Period and subsequently brought the timing of the breach of contract within the 3 year safe zone and consequently obliged the CAS to impose sporting sanctions on the Player and his new Club.

However, some creativity was required by the CAS in this instance because the 2001 Regulations did not specifically state that the renewal of a contract would result in the renewal of the Protected Period. The Panel had to find the *ratio legis* for the rules which policed the legal relationship between the two parties.

The Panel thought that it was appropriate to consider the intention of FIFA for its own 2001 Regulations by examining the new version of the FIFA Regulations, and what they stated with regard to the extension of the term of a professional player contract and triggering a new stability period<sup>7</sup>. Therefore the DRC determined that the Player's signature of an extension agreement to their previous playing contract would restart the Protected Period even though this was not indicated in the 2001 Regulations and had to be changed in the 2005 ones.

##### *Final Award - Suspension*

The Regulations state that the player shall be banned from playing for 4 months, and the new club shall receive a ban from registering players for 2 transfer windows. However, these suspension times enshrined in the Regulations of FIFA were ignored by the CAS and other sanctions were imposed.

With regard to the Player's suspension Auxerre had no interest in the length of the playing ban imposed against Mexès as he was no longer part of the team. In the absence of any legitimate submissions



stating why the sanction should be increased, and according to the principle of *ne ultra petita*, the CAS could not impose a playing ban of longer time than the one award which was given by the FIFA DRC, which was six weeks, according to the “exceptional circumstances of the case” that was stated in article 23 of the 2001 FIFA Regulations.

Once again, those “exceptional circumstances” that had permitted the reduction of the usual sanction, had been taken off in the new Regulations of 2005.

### *Ignoring FIFA Regulations*

#### *FC Pyunik Cases*

Upon reading the CAS award of this dispute, one often wonders how Philip Mexès breaches his contract unilaterally within the Protected Period<sup>8</sup> and escapes with a 6 week playing ban, when the relevant Status clearly stated that Mexès should have received a 4 month playing ban.

However, this is not the first time that this happened. In the *FC Pyunik* cases<sup>9</sup>, which were also regarding unilateral termination of contract, the Player's Carl Lombe and Edel Apoula Edima Bete both escaped sporting sanctions despite the FIFA Regulations indicating that their actions merited suspension.

Within their submissions and during the trial the Appellants, FC Pyunik Yerevan, stated that both of the respondents, the players and Rapid Bucharest<sup>10</sup>, should be condemned to sporting sanctions of six months<sup>11</sup> playing ban and two transfer registration period ban respectively. They submitted effervescently, in capital text; at paragraph 73.2 of the Carl Lombe decision<sup>12</sup> that:

*“That both respondents have to be condemned to sporting sanctions of 6 months and of two transfer windows without inscriptions of players on the national and international level. AS FIFA FAILED TO SANCTION THEN ACCORDING TO THE FIFA REGULATIONS FOR THE STATUS AND TRANSFER OF PLAYERS.”*

FIFA had originally stated in their DRC decision, with regard to Article 17.3 and the stipulated sanction to apply to parties in breach of contract, that:

*“[Article 17.3] assigns the competent deciding body the power, but by no means the obligation, to impose a sporting sanction on a player found to be in breach of contract during the protected period.”*

The CAS later confirmed FIFA's decision not to sanction the parties stating at paragraph 118 of the Carl Lombe decision<sup>13</sup>:

*“In view of the specific circumstances of the case, including the age of the Player at the time he signed the Employment Contract<sup>14</sup> and the controversy surrounding his registration from the Appellant, the DRC decided not to impose any sporting sanctions, which would have had a considerable impact on the Player and were considered to be excessive and inappropriate.”*

However, it does not appear that neither the FIFA DRC nor the CAS should have interpreted application of the clause as optional. The relevant provision, 17.3 of the Regulations, is clear in its wording when

it states that “In addition to the obligation to pay compensation, sporting sanctions shall also be imposed.”

The CAS admits in paragraph 119 of the Carl Lombe decision that “if the intention of the FIFA Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word “may” and not “shall.”

There was nothing ambiguous about the wording of the Article in either the Mexès or FC Pyunik cases. However, in each of the cases the DRCs decided to make a decision in the interest of the “Spirit of the Regulation”, which was then confirmed by the CAS<sup>15</sup>.

While one can understand the sympathetic nature of the Pyunik cases it is hard to understand why Mexès, a player who requested a transfer and then took matters into his own hands when he wasn't given one, was treated leniently when it came to the handing out of a sporting sanction.

It is the opinion of the writer that in certain situations the DRC or the CAS need to be lenient on the athlete because of unfortunate circumstances, mistreatment of one of the parties, the age of the player, or any number of criteria.

However, it would be more legally sound and certain if FIFA were to redraft their Regulations to give the power to the DRC to impose a ban on the player and the club, rather than the obligation. Each time a player breaches his contract and the DRC or CAS does not feel that a ban is appropriate they are given the difficult task of straying away from unambiguous regulations, and essentially improperly interpreting the text in order to give a fair decision.

#### *Mid-season breach*

The FIFA regulations not addressing the scenario where a contract is extended rather than a whole new contract drafted with regard to the Protected Period. The CAS considered that the new Protected Period should take effect from when the contract extension comes into force. Ergo, they stressed that FIFA should clarify how the Protected Period should apply when a contractual extension comes into effect during the season.

However, it is my opinion that such clarification is now not necessary as the FIFA Regulations define the Protected Period<sup>16</sup> as “a period of three entire seasons or three/ two years, whichever comes first, following the entry into force of a contract...” Therefore, FIFA has stipulated that if the breach of contract occurs mid-season but less than three years or seasons to the day after the signing of an extension of contract, then the Player will be deemed to have committed the breach within the protected period.

### **CAS Decision Second Mexès Case (Player and Roma Indemnity to pay to Auxerre):**

#### *Final award - Compensation*

In its decision on the 13th of May 2005 the CAS felt one of the main issues to be considered is that the DRC had not properly communicated what their motivation or method of calculation was in their decision obliging Roma to pay Auxerre EUR 8,000,000 compensation.

Therefore, they believed it to be one of their primary mandates to calculate the amount of compensation due to be paid, if any, and state how they had reached this decision.

The CAS reviewed the facts concerning their potential transfer of the Player to another club from Auxerre.

The Panel first took into account the “investment” made by Auxerre on the player. Mexès had initially signed a five-year contract from 2000 to 2005, but then, on December 2002, he signed an extension until the end of the 2005-2006 season. This extension was made retroactive to 2002, so the extension was effectively a new four year contract from 2002 to 2006.

The Panel concluded that the difference between the old salary and the new salary that was effectively paid from the date when the extension was signed, in the summer of 2002, until the date in which the contract was terminated, in the summer of 2004. They also accounted for the bonus paid to Mexès for signing the extension, and the fee paid to the agent for the extension agreement. Therefore the effective costs incurred by Auxerre came to a total of EUR 2,289,644.

8 As a result of the CAS's interpretation that a renewal of contract shall be seen as a new contract, thus triggering the commencement of a new protected period.

9 CAS 2007/A/1358 FC Pyunik Yerevan v. Carl Lombe, AFC Rapid Bucuresti & FIFA, CAS 2007/A/1358 FC Pyunik Yerevan v. Edel Apoula Edima Bete, AFC Rapid Bucuresti & FIFA.

10 The club that the players joined after having breached their contract with Pyunik

11 Pyunik felt that a six, rather than four, month sanction should apply because they believed the breach of contract to

have been made with aggravated circumstances.

12 See 11 above

13 See 11 above

14 The Players, Lombe and Edima Bete were minors at the time of signing the playing contract with FC Pyunik.

15 In the case of Mexès this was because AJ Auxerre did not request the Player receive a longer playing ban. The maxim of *Ultra petita* was therefore applicable for the rights of the athlete.

16 #7 in the Definitions Section of the FIFA Regulations on the Status and Transfer of Player 2009.

The Panel then took into account the future earnings for the transfer of the player that Auxerre lost due to the breach. This is when they took into account Roma's offer of EUR 4,500,000, as this was the only existing offer for the player.

That offer was the only official one and moreover was made by the future club of the player who signs a contract quite immediately after having ended his relationship with Auxerre. The offer in Mexès case is really an important issue and has been the example for the following breach of contract proceedings like the Webster one.

#### *Comparison of Webster Offer*

Later on in the case commentaries we shall analyze the Andrew Webster case<sup>17</sup> however, for the purposes of the Mexès case it is important to consider why the CAS interpreted the offers received from a third club.

The answers are two. One is timing. The fact that Hearts received the offer for Webster's services after the Player had broke his contract with the Club means that Hearts are not suffering any damage because the Player and the Club no longer have any contractual ties. The Club is not entitled to accept any offer; therefore it is money which they never could have earned.

However, in the Mexès case, these offers were received while the Player was still under contract with the Club and still was an asset of the Club. Therefore, the Panel was of the opinion that these offers were legitimate losses for the Club.

The pattern of these offers, and perhaps even the renewal of the contract with a clause providing for the Player to receive a certain proportion of any transfer offer received, demonstrates that the Club had the intention, or at least, other clubs had the motivation to buy this player. In contrast, no offers were received for Webster in the time leading up to his breach; therefore it didn't appear as if the Club would be able to earn any money from the Player, but for his breach of contract.

However, it is my belief that if the Panel thought Hearts were not entitled to any money because the offer was received after Webster had breached his contract and therefore the Club never could have accepted this offer. It would also appear that the refusal of an offer to purchase the Player by a third party should also not carry with it financial value because in this case Auxerre also could never have accepted this offer having previously turned it down.

One can only assume that it is because Auxerre had already received offers for the Player and thus there was the indication that the Club would continue to receive offers in the future, that the CAS took the view that Auxerre might suffer potential loss because of the breach of contract of Mexès. Whereas, there was no indication that Hearts would suffer potential loss because Hearts had not received an offer for the Player until after he had terminated his contractual ties with the club.

The second answer is who made the offer. In this case, AS Roma was not only offering a transfer fee just a week before a contract is signed between the club and Mexès.

#### *Forfeiting Transfer Fee*

One point which is often ignored but interesting to note when reviewing this case is that Philip Mexès signed a contract extension which had a clause inserted to allow him to collect a certain percentage<sup>18</sup> of the transfer fee received by Auxerre for his playing services. However, because the Player unilaterally terminated his contract no transfer fee was received by Auxerre from Roma, so Philip Mexès would have forfeited any right to this percentage that he may have once had.

#### *Valuation of the Player*

One of the most interesting parts of this case, and something which Auxerre were certainly unsatisfied with was the CAS's valuation of the Player, perhaps the Club's most prized asset. Auxerre in their submission to FIFA compared Mexès to several other professionals who had been acquired or transfer by Roma, and they compared Mexès to other professionals who had been acquired by different Club's in several positions.

Auxerre made note of several transaction involving AS ROMA, submitting the following information:

Walter Samuel, a 31 year old Uruguayan, had transferred from Roma to Real Madrid for 25 million euro, and played "exactly the same position as the player Mexès" who was only 22 years of age, and arguably just as talented.

Emerson, a Brazilian defensive midfielder, had transferred from Roma to Juventus approximately 26 million euro<sup>19</sup>; and,

Ferrari, an Italian defensive minded player, had transferred from Parma to Roma for 16 million euro, and was not rated as highly as Mexès.

They also submitted the following information about comparable transfers:

Ricardo Carvalho, a Portuguese centre-back, had transferred from Porto to Chelsea for 30 million euro, and this was after they had engaged in failed negotiations for Mexès.

Gabriel Heinze, an Argentinean centre-back or full-back, had transferred from French team PSG to Manchester United for 11.5 million euro.

Wayne Rooney, a young English forward, had transferred from Everton to Manchester United for 37.5 million euro.

Finally Djibril Cisse, a young French forward, had transferred from Auxerre to Liverpool for about 20 million euro.

While not all of the information that Auxerre submitted with regard to other transfers was relevant to the dispute<sup>20</sup> it was clear that Auxerre had established that, in the current market, Mexès was a very valuable asset, and were Auxerre to transfer the Player he would command a fee comparable to the other footballers mentioned in their submission.

The Panel decided that Auxerre did not prove its commercial and sporting damages. It also determined that Auxerre had obstructed Mexès' possibilities to obtain a transfer by refusing to enter into any negotiations whatsoever<sup>21</sup>. At the same time, the Panel also determined that Roma's offer did not reflect the true value of the player, and that the offer's sole objective was to lead to the termination of Mexès contract with Auxerre.

In the end, the indemnity was fixed at EUR 7,000,000, as a result of the sum of the costs incurred by Auxerre, EUR 2,289,644, and Roma's offer, EUR 4,500,000, plus the other criteria taken into account by the Panel, although no specification of why they rounded the indemnity to exactly EUR 7,000,000<sup>22</sup>, reducing the FIFA DRC amount by 1 million EUR.

#### **CAS Decision Third Mexès Case (Roma Sporting Sanction):**

The CAS determined that Roma would receive a transfer ban of only 1 more registration period and thus reduced the ban from the previous two that the DRC had decided.

Roma had stated at the trial that because they had received notice from FIFA on the 30th of June 2005 and that during June some players have already signed a contract with the club.

Then Roma filed an appeal as well as a request for the stay of the

17 CAS 2007/A/1298 & 1299 & 1300

18 The percentage of the transfer he was entitled to would increase the longer he spent with the Club.

19 If the exchange of the Player Matteo Brighi was accounted for.

20 Comparing a French centre-back of 22 years of age, to an English forward of 19 years of age is somewhat difficult. Furthermore, not every team is equally proficient in the transfer market. Some teams have a history of paying over market price for a Player in order to obtain the player they believe is necessary to win, and to prevent their direct competition from acquiring the talent. Real Madrid, Manchester United, and Chelsea are three perfect examples of clubs who engage in this practice.

21 It was submitted that Portsmouth FC in England had offered EUR 7,000,000 for the Player's service, and this offer was also refused by Auxerre. Furthermore, it was brought to the attention of the CAS that both Manchester United and Chelsea FC had contract with Auxerre and engaged in a series of negotiations to by the Player. However, Auxerre were very reluctant to negotiate and made it difficult for the player to secure a transfer elsewhere.

22 However it perhaps it is appropriate to draw attention to the Portsmouth bid which was turned down by Auxerre and recognize that the two figures are identical; EUR 7,000,000.

execution. Such a stay was not granted by the President of the TAS Appeal proceedings initially on his decision dated 25th July 2005 but a second request was made to the Panel itself on the 2nd August 2005, with new facts such as a claim by the players that have signed with the club and that cannot be registered because of the ban.

The Panel decided that due to those new facts, the stay should be granted and gave it on the 8th of July 2005. Thus, Roma was not only entitled to register the previous players that have already signed a contract but also the possible new ones up to the end of that transfer window (i.e. 31st of August).

Once it was clear that Roma made the offer for a transfer and they signed quite immediately afterwards a contract with Mexès, the induction to the breach was evident and a sanction had to be taken by CAS.

The fight was on whether the sanction had to be reduced to one only as July 2005 had not been a free month due to the decision of not granting the stay to Rome. CAS accepted Roma's position that July

and the eight days of August should be accepted as having been already punished, even though players have been contracted before that date (June) and after (rest of August).

Roma expressed the view, and the CAS agreed<sup>23</sup> that this should constitute having already served half of their transfer registration ban, and they should only be prevented from signing players for one more transfer window.

This was a splendid decision for Roma, as it had really only one ban being the only case where a reduction on two transfer windows was given.

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<sup>23</sup> The CAS took the view that imposing a ban of 2 transfer window periods on Roma when they had not acted during the previous transfer window allegedly

anticipating a ban was contrary to the "Spirit of the Regulations", therefore they did not take a literal interpretation of the Regulations.

