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FIFA Signs Historic Agreement with Interpol

As part of FIFA's plans to clean up the 'beautiful game', and, no doubt, with an eye on his re-election at the FIFA Congress at the beginning of June, which is being opposed, Sepp Blatter, announced on 9 May, 2011 the signature of an historic Cooperation Agreement with INTERPOL, the international policing organisation with members in 188 countries in the world.

This Agreement is designed to rid football, the world's favourite and most lucrative sport, of illegal and irregular betting and match-fixing, and involves a ten-year programme with INTERPOL and a grant of several millions of Euros a year - the first two years of €4m each year and €1.5m for each of the remaining eight years. This grant - the biggest ever single one made by a private institution to INTERPOL - will support the setting up of a dedicated FIFA Anti-Corruption Training Wing within the INTERPOL Global Complex in Singapore. According to INTERPOL, illegal gambling in football will account for hundreds of millions of US\$ in Asia alone this year! So, it is a big problem. As Blatter has said: "*the threat of match-fixing in sport is a major one, and we are committed to doing everything in our power to tackle this threat. Match-fixing shakes the very foundations of sport, namely fair play, respect and discipline. That's why FIFA employs a zero-tolerance policy.*" Fighting words indeed!

This development comes against the following background: In Germany, for example, there are apparently 300 suspicious games currently under scrutiny; and illegal betting and match-fixing affects all levels of the game, including international friendlies, a Champions

League and some Europa Cup games, as well as some lower league semi-pro matches. So, the problem is quite widespread and undermines the integrity of football. It is also prevalent in other sports, as the recent spot-fixing in test cricket has shown. But, as far as football is concerned, the match-fixing scandal involving several leading Italian clubs in 2006, is perhaps the one that brought the problem to prominence.

But, whatever one may think about Blatter - and he certainly has his supporters as well as his opponents - he never fails to surprise by pulling rabbits out of the hat! The latest example of which is this major initiative with INTERPOL! A move, it must be added, that is well needed, and one, incidentally, that has been foreseen in the forthcoming latest Book in the Asser International Sports Law Series on '*Sports Betting: Law and Policy*' of which the author of this Editorial is one of the Contributors and Editors.

Ian Blackshaw

International Sporting Event Bid Processes, and How They Can be Improved

by Ryan Gauthier*

I. Introduction

On December 2, 2010, the Fédération Internationale de Football Association ("FIFA") will announce the hosts of the 2018 and 2022 Football World Cups. For the successful hosts, this is only the beginning of a long road that will certainly have its share of economic and political problems, but will likely culminate in a month-long world-wide celebration of sport. As much work lies ahead of the hosts, it is also true that much work was required to win the rights to host.

The sports industry is a global phenomenon with global impacts. Economist Brad Humphreys estimates the economics of the sports industry in the United States alone as being valued from \$44-\$73 billion in 2005.¹ Plunkett Research puts the size of the sports industry at an even more spectacular \$414 billion.² Regardless, it would be safe to say that the economics of sports are staggering. A particular example would be the 2010 FIFA World Cup. The cost to South Africa of hosting the 2010 World Cup was estimated in 2008 at \$3.7 billion (30 billion Rand),³ but more recent estimates are almost \$5.4 billion.⁴ This equates to approximately 1.72% of South Africa's Gross Domestic Product.⁵ To put this into perspective, the agricultural industry of South Africa comprises 3% of its GDP.⁶

In most advanced societies, organizations with such a large economic impact would be subject to some form of regulation or oversight by the national government. This is what happens with the local organizing committees of various international sporting events.⁷ But this is not the case with the international sporting organizations that select which country will host the event. To return to the World Cup example, the governing body, FIFA, is an association governed under Article 60 of the Civil Code of Switzerland,⁸ but has a regulatory and economic impact of its own across the globe. This is troublesome when concerns of impropriety and corruption arise. As these international organizations often cannot be reached by the laws of the government in which they stage their games, recourse is generally limited to what an organization decides to do internally.⁹ The lack of accountability to national governments, aside from those that host the headquarters of the organization, can be problematic.