# CAS 2004/A/593 - Football Association of Wales v. UEFA: Comment

by Tim Kerr\*

1. This case demonstrated the difficulty in persuading UEFA's disciplinary bodies, and the CAS, to impose a sanction on an entire football team where the evidence shows doping by only one player in the team. The Football Association of Wales ("FAW") succeeded in establishing that CAS had jurisdiction to hear its appeal against the decision of UEFA's Appeals Body, but failed in its attempt to get the decision overturned and in its ambitious quest to obtain a ruling effectively substituting Wales for Russia among the qualifying teams for Euro 2004.
2. Russia had eliminated Wales by winning 1-0 on aggregate over two matches in a play-off. The FAW argued that this achievement may have been secured through illegal and corrupt sporting advantage, i.e. doping of a player, and not fairly according to the rules of the game. The FAW's central proposition was that UEFA's rules should be interpreted as requiring that the benefit of the doubt should not go to the team whose player has cheated, but to the team whose players have not cheated.
3. The facts were these. On 11 November 2003 a Spartak Moscow player, Titov, tested negative for banned substances. The Football Union of Russia ("FUR") found him eligible for selection for the national team. On 15 November Titov was a non-playing substitute at the 0-0 draw in Moscow, in the first leg of the play-off between Russia and Wales. After the match, he was selected for drug testing.
4. Before the result of that test was known, the return match was played in Cardiff on 19 November. Titov played until the 59th minute when he was substituted, with the score standing at 0-1 to Russia. That was also the final score, so Russia was declared the winner and Wales eliminated. Titov was not tested on that occasion. But on 3 December the IOC accredited laboratory reported to UEFA that Titov's sample taken in Moscow had tested positive for bromantan; a performance enhancing banned substance known to have been used by Soviet military pilots as well as by sportsmen and women, to increase their endurance.
5. On 22 January 2004, UEFA's Control and Disciplinary Body suspended Titov for 12 months and fined him CHF 10,000. It also fined his club, Spartak Moscow, CHF 20,000, but expressly

- absolved the FUR from all responsibility. The FAW protested but after correspondence and written submissions, on 3 February 2004 UEFA's Control and Disciplinary Body rejected the FAW's complaint, reasoning that it had not been shown that Titov was doped in the second match, in which he actually played; and that even if that had been shown, neither UEFA's rules nor the (then newly promulgated) World Anti-Doping Code provided for sanctions to be imposed on entire teams unless more than one player from the team had committed an anti-doping rule violation.
6. The FAW appealed against that ruling. The FUR was joined to the appeal as an interested party. At a hearing on 1 April 2004 in Lausanne, UEFA's Appeals Body rejected the appeal and upheld the decision appealed against. The Appeals Body pointed out that Titov had not been disqualified when he played in the second match, before the result of the test in Moscow was known; that on the true construction of UEFA's rules (Articles 6 and 12.4 of UEFA's Disciplinary Regulations 2002), a national federation could be held responsible for a doping offence only if it was *implicated* in the offence, and that this could not be proved in the present case.
7. The Appeals Body heard disputed evidence from scientists called by both parties, but did not find it necessary to resolve a scientific dispute over whether the effect of bromantan on Titov's performance would have lasted from 11 November 2003 (the date of the first match) until 19 November 2003 (the date of the second match). This was because the Appeals Body reasoned that even if Titov was still doped when he played during the second match, he was eligible to play and his subsequent ban for 12 months had not then yet been imposed and was not retroactive.
8. On 10 April 2004 the FAW appealed to the CAS. The language of the appeal was English and the applicable law was Swiss law, in the absence of any other choice of law by the parties. The hearing of the appeal took place on 12 May 2004 in Lausanne. At the hearing, the author spoke for the FAW (instructed by Michael Culley, of Loosemores, solicitors in Cardiff) except in relation to matters specifically concerned with Swiss law, which were addressed by Dr Marco Niedermann, a distinguished commercial lawyer practising in Zürich. UEFA was ably represented by M. Ivan Cherpillod, also an eminent Swiss lawyer practising in Lausanne.
9. UEFA contested the jurisdiction of the CAS. The question of jurisdiction turned on whether (per Article 62.1 of UEFA's Statutes)

\* Tim Kerr QC, Counsel for the FA of Wales

- the decision of the Appeals Body was a “decision under civil law (of a pecuniary nature)”. UEFA submitted that it was not, but rather that it was a decision “of a sporting nature” (per *ibid.* Article 62.2) and thus excluded from challenge on appeal to the CAS. The FAW submitted that the exception in the case of decisions “of a sporting nature” should be narrowly construed and relied on witness evidence of the substantial financial consequences attendant on qualification for, or elimination from, Euro 2004.
10. In their decision, the CAS arbitrators (Professor Michael Geistlinger, Mr Peter Leaver QC and Professor Massimo Coccia) looked at the Swiss law genesis of Article 62 of UEFA’s Statutes and noted that the expression “of a pecuniary nature” corresponded to the phrase “*de nature patrimoniale*” in Article 177 of the Swiss Federal Code on Private International Law. After considering Swiss Federal Tribunal case law dealing with that provision, the CAS panel decided that it did have jurisdiction to determine the appeal, on the following basis (para 33 of its decision):  
*“in cases in which it is not clear whether the sporting or the pecuniary nature of the decision is predominant, it should normally be the case that the matter will be considered to be of a pecuniary nature. .... a dispute is of a pecuniary nature if an interest of a pecuniary nature can be found in at least one of the parties. ...”*
  11. The panel therefore went on to consider the merits. The FAW submitted that the doping offence occurred while Titov was on international duty, not club duty, and that the FUR must be regarded as implicated because it was involved in the offence in that Titov was under the direction and control of the FUR, not Spartak Moscow, when the offence was committed.
  12. The FAW relied on the award in the *Eindhoven* case, TAS 2002/A/423 as establishing the principle of a host association or club’s strict liability under UEFA disciplinary rules for the conduct of supporters; and that *a fortiori* that reasoning applied to strict liability for the conduct of players. Alternatively, the FAW contended that if negligence was required, the evidence of negligence on the part of the FUR was very strong and the burden of proof should rest with the federation of the cheat, not the federation which is the victim of the cheat.
  13. Finally, the FAW submitted that the CAS should not apply UEFA’s unwritten rule whereby a team would not be sanctioned unless more than one player was found to be doped; there was no express provision in UEFA’s disciplinary regulations to that effect, and it would be unfair and would encourage cheating to apply that principle given the small number of tests carried out after football matches.
  14. UEFA submitted that, on the contrary, implication in a doping offence by a national federation required intent or, at least negligence on the part of the federation and that there was no evidence of such intent or negligence on the part of the FUR. UEFA also submitted that provisions in other sports which allowed for disqualification of an entire team where only one member of the team is doped, were not appropriate in the case of football and would violate the principle of proportionality, given the interest of the undoped players in the team concerned.
  15. The panel’s decision was squarely against the FAW and in favour of UEFA. The panel started by assuming, without deciding, that Titov remained under the effects of bromantan during the second match. Even on that basis, the FUR was not liable for Titov’s offence. While a host association and host club are responsible for order and security before, during and after matches (Article 6.2, as interpreted in the *Eindhoven* case), culpability is required before a sanction can be imposed.
  16. In the case of a doping offence, Article 12.4 imposes liability on host associations and clubs only where they are “accomplices or abettors”, and this must be interpreted in accordance with Swiss civil and criminal law as requiring that:  
*“before a person can be fixed with liability he must at least have participated in the violation of a law and been aware of the violation and, therefore, [this] is more than just being ‘involved’”* (paragraph 50).
  17. In the context of the case before the panel, that would mean that in order for the FUR to be liable for Titov’s doping offence, the FAW would have had to show “participation of an association [the FUR] in the voluntary or negligent use of a banned substance or method by a player being aware of his doing so” (paragraph 51).
  18. Turning to the evidence, the panel rejected the FAW’s alternative case that if it were necessary to show fault on the part of the FUR, circumstantial evidence pointed overwhelmingly to Titov’s doping offence having been committed after and not before Titov had joined the national squad, i.e. while Titov was on international duty and under the direction and control of the FUR, not Spartak Moscow.
  19. The panel assumed in the FAW’s favour, without deciding, that Titov’s body was free from bromantan on 11 November 2003 and that his doping offence was committed while under the direction and control of the FUR. But even on that basis, the panel rejected the *res ipsa loquitur* argument advanced by the FAW and held that “there is no evidence at all that the FUR cooperated intentionally or negligently in the use of this banned substance by Titov” (paragraph 53).
  20. In other words, it is not enough to show that a doping offence is committed while a player is on international duty under the direction and control of his national association rather than his club. The challenger must perform the almost impossible task of adducing evidence that the national association was aware of and participated in the doping offence. The panel commented that:  
*“... it is impossible for a federation or club to control a player every day for 24 hours; the player will always have a chance sooner or later to hide and take by himself a forbidden substance.”* (paragraph 53).
  21. The FAW’s appeal therefore failed and the FAW was ordered to pay CHF 5,000 as a contribution to UEFA’s costs. The panel did, however, state that it “understands and sympathises with the FAW’s concerns at having played a team with a cheat, at least in the first match ...” (paragraph 55). Perhaps of greater consolation to Welsh football fans was Russia’s early exit from Euro 2004 after losing to Portugal and Spain, despite being the only team to beat the eventual winners, Greece.





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by Ian Blackshaw

## The Island of Guernsey to Introduce New IP Image Right

The commercialisation of the image rights of sports personalities, such as Tiger Woods and David Beckham, are big business for the sports persons themselves and those who wish to be commercially associated with them to promote their goods and services. However, the legal protection of sports image rights varies around the world. On the subject of sports image rights generally, see '*Sports Image Rights in Europe*' edited by Ian S Blackshaw & Robert C R Siekmann, 2005, The TMC Asser Press, The Hague (ISBN 90-6704-195-5).

In the United States, generally speaking, these rights are legally recognised and protected as so-called 'rights to publicity' - in 28 out of the 50 States, including, not surprisingly, California, the home of celebrities.

In Continental Europe, known as 'personality rights', these rights are protected under special provisions in the written Constitutions or special Legislation of the countries concerned. For example, in Germany, articles 1 & 2 of the German Constitution protect image rights (see the case of *Kahn v Electronic Arts GmbH*, 25 April, 2003, in which the image rights of Oliver Khan, the former German national team goalkeeper were protected against commercial use without his consent). And, in France, article 9 of the French Civil Code confers a general right of privacy on individuals as part of a package of rights protecting the person.

On the other hand, in the UK, there is no such thing, legally speaking, as an image right *per se*. Image rights are only legally protected, if the reproduction or use of a person's likeness "results in the infringement of some recognised legal right which he/she does own" (per Mr Justice Laddie in *Elvis Presley Trade Marks* [1997] RPC at p 549). An example of such a right would be a registered trademark. For example, a sports personality may have registered his nickname as a trademark, as in the case of the Paul Gascoigne, the English footballer, who is widely known as 'Gazza'.

However, in the UK, image rights are recognised for tax purposes. See the UK case of *Sports Club plc v Inspector of Taxes* [2000] STC (SCD) 443, in which Arsenal Football Club succeeded in having payments made to off-shore companies in respect of the Club's commercial exploitation of the image rights of their players, David Platt and Dennis Bergkamp, classified, for tax purposes, as capital sums and,

therefore, non-taxable as income. The Special Commissioners of Income Tax held that, for tax purposes, image rights are to be considered to be capital assets and, as such, a species of property.

Now in Guernsey, one of the British Channel Islands, which lie off the North West coast of France and which are on the so-called OECD 'white' list of tax havens, a new Law, *The Intellectual Property (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004*, when it comes fully into force, will recognize legally a person's image right; and it will be possible to register that right, at the Intellectual Property Office in Guernsey, as a species of intellectual property, which can then be legally protected and enforced.

As Jason Romer, a partner in the commercial department of the Guernsey Law Firm *Collas Day* and a director of *Collas Day IP Management*, in an article, dated 28 September, 2009, published in '*The Lawyer Magazine*' and entitled '*Channeling your IP through Guernsey*' has remarked:

*"Image rights are big business and are already established and licensed from Guernsey to reflect the value of those rights. Proposed new legislation will see the ability to register an image right in Guernsey. While a trademark demonstrates the distinctiveness of a brand, so the image right will demonstrate the distinctiveness of an individual."*

Of course, to take full advantage of this new image right and tax shelter its commercial exploitation, it will be necessary, as Romer adds:

*"[To structure] IP royalties or licence fees through a Guernsey company or trust structure, [and as such] the value of that IP may be enhanced and maximised by benefiting from a benign tax environment and strong IP laws."*

Once the new Law comes into force, this will make registering in and exploiting sports image rights through Guernsey even more attractive than hitherto, from a legal and also a tax-saving point of view, as the rate of tax is zero!

## The Lisbon Treaty is Finally Ratified

# The Possible Implications of its 'Sport Article' for Sport in the New Streamlined Europe

After eight years and much wrangling and politicking, the Lisbon Treaty of 13 December, 2007 was finally ratified with the signature of the Czech President on 3 November 2009 and is effective as of 1 December, 2009.

This is not only a milestone in the history and evolution of the so-called European Project, but also - to some extent - for the regulation of sport within the twenty-seven Member States of the Union, comprising some 500 million people. For the first time, the governing Treaty contains a specific provision on sport giving the Union competence in the sports arena. The Lisbon Treaty now contains a so-called 'Sport Article' in Article 165, which in sub-paragraph 2 of paragraph 1 of this Article makes the following provision:

*"The Union shall contribute to the promotion of European sporting issues, which taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."*

In effect, the Article recognises the social and political role and importance of sport at the European level.

Sub-paragraph 2 of the Article makes further provision as follows:

*"Union action shall be aimed at:*

- developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen."*

Finally, sub-paragraph 3 of the Article looks at the wider relationship between sport in the Union and beyond its borders and provides as follows:

*"The Union and Member States shall foster cooperation with third countries and the competent international organizations in the field of education and sport, in particular the Council of Europe."*

In fact, the Council of Europe has been very active over the years in the sporting arena -not least in the area of doping in sport. For further information on the scope of the activities of the Council of Europe in sport, see *'The Council of Europe and Sport: Basic Documents'*, edited by Robert C R Siekmann and Janwillem Soek, 2007, The TMC Asser Press, The Hague.

So, what difference will such a general and rather vaguely worded 'Sport Article' make to the existing and future body of European Union Law in the sporting field?

In my opinion, very little! In fact, perhaps the more important EU

text on sport is that to be found in the EU 'White Paper' on Sport, published by the European Commission on 11 July, 2007 (COM(2007) 391 Final).. This provides a framework in which the EU operates in sport and recognizes - as does the new 'Sport Article' - the 'specificity of sport'. A term which - no doubt - will be the subject of further clarification in the future.

However, according to Sepp Blatter, President of the World Governing Body of Football, FIFA, who recently met with the Vice-President of the European Parliament, Pál Schmitt, whom he has dubbed as the 'EU Ambassador on all Sports', the new 'Sport Article' will make it easier for FIFA to introduce the so-called 6+5 rule. For a long time, it has been considered - a view to which the writer of this Opinion subscribes - that the 6+5 Rule was incompatible with EU Law. When recently questioned on this point, in the light of the Lisbon Treaty, Blatter had the following to say:

*"Contrary to what may have been said, the '6+5' rule does not contravene the European Labour Law on the freedom of movement. Clubs will still be free to take on as many foreign players as they want. When a match kicks off however, they will have to have six players on the pitch who are eligible for the national team of the country in question."*

Under current FIFA rules, a player can live in a foreign country for only two years before he can claim that nationality. The 6+5 rule will also seek to change this and move the limit to five years to stop the misuse of the loophole in the previous ruling.

Currently, many South Americans and Africans are being 'nationalised' by a whole host of countries across the world. FIFA are, therefore, trying to stem this flow of talent by the introduction of the new ruling.

UEFA are also considering introducing their own version of the 6+5 rule, namely, the 4+4 rule! They are also currently looking at the possibility of banning transfers of players aged 17 and under. This latter provision may pass legal muster under sub-paragraph 2 of the 'Sport Article' quoted above, which seeks to protect the physical and moral integrity of the youngest sports persons. In other words, a general rule against the exploitation of minors involved in sport!

Be all the above as it may, it seems to me that the main effect of the new 'Sport Article' will be to add some legitimacy to the intervention of the EU in the sports arena - if, in fact, any is needed! After all, the EU has successfully managed without the 'Sport Article' for more than 50 years and the existing rules will continue to apply!

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## WADA to Introduce Blood Profiling Programme to Catch Drugs Cheats: but what about their Human Rights?

After years of discussion and development, the World Anti-Doping Agency (WADA) is reportedly ready to launch a global programme to monitor athletes' blood profiles for evidence of cheating.

Meeting in Stockholm at the beginning of December 2009 to mark the 10th anniversary of its creation in Lausanne, Switzerland, WADA is expected to ratify the 'athlete biological passport' scheme, under consideration since 2002.

The scheme involves collecting and storing athletes' blood samples and monitoring them over time for any variations that could indicate doping - without carrying out an actual positive test.

After a series of scandals in cycling, especially its flagship event, the *Tour de France*, UCI (The International Cycling Federation) has implemented its own blood profiling scheme, but WADA has now finalised its own programme, which it hopes can be adopted by sports federations and organisations in countries around the world.