In addition to the nations where the games are held, the international

al sporting bodies themselves have an interest in creating more transparency. Michael Payne, the former Marketing and Broadcast Rights Director for the International Olympic Committee ("IOC"), makes this point in his book, *Olympic Turnaround*. Payne points to the difference in coverage between the Salt Lake City corruption scandal, and a scandal in the European Commission around the same time. The Salt Lake City scandal involved payments and gifts to delegates, which totaled \$400,000,¹⁰ \$800,000,¹¹ \$1.2 million,¹² or upwards of \$10 million.¹³ The same year the Salt Lake City scandal broke, the European Commission lost \$5 billion of its \$107 billion budget to fraud,¹⁴ leading to the resignation of the entire 20-member European Commission.¹⁵ Payne examined the staying power of the Salt Lake City scandal and the quick die-down of the European Commission scandal, and concluded: "People have lower expectations of bureaucrats and politicians than of the stewards of the Olympic Games. It is the IOC's job to make sure they are never disappointed."¹⁶ This faith in the international organizations is precisely why it is in their interest to be better than governments when it comes to transparency, especially when millions of dollars are involved.

Over the years, this faith has been shaken. The corruptions surrounding Salt Lake City and Nagano are now becoming a distant memory. However, more recently, it has been revealed that Delhi and Hamilton offered tens of thousands of dollars to voting nations in an effort to win the rights to host the 2010 Commonwealth Games, and that there have been improprieties in securing the 2018 and 2022 FIFA World Cups, discussed later in this article. There are concerns with the biases of executive committees and the decisions to select hosts that seem to defy all logic. While not everyone can be happy with the selection of a particular host (especially the unsuccessful bidders), much of the anger is more than simply "sour grapes".

This article aims to examine the bidding structures used by international sports organizations, and to inquire into potential alternatives. This article posits that a written process, that is not easily alterable, combined with a regional voting structure and a published technical report, is a process that will enhance transparency and improve the processes of host selection. Part II of this article will examine the selection processes of several international sporting competitions: the FIFA World Cup,

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1 Brad R. Humphreys & Jane E. Ruseski, Estimates of the Size of the Sports Industry in the United States, IASE/NAASE Working Paper Series, No. 08-11 (August 2008), available at http://college.holycross.edu/RePEc/spe/HumphreysRuseski_SportsIndustry.pdf. All dollar figures in \$US unless otherwise noted.

2 Plunkett Research, Ltd., Sports Industry Overview, <http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx> (last visited Sept. 27, 2010).

3 BBC Sport, SA 2010 Could Cost \$3.7 Billion, Mar. 18, 2008, <http://news.bbc.co.uk/sport2/hi/football/africa/7303689.stm>.

4 David Bond, *FIFA Approved Extra World Cup Cash for South Africa*, BBC.com, May 11, 2010, <http://news.bbc.co.uk/>

sport2/hi/football/world_cup_2010/8674024.stm [hereinafter, Bond, *Extra World Cup Cash*]. See also, Jonathan Berr, *Why Hosting the World Cup 2010 is a Losing Proposition for South Africa*, Daily Finance, June 12, 2010, <http://www.daily-finance.com/story/media/why-hosting-the-world-cup-is-a-losing-proposition-for-south-africa/19513301/> (citing costs of \$3.94 billion to the federal government, and \$1.17 billion to the provinces and cities of South Africa).

5 Bond, *Extra World Cup Cash*, *supra* note 4.

6 The Central Intelligence Agency, The World Factbook, GDP - Composition by Sector, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2012.html> (last visited Sept. 13, 2010).

7 For instance, the South Africa Organizing Committee was registered as a non-profit corporation under Section 21 of South Africa's *Companies Act*. South Africa Organizing Committee, Structure, <http://www.saz2010.gov.za/en/structures> (last visited Sept. 13, 2010).

8 FIFA Statutes 2010, Art. 1. Art. 60 of the

Swiss Civil Code simply sets forth the legal personality of a charitable organization.