WADA Director General, David Howman, explained the *rationale* behind this move as follows:

*"The idea is to provide the anti-doping world in general with a model so that any organisation, whether it be at the national or international level, can use this to catch drugs cheats."*

But how would the scheme work? The blood profiles would be registered in WADA's database and could be used for target-testing or sanctioning athletes when abnormal values are recorded.

Howman also added:

*"This would add a major weapon in the anti-doping fight, which has traditionally relied on analysis of standard drug tests."*

But he was also quick to point out that WADA will not be able to force sports governing bodies and sporting organisations around the world to adopt the scheme: admitting that it is not cheap, simply because it requires taking at least five samples from an athlete to establish a profile. But he thinks that it will show commitment if sport introduces the scheme.

Howman also said that WADA hopes to expand the scheme beyond just blood profiles and is also looking at other biological issues, such as hormonal ones.

But, although he believes that WADA has got the process right, he admits that WADA has to develop the science further!

Whilst not condoning in any way and being in entire agreement with the basic objective of ridding sport of drugs cheats, this cannot, in my view, be done at all costs. In particular, in contravention of athletes' human rights.

The main problem is that there will be no traditional testing of athletes, but conviction will follow from any variations that are found in athletes' blood profiles that *"could indicate doping."*

In my opinion, therefore, the scheme falls foul of athletes' basic human rights to a fair trial and, in particular, the presumption of innocence until proved guilty. It also represents an invasion of their rights to privacy. Shades of the WADA 'whereabouts rule'. Both in contravention of the provisions of articles 6 & 8 respectively of the European Convention on Human Rights of 1950. The scheme could also breach Data Protection Laws.

I am sure that the international sports governing bodies and other sporting organisations around the world will consider these matters very carefully before adopting and introducing the WADA scheme. Otherwise, I am equally sure that they will face many legal challenges from athletes to the validity of the scheme particularly from a human rights' point of view.

Howman described the WADA scheme as *"a great example of plenty of advances that ought to be made"* to catch drugs cheats. But watch out, the end - however laudable - does not justify the means!

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## Chelsea Sporting Sanctions Frozen Pending the Final Outcome of their Appeal to CAS

The Court of Arbitration for Sport (CAS) has issued on 6 November, 2009 the following Statement to the Media in the *Chelsea/Kakuta/Lens* appeal case:

BEGINS

Tribunal Arbitral du Sport Court of Arbitration for Sport

PRESS RELEASE

For further information related to the CAS activity and procedures in general, please contact

Mr. Matthieu Reeb, CAS Secretary General. Château de Béthusy, Avenue de Beaumont 2, 1012 Lausanne, Switzerland. Tel: (41 21) 613 50 00; fax: (41 21) 613 50 01, or consult the CAS website: [www.tas-cas.org](http://www.tas-cas.org)

FOOTBALL

CHELSEA FC - GAËL KAKUTA - RACING CLUB DE LENS

REQUEST FOR STAY GRANTED

*Lausanne, 6 November 2009* - The Court of Arbitration for Sport (CAS) has granted the request for a stay filed by Chelsea Football Club Ltd and Mr Gaël Kakuta in relation to the decision taken by the FIFA Dispute Resolution Chamber on 27 August 2009.

The FIFA Dispute Resolution Chamber imposed, *inter alia*, a restriction of four months'

ineligibility on Mr Gaël Kakuta, and Chelsea Football Club Ltd was banned from registering any new players, either nationally or internationally, for the next two complete, consecutive registration periods. Such sanctions are now stayed until the CAS renders its final decision in this matter.

ENDS

The legal effect of this ruling by the CAS is to suspend the decision of the FIFA Dispute Resolution Chamber (DRC) pending the final outcome of the appeal to CAS against it by Chelsea Football Club, filed on 22 October, 2009. This means that, *inter alia*, the ban on transfers imposed on Chelsea until January 2011 has been temporarily lifted.

It is expected that the Appeal will be heard and determined in the first quarter of next year (2010) once all the 'pleadings' in the case have been filed at the CAS and answered by the parties, including FIFA, which, I am sure, contrary to their normal practice in CAS appeal cases against their DRC decisions, will actually wish to intervene in such a leading case on 'tapping up' of football players.

Watch this space!

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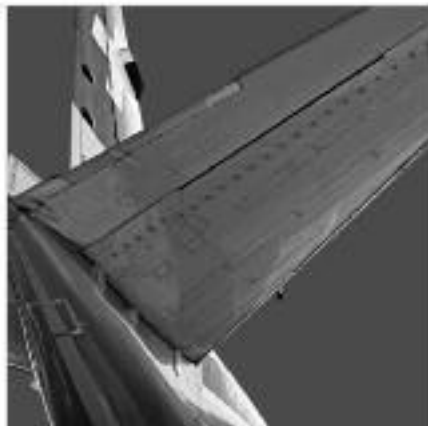
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# South Africa 2010 World Cup: FIFA Wins Landmark 'Ambush Marketing' Case

This year sees the FIFA World Cup taking place in South Africa - the first time in its history that it will be staged on the African Continent. This in itself is a landmark event; and another landmark event is the recent ruling of the Pretoria High Court in a high profile 'Ambush Marketing' case in the run up to the Tournament.

'Ambush Marketing' is a form of unfair marketing and has been described as 'parasite marketing'. Others claim that it is clever and creative marketing and fair game! But what actually is 'Ambush Marketing'?

Basically, a company or firm claims an association, through advertising and consumer promotions, with a sports event, which it does not have, and, perhaps more importantly, for which it has not paid a penny. In such a case, the official sponsors do not get value for the considerable sums that they have expended on the particular sponsorship. 'Ambush Marketing' not only adversely affects official sponsors and undermines their sponsorships; it also dilutes the value and integrity of the sports events themselves, as well as causing confusion amongst consumers.

For further general information on this important topic of 'Ambush Marketing' and the corresponding 'Brand Protection Programmes,' see Chapter 11 by Ian Blackshaw in 'Sports Law' by Gardiner et al, 2006 Third Edition, Cavendish Publishing, London, ISBN 10: 1-85941-894-5.

Of course, the more popular and more global reach the sports event enjoys, the more it is likely to be the subject of attack from 'Ambush Marketers'! And, therefore, the more protection the organisers need to put in place to safeguard and defend their legitimate interests.

So, what are these interests and why, in the case of the World Cup, is it important for FIFA to fight 'Ambush Marketing'? What is the rationale? These questions have been very well answered by Dr Owen Dean, a partner and IP specialist in the leading South African Law Firm, Spoor and Fisher, and FIFA's legal adviser on these matters in relation to the 2010 World Cup:

*"The main objective of the Federation Internationale de Football Association (FIFA) for the 2010 World Cup Tournament is to make it a success not only for the players, the football fans and the game of soccer, but also from a financial point of view and in particular for the sponsors of the event. Sponsorship is an integral and essential part of a world cup tournament and without the funds provided by sponsors the enormous costs involved in running an event such as a Soccer World Cup could not be met. FIFA therefore sets itself the goal of giving its sponsors value for money so that sponsor will continue to support the event in the future and thus make it viable.*

*When FIFA signs up a sponsor for a world cup tournament it undertakes to give that sponsor, and its sponsors in general, exclusivity in the use of the event as a platform to parade and promote their brands. More particularly, when FIFA signs up a sponsor which operates in a particular field, for instance providing credit card and other financial facilities, it commits itself to exclude that sponsor's competitors from using the event as a platform from which to promote their brands. It also assumes obligation to prevent all non-sponsors from seeking to gain promotional benefit from the event and thus from undermining the privilege which sponsors obtain from payment of the sponsorship fees.*

*In consequence it behoves FIFA to strictly control and police the use of the Soccer World Cup as a promotional platform. FIFA must ensure that non-sponsors do not ride on the back of the World Cup and bask in its limelight to the detriment of the sponsors. To this end FIFA has in the case of past Soccer World Cups pursued, and is actively pursuing in regard to the 2010 World Cup in South Africa, a rigorous rights enforcement program to curtail unauthorised use of the event for promotion purposes. The threats that FIFA faces in controlling the use of a World Cup Tournament for promotional purposes comes basically*

*from two quarters, namely the distribution of counterfeit merchandise and from so-called 'ambush marketing'."*

So what legally can be done about 'Ambush Marketing'?

Depending on the facts and circumstances of the particular case and depending also on whether the sports event is protected by a special law or statute, which is usually a basic requirement of FIFA for awarding a host country the right to stage the World Cup, it may be possible to obtain a Court Injunction, an award of damages or other legal remedies.

In the case of the 2010 South Africa World Cup, special legal measures are, in fact, available to FIFA and the local organising committee to counteract 'Ambush Marketing'!

First of all, the 2010 World Cup in South Africa has been declared in May 2006 by the Minister of Trade and Industry a 'Protected Event' under and for the purposes of the provisions of Section 15A of the Merchandise Marks Act, 1941. The legal effect of this declaration is that 'Ambush Marketers' can be prevented from competing unlawfully with FIFA by obtaining special promotional benefit from, or associating themselves with, the 2010 World Cup, without being official sponsors.

FIFA has also registered a number of trademarks related to the event, including WORLD CUP 2010, SOUTH AFRICA 2010 and TWENTY TEN SOUTH AFRICA.

Section 15A, an amendment to the Merchandise Marks Act, 1941, was passed on 30 December, 2002 in anticipation of the Cricket World Cup held in South Africa in 2003, and provides as follows:

## "Abuse of trade mark in relation to event

- 15A. (1) (a) The Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the *Gazette* designate an event as a protected event and in that notice stipulate the date-
- (i) with effect from which the protection commences; and
  - (ii) on which the protection ends, which date may not be later than one month after the completion or termination of the event.
- (b) The Minister may not designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities.
- (2) For the period during which an event is protected, no person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event.
- (3) For the purposes of subsection (2), the use of a trademark includes-
- (a) any visual representation of the trade mark upon or in relation to goods
  - (b) any audible reproduction of the trade mark in relation to goods or the
  - (c) the use of the trade mark in promotional activities, which in any way, directly or indirectly, is intended to be brought into association with or to allude to an event.
- (4) Any person who contravenes subsection (2) shall be guilty of an offence.
- (5) For the purposes of this section 'trade mark' includes a mark; or in relation to the rendering of services."

As will be seen, this statutory provision, in effect, is a criminal measure; and, in fact, 'Ambush Marketers' can, amongst other penalties, in serious cases be sent to prison! However, FIFA is using it as a civil measure by claiming that, by acting contrary to law in conducting offending trading practices, the offenders are competing unlawfully with FIFA. On the strength of these unlawful acts, FIFA, as part of its Anti 'Ambush Marketing' Programme, is seeking interdicts (injunctions) restraining the unlawful conduct; delivery-up of all goods bearing the offending marks; costs of suit; as well as various other forms of ancillary relief. FIFA is also reserving its rights to claim damages from the offenders in further proceedings.

Taking advantage of the provisions of section 15A of the Merchandise Marks Act, 1941, and following this legal approach, FIFA launched proceedings against Metcash Trading Africa (PTY) Ltd (*Metcash*), a leading distributor of consumer products in South Africa, in November 2007 when *Metcash* refused to cease selling a lollipop product marketed under the name of "2010 POPS" in its Trade Centre stores. The packaging of the product featured images of footballs in the design of the official ball of a past FIFA World Cup™ tournament combined with the South African flag. FIFA claimed that this, taken together with the name of the product, took advantage of the publicity surrounding the 2010 FIFA World Cup™ and constituted 'Ambush Marketing'.

The Court agreed that *Metcash* was competing unlawfully and granted FIFA the corresponding injunction, as well as its court costs. The text of the Pretoria High Court judgment, issued on 1 October, 2009, in this landmark *Metcash* case, in view of its importance and precedent setting nature, is reproduced in full in the Appendix to this article.

So, 'Ambush Marketers' watch out - the *Metcash* case has set an important precedent and should act as a clear warning to them not to engage in unfair competition in relation to the 2010 World Cup in South Africa!

## Appendix

In The High Court of South Africa (North Gauteng High Court, Pretoria)

Case No: 53304/07

In the matter between

Federation Internationale de Football Association (FIFA)

Applicant

and

Metcash Trading Africa (PTY) LTD

Respondent

Judgment

Msimaki, J

## Introduction

[1] The Applicant is an association which is organised and exists under the laws of Switzerland. The Applicant is a world wide body of "association football". According to Mr David Murray the deponent to the founding affidavit, the Applicant was founded in 1904 and its membership consists of National Football Associations of 208 countries around the world. The Applicant is the organiser and manager of the world famous international soccer tournament officially called the FIFA WORLD CUP and commonly known as 'The soccer world cup' or 'World cup'. The tournament is staged once in four years. Mr Puckrin, on behalf of the Applicant, contended that it is probably the best known and supported sports tournament the world over. Several national teams compete in several qualifying matches and the final competition which will be staged in South Africa in 2010. The deponent to the founding affidavit, Mr David Murray, ("Murray") has given figures of international coverage of the final competition in a few world cups as follows: 1998 tournament had 33 billion viewers, the 2002 tournament 28 billion and the 2006 tournament 26 billion. Organising and conducting a soccer world cup tournament is said to be very expensive. According to him it cost in excess of R5 bil-

lion to stage the 2006 tournament which was held in Germany. To stage the tournament, the Applicant is said to rely on: television rights which it grants to broadcasters; sponsorships by commercial enterprises, merchandising goods and services that have a connection in the course of trade with the tournament and licensing its sponsors and merchandisers who use its intellectual property. The licensees and sponsors expect protection and a measure of exclusivity when they pay the fees. It follows therefore, it is submitted on behalf of the Applicant, that no licensee or sponsor would want to be associated with the soccer world cup unless all who enjoy the benefits pay fees which usually comprise large sums of money. Because of the position it occupies, the Applicant enjoys both statutory and common law protection in its trade marks and in the soccer world cup event that it stages. The Applicant is the registered proprietor of trade mark number 2003/040150 SOUTH AFRICA 2010 BID & DEVICES ("the Applicant's trade mark") which is registered in class 30 in respect of, inter alia, "confections". The soccer world cup has been declared a "protected event" in terms of section 15 A of the Merchandise Marks Act of 1994 ("the MMA") which permits the Minister to designate an event as a "protected event". Government Gazette Notice 28877 of 25 May 2006 ("the Ambush Marketing Notice") read with section 15 A of the MMA evidences the declaration of the soccer world cup as such protected event. It is submitted on behalf of the Applicant that soccer world cup tournaments have had significant publicity and public interests in South Africa. It is further submitted that there is enormous reputability and goodwill in the 2010 soccer world cup in South Africa and that strong common law rights in the event vests in the Applicant.

## Facts of the Case

[2] The Respondent is said to be one of the largest South African distributors of fast moving consumer goods which has made use of the mark Astor since 1985. Astor is said to enjoy a very substantial representation in the market place. The Astor lollipops, the subject matter of this application, are marketed under the trade mark Astor. The trademark was registered in 1985. Mr Clive Kairuz, ("Kairuz") the deponent to the answering affidavit, averred that the Astor 2010 pops formed an extension of the Respondent's range of confectionery and that they were launched in December 2004. He further averred that they have contributed 3.3 million Rands worth of revenue since they were launched and the sales for the period March to November 2007 contributed R816,539.00. The Applicant alleges that the Respondent is in unlawful competition with the Applicant on the strength of the fact that the Respondent is contravening section 15 A of the MMA. The Applicant contends that the Respondent intended its pops to be associated with, not only soccer, but also the 2010 soccer world cup. Contrariwise, the Respondent, contends that it intended its pops to be associated only with soccer in general. It is further the Applicant's contention that the soccer world cup was uppermost in its mind when the Respondent considered its trade mark for its pops. According to the Applicant, the Respondent's use of its trade mark in relation to the event is calculated to achieve publicity for its trade mark and in the process derive special promotional benefit from the event without the prior authority of the organiser of the event and without paying for it. The Applicant contends that the Respondent's use of the trade mark in its promotion activities directly or indirectly is intended to bring it into association with or allude to the event. This, the Respondent denies. The Applicant, initially brought its application on the basis that the Respondent's conduct complained of constituted passing off, a contravention of section 15 A of the MMA and/or section 9 (d) of the Trade Practices Act of 1976 (TPA); and trade mark infringement in terms of the Trade Mark Act of 1993 ("the TMA").

At the end the matter was argued on the unlawful competition on the strength of the contravention of section 15 A of the MMA. The argument did not include the other two heads which, Mr Puckrin submitted, were not necessarily abandoned. This then narrowed

the issues to be resolved or determined. The Applicant, initially, had sought an order in the following terms:

- “1. restraining the Respondent from infringing the Applicant’s trade mark registration no. 2003/04015 SOUTH AFRICA 2010 BID & device in class 30 by making unauthorised use, in the course of trade, of the mark 2010 POPS and/or 2010 in conjunction with depictions of the South African flag or parts thereof and/ or depictions of soccer balls in relation to confectionery products;
2. restraining the Respondent from passing its products off as being those of the Applicant or as being products made by or with its licence or authority and/or as being connected or associated with the Applicant and/ or the 2010 FIFA WORLD CUP SOUTH AFRICA event (hereinafter referred to as “the event”) by using the marks 2010 POPS and/or 2010 in conjunction with depictions of the South African flag or parts thereof and/or depictions of soccer balls in relation to confectionery products;
3. restraining the Respondent from competing unlawfully with the Applicant by contravening Section 15 A of the Merchandise Marks Act of 1941 (read with Notice 683 of 2006 appearing in Government Gazette no 28877 of 25 May 2006, designating the event as a protected event) and/or Section 9 (d) of the Trade Practices Act of 1976 by using the mark 2010 POPS and/or 2010 in conjunction with depictions of the South African flag or parts thereof and/or depictions of soccer balls in relation to confectionery products;
4. ordering the First Respondent to pay the costs of this application, including the costs of two counsel;
5. further and/ or alternative relief”

#### The Issues to be Determined

- [3] The issue then to be determined is whether or not the Respondent is contravening Section 15 A of the MMA, the issue that was argued on behalf of the parties.

#### Common Cause Facts

- [4] The following facts are common cause.
  1. The Applicant is the organiser and manager of the world famous international soccer tournament.
  2. The tournament is staged once in 4 years.
  3. The international coverage of the final competition in each world cup is enormous.
  4. Organising and conducting the soccer world cup tournament is very expensive.
  5. The organiser and manager relies heavily on:
    - 5.1 granting television rights to broadcasters;
    - 5.2 sponsors and commercial enterprises;
    - 5.3 merchandised goods and service that have connection in the course of trade with the tournament;
    - 5.4 The use of the intellectual property by the licensees and merchandisers.
  6. Licensees and sponsors pay fees which are of great assists to the organiser and manager.
  7. The Applicant is the registered proprietor of inter alia, trade mark number 2003/04015 SOUTH AFRICA 2010 BID & DEVICES (“The Applicant’s registered trade mark”) registered in class 30 in respect of inter alia, “confections”.
  8. In terms of section 15 A of the MMA read with GG Notice 28877 of 25 May 2005 (“The ambush marketing notice”), the soccer world cup has been declared a “protected event.”
  9. The soccer world cup tournaments have received significant publicity and public interest in South Africa.
  10. The 2010 soccer world cup has enormous reputé and goodwill which presupposes the existence of common law rights which vests in the Applicant.
- [5] It is important when determining the issue to have regard to the relevant legislation. The Applicant relies on section 15 A of the MMA.

Section 15 A of the MMA provides:

*“No person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby derive special promotional benefit from the event, without the prior authority of the organiser of such event.”* (my emphasis)

The use of the trade mark referred to in section 15 A (2) includes: *“the use of the trade mark in promotional activities, which in any way directly or indirectly, is intended to be brought into association with or to allude to an event.”* (my emphasis)

- [6] Mr Puckrin on behalf of the Applicant submitted that section 15 A needs no complicated interpretation as the section means what it says. It is his contention that the words should be given their simple meaning.
  - [7] The Applicant contends that the manufacturing and/or the offering for sale and/or the selling of confectionery products under the trade mark 2010 pops coupled with the partial depiction of the South African flag and depictions of soccer balls (“the offending marks”) seen on paginated papers 175, annexure “DM8” being images of the Respondent’s ASTOR 2010 POPS products showing the manner of use of the offending marks constitutes unlawful competition in that the Respondent is thereby contravening section 15 A of the MMA. The Applicant contends that in the event of the conduct of the Respondent being contrary to the provisions of section 15 A of the MMA then and in that event the conduct will amount to unlawful competition. The contention, in my view, has merit.
  - [8] It is contended on behalf of the Applicant that regard must be had to the fact that licensees and sponsors of a world cup tournament use their own trade marks on the licensed products to promote their own trade marks and businesses. The examples are: MTN, FNB and TELKOM. The use of its trade mark by the Respondent, according to the Applicant, shows that it intended its pops to be associated with soccer and 2010 soccer world cup. If the Respondent had only intended its pops to be associated with soccer only, then the need would not have been there to mention 2010 world cup. The soccer world cup, it is further contended, was in the Respondent’s ‘mind’ when its trade mark for its pops was considered. A proper consideration of the offending marks seem to confirm this. It is submitted on behalf of the Applicant that it cannot be correct that the numeral 2010 was chosen because the Shona Khona programme would run up to and until 2010. This, according to the Applicant, is simply because the offending marks make no reference to Shona Khona. The submission, in my view, appear to have merit. The change of the initial get up packaging of the Respondent to its current get up i.e. from annexure “J” to annexure “DM8”, according to the Applicant, with. This according to Mr Puckrin, simply means that section 36 of the Constitution would allow and justify the limitation of the Respondent’s rights to freedom of expression or to the intellectual property if their use would deceive or confuse the public and end up jeopardising an event such as the soccer world cup and at the same time prejudicing the sponsors and the licensees of the event. There is again, in my view, merit in this submission.
  - [11] It was contended by the Respondent that section 15 A should be used in circumstances where “the user of a trade mark which has no reputation of its own relies on the event rather than the mark’s reputation to sell its products.” I do not think this is what the legislature intended as section 15 A envisages the use of one’s own trade mark in a manner which would derive special promotional benefit from the event. This is the Applicant’s contention which, in my view, appears to be correct. The nub of the matter, is whether the Respondent’s conduct is calculated to achieve publicity for the trade mark which results in the deriving of special promotional benefit from the event **without the prior authority of the organiser of the event**”, (my emphasis)
- If the answer is yes, then the conduct is unlawful, as Mr Puckrin submitted, irrespective of any damage to the “trade mark” of the Applicant. I agree.



[12] Mr Morley on behalf of the Respondent submitted that section 15 A has some constitutional implications. The submission, in my view, is correct. He further submitted that the court should favour an interpretation of legislation which is consistent with the constitutional provisions than the interpretation which would lead to invalidity (See *Daniels v Campbell N.O. and Others 2004 (5) South Africa 331 (CC) at [16] F - G*). This is trite law.

The facts of the case and the Respondent's version however, do not support the Respondent's case.

[13] It was contended on behalf of the Respondent that section 15 A of the MMA limits the prohibited use to that which is unfair and likely to result in material harm to the Applicant's marks. Section 15 A, as shown above, is not complicated. According to it, the conduct is either unlawful or lawful. The Respondent's version supports the Applicant's case. The Respondent's conduct clearly, falls foul of the provisions of 15 A of the MMA. The submission, on behalf of the Respondent, "that the Respondent's trade mark use cannot reasonably possibly be seen to constitute use in relation to the event itself nor that its use is intended to derive special promotional benefit from the event itself, as required by the section" in light of the facts of the case, in my view, cannot be correct.

[14] The Respondent's version clearly discloses its intention in the

marketing of its lollipops which is to derive special promotional benefit from the event itself. Evidence shows how the sales have gone up since the trademark use was implemented. The association with the event or the link thereto has generated a lot of money for the Respondent without the prior authorisation or authority of the organiser of the event. This conduct is therefore, unlawful. No money is paid for the association or the link while other sponsors and licensees are paying fees for the use of their trade marks.

[15] The Applicant, in my view, has made out a case for the relief that it seeks. The application, therefore ought to succeed.

[16] The order that I make, in the result, is as follows:

1. The Respondent is restrained from competing unlawfully with the Applicant by contravening section 15 A of the Merchandise Marks Act no 17 of 1941 (read with Notice 683 of 2006 appearing in Government Gazette no 28877 of 25 May 2006, designating the event as a protected event.)
2. The Respondent is ordered to pay the costs of this application including the costs of two counsel one senior the other junior

M.W. MSIMEKI  
JUDGE OF THE HIGH COURT

The International Sports  
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## Kicking Illegal Betting out of Football FIFA's 'Early Warning System'

The manipulation of sport through illegal betting undermines its integrity. For most punters, betting on the outcome of sporting events, especially football matches, football being the world's most popular sport, is an innocent and harmless pastime. But for a minority, it is way of getting rich by fixing and throwing the results of matches and betting large stakes on them.

FIFA, the world governing body of football, is well aware of this problem and, under article 2 (e) of its Statutes, is committed to protecting and safeguarding the integrity of the 'beautiful game' through prevention and early warning. And so, in 2005, in time for the last World Cup in Germany in 2006, FIFA set up a legally independent company, without any commercial interests at all in the field of international sports gaming, called 'Early Warning System GmbH' (EWS), which is based in Zurich, Switzerland. Incidentally, of course, one way of stopping such betting would be to impose a wholesale ban on sports betting generally, but that would not be in anybody's interests.

The aim of EWS is to identify irregular betting patterns and manipulation of gaming in international sport. The system is primarily geared towards prevention, wherever possible. But, where this not possible and illegal betting is identified after the event, EWS is available to assist sports governing bodies in pursuing offenders with appropriate sporting sanctions. For example, FIFA introduced in 2006 changes to its *Code of Ethics* prohibiting officials and players from participating in betting on football matches. Any breaches of this *Code* will be visited with severe sporting sanctions, which, hopefully, will act as a deterrent against would be offenders!

In order to identify illegal betting activities, EWS has established cooperation agreements with some 400 national and international bookmakers, who have agreed to report to EWS any irregular betting activities in sport that they may come across. All this is carried out on a strictly confidential basis between the bookmakers and EWS.

In addition to this valuable source of information, EWS is also in the process of monitoring the sports betting market and establishing a wealth of intelligence on sports betting through its own researches and those of specialist research companies and organisations around the world. As a result, EWS has already built up and is adding to a very important data base on the sports betting industry and how it functions and operates internationally.

Of course, it is impossible to completely eradicate criminal activity in the field of international sports betting, and EWS is fully aware of these limitations, but, nevertheless, is committed to doing all it possibly can, wherever possible, to identify, prevent and expose irregular and illegal betting on sport in general - EWS monitored the 2008 Beijing Olympics - and football in particular.

These are laudable and noble objectives and, with the support and cooperation of the international sporting community and bookmakers, who also have a significant commercial interest to protect, EWS stands a good - in fact, one might say, a sporting - chance of winning the battle against illegal betting which, without any doubt, blights sport, is incompatible with its objectives of fair play and undermines its integrity.

Further information about EWS and its activities can be obtained by logging onto its official website at [www.fifa-ews.com](http://www.fifa-ews.com).

The International Sports  
Law Journal



The Court of Arbitration for Sport (CAS) and the Swiss Bar Association (SBA) organise in co-operation with the Fédération Internationale de Football Association (FIFA) the following Seminar:

# CAS Jurisprudence and New Developments in International Sports Law

Friday, 17 and Saturday, 18 September 2010  
Olympic Museum, Lausanne, Switzerland

# Programme

## Friday, 17 September 2010

09.00 Welcome

**09.30 Opening Address**

(by representatives of the SBA, CAS and FIFA)

**09.45 Topic 1: CAS Proceedings in the Light of the Revised Code**

Session Chair: Matthieu Reeb

09.45 The revised CAS Code – what's new?

Matthieu Reeb

10.15 Questions

10.30 Break

11.00 CAS users' perspective

Juan de Dios Crespo Pérez

11.30 CAS arbitrators' perspective

Rui Botica Santos

12.00 Questions

**12.30 Lunch**

**14.00 Topic 2: The Athlete's Passport**

Session Chair: Antonio Rigozzi

14.00 Scientific aspects

Pierre-Edouard Sottas

14.30 Legal aspects

Philippe Verbiest

15.00 Questions

15.30 Break

**16.00 Topic 3: Sports Betting**

Session Chair: Marco Villiger

16.00 The position of the sports community

Peter Limacher

16.30 The position of sports betting companies

Peter Probert

17.00 The position of state authorities

Paul Scotney

17.30 Questions

**18.00 Closing Address**

**19.15 Cocktail**

**20.00 Dinner**

## Saturday, 18 September 2010

### 09.00 Opening of the Day 2

**Topic: The Jurisprudence of FIFA and CAS in Football Matters: Selected Questions**

Session Chair: *Michele Bernasconi*

09.15 The referee and the new challenges of football

*Michel Vautrot*

09.45 The jurisprudence of FIFA

*Omar Ongaro*

10.15 Questions

10.30 Break

11.00 The jurisprudence of CAS in football matters (excluding art. 17 RSTP)

*Jean-Philippe Dubey*

11.30 The jurisprudence of CAS with respect to Art. 17 RSTP

*Jan Råker*

12.00 Questions

### 12.30 Closing Address

*René Rall*

*Matthieu Reeb*

## Speakers

**Michele Bernasconi**, Attorney-at-law, Member of CAS, Zurich

**Rui Botica Santos**, Attorney-at-law, Member of CAS, Lisbon

**Juan de Dios Crespo Pérez**, Attorney-at-law, Valencia

**Jean-Philippe Dubey**, Dr. in Law, Counsel to CAS, Lausanne

**Peter Limacher**, Head of Disciplinary Services UEFA, Nyon

**Olivier Niggli**, Head of Legal Department, WADA, Montreal

**Omar Ongaro**, Head of Player Status, FIFA, Zurich

**Peter Probert**, Head of Integrity, Legal & Compliance Department, London

**Jan Råker**, Legal Counsel, Hamburger Sport-Verein e. V., Hamburg

**Matthieu Reeb**, Attorney-at-law, General Secretary to CAS, Lausanne

**Antonio Rigozzi**, Dr. in Law, Lecturer, University of Neuchâtel, Attorney-at-law, Geneva

**Paul Scotney**, Director of Integrity Services, Compliance & Licensing, London

**Pierre-Edouard Sottas**, Head of Research Project, Swiss Laboratory for Doping Analyses, Epalinges

**Michel Vautrot**, Former International Referee FIFA & UEFA, Besançon

**Philippe Verbiest**, Attorney-at-Law, UCI legal advisor, Leuven

**Marco Villiger**, Director Legal Affairs Division FIFA, Zurich



# Information/Registration

## Target audience:

CAS arbitrators, attorneys and lawyers working in arbitration and sports law, representatives of clubs and sport associations and federations, staff of legal departments, in-house counsel with companies active in the field of sport whose contracts or articles of association provide for CAS jurisdiction.

## Objectives of the seminar:

In its first day, this year's seminar will offer a discussion of selected questions arising from some of the most topical contemporary issues in sports law: the entry into force of a revised CAS Code of arbitration, the questions raised by the Athlete's Passport as indirect evidence of doping, and the legal issues associated with sports betting. The second day of the seminar, in keeping with what can now be considered as a tradition, will be devoted to football-related topics, including the abundant CAS jurisprudence in football matters.

## Venue:

The seminar will take place at the Olympic Museum in Lausanne.

## Languages:

The presentations will be held in German, French and English. All presentations will be translated simultaneously into the other two languages of the seminar.

## Participating conditions:

The participation fee is **CHF 640.–** for SBA members and/or CAS arbitrators, and **CHF 740.–** for all other participants. The participation fee includes the conference volume, lunch at the Olympic Museum on 17 September 2010, dinner at the hotel Beau-Rivage Palace on 17 September 2010 and the buffet in the Olympic Museum on 18 September 2010.

We kindly ask you to transfer your participation fee upon registering for the seminar. Payments must in any event be made by **15 June 2010** at the latest. The bank account number of the SBA is 235-367571.41G, UBS Berne (PC 80-2-2/BC 235, for foreign transactions: IBAN-Nr. CH09 0023 5235 3675 7141 G/BIC UBSWCHZH80A). Please quote the reference "Seminar CAS-SBA-FIFA" in your payment order.

## Registration:

You may register until **15 June 2010** by filling in the attached form and returning it by fax or mail. Alternatively, you may register online at [www.swisslawyers.com](http://www.swisslawyers.com). **Please note that the number of participants is limited.** For any cancellations made after **15 June 2010**, the participation fee will nevertheless be due.

An admission card for the seminar will be sent to you in due course.

## Hotel reservations:

Participants are responsible for the booking of their hotel accommodation. A significant number of rooms have been reserved with the hotels Beau-Rivage Palace and Angleterre & Résidence. You may book your accommodation until **15 June 2010** by using the attached application form (fax, mail), which you can also download as a pdf-document at [www.swisslawyers.com](http://www.swisslawyers.com).