9 Many events, while governed by an international organization, such as FIFA, are actually carried out by a national or local organizing committee. These committees are subject to local laws. However, it is not always clear where the decision-making rests. For example, in 2009, female ski-jumpers sued the Vancouver Organizing Committee ("VANOC") for the 2010 Olympics, because women's ski jumping was not included as a sport, while men's ski jumping was. VANOC was sued under the Canadian Charter of Rights and Freedoms, which bars discrimination on the basis of sex, but the British Columbian courts found that the International Olympic Committee ("IOC") was ultimately responsible for the decision to not include women's ski-jumping. *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942 (aff'd 2009 BCCA 522).

10 Michael Payne, *Olympic Turnaround* 246 (2006).

11 BBC.com, Olympic Chiefs Probe Bribe Scandal, Jan. 23, 1999, <http://news.bbc.co.uk/2/hi/261152.stm>.

12 George B. Cunningham & John E. Dollar, Tarnished Rings, *Sociology of Sport Online*, <http://physed.otago.ac.nz/sosol/v4i1/v4i1rings.html> (last visited Sept. 27, 2010).

13 Jonathan Calvert, How to Buy the Olympics, *The Observer*, Jan. 6, 2002, available at <http://observer.guardian.co.uk/sport/issues/story/0,,676494,00.html>.

14 Kevin Cullen, *Corruption Scandal Jolts European Union*, *Boston Globe*, at A1 (Jan. 11, 1999).

15 Vaughne Miller & Richard Ware, The Resignation of the European Union, The House of Commons Library Research Paper 99/32 (Mar. 16, 1999), available at <http://www.parliament.uk/documents/commons/lib/research/rp99/rp99-032.pdf>.

16 Payne, *supra* note 10, at 246-47.

the Olympics, the Cricket World Cup, the Union of European Football Associations EURO Championship, the Fédération Internationale de Basket-ball's World Championships, and the Commonwealth Games. Part III of this article will then examine the structural problems with the process. Part IV then sets out the practical problems that arise as a result. Part V of this article will examine possible alternatives to host selection and its process. Part VI will suggest a more efficient, transparent process.

II. International sporting event Host Selection Processes

Each international sporting organization has unique events, organizational models, traditions, and processes. This Part will outline these aspects for the world's largest international sporting events, often termed "mega-events":¹⁷ the Olympics, the FIFA World Cup, the Cricket World Cup, the EURO Football Championships, the FIBA Championships, and the Commonwealth Games. Although competitions like the Super Bowl of the National Football League are of a large scale and rotate their hosts, this article focuses on trans-national events.

For each organization attention will be paid to: the event; the governing body structure; the relevant history of host city selection, when available; the current process; and recent host selections and controversies surrounding those selections.

A. The Olympic Games

The Olympic games are a series of multi-disciplinary events held in individual cities in both the summer and winter. The Summer and Winter Olympic Games are each held every four years, and alternate biennially (i.e. 2004 Summer Olympics, 2006 Winter Olympics, 2008 Summer Olympics, etc.).

The International Olympic Committee ("IOC") is a non-profit, non-governmental body situated in Lausanne, Switzerland.¹⁸ The IOC is divided into the Session and the Executive Board.¹⁹ The Session determines the host city of the Olympic Games.²⁰ There are up to 115 members, spread across four categories. First, 70 members are what one might call "members-at-large", who have no defined office but represent the IOC in their country.²¹ Although members are not representatives of countries, there cannot be more than one member per country in this first category. Secondly, there are up to 15 active athletes who are members of the IOC. Third, there are up to 15 presidents or senior leadership of the various International Federations of the various Olympic sports, who are IOC members. Finally, up to 15 presidents or senior leadership from National Olympic Committees ("NOCs") round out the IOC.²² The Executive Board is made up of the President and fifteen other members,²³ and establishes and supervises the procedures for selecting candidates to organize the Olympic Games.²⁴

The Olympic Games had their origins in Olympia, Greece in 776 B.C.E.²⁵ For years, the only event was a 200-yard dash, but soon other running events and the pentathlon were added.²⁶ The Games were held until at least 385 C.E., and likely later, until all forms of pagan worship were abolished by Christian Byzantine Emperor Theodosius I.²⁷ French nobleman Pierre de Coubertin created the modern Olympic Games in the late 1800s, establishing the IOC in 1894, with the first modern Olympics held in Athens, Greece, in 1896. Since then, the Games have been a primarily European affair, with 61% of the Games hosted by European cities.

Although there have been political and economic problems with the hosting of other sporting and non-sporting events, problems arising from hosting the Olympic Games appear to take on a special significance. The most obvious political problems have been the boycotts of the 1980 Moscow, and the 1984 Los Angeles Olympic Games by the U.S.A. and the U.S.S.R., respectively.²⁸ Another problem with hosting has been economic. Those opposed to hosting an Olympic Games also commonly point to the 1976 Summer Olympics, held in Montréal, which racked up over \$1 billion in costs. Although the Los Angeles Games turned a profit with the rise of media rights, and Sydney is another success story, the Olympics are not realistically a money-making venture.

Despite the political and economic concerns with hosting the Olympic Games, it was not until the late 1990s that the process used to select hosts came under scrutiny. In December of 1998, Marc Hodler, a Swiss IOC member, went public with the information that IOC members had taken bribes in awarding Salt Lake City the 2002 Games.²⁹ Ski trips, college scholarships, cash payments, and payment of medical costs were the order of the day in an attempt to woo IOC members to vote for Salt Lake City.³⁰ The scandal led to investigations by the US Department of Justice, the IOC, the United States Olympic Committee, and the Salt Lake Organizing Committee. The heads of the Salt Lake City Organizing Committee resigned, while the scandal led to the expulsion of six IOC members, the resignation of four members, and warnings being issued to ten other members.³¹

The current process to select host cities is a multi-tiered process that was preliminarily adopted during the selection of Salt Lake City as the host of the 2002 Winter Olympic Games,³² and formally adopted thereafter. This process was not necessarily immune to corruption, as it was the 2002 Games that were the subject of an in-depth inquiry. A reform that was undertaken post-Salt Lake City-scandal was the barring of visits to potential host cities by IOC members, outside of the four-day inspection visits as part of the application process.³³

The process as it currently stands takes place in two stages. In the first stage, an "Applicant City" must be approved by the country's NOC, and the bid is submitted by the NOC to the IOC.³⁴ Following the submission of the bid, the IOC undertakes a technical evaluation, using the following eleven criteria: government support, legal issues, and public opinion; general infrastructure; sports venues; Olympic village; environmental conditions and impact; accommodation; transport concept; safety and security; experience from past sports events; finance; and overall project and legacy.³⁵ This report is then published, and the IOC Executive Board takes a vote to determine which cities move on to the second stage and become official "Candidate Cities".³⁶ In the second stage of the process, the IOC makes site visits to Candidate Cities,³⁷ and makes a final selection after presentations by the Candidate Cities in a vote held by all active members of the IOC. The IOC members vote until a majority of members vote for a host city.

This two-step process allows for additional public vetting and scrutiny of applicant cities before the final vote. However, it is not entirely without controversy, and may actually court complaints. The most recent host city selection was the election of Rio de Janeiro as the host city of the 2016 Olympic Games. This occurred despite of Rio receiving the lowest score in the Technical Evaluation of the other Candidate Cities:

17 A "mega-event" is an event of short duration, but "has an impact and meaning far beyond the event itself for the host city." Harry H. Hiller, *Mega-Events, Urban Boosterism and Growth Strategies: An Analysis of the Objectives and Legitimations of the Cape Town 2004 Olympic Bid*, 24 Int'l J. Urb. & Regional Res. 439, 439 (2000).
18 Olympic Charter (2010), art. 15(1).
19 *Id.* at art. 17.
20 *Id.* at art. 18(2.4).
21 *Id.* at art. 16 (1.1).
22 *Id.*
23 *Id.* at art. 19.
24 *Id.* at art. 19(3.6).