## Transport:

We recommend that you use public transport. The Olympic Museum and the Beau-Rivage Palace and Angleterre & Résidence hotels are near the train station (ten minutes walking distance). The programme of the seminar is scheduled to accommodate public transport users.

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# UEFA Financial Fair Play Rules Should be Implemented without Delay

According to UEFA, the European Governing Body of Football, half of the leading professional football clubs in Europe are living beyond their means and are on the edge of administration. One of them, Portsmouth FC in the English Premier League, has recently gone into administration - the first club in this prestigious and generally regarded as the most lucrative League in the world - to do so!

Other clubs are saddled with considerable debts, like Manchester United - a staggering £716.5 million! The financial situation in football is far from rosy and to try to restore some financial stability into the 'beautiful game', UEFA has faced up to the problem, for which '*chapeau*' as the French say, and is introducing some so-called 'financial fair play' rules.

Under these rules, which are currently being formulated and are expected to be approved and issued in the Summer, football clubs that do not balance their books and break even - over a three year period - will be subject to financial and sporting penalties - in particular, will be banned from participating the major European club competitions - the Champions' and the Europa Leagues.

Meeting in General Assembly in Manchester on 2 March, 2010, the ECA (European Club Association - 93 clubs from 53 countries) - the replacement of the G-14 and within two years of its establishment proving to be an equally formidable force in European football - has persuaded UEFA to delay the implementation of the new rules, which were due to come into force during the 2012-2013 season, for five years

to 2015. They have also persuaded UEFA to lift the qualifying level of an annual turnover of €50 million, so that all clubs, irrespective of their financial size, will be subject to the new Rules, when they are implemented. This will provide a so-called 'level playing field'!

The new rules are concerned with losses - not debts - and so Manchester United, according to their chief executive, David Gill, are expected to be able to comply with them as they are "a well managed club" - as long, I would add, as they at least break even.

Also, clubs will not be able to owe one another money and failure to pay their players and non-playing staff - a common occurrence nowadays - will also result in exclusion from European club competitions.

From 2012 - 2015, there will be a transitional period of three years to allow clubs to adapt their finances and financial arrangements to the new rules.

Given the situation of Portsmouth FC and the precarious state of European football club finances generally - although UEFA does not admit that there is a crisis, citing the general recovery from the global economic downturn that is currently under way in support of this view - in my view, not to introduce the new Rules earlier, but, in fact, to further delay their implementation is, in my opinion, irresponsible and nothing short of gambling with the future of European football, which for so long has led the way and set the standards in football throughout the world!

The International Sports Law Journal

## 'OFCOM' Orders Sky Sports to Make their Coverage More Widely Available to Broadcasters and Viewers Alike

Following a three-year investigation into the UK Pay TV market, the UK Broadcasting Regulator 'Ofcom', has ruled on 31 March, 2010 that Sky Sports (dedicated sports channels of BSkyB, owned by the media tycoon Rupert Murdoch) (Sky), which carries exclusive coverage of Premier League football, English cricket and domestic rugby union, be made available to rival broadcasters, such as BT and Virgin Media, for a monthly fee of £10.63 per subscriber instead of £13.88. With Top Up TV also keen to show football, Ofcom believes that, as a result of its ruling, there will be more choice for viewers.

Ofcom considers that Sky "exploits their market power", and this "prevents fair competition and reduces consumer choice".

Sky and the Governing Bodies of the sports affected claim that they will lose out on TV money as a result of the Ofcom ruling, and, not surprisingly, are very unhappy about it. They are, therefore, considering launching a joint legal challenge against the Ofcom ruling. In any case, Sky has announced that it will appeal against the decision, following an initial application to the UK Competition Appeal Tribunal, for a stay of execution of the Ofcom ruling.

A spokesperson for Sky described the Ofcom ruling as an "unprecedented and unwarranted intervention," claiming that customers were already "well served with high levels of choice and innovation" and warning that "consumers will not benefit if regulators blunt incentives to invest and take risks".

The Governing Bodies of the sports concerned are united in their condemnation of the Ofcom ruling, claiming that it will cut the price of their television rights and that it will impact on the funding of 'grass-roots' sport. Sky spent £944m in 2009 on sports broadcasting rights - a not insignificant sum!

Richard Scudamore, the chief executive of the English FA Premier League, described the Ofcom ruling as an "ill-judged and disproportionate intervention". He said: "We do not rule out a challenge to protect the interests of fans, clubs and the wider game." A statement

from the Premier League itself added: "It will be harder to recruit and retain top talent."

Francis Baron, the outgoing chief executive of the Rugby Football Union, said: "We believe this is little more than a confiscation of our rights by Ofcom dictat. We think it is grossly unfair and our lawyers are looking into it."

As for English cricket, Steve Elworthy, the ECB's director of marketing and communications, warned that the ruling could have implications for the amount Sky would be willing to pay for sports rights with a knock-on effect on funding for the game. According to Elworthy: "A decision like this could lead to less investment in sport. It fails to consider the damage it could cause to sports from the grass-roots upwards and that's our biggest concern."

Incidentally, the current ECB deal with Sky is worth £300million over four years and ends in 2013, and there are already fears that proposals to make 'the Ashes' a listed event - reserved for free-to-air broadcasters - would reduce the value of the rights.

So, what are the reasons for and the legal basis of the Ofcom ruling against BSkyB?

According to Ofcom, their decision will deliver significant benefits to consumers in terms of:

**Choice:** Premium sport, such as Premier League football matches, will be available to around 10 million free-to-view-only homes receiving TV through an aerial, and via other TV platforms. As a result of these decisions, there could be around 1.5 to 2 million additional consumers of premium TV channels by 2015.

**Innovation:** Consumers will, in the future, enjoy a greater range of innovative services following fresh investment by competing pay TV providers. This could include, for example, new interactive and on-demand services and a much wider range of TV package options. These innovations will also help to drive the deployment and take up of super fast 'broadband' networks.

**Price:** Consumers are also likely to benefit from the availability of smaller, lower-priced TV packages, including Sky Sports 1 and 2, and a greater range of 'bundles' combining pay TV, broadband and telephone services.

As for the **Legal Rationale:** Ofcom has concluded that Sky has market power in the wholesale provision of premium channels and that Sky exploits this market power by restricting the distribution of its premium channels to rival pay TV providers. This prevents fair and effective competition; reduces consumer choice; and holds back innovation and investment by Sky's rivals. In other words, Sky is abusing its dominant position in the market for premium sports broadcasting, contrary to UK and European Union (EU) Competition Rules.

Ofcom's rulings are, therefore, designed to ensure fair and effective competition, which, in turn, should lead to greater investment, innovation and choice for consumers.

Rather than, as claimed by the sports governing bodies concerned that sports fans are losing out, I would argue that they stand to gain significantly from reduced prices for those who want to pay and broader platforms, including free-to-view TV, for those who do not, on which broadcast sport is available in the UK.

It will be very interesting to see how far Sky and the Sports Governing Bodies concerned get with their legal challenges, as, it seems to me, that Ofcom have an open and shut legal case in accordance with the well-established objectives of Competition Law: extending consumer choice and driving down prices! Furthermore, I do not think that the EU '*specificity of sport*' argument will help the challengers!

The International Sports Law Journal

## Are Athletes Obligated to Accept the Jurisdiction of the Court of Arbitration for Sport Ad Hoc Division for Settling their Disputes at the Olympic Games?

### Introductory Remarks

The Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, has recently published in English and French (July, 2009) a Digest of the Awards made by its Ad Hoc Division (AHD) - a kind of circuit court of the CAS - during the Beijing Olympic Games held from 8 - 24 August, 2008.

The CAS AHD has operated at all the Summer and Winter Games since and including those held in Atlanta in 1996; and will again be in session at the Winter and Summer Games in Vancouver and London in 2010 and 2012 respectively.

The jurisdiction of the CAS AHD is derived from the provisions of article 59 of the Olympic Charter, the latest version of which dates from 7 July, 2007, as follows:

*"Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-related Arbitration."*

The kinds of disputes contemplated by this provision are as follows:

- *eligibility disputes;*
- *doping test results; and*
- *event results or referee penalties.*

Athletes who wish to compete in the Olympic Games are required, in their entry form, to submit all disputes to the CAS AHD whether they wish to do so or not; otherwise they will not be allowed to participate. *Quaere:* is this a valid and legally binding consent to arbitration? And what are the legal and practical consequences if an athlete steps out of line and refers a dispute to the ordinary courts instead of to the CAS AHD?

### The Legal Issues

The basic legal issue here is whether, in these particular circumstances, the jurisdiction of the ordinary courts can be ousted? Or must the athlete first seek arbitration of the particular dispute with the CAS?

Arbitration is a form of alternative dispute resolution; in other words an extra judicial way of settling disputes. As such, the process is consensual; that is, based on the agreement of the parties. In fact, the UK Arbitration Act 1996 requires there to be a written arbitration agreement. In other words, there needs to be evidence of an agreement between the parties in dispute to submit to arbitration. The agreement to refer a dispute to arbitration is a contract in law; and like any other contract requires consent. Such consent must be the result of independent freewill. If a party is forced into a contract

against his/her will, the lack of a real and genuine consent will vitiate the contract. In other words, there is no legally binding agreement and nothing to enforce. These are the basic rules of contract law and the essential concept of freewill is not only well known and established in England, but also, generally speaking, in the jurisprudence of the rest of Europe and elsewhere in the world.

If an athlete, in effect, is forced into agreeing to arbitration by the CAS AHD on pain of not being allowed to compete in the Olympic Games - the pinnacle of every athlete's ambitions and dreams - can his/her consent be said to be real and genuine? It is, I think, arguable that it cannot. And, therefore, under general principles of contract law, the athlete, I think, can 'renege' on the so-called written arbitration agreement with legal impunity.

To the best of my knowledge, no such case has been tried before the CAS or the ordinary courts with jurisdiction in the matter. What I can say, with some degree of certainty, is that, before the CAS will accept any case, it must be satisfied that it has actual jurisdiction. This is not a given in every case. The CAS does not have any inherent jurisdiction; only such jurisdiction as is expressly conferred on it. Under the procedural rules of CAS - the Code of Sports-related Arbitration - there must be an arbitration agreement in writing or written evidence of any other document providing for the parties to refer their dispute to the CAS (Art. R38 of the CAS Code of Sports-related Arbitration). In either case, the agreement or other document to confer jurisdiction on the CAS must be clear and explicit. Any doubts will be resolved by the CAS against conferring jurisdiction on itself. See the decision on jurisdiction in CAS 2008/O/1694 PFC CSKA Sofia v/ BFU. It is open, therefore, in a preliminary hearing on jurisdiction before the CAS, for the athlete to argue that the so-called CAS AHD arbitration agreement is not legally binding on him/her because he/she was forced to sign it. In other words, there was no real or genuine consent supporting it.

In such a case, where an athlete is about to compete or has competed in the Olympic Games and a qualifying dispute has arisen, can the athlete be barred from competing or be stripped of any medal he/she may have won, based on the lack of consent to the jurisdiction of the CAS AHD? In other words, the athlete's *ex post facto* failure to recognise or deny the jurisdiction of the CAS to determine his/her case. This would be quite a challenge for the CAS and a complex matter to resolve and the outcome would be far from certain. The CAS tends to be rather conservative, generally speaking, in its approach to novel issues and situations!

What can be said, however, is that, under English law, it is difficult to oust the jurisdiction of the courts. And, in a case involving an

English athlete, English law would be relevant for a CAS determination (see on applicable law generally, Arts. R45 & R58 of the CAS Code of Sports-related Arbitration). However, under the House of Lords decision in *Scott v. Avery* [1856] 5HL Cas 811, the English courts will stay proceedings until the parties have exhausted their remedies elsewhere - through arbitration, for example. So such an athlete might well, therefore, have to go through the CAS AHD before bringing a legal action before the ordinary courts, if only because under his/her sports governing body's dispute resolution rules, there is a requirement to appeal ultimately to the CAS. This is true of athletes falling within the jurisdiction of other European courts - for example, Spain.

In such a case, a further legal issue arises and that is that there are very limited grounds for appealing against or challenging CAS decisions. The CAS, having its seat in Lausanne, Switzerland, is governed by Swiss Law and, under the provisions of article 190(2) of the Swiss Federal Code on Private International Law of December 18, 1987, the grounds for appeal are restricted to the following:

"[The Award] can be attacked only:

1. if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
2. if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
3. if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims;

4. if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;
5. if the award is incompatible with Swiss public policy."

Would lack of legal consent come under these provisions? Not directly, but indirectly under ground (b) above. Because of the lack of consent, it is arguable that there was no legal basis for referring the dispute to the CAS in the first place. In other words, the CAS did not have jurisdiction to deal with the dispute because there was no genuine and, therefore, legally binding agreement to refer the matter to the CAS.

#### Concluding Remarks

This is an important and fundamental issue not only for CAS but also for the international sports governing bodies, who are members of the Olympic Programme, and their athletes; and not an easy one to resolve. Perhaps, therefore, to provide some legal clarity, the issue should be the subject of a CAS Advisory Opinion under the CAS Consultation Proceedings (see Arts. R60-R62 (inclusive) of the CAS Code of Sports-related Arbitration).

So, who will be the first to break ranks and have a go and bring such a case? And how will CAS decide such a dispute?

The International Sports Law Journal



## SPORT&EU 5TH ANNUAL CONFERENCE

### *"The Challenges of Sport Governance after the Lisbon Treaty"*

**University of Ghent  
1-2 July 2010**

The programme for this year's conference promises to be of a high standard, with world leading academics and high ranked practitioners involved. The conference will feature Professor Ian Henry (Loughborough University) as keynote speaker and we have also organised a high level round table to discuss the future of EU Sports Policy with the confirmed attendance of Michal Krejza (European Commission), Richard Corbet (Cabinet of Herman Van Rompuy) and Folker Hellmund (EU-EOC Office). The Flemish minister for sport, responsible for the EU rotating presidency, will open the conference.

The research programme features 19 excellent papers divided in six different pannels. The range of disciplines and topics covered by the papers will make for a very interesting and intellectually appealing conference.

If you want more information about the programme, please visit the conference website at <http://www.pswx.ugent.be/seuc2010/Program/tabid/131/language/en-US/Default.aspx>



## Sport, Mediation and Arbitration

By Ian S. Blackshaw

T.M.C. Asser Press, The Hague 2009, pp. 557 + XXII, ISBN 978-90-6704-307-6, price: £90

There can surely be no more enthusiastic and articulate champion of Alternative Dispute Resolution (ADR) in sport than Professor Ian Blackshaw. Professor Blackshaw has written and spoken widely on the subject over the years, and is himself a leading exponent of ADR as a member of the Court of Arbitration for Sport (CAS) and his association with the Arbitration and Mediation Center of the World Intellectual Property Organisation (WIPO).

This work in painstaking detail guides the reader through the fundamental principles of ADR and its particular applications to sport, including the particular features of the ADR mechanisms employed by CAS (such as "Advisory Opinions") and the "Expert Determination" mechanisms employed by WIPO.

Very much with an eye to assisting those new to the area Part one of the work under the heading "Alternative Dispute Resolution in General and Mediation in Particular" helpfully explores the background to the evolution of ADR with particular reference to its increasing use in the sporting domain. There are included chapters on the experience of the use of ADR in a variety of jurisdictions including the American and Chinese experience. In keeping with a cutting edge analysis of the subject the use of new technologies is considered and there is included a chapter on the use of mediation in a virtual "on line" environment.

Part One draws widely from the work of academic and professional commentators in the area which adds considerable flavour to the technical issues explored.

Part Two of the work explores in more detail the experience of the Court of Arbitration for Sport which will perhaps be of keenest interest

est to those within Europe engaged in the Sports Law, Sport Administration and Sports Industry communities.

For completeness Part Three of the work concludes with a review of the processes available under the auspices of WIPO and sports law practitioners may in particular find the chapter on Sports Domain Name Disputes with its detailed use of Case Studies a particularly useful guide in this area.

Finally, and very much with the needs of the busy practitioner in mind, the work includes as a series of appendices a comprehensive set of the applicable arbitration rules that will be most commonly encountered in the sports arena. To add flavour there is also included full decisions in such landmark cases such as that involving footballer Andrew Webster.

In conclusion this work is clearly a "must have" for any practitioner involved in dealing with sporting disputes it will also be a valuable addition to the library shelves for all with an interest from an academic, sports administration or sports industry perspective on the available mechanisms for resolution of sporting disputes. This is in every sense a global critical evaluation of the topic which helpfully includes sample documentation drawn from a wide variety of sources. At all time authoritative and engaging this work must clearly rank as the leading publication in this area.