25 David C. Young, *A Brief History of the Olympic Games* 16 (2004).
26 *Id.* at 20.
27 *Id.* at 135-36.
28 See, e.g. Scott Rosner & Deborah Low, *The Efficacy of Olympic Bans and Boycotts on Effectuating International Political and Economic Change*, 11 Tex. Rev. Ent. & Sports L. 27, 46-58 (2009-2010).
29 Kristine Toohey & A.J. Veal, *The Olympic Games: A Social Science perspective* 115 (2007).
30 *Id.* at 116; these stories are also extensively chronicled in Andrew Jennings, *The Great Olympic Swindle: When the World Wanted Its Games Back* (2000).

31 Vicki Michaelis, *Former IOC Chief Samaranch Oversaw Progress, Problems*, USA Today, Apr. 22, 2010, available at www.usatoday.com/sports/olympics/2010-04-21-samaranch-obit_N.htm.
32 "The change in the selection process, with a preliminary cutdown to fewer cities, appears to have been very successful, and the IOC is apparently very happy with its outcome. It could possible be adopted for future bidding for candidate cities." *Olympic News*, 3 Citius, Altius, Fortius: Publication Int'l Soc'y Olympic Historians 41, 44 (1995), available at www.la84foundation.org/SportsLibrary/JOH/JOHV3n2/JOHV3n2g.pdf.

33 Toohey & Veal, *supra* note 29, at 117.
34 Olympic Charter (2010), art. 34, Bye-Laws 1.2, 1.3.
35 Report by the IOC Candidature Acceptance Working Group, *Games of the XXXI Olympiad in 2016*, 9 (2008).
36 *Id.* at Bye-Law 1.6.
37 Olympic Charter (2010), art. 34, Bye-Law 2.3.
38 The final scores, on a scale of 1-10, were: Tokyo-8.3; Madrid-8.1; Chicago-7.0; Doha-6.9; Rio de Janeiro-6.4; Prague-5.3; Baku-4.3. Report by the IOC Candidature Acceptance Working Group, *Games of the XXXI Olympiad in 2016*, 9 (2008), at 107. To be fair, one of the problems with

Madrid, Chicago, and Tokyo; and receiving a score lower than one of the cities that did not even make it to the Candidate City stage, Doha.³⁸ Many pundits thought Chicago or Tokyo would be the favorite,³⁹ and the reasons that have been speculated upon for Rio's win range from a desire to have a South American country host an Olympic Games,⁴⁰ to the IOC-United States Olympic Committee tensions,⁴¹ to concern over American foreign policy.⁴²

The 2012 Games were also hotly contested, and it has been speculated that the presence of Prime Minister Tony Blair was the deciding factor. Currently, presentations to the IOC are now considered lacking without a visit from the head of government, state, or another highly important figure.⁴³ It would seem that the technical evaluation has not eliminated all subjectivity, speculation, and controversy.

B. FIFA World Cup

The FIFA World Cup is a one-month tournament that represents the culmination of four years of qualifying by national football (or "soccer") teams worldwide. The tournament, involving 32 national teams, takes place in several cities across a host country. For instance, in the case of the 2010 World Cup, held in South Africa, the tournament matches were played in ten stadia across nine cities,⁴⁴ and in the case of the 2006 World Cup, held in Germany, the tournament matches were played across twelve cities.⁴⁵ Most interesting was the 2002 World Cup, held across two host countries, Japan and the Republic of Korea ("South Korea"), where twenty cities played host to games.⁴⁶ This is a large undertaking, and the economics of the World Cup are staggering.⁴⁷

FIFA is the organization that oversees the World Cup. Based in Zürich, Switzerland, FIFA is established under the laws of Switzerland. FIFA oversees football worldwide, and oversees the six continental confederations, one of which, the Union of European Football Associations, is discussed later in this article. Created in Paris in 1904, pursuant to an agreement between the football associations of France, Belgium, Denmark, Netherlands, Spain, Sweden, and Switzerland,⁴⁸ FIFA soon undertook the task of organizing the Olympic football championships in 1924 and 1928.⁴⁹

From the beginning, a fascinating history of those who were to host FIFA's new World Cup began to unfold. During the Olympic tournaments of 1924 and 1928, the dark horse team of Uruguay took home gold medals. Due to its dominance at the previous Olympic Games, and the great expense it was undertaking for its centennial celebrations that year, Uruguay was selected to be the host of the inaugural World Cup, held in 1930. Although Hungary, Italy, Netherlands, Spain and Sweden had initially bid to host the World Cup, along with Uruguay, all of the European countries eventually withdrew their bids.⁵⁰ For the

1934 World Cup, with only Italy and Sweden as bidders, Sweden withdrew its candidacy to host the World Cup.⁵¹ In 1938, there were votes on competing bids for the first time, with France being selected over Argentina and Germany.⁵²

Following the Second World War, voting for the next three World Cups in 1950 (Brazil), 1954 (Switzerland), and 1958 (Sweden) went uncontested.⁵³ The following three World Cups, held in 1962 (Chile), 1966 (England) and 1970 (Mexico), were contested affairs, although only between two countries each time. Where there was a third country, one withdrew before the vote took place. This was followed by three more World Cups devoid of competition for the rights to host the championship. On June 7, 1966, FIFA selected the hosts of the 1974, 1978, and 1982 World Cups simultaneously, selecting the Federal Republic of Germany (West Germany), Argentina, and Spain, respectively, to be the hosts of the next World Cups.⁵⁴ Up until this point, the FIFA Congress, where each national association has one vote, selected the host of the World Cups. After the 1966 selection of the future World Cup hosts, the burden of selecting future hosts fell to the Executive Committee, consisting of the President, eight vice-presidents, and fifteen members.

In 1974, the Executive Committee selected Colombia as the host for the 1986 World Cup. This was an easy selection as Colombia was the only bidder. However, this ease was short-lived as Colombia withdrew as the host in 1982, leaving the Executive Committee to scramble to find another host. Canada, Mexico and the USA stepped up to take over hosting duties, and the Executive Committee selected Mexico on May 20, 1983 to host the 1986 World Cup. The World Cups of the 1990s saw a return to a simpler bidding process, with the 1990 World Cup being awarded to Italy over the Union of Soviet Socialist Republics, the 1994 World Cup being narrowly awarded to the United States of America over Brazil and Morocco, and the 1998 World Cup being awarded to France over Morocco and Switzerland.

The 2002 World Cup was the first to be hosted in Asia. Additionally, it was also the first World Cup to be hosted in two countries. Both Japan and South Korea had prepared separate bids for the 2002 World Cup, but it has been alleged that it was a power struggle within FIFA that led to a brokering of an agreement between these two East Asian powers with a history of at least low-level animosity to cooperate in co-hosting the World Cup.⁵⁵ In 2000, the Executive Committee contentiously voted to have Germany as the host of the 2006 World Cup. The final vote was 12-11 in favor of Germany over South Africa (Brazil and Morocco were eliminated earlier), which soon led to allegations of corruption, and denunciations of a lack of transparency in the bidding process.⁵⁶

After the contentious selection of Germany, FIFA formally imple-

Doha's bid was the proposal to host the games in October, to get away from Doha's oppressive heat. This time period is technically outside of the requirements for the Summer Olympic Games, although not without precedent. Mexico City (Oct. 12 - Oct. 27, 1968) and Sydney (Sept. 15 - Oct. 1, 2000) are examples of Summer Olympic Games hosted later in the calendar year.

39 See Melody K. Hoffman and Kevin Chappell, *Why Chicago May Have Lost Olympics Bid*, Jet Magazine Oct. 19, 2009 at 8; Hiroko Tashiro, *Tokyo's Chances Fade for 2016 Olympics*, BusinessWeek Online, Sept. 28, 2009, at 1; John Mark Hansen and Allen R. Sanderson, *The Olympics of Voting*, Forbes, June 22, 2009, at 26.

40 See George Vecsey, *A Great Choice, Even if Others Were Worthy*, N.Y. Times, Oct. 3, 2009, at 1.

41 *Id.* The United States Olympic Committee ("USOC") is at odds with the IOC over television contracts and marketing agreements, including an USOC-announced 24-hour Olympic television network. Brian Cazeneuve, *It's Not You, It's Them*, Sports Illustrated, Oct. 12,

2009, 22, at 22. Too late for Chicago, on April 21, 2010, the USOC ended its pursuit of the network. Richard Sandimir, *U.S.O.C. Ends Plans for its Own Olympic Channel*, N.Y. Times, Apr. 22, 2010, at B3.