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## The Law of the Olympic Games

By Alexandre Miguel Mestre, T.M.C. Asser Press 2009, The Hague, pp. 242 + XII, hard cover, ISBN 978-90-6704-304-5, price: £45

This Book by Alexandre Miguel Mestre, a leading Portuguese Sports Lawyer and former Assistant to the Portuguese Secretary of State for Sport, is yet another first for the Asser International Sports Law Series of Books, under the general editorship of the indefatigable Rob Siekmann, Director of the Asser International Sports Law Centre in The Hague, and his faithful colleague, Janwillem Soek.

The subject of the Book - the so-called '*Lex Olympica*' ('Olympic Law') - is a fascinating one. The Olympics, Olympism and the Olympic Movement are relatively easy to describe but difficult to define in practice, and this Book lifts the lid on the mystique of these concepts and the legal rules and regulations governing them from their beginnings in ancient Greece in 776 BC to the modern era of the Games, established in 1896 by the French aristocrat, Baron Pierre de Coubertin, the 'father' of the Modern Olympics.

As the author points out, de Coubertin was against a proliferation of regulations, declaring that: "*the more regulations we adopt, the more we are fettered.*" He preferred a lighter touch, which would allow "*the Olympic organisations some flexibility.*" That is why it took a further 14 years before the International Olympic Committee (IOC) was established in 1908.

However, no organisation, like the IOC of such world-wide importance and influence, responsible for organising and, in fact, the custodian of the Summer and Winter Olympic Games - often dubbed 'the greatest sporting show on earth' - can function without a complex set of rules!

Thus, the Book covers the historical development of 'Olympic

Law' and the current legal status of the IOC as an NGO (Non Governmental Organisation) under Public International Law, and its various constituent members and organs; and also deals with the subject of the Olympic Amnesties, which are granted by the United Nations (UN) for each Olympiad. These UN resolutions are of a recommendatory nature ('soft law'), but well illustrate the wide range of international legal instruments, which constitute the corpus of so-called 'Olympic Law', including the inter-State Nairobi Treaty of 26 September, 1981 on the Protection of the Olympic Symbol - the famous five interconnected rings.

Of course, at the heart of 'Olympic Law' is the Olympic Charter, the latest version of which dates from 7 July, 2007 and which governs every aspect of the IOC and its constituent organs and bodies and their functions; and, usefully, the Book includes the complete text. Likewise, the Book includes the important IOC Code of Ethics, the latest version of which was adopted by the IOC Executive Board on 26 April 2007 in Beijing. The IOC, it will be recalled, was forced to introduce such a Code following the bribery scandals surrounding the granting of the Winter Olympics to Salt Lake City in 2002 - all, much to the *chagrin* of the IOC, well-documented by the world's media!

The Book also addresses some contemporary legal issues affecting the Olympic Movement, including eligibility criteria; dual participation in the Olympics and the Paralympics; and the participation of transsexuals in the Olympic Games, as well as environmental concerns and the protection of the so-called 'Olympic Properties' - in other words, the very valuable intellectual property rights of the IOC

including TV rights - without which the Olympic Games could not be financed and staged.

Furthermore, the Book also includes a section on the so-called 'Satellite-Organisations' of the Olympic Movement, including the World Anti Doping Agency; the Court of Arbitration for Sport; the Olympic Congress and Commissions; and the International Foundation for the Olympic Truce.

Finally, the Book reproduces a very interesting article by an American Attorney-at-Law, Frederic C Rich, on 'The Legal Regime for a Permanent Olympic Site' - a controversial and ongoing subject of debate for "*a permanent neutral enclave for the Games*" which was prompted by the boycott of the 1980 Moscow Olympics.

The Book is completed by a List of Acronyms; Tables of

International and National Legislation and Sport Regulations and Cases; a workmanlike Subject Index; and a useful Index of Organisations mentioned in the Book.

As Professor Wang Xiaoping, Executive Associate Director, Research Center for Sports Law, China University of Political Science and Law, Beijing, writing in the Foreword to the Book says: ".... I am sure the book will find its rightful place on the shelves of many sports lawyers, administrators, event managers and their professional advisers, throughout the world....", with which your reviewer wholeheartedly concurs!

Ian Blackshaw

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## Privacy and Personality Rights: Commercial Exploitation and Protection

By Robert Deacon, Nigel Lipton and Robert Pinker, Jordan Publishing Limited, 2010, Bristol, pp 692 + XLVIII, ISBN 978 1 84661 186 5, price £120

We are living in an age obsessed with celebrities - whether they are film stars or sports personalities! Indeed, sport is now firmly an integral part of the world entertainment industry and sports stars enjoy the same adulation as film stars and also earn equivalent mega salaries and financial benefits.

Although this Book is concerned with celebrities from all walks of life including super models, such as Naomi Campbell - and the authors, a barrister, a solicitor and an international consultant to the UK Press Complaints Commission respectively, quite rightly make the point that all celebrities are public figures but not all public figures are celebrities - the Book draws on several examples of cases involving sports personalities. More and more their activities on and off the field of play are attracting the attention of the world's media, as the extra-marital affairs of Tiger Woods and the dalliance of John Terry, the former England Football Team Captain, have clearly demonstrated recently.

The Book deals with the fascinating subject of the law on privacy, reputation and the commercial exploitation of the image rights of celebrities, as well as the self-regulation of the print media through the UK Press Complaints Commission (PCC), which regulates unlawful and unjustified intrusion of the Press into the private lives of persons in the public eye. The text of the PCC Editors' Code of Practice, which the PCC is charged with enforcing, is set out in one of the Appendices to the Book.

In a Foreword, the internationally well-known 'publicist', Max Clifford, describes the Book as timely and providing a "*comprehensive guide to all of the many often complex legal issues regarding famous people's relationship and dealings with the media.*" And your reviewer would entirely agree with him.

However, he goes on to say that the Book is the first of its kind to deal with this developing area of the law, but your reviewer would not agree with him on this point. In fact, the first Book on the legal protection and commercial exploitation of image rights was the Book 'Sports Image Rights in Europe', published five years ago in the TMC Asser International Sports Law Centre Series of Books, of which your reviewer and Dr Robert Siekmann, the Director of the Centre, are the Editors and of which, it may be added, a second edition of this Book is currently in preparation.

Of particular interest to sports lawyers, administrators, agents, marketers and promoters in the Book under review is the comprehensive coverage of the case in 2008 of Max Mosley, the former President of the FIA - the World Motor Sport Governing Body - whose *extra-curricular* activities were "exposed" by the British '*News of the World*' Sunday Newspaper. In that case, Mosley took part in what was described as a 'depraved Nazi-Style orgy' with a number of women,

one of whom secretly videoed the activities and passed on the footage to the newspaper. Mosley brought a legal action in the English High Court against the newspaper for breach of confidence and/or the unauthorised disclosure of personal information in breach of his right to privacy under article 8 of the European Convention on Human Rights of 1950. The Court agreed with the claim on both grounds, namely an "*old-fashioned breach of confidence*" as well as a breach of the Article 8 rights of those involved in the orgy, and awarded Mosley £60,000 in damages. Mosley is also pursuing a case before the European Court of Human Rights and it will be interesting to see the outcome of these proceedings, in due course.

The Book also covers the 2002 Eddie Irvine false endorsement case, in which the former Formula 1 driver successfully sued Talksport in 'Passing Off' for doctoring a photograph of him holding a mobile phone, which was electronically transformed into a radio bearing the logo of Talksport, with the suggestion that he listened to and endorsed this radio station, which was not, in fact, the case.

The Book also includes useful Chapters on the UK Press Complaints Commission and Celebrity Sponsorship, Merchandising and Endorsement Agreements, which are well known and well used in the sporting arena. There are also helpful practical Chapters on bringing legal proceedings for privacy, defamation and harassment claims, as well as applying for injunctive relief, which is always a controversial matter.

In connection with injunctive relief, the Book also discusses the relatively new phenomenon in the UK of the so-called '*super injunction*' in the very recent LNS case, which concerned a well-known footballer. Essentially, a '*super injunction*' prohibits the disclosure that an injunction has actually been issued in certain legal proceedings in order to ensure the anonymity of the persons involved in those proceedings. As the authors of the Book correctly point out, applications for '*super injunctions*' will need to be carefully reviewed by the courts "*to ensure that there is no undue interference with the principle of open justice*" as first enunciated in *Rex v Sussex Justices* by Viscount Hewart, a former Lord Chief Justice of England and Wales, that "*Justice must not only be done, but should manifestly and undoubtedly be seen to be done.*"

There are also Tables of Cases and Statutes and a comprehensive Subject Index.

This is a well-researched and well-written Book and I commend it to anyone involved in protecting and commercially exploiting the images/personality rights of all kinds of celebrities, including, of course, sports personalities.

Ian Blackshaw

# New Players' Agents Regulations in Turkey

## I. General Provisions

### Article 1 - Purpose

The purpose of these Regulations is to set the terms for acquiring a Players' Agent Licence and to define the rules and procedures governing the players' agents' activities.

### Article 2 - Definitions and Acronyms

In these Regulations, the terms set out below shall have the following meanings:

- |                                 |   |
|---------------------------------|---|
| a) TFF                          | the Turkish Football Federation;  |
| b) Executive Board              | the Executive Board of the Turkish Football Federation;   |
| c) Arbitration Committee        | the Arbitration Committee of the Turkish Football Federation;   |
| d) PFDC                         | the Professional Disciplinary Committee of the Turkish Football Federation;   |
| e) Dispute Resolution Chamber   | the Dispute Resolution Chamber of the Turkish Football Federation;  |
| f) Players' Agent               | a natural person who, for a fee, introduces players to clubs with a view to negotiating a professional player contract or introduces two clubs to one another with a view to concluding a transfer contract, in compliance with a players' agent licence obtained under these Regulations and the FIFA Players' Agents Regulations; |
| g) Licence                      | a "Players' Agent Licence" obtained from the TFF within the context of these Regulations, enabling a natural person to act as a players' agent;   |
| h) Insurance                    | a Professional Liability Insurance that must be purchased by each players' agent within the terms of these Regulations;   |
| i) Insurance Policy             | a Professional Liability Insurance Policy;  |
| j) Players' Agent Contract      | a written contract, that shall be signed by players' agents with clubs, players, coaches and trainers in compliance with the sample contract template drawn up by the TFF   |
| j) Professional Player Contract | a written employment contract conducted between a professional player and a club and registered by the TFF;   |
| k) Applicant                    | a natural person wishing to obtain a licence to act as a players' agent.  |

## II. Acquisition of Players' Agent Status

### Article 3 - Prerequisites for Application

A natural person, wishing to obtain a Players' Agent Licence, must meet the following prerequisites to sit for the relevant examinations held by the TFF:

The applicant must:

1. be a Turkish citizen or must have been holding a valid residence and work permit in Turkey;
2. hold a high-school diploma or its equivalent;
3. have not been imprisoned for a term of more than two (2) years for any crime committed intentionally or convicted of any crime against the security of the State, the Constitutional order or the operation of that order, the national defense or State secrets, or of espionage, embezzlement, malversation, corruption, theft, fraud, forgery, breach of trust, fraudulent bankruptcy, conspiracy in public tenders, fraudulent breach of contractual obligations, laundering of illegally obtained assets, or smuggling (any applicants received a sentence because of one of the above mentioned infamous crimes regardless of whether such a sentence has been suspended, converted into a fine or otherwise pardoned shall not become a player's agent);
4. not hold any honorary or paid position in FIFA, UEFA, the TFF, any club or on any organ of these bodies;
5. have good professional, social and ethical reputation; and
6. meet all other requirements as may be introduced by the TFF;

### Article 4 - Required Documents

- (1) When filing their applications, applicants must submit all the following documents to the TFF for each examination:
  1. Application statement;
  2. 4 passport photos;
  3. Certificate of residence;
  4. A certified copy of ID Card (or a certified copy of passport, in the case of foreigners);
  5. Criminal Record, issued no earlier than 1 month prior to the date of application;
  6. A notarized copy of the diploma held (in the case of a diploma received abroad, it must be accompanied by its notarized Turkish translation and other documents evidencing its equivalence);
  7. Other documents as may be required by the TFF.
- (2) No facsimile transmissions or photocopies of the documents listed above shall be accepted. Applicants may file their written applications in person or by post by the application deadline set by the TFF.

### Article 5 - Preliminary Evaluation

- (1) After receiving an application, the TFF shall ascertain the application to verify whether it meets the relevant prerequisites set forth in these Regulations then, if the TFF considers the application acceptable, it shall invite the applicant to take a written examination.
- (2) As a result of the preliminary evaluation, applications not meeting any of the relevant prerequisites set forth in hereunder shall be rejected. Applicants, whose application have been rejected, have a right to object against the rejection decision in accordance with Article 7 of the FIFA Players' Agents Regulations.

### Article 6 - Examinations

- (1) Written examinations shall be held in the Turkish language twice a year in the months of March and September on the exact dates determined by FIFA. However, upon request, applicants may take the examination in one of the following languages: English, German, French or Spanish.
- (2) The exact examination dates and the examination fee payment deadline shall be announced by the TFF on its official website, [www.tff.org](http://www.tff.org), one month in advance of the examination dates.
- (3) Examination fees shall be determined annually by the Executive Board and shall be paid separately for each examination. Applicants who fail to pay the required examination fee and sub-

mit the relevant payment receipt to the TFF within the deadline set shall not be allowed to take the examination involved.

- (4) A players' agent applicant shall be considered to have passed the examination only if he attains the minimum mark set by FIFA.
- (5) A players' agent applicant who fails to attain the minimum mark may apply to retake the examination on the next available date. If an applicant fails to attain the minimum mark at the second attempt, he may not retake the examination until the next two examination periods have elapsed. If the applicant applies to retake the examination a third time, he may choose to be examined by the TFF or FIFA.
- (6) An applicant who fails to attain the minimum mark at the third attempt may not take the examination again for two years.
- (7) Individual results of the examination shall be assessed by the Players' Agents Examination Committee which consists of the TFF's General Secretary, Head of the TFF's Legal Department, Professional Player Registration Affairs Department Director and 2 counsels from the TFF's Legal Department.

#### **Article 7 - Insurance**

- (1) Each applicant, who has passed the written examination, shall conclude a professional liability insurance in his own name with a reputable insurance company and present the original copy of the relevant insurance policy to the TFF.
- (2) An applicant who fails to present original copy of his professional liability insurance policy to the TFF within six months following the examination date shall not be licensed unless he retakes and passes the examination.
- (3) The insurance policy shall be worded in such a way that it adequately covers any risks that may arise from the players' agent's activity and contains such minimum conditions as may be required by the TFF. The insurance shall particularly cover any claims for compensation from players, clubs or other players' agents arising from the players' agent's activity which violates these Regulations and other relevant national and international regulations.
- (4) The insurance policy shall further cover claims made after expiry of the policy for events that occurred during the period of the policy.
- (5) The amount covered by the insurance policy shall be fixed on the basis of the player's agent's yearly turnover. Such amount shall in any case not be less than CHF 100,000.
- (6) The insurance policy may be concluded for a limited or unlimited period of time. If concluded for a limited period of time, the policy must be renewed without interruption and the original copy of the new policy must be immediately presented to the TFF with all the receipts evidencing payment of all the relevant insurance premiums.
- (7) The licence of a players' agent who fails to renew his professional liability insurance policy without interruption shall be suspended beginning from the date the policy expires until he submits his new professional liability insurance policy to the TFF. The players' agent may not carry out his activities as such during this period of suspension.
- (8) A players' agent may not cancel his professional liability insurance policy until he has fully terminated his activities as a result of cancellation or return of his licence. Furthermore, the players' agent shall ensure that any claim for compensation made after termination of his activities which originates from his former activity as a players' agent is covered by the insurance.

#### **Article 8 - Bank Guarantee**

- (1) If it is not possible for a players' agent to conclude a professional liability insurance policy as stipulated above, he may provide an irrevocable bank guarantee from a Swiss bank for a minimum amount of CHF 100,000.
- (2) The bank guarantee has the same purpose as that of professional liability insurance, and exclusively FIFA shall have access to this bank guarantee.

- (3) In case where the amount of the bank guarantee is not sufficient to fully cover the damages made, the players' agent shall be solely responsible for such portion of the damage that is not covered by the bank guarantee.
- (4) If the amount of the bank guarantee is reduced for any reason, the players' agent's licence shall be suspended automatically until the amount of the guarantee has been increased to the initial amount of CHF 100,000. The players' agent may not carry out his activities as such during this period of suspension.

#### **Article 9 - Letter of Commitment**

In order to receive a players' agent licence, the applicant must sign and submit to the TFF the Code of Professional Conduct (Annex 1) governing his activity and agree to abide by the regulations and directives of FIFA and the TFF and also comply with the basic principles of the occupation so long as he acts as a players' agent.

### **III. Players' Agent Licence**

#### **Article 10 - Licence**

- (1) The TFF shall issue a "Players' Agent Licence" to each applicant who has fulfilled all the foregoing prerequisites for the issuance of a players' agent licence. The applicant may not receive his licence unless he pays the service fee determined by the Executive Board.
- (2) A licensed players' agent must use the title "Players' Agent Licensed by the Turkish Football Federation" after his name and surname. Licensed players' agents may use only the logos permitted by the TFF on their printed documents and business cards. However, licensed players' agents shall not use the name and logo of FIFA on their printed documents or business cards.
- (3) Transferring the licence to any third party is prohibited.

#### **Article 11 - Publication**

The TFF shall publish on its official website, [www.tff.org](http://www.tff.org), a list of all the players' agents to which it has issued a licence. The TFF shall send a list of all the licensed players' agents to FIFA after every examination period and also update the list published on its official website.

#### **Article 12 - Renewal of Licence**

- (1) The players' agent licence shall be valid for five years after its date of issue. Additionally, the licence must be subject to recertification by the TFF every year. The players' agent is obliged to pay the annual recertification fee determined by the TFF Executive Board and also submit to the TFF all the documents and information that may be requested by the TFF. If the players' agent fails to pay the annual recertification fee or to submit any document or information that may be requested by the TFF, his licence shall be suspended.
- (2) The players' agent shall send a written application, which must be accompanied by the documents listed in Article 4 above, to the TFF to resit the examination before the date on which his licence is due to expire. Otherwise, the players' agent's licence shall be suspended automatically on its date of expiry. If the players' agent apply for the reexamination before the deadline given above, his licence shall remain valid until the date the results of the next available examination are announced.
- (3) If the players' agent fails the examination which was taken for enabling him to renew his licence, his licence shall be automatically suspended until such time as he passes it.
- (4) There is no limit on the number of times a players' agent may retake the examination.

#### **Article 13 - Loss of Licence**

- (1) A licence may be withdrawn if the players' agent no longer fulfils any of the relevant prerequisites or terminates his activity, or as a result of a disciplinary sanction or due to other relevant circumstances stipulated under these present Regulations.
- (2) If players' agent no longer fulfils any of the prerequisites for holding a licence, unless specifically stipulated otherwise hereunder, a reasonable and conclusive time limit in which to satisfy the rele-



vant requirements shall be given the players' agent. If, at the expiry of such time limit, the requirements are still not satisfied, the licence shall be cancelled.

#### **Article 14 - Return of Licence by Players' Agent**

A players' agent who decides to terminate his activity must return his licence to the TFF. Failure to comply with this provision shall result in the cancellation of the licence and publication of this decision to the relevant authorities by the TFF.

### **IV. Player' Agent Contract**

#### **Article 15 - Players' Agent Contract**

- (1) A players' agent shall conclude a written contract with the club or player he represents.
- (2) A players' agent contract signed with a minor player shall be valid only if it is also signed by the players' legal guardian(s).
- (3) The players' agent contract shall be concluded for a maximum period of two years. It may, however, be extended for another maximum period of two years upon mutual consent in written form. No provision stipulating that the contract will be extended automatically shall be valid. If the parties wish to extend their contract, they must sign a new players' agent contract for another maximum period of two years.
- (4) The players' agent contract must contain the names of the parties, its date and duration, the remuneration due to the players' agent, the terms of payment, the obligations of the players' agent and the signature of the parties.
- (5) The players' agent may use the Standard Players' Agent Contract drawn up and recommended by the TFF.
- (6) All payments due to the players' agent shall be made to the players' agent directly by the player or the club the players' agent represents. To receive any payment from any unrepresented parties by the players' agent is prohibited. However, whereas a player is represented by the player's agent, the player may give his written consent for the club to pay the player's agent on his behalf after the conclusion of the relevant transactions subject to the representation. The payment made on behalf of the player must reflect the general terms of payment agreed between the player and the player's agent.
- (7) The players' agent contract shall be issued in at least three originals which shall be duly signed by both parties. Each party shall keep one of the copies respectively, and the remaining copy shall be submitted to the TFF for registration purposes within 30 days of their conclusion. If the player or the club with which the players' agent contract is signed is a foreigner, the contract shall be signed in 4 original copies and the 4th copy shall be submitted to the national association to which the player or the club is registered. The TFF reserves its right to ask for amendments or to refuse to register any contract which does not contain the minimum requirements applicable or comply with the regulations of the TFF or FIFA.

#### **Article 16 - Reference to Players' Agent in Negotiated Contracts**

In any transfer or employment (professional footballer) contract concluded as a result of negotiations conducted by a licensed players' agent, the players' agent's name and title shall be clearly specified.

#### **Article 17 - Remuneration**

- (1) The remuneration due to the players' agent and the terms of payment must be explicitly specified in the contract.
- (2) If the contract does not specify any remuneration, then the remuneration due to the players' agent acting on behalf of the player concerned shall be calculated on the basis of the player's annual basic gross income. Such amount shall not include the player's other benefits (such as movable and immovable assets allocated or transferred to the player free of charge), point premiums or any kind of bonus or privilege which is not guaranteed.
- (3) In the event of a players' agent contract concluded between a players' agent and a player, the remuneration shall be explicitly decid-

ed in advance whether the player shall remunerate the players' agent with a lump sum payment at the start of the employment (professional footballer) contract or whether he shall pay annual installments at the end of each contractual year of the employment (professional footballer) contract. If the players' agent and the player do not decide on a lump sum payment and the player's employment contract negotiated by the players' agent on his behalf lasts longer than the players' agent contract between the players' agent and the player, the players' agent shall be entitled to annual remuneration even after the expiry of the players' agent contract. This entitlement shall last until the player's employment contract expires or the player signs a new employment contract without the involvement of the same players' agent. If the players' agent contract does not stipulate whether the remuneration shall be paid with a lump sum payment at the start of the employment (professional footballer) contract or whether he shall pay annual installments at the end of each contractual year of the employment (professional footballer) contract then the rule for remuneration is a lump sum payment.

- (4) Unless otherwise agreed explicitly, a club is obliged to remunerate a players' agent who has been contracted for his services by payment of a lump sum.
- (5) If the players' agent and the player cannot reach agreement on the amount of remuneration to be paid or if the players' agent contract does not contain a clear provision on the amount of remuneration, the players' agent shall be entitled to a remuneration amounting to 3% of the annual basic gross income as described in paragraph 2 above which the player is due to receive under the employment contract negotiated by the players' agent on his behalf.

### **V. Rights and Obligations of Parties**

#### **Article 18 - Rights of Players' Agents**

- (1) A licensed players' agent has the right to:
  - a) contact every player or club that is not under an exclusive players' agent contract with another players' agent;
  - b) negotiate contracts on behalf of a player or club that requests him to do so, and also sign contracts on his or its behalf if duly empowered under a notarized power of attorney;
  - c) represent the interests of any player or club that empowers him to do so, and also file applications with the TFF in relation to administrative procedures and decisions concerning that player or club by submitting the necessary power of attorney.
- (2) However, applications that are related to the player's disputes with third parties and that may result in judicial proceedings may only be filed by the player himself or his counsel.

#### **Article 19 - Obligations of Players' Agents**

When exercising his rights and powers, a licensed players' agent shall:

- a) comply with the relevant laws, the statutes and regulations of FIFA, UEFA and the TFF, the Code of Professional Conduct, and all decisions of the competent bodies of FIFA and the TFF;
- b) ensure that every transaction he is involved in complies with relevant laws, the statutes and regulations of FIFA, UEFA and the TFF;
- c) not approach or act to result in to any player who is under contract with a club with the aim of persuading him to terminate his contract prematurely or to violate any of his contractual obligations; particularly not contact any club on behalf of the player without first obtaining the prior written permission of the player's club (it shall be presumed that, unless established to the contrary by the players' agent, any players' agent involved in a contractual breach committed by the player without just cause has induced such breach of contract);
- d) never negotiate contracts without the consent of the club or player he represents; inform the club or player he represents about the details and developments regarding the contract negotiations he is involved in; and protect the legal interests of the party he represents in the best manner possible;

- e) ensure that his name, signature and the name of the party (club or player) he represents appear in any contracts resulting from negotiations in which he is involved;
- f) upon request, provide the TFF and FIFA all the necessary information and documents;
- g) participate in all training programmes organised by the TFF and FIFA;
- h) carry out the players' agent activity in person;
- i) carry out his activity on his own and not employ any person other than for the purposes of dealing with administrative duties in connection with player's agent activity (Only the players' agent himself may represent clubs or players and promote the interests of the represented players or clubs in connection with other clubs or players);
- j) prevent any unlicensed players' agent from using his licence to act as a players' agent or from benefitting from the rights arising from his licence;
- k) avoid all conflicts of interest in the course of his activity; represent the interests of only one party per negotiation; not have a representation or a cooperation relation or shared interests with one of the other parties or with one of the other parties' representatives involved while negotiating a transfer or employment contract;
- l) submit his criminal record to the TFF every year;
- m) avoid carrying out directly or indirectly any players' agent activity, during the period when his licence is suspended or withdrawn;
- n) update his address and other personal information which he submitted to the TFF (if he fails to notify the TFF of any change in his mailing address, any notice sent to the address registered with the TFF shall be deemed to have been duly given.)

#### Article 20 - Rights and Obligations of Players

A player shall:

- a) comply with the law, the statutes and regulations of FIFA, UEFA and the TFF and decisions of the competent bodies of FIFA and the TFF;
- b) only engage the services of a licensed players' agent; not permit directly or indirectly any unlicensed person to act on his behalf in negotiating any contract with clubs or in carrying out any activity that may fall within the scope of a players' agent activity;
- c) satisfy himself that a players' agent is appropriately licensed to act in such a capacity, or that his licence is not suspended or withdrawn, prior to getting into any contractual relationship with that agent;
- d) upon request, provide the TFF and FIFA all the necessary information and documents;
- e) abide by all the provisions of the contracts he has concluded with a players' agent; and
- f) explicitly disclose, in any professional player contract he signs, whether he has engaged the services of a licensed players' agent in concluding that contract, and also ensure that the name and title of the licensed players' agent, if any, involved in the completion of the contract is explicitly specified in the contract.

#### Article 21 - Rights and Obligations of Clubs

A club shall:

- a) comply with, and also ensure that all of its honorary or paid officials adhere to, the law, the statutes and regulations of FIFA, UEFA and the TFF and decisions of the competent bodies of FIFA and the TFF;
- b) only engage the services of a licensed players' agent; not permit directly or indirectly any unlicensed person to act on its behalf in negotiating any contract with clubs or players or in carrying out any activity that may fall within the scope of a players' agent activity;
- c) ensure that, during contractual negotiations it conducts, the players or clubs with which it wishes to sign an agreement are represented by licensed players' agents throughout such contractual negotiations; prevent unlicensed persons from conducting such contractual negotiations; not enter directly or indirectly into any contractual relationship, with unlicensed persons;

- c) satisfy itself that a players' agent is appropriately licensed to act in such a capacity, or that his licence is not suspended or withdrawn, prior to getting into any contractual relationship with that agent;
- d) upon request, provide the TFF and FIFA all the necessary information and documents;
- e) abide by all the provisions of the contracts it has concluded with a players' agent;
- f) explicitly disclose, in any professional player contract it signs, whether it has engaged the services of a licensed players' agent in concluding that contract, and also ensure that the name and title of the licensed players' agent, if any, involved in the completion of the contract is explicitly specified in the contract; and
- g) not induce any player to a contractual breach with a players' agent.

### VI. Sanctions

#### Article 22 - General Provisions

- (1) Any players' agent, player, club or other person that violates any provision of these Regulations, the FIFA Players' Agents Regulations or the statutes and regulations of FIFA, UEFA or the TFF shall be lodged to the PFDC in order to be subject to disciplinary sanctions. Decisions of the PFDC may only be appealed to the Arbitration Committee.
- (2) In the event of a violation in international transactions, the FIFA Disciplinary Committee is responsible for imposing sanctions in accordance with the FIFA Players' Agents Regulations and the FIFA Disciplinary Code. In the event of a dispute regarding competence, the FIFA Disciplinary Committee shall decide who is responsible for imposing sanctions. Representation of one of the parties by a players' agent licensed by TFF in situations such as during a contract negotiations between two clubs affiliated to TFF or between a club affiliated to TFF and a player who has Turkish nationality, shall be considered as players' agent activity of national dimension.
- (3) While conducting an investigation into a possible violation of the players' agents regulations of TFF, the investigation bodies and disciplinary committees may use and freely consider any means of evidence, including news, photos and video recordings appearing in the media.
- (4) Players' agents, players or clubs that are strongly suspected of having committed a disciplinary infringement are obliged to prove that they acted in compliance with the present Regulations during the disciplinary investigation and proceedings initiated against them.

#### Article 23 - Sanctions on Players' Agents

The following sanctions may be imposed on players' agents for violation of this present Regulations, the FIFA Players' Agents Regulations, or other regulations of FIFA, UEFA or the TFF, or the letter of commitment they sign under Article 9 of this present Regulations:

- a) a warning;
- b) a reprimand;
- c) a fine of at least TL 50.000.-;
- d) a suspension / a ban on taking part in any football-related activity;
- e) a suspension of licence;
- f) a licence withdrawal.

These sanctions may be imposed separately or in combination depending on the severity, nature and recurrence of the violation.

#### Article 24 - Sanctions on Players

The following sanctions may be imposed on players for violation of this present Regulations, the FIFA Players' Agents Regulations, or other regulations of FIFA, UEFA or the TFF:

- a) a warning;
- b) a reprimand;
- c) a fine of at least TL 50.000 in the case of Super League player; a fine of at least TL 25.000 in the case of a TFF League 1 player; a fine of at least TL 10.000 in the case of a TFF League 2 player; and a fine of at least TL 5.000 in the case of a TFF League 3 player;
- d) a match suspension;

e) a ban on taking part in any football-related activity; These sanctions may be imposed separately or in combination depending on the severity, nature and recurrence of the violation.

#### **Article 25 - Sanctions on Clubs**

The following sanctions may be imposed on for violation of this present Regulations, the FIFA Players' Agents Regulations, or other regulations of FIFA, UEFA or the TFF:

- a) a warning;
- b) a reprimand;
- c) a fine of at least TL 100.000 in the case of a Super League club; a fine of at least TL 50.000 in the case of a TFF League 1 club; a fine of at least TL 25.000 in the case of a TFF League 2 club; and a fine of at least TL 10.000 in the case of a TFF League 3 club;
- d) a transfer ban;
- e) deduction of points;
- f) demotion to a lower league.

These sanctions may be imposed separately or in combination depending on the severity, nature and recurrence of the violation.

#### **VII. - Final Provisions**

##### **Article 26 - Exempt Individuals**

The parents, siblings or spouse of the player may negotiate a professional player contract on behalf of the player. FIFA's and TFF's regulations on players' agents shall not apply to such activities, conducted by the parents, siblings or spouse of the player. This activities do not fall under the jurisdiction of FIFA or TFF.

##### **Article 27 - Reporting to FIFA**

The TFF shall submit to FIFA the players' agents who have terminated their activities, disputes involving players' agents, and disciplinary proceedings regarding players' agents.

##### **Article 28 - Coming into Force**

These Regulations, were adopted by the TFF Executive Board, and come into force upon their publication on the TFF's official website, [www.tff.org](http://www.tff.org), on the date of 19.03.2010.

##### **Article 29 - Provisions Repealed**

Once came into force, these present Regulations shall replace the Regulations on Players' Agents that came into force upon being published in Official Gazette No. 25151 of 12 June 2003.

##### **Provisional Article 1**

Any case that is related to the transactions prior these Regulations come into force shall be dealt with in accordance with the "FIFA Regulations on Players' Agents" that published in the Official Gazette of 12 June 2003.

##### **Provisional Article 2**

The permanent licences issued to players' agents prior to the coming into force of these present Regulations shall be valid for 5 years as of the date of 01 January 2008 on which the FIFA Players' Agents Regulations came into force. These players' agents shall be obliged to re-sit the examination in accordance with the relevant provisions of these present Regulations upon expiry of the said 5-year period.

##### **Provisional Article 3**

In case of any amendment made by the FIFA to the FIFA Players' Agents Regulations after the present Regulations come into force, the present Regulations shall be amended and ensured to be in conformity with the FIFA Regulations.

*The regulations came into force on 19 March 2010.*



## **Letter from the Indonesia Lex Sportiva Instituta**

### **Indonesia Calls: Promoting Indonesian Professional Football**

"Have a save trip home back to your family in the legal capital of the world, The Hague", I said while firmly shaking hands with Dr. Robert Siekmann and Roberto B. Martins when seeing them off at Soekarno-Hatta international airport, Indonesia, on 10 October 2009. They had just given new colour to the spirit of Indonesia in promoting professional football to meet international standards for 6 consecutive days (October 5-10, 2009) in Jakarta, the capital city of Indonesia, and Makassar, the largest city in the eastern part of Indonesia.

Both experts, who are also my international best friends, come from the Asser International Sports Law Centre, T.M.C. Asser Instituut, The Hague, Netherlands. Dr. Robert Siekmann is the director of the Centre, while Roberto B. Martins is a research fellow there. In addition, Roberto B. Martins is the general manager of the Football Players' Agents Association in Europe (EFAA).

Why were they invited by me? There are many reasons, but the main reason is that I want Indonesia, as a large country full of potential and talent in football, to be able to rise to world-level achievements, and this requires many best friends and cooperation with other countries whose football has long since been fully developed, particularly in respect of aspects of planning and management with high legal standards. Europe, as the place of origin of football, is the obvious choice. In 2008, I established the Indonesia Lex

Sportiva Instituta — formerly called the Indonesia Sports Law Institute when incorporated in 2006 — to realize my ambition to bring Indonesian Professional Football to an international level, particularly from a legal and policy perspective. On November 27-29, 2008, at the 14th Conference of the International Association on Sports Law (IASL) in Athens, Greece, I promoted Indonesian football management through the Indonesia Lex Sportiva Instituta. I had the honour of presiding over the first day of the conference. Since then, Indonesia has been part of the international forum, and particularly of the community of sports law experts numbering over ten countries. At this conference I met Dr. Robert Siekmann. We got along well and had many discussions and I diplomatically tried to find out "whether the ASSER International Sports Law Centre that you chair could make new history between the Netherlands and Indonesia through cooperation with the institution which I chair, the Indonesia Lex Sportiva Instituta". "Why not?", he said.

On June 18, 2009, I decided to fly from Jakarta to The Hague, visiting the Asser International Sports Law Centre to follow up on our diplomatic arrangement from Athens. It took only two hours to sign the General Agreement of Cooperation between the Asser International Sports Law Centre and the Indonesia Lex Sportiva Instituta for a period of 4 years with the possibility of renewal. "Considering the close, traditional ties between the Republic of Indonesia and

the Kingdom of the Netherlands, and considering that close cooperation in the field of international sports law between our institutions would be conducive to strengthening these ties, and that close cooperation in the field of education and research in international sports law between our institutions would make an important contribution to the promotion and development of international sports law - our institutions being seated in the western and eastern hemisphere of the world respectively...", reads the preamble to our agreement, which sets out the basis of this cooperation. There are six activities that can be performed jointly, to wit (i) the exchange of information and library services, (ii) the joint organization of specialized courses, (iii) the joint organization of conferences, seminars and workshop on topical issues of international sports law, (iv) the exchange of students and trainees, (v) the joint undertaking of studies, and (vi) the publication of books.

Less than 4 months later, the cooperation was already in full swing, as Robert Siekmann and Roberto B. Martins came to Indonesia in the framework of fulfilling the cooperation between the Asser International Sports Law Centre and the Indonesia Lex Sportiva Instituta for the purpose of assisting the Indonesian League, which was promoting and preparing the implementation of a professional football competition in 2009/2010. Our joint activity started off with a discussion with a number of journalists of Kompas daily in Jakarta, which is the largest and most influential newspaper in Indonesia, on 5 October 2009. Our first stop were the media, because we fully realize that football can only grow and develop as an industry if the media play a significant role in promoting and informing on football. In addition to Robert Siekmann, Roberto B. Martins and myself, Mr. Driyono, the CEO of the Liga Indonesia, also took part in the discussion. The result was promising, with Kompas daily confirming that it will play a directive role and encourage professional football towards becoming a fully-fledged industry in Indonesia.

The following night, we flew from Jakarta to Makassar, the largest city in eastern part of Indonesia. There, on the following day (6 October 2009) an International Short Course programme was held regarding How to Organize Professional Football to achieve Football Professionalism in Indonesia which was attended by the managers of 18 clubs participating in the super league of Indonesia, some of whom were from clubs participating in the premier league. The Course was incredibly interesting and taken very seriously. Robert Siekmann talked about Lex Sportiva, Sports Governance and Football Hooliganism, while Roberto B. Martins talked about Football Contracts, Players' Transfers and Players' Agents. I myself talked about Disciplinary Law in Football. The programme went on from the morning through the afternoon for a total of 9 consecutive hours.

On 7 October 2009, we proceeded to the Phoenam coffee shop, a public place which is very popular in Makassar, to appear live on the Radio Talk Show, a programme broadcast by Mercurius Top FM radio, from 10 to 12 am. In addition to listeners at home or travelling who called in to the programme to take part in the discussion, the discussion was also attended by the coordinator of football supporters, Mr. Maczman from PSM Makassar and a supporter of Sriwijaya Mania from Sriwijaya FC. The discussion turned quite lively with the supporters present singing a song containing the words "yel, yel Indonesian football" complete with props and an attractive dance. The following night, we went to see a match in the Community Shield 2009 (Super Cup) between Sriwijaya FC, the champion of Copa Indonesia in the 2008/2009 season, and Persipura Jayapura, the cham-

pion of the super league competition of 2008/2009, which we felt was a strong signal that the Indonesian professional football competition of 2009/2010 would truly be able to commence soon.

The following morning on 8 October 2009 we flew from Makassar back to Jakarta to attend the International Seminar on Lex Sportiva and Professional Football organized by the Faculty of Law of the University of Pelita Harapan (UPH), a well-known private university. This international seminar was very interesting and attended by more than 80 participants who engaged in dynamic debates. It was opened by a warm welcome from Sheldon Mord, Ph.D, President of UPH. Robert Siekmann, Roberto B. Martins and Joko Driyono fascinated the seminar participants with their contributions. I had the privilege of acting as moderator. Prof. Dr. Bintan R Saragih SH, dean of the Faculty of Law of UPH, expressed his special appreciation to the speakers and said that this had been a great opportunity to introduce the modern field of football as studied at UPH.

On 9 October 2009, a discussion took place at the secretariat of PSSI (the Indonesian football association) which has its seat in the national Bung Karno football stadium in Djakarta, attended by Nugraha Besus, Secretary General of PSSI, Dali Tahir, member of the Executive Committee of AFC and member of the Etiquette Committee of FIFA, as well as some other members of the management of PSSI. The following day, before returning to the Netherlands, and after meeting Mr. Onana, one of the FIFA-licensed foreign players' agents in Indonesia to whom it was recommended that he immediately establish a players' agents association in Indonesia, Robert Siekmann and Roberto B. Martins talked to the second secretary of the Dutch Embassy, Maarten J.L. Froger, of their amazing experience in Indonesia in the framework of promoting professional football in Indonesia. "The Embassy of the Netherlands is ready to assist you, Mr. Hincin", said Roberto B. Martins on our way to the airport. And I said to myself, "Yes, Mrs. Martin and Siekmann, we have just made an international diplomatic effort, building cooperation and sharing information and expertise to support football for the sake of a peaceful world", as they took off to fly for 14 hours leaving Indonesia for the Netherlands through Singapore.

Mrs. Siekmann and Martins are "free variables" having the same concern as me and you, building a new spirit of professional football in the world, particularly in Indonesia, through sharing points of view internationally from many aspects, particularly football law aspects and policy on football management. Therefore, I write this letter and report of their visit for this issue of the International Sports Law Journal and its readers around the world in gratitude to Robert Siekmann and Roberto B. Martins who were so kind to come to Indonesia. Indonesia calls you. Indonesia is a large country with major potential and some outstanding talent in football. Indonesia has a population of over 220 million dwelling on 17,508 islands, far larger than Europe. With hundreds of different cultures, languages, customs and races it is a true example of pluralism, *bhinneka tunggal ika*. While flying across Europe takes only 5 hours, it takes 8 hours to fly from the eastern part of Indonesia, Jayapura, Papua to Banda Aceh in the west.

A survey held by FIFA in 2006 among 207 FIFA members<sup>1</sup> indicated that 270 million persons are active in football: 265 million players, both male and female, and 5 mil-

<sup>1</sup> [http://www.fifa.com/mm/document/fifafacts/bcoffsurv/bigcount.staatpackage\\_7024.pdf](http://www.fifa.com/mm/document/fifafacts/bcoffsurv/bigcount.staatpackage_7024.pdf).



lion supporting and managing staff having the task of organizing football matches. This number has increased by 10% compared to the outcome of a survey conducted in 2000, with the number of registered female football players having increased by 50% in 2006 compared to in 2000. Of the 270 million persons who are active in football 85 million persons live in Asia, 62 million in Europe, 46 million in Africa, 43 million in North and Middle America and the Caribbean, 27 million in South America and 500 thousand in the Oceania area. Of the 85 million players who are active in football in Asia, 7,094,000 live in Indonesia.

According to the Asian Football Association (AFC) Professional League Ad-Hoc Committee of 2007 and 2008, the management and organization of professional football in Indonesia ranked at number 8 in Asia, and as the best in Southeast Asia. As regards the number of spectators and supporter-base, Indonesia ranked second after Japan. In terms of incoming sponsorship, Indonesia ranked third after Japan and Korea.<sup>2</sup>

Joko Driyono, CEO of the Football League<sup>3</sup> noted that interest in professional football in Indonesia is high. The 2008/2009 professional football competition of Liga Super Indonesia was viewed by 1,368,902 viewers, which means an average of 8,947 viewers per match. In 2006, 150 professional foreign players were registered playing football in Indonesia with a sponsorship of Rp. 65 billion and an average income per player of Rp. 450 million per year. 457 professional players participated in the professional football competition season of 2008/2009, 88 of whom were foreign players. There are 450 football clubs that are members of PSSI. 18 clubs are professional, 36 clubs are semi-professional and the remainder are amateur. More than 1000 professional matches are played every year. More than 10 million viewers visit the stadium. More than Rp. 750 billion per year circulates in professional and semi-professional clubs. Professional clubs have a budget between Rp. 1 billion and Rp. 30 billion per year. The Indonesian professional league is heading towards a fan-base of 50 million. Over 200 Indonesian professional football matches are broadcast live on television. 960,000 viewers were already counted in the ratings for viewing football matches in the period from July through November 2008. The television rating for live Indonesian professional football matches exceeds digit 3, which is higher than the rating for European league professional football matches, such as in England, Spain, Italy, Germany and the Netherlands. The sponsor value for the management and organization of professional football in Indonesia has kept growing for the past 3 years. In 2006, sponsoring received by the Indonesian League Board was Rp. 27.5 billion for 627 matches, 70 of which were broadcast live on television. In 2007, this value increased to Rp. 35 billion for 627 matches, 150 of which were broadcast live on television. In 2008, the value was Rp. 30 billion for 306 matches, with 150 matches broadcast live on television.

However, according to FIFA, the achievements of the national team of Indonesia in the world arena have so far only amounted to a ranking in 133<sup>rd</sup> position. This is not yet a good achievement. Football matches are frequently postponed and hampered by the issue of the necessary permit from the police. Football has a lower priority than that of a democratic party or a general election. There is one instance

of a football player who misconducted himself on the field and was prosecuted. Currently, the Court of First Instance of Solo is trying professional football players, Bernard Mamadao, a citizen of Liberia, and Nova Zainal Mutaqim, a citizen of Indonesia, on a charge of fighting with may be subject to imprisonment of 2 years and 8 months as provided in Article 351(1) of the Criminal Code. An international friendly match between Manchester United and the national team of Indonesia which was scheduled for June 20, 2009 was cancelled due to a terrorist act occurring just two days before kick-off. Act No. 3 of 2005 on the National Sport System authorizes any government to interfere in sports events. This is the same in Armenia and Romania and in 15 other European countries, but different from the system in the Netherlands, Germany and England, as already noted by Andre-Noel Chaker (2009). Indonesia has no world elite referee. Misconduct on the part of players, officials and supporters is still a frequent occurrence. Natural disasters occur one after another, among others the tsunami in 2006 in Aceh and the earthquake in Padang, West Sumatera in 2009. Much of the infrastructure was damaged, including football pitches. Consequently, football was unable to continue. Fortunately FIFA assisted by constructing 4 football pitches in Aceh and Cristiano Ronaldo came to Aceh to inaugurate the new complex.

This is the challenge. Yet there is also the potential. Again, this is why I am writing this letter and report: Indonesia calls you. At the time of writing, Susilo Bambang Yudhoyono, the President of the Republic of Indonesia, was composing his new cabinet for the period 2009-2014, after having been elected in the second general election. Therefore, I also forward this letter to him. I believe he shares my wish that Indonesian football will achieve success among the world elite. He would surely wish to repeat the moment when he witnessed the match in April 2007, when Indonesia hosted the Asia Championship and over 85,000 supporters in the stadium of the Bung Karno Sports Center, the national stadium of Indonesia, brave and full of spirit, spontaneously sang 'Indonesia Raya', the national anthem, to support the national team of Indonesia. Indonesia is very proud that the FIFA President attended and commended this match. Indonesia is proudly and bravely proposing to be one of the hosts of the world championship 2022, with the slogan 'Green World Cup Indonesia 2022' and the theme, Worldwide synergy for the game, for the world, and for our planet's safety.

In view of the above, Robert Siekmann suggested several ideas to promote the professionalism of Indonesian football:

1. Building new football stadiums (all-seated) means security for spectators and no hooliganism in the stadiums. Municipalities (cities) should finance these projects. Security for spectators allows the families or at least fathers with their sons to visit matches.
2. Strengthening the link with families by introducing the 'socio model' (cf. FC Barcelona): supporters pay an annual membership fee which guarantees their tickets for home matches and being fully informed about the club; and new-born babies are immediately registered as members of the club.
3. Security around the stadiums and while travelling to away matches: strong cooperation between police and clubs; and fan work by clubs in the cities; convincing hooligans that they must support the club and not destroy it; engage hooligans (their leaders) into voluntary work for the club. Security in and around the stadiums means more sponsors will be drawn to the game. The clubs

2 AFC Professional League Ad-Hoc Committee, *Document of First Evaluation Indonesia*, 10 December 2007, and AFC Professional League Ad-Hoc Committee, *Document of Second Evaluation Indonesia*, 20 May 2008.

3 Joko Driyono, CEO of the Liga Indonesia, in the article *Professional Football in Indonesia*, published at the Constitutional Court of Indonesia, 28 April 2009.

need business seats and skyboxes for sponsors in the stadiums, and, in particular, a business room where all (major, medium and small) sponsors may meet as a "business club" before and after the match and during halftime; they will speak about the match and football in general and do business. There should be a restaurant for sponsors so that they may have lunch/dinner before or after the match. In this way, there will be two communities in the clubs: one of fans and one of sponsors. More sponsors means more money for the club which means that better players may be contracted, also from abroad on key positions in the team, if necessary. It also means more money for the club's football school and for improving scouting at the grassroots level (amateur and school football).

4. Players should visit schools to talk about the game and hooliganism, and give clinics at the grassroots level. These tasks should be explicitly incorporated in their contracts. League representatives and club managers should directly meet with players' agents representatives to discuss relevant issues (workshops).
5. Refereeing: referees should regularly meet club managers and club coaches as well as team captains to discuss Laws of the Game questions, fair play and gentlemanly conduct on and off the field of play. The Chairman of the FA disciplinary committee will of course be involved (workshops).

6. Super League representatives and club managers might visit a Dutch model club, for example, SC Heerenveen or FC Twente, which operate along the lines outlines above to see how it works "on the spot".

Roberto B. Martins suggested an association of players' agents be established in Indonesia like the European Football Agent Association (EFAA).

Last but not least, holding hands with nations in the world creating peace through football is another intention, especially to promote Indonesian professional football. The Indonesian constitution speaks of "improving public wealth, improving the nation's way of thinking and participating in world order". Therefore, the Indonesia Lex Sportiva Instituta with the full support of the Asser International Sports Law Centre appeals to experts and world observers to cooperate with Indonesia. Indonesia calls you! Thank you Robert Siekmann and Roberto B. Martins who have helped us starting out. Thank you to the Asser International Sports Law Centre for its cooperation. It is now your turn, readers!. Best regards from Indonesia.

*Hinca IP Pandjaitan*

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