42 See Michelle Higgins, *Chicago's Loss: Is Passport Control to Blame?*, N.Y. Times, Oct. 2, 2009, <http://intransit.blogs.nytimes.com/2009/10/02/chicagos-loss-is-passport-control-to-blame/> (highlighting a comment by Pakistani IOC member Syed Shahid Ali describing entering the U.S. as "a rather harrowing experience.").

43 After the appearance of Tony Blair on behalf of London's 2012 Olympic Bid, and Vladimir Putin's appearance on behalf of Sochi's 2014 Olympic Bid, President Barack Obama, former IOC President Juan Antonio Samaranch (who passed away during the drafting of the paper giving rise to this article), Prime Minister Yukio Hatoyama, and President Luiz Inácio Lula da Silva, represented Chicago, Madrid, Tokyo, and Brazil, respectively, at the final presentations.

44 These cities were Johannesburg, Cape

Town, Durban, Port Elizabeth, Rustenburg, Pretoria, Polokwane, Nelspruit, and Bloemfontein.

45 These cities were Hamburg, Hannover, Berlin, Leipzig, Gelsenkirchen, Dortmund, Cologne, Frankfurt, Kaiserslautern, Stuttgart, Nuremberg, and Munich.

46 In Japan, the cities hosting World Cup games were Yokohama, Saitama, Shizuoka, Osaka, Miyagi, Oita, Niigata, Ibaraki, Kobe, and Sapporo. The South Korean cities were Seoul, Daegu, Busan, Incheon, Ulsan, Suwon, Gwangju, Jeonju, Daejeon, and Seogwipo.

47 That said, while the economics of such events are on an incredible scale, they are rarely as beneficial as claimed. See, Dennis Coates, PhD, *World Cup Economics: What Americans Need to Know About a US World Cup Bid*, available at http://www.umbc.edu/economics/wpapers/wp_10_121.pdf.

48 FIFA.com, *History of FIFA - Foundation*, <http://www.fifa.com/classicfootball/history/fifa/historyffar.html> (last visited Sept. 6, 2010).

49 Fifa.com, *History of FIFA - More*

Associations Follow, <http://www.fifa.com/classicfootball/history/fifa/historyffar3> (last visited Sept. 6, 2010).

50 FIFA, *Fact Sheet*, http://www.fifa.com/mm/document/fifafacts/mencompw/51/97/81/fs-201_13a_fw-host.pdf (last visited Sept. 6, 2010).

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 John Horne, *The Global Game of Football, the 2002 World Cup and Regional Development in Japan*, 25 *Third World Quarterly* 1233 (2004), at 1236. See also, Richard Pomfret, John K. Wilson & Bernhard Lobmayr, *Bidding for Sport Mega-Events* 12 (Aug. 2009) available at <http://srn.com/abstract=1566283>.

56 Pomfret, et. al. put it best: "Germany won the third round by 12 votes to 11. The Oceania delegate abstained, despite instructions from his region to support South Africa. A 12-12 tie would have been broken by the vote of the FIFA President, Sepp Blatter, who had supported South Africa's bid." Pomfret, et. al., *supra* note 55, at 12.

mented a rotation system in 2003. FIFA would rotate the hosting of the World Cup by Continental Confederation, accepting bids from the African Confederation for the 2010 World Cup, which was awarded to South Africa, and to the South American Confederation for the 2014 World Cup, which was awarded to Brazil.⁵⁷ The 2010 World Cup hosting was between Egypt, Morocco, and South Africa, with the Libya/Tunisia bid withdrawing after FIFA barred further co-hosting bids. The 2014 World Cup had Brazil as its only bidder.

FIFA's current World Cup host selection process echoes 1966, as the hosts for the 2018 and 2022 World Cup were selected simultaneously. How this process was arrived at is unclear. In 2007, the rotation policy was ended. At that time, FIFA President Joseph S. Blatter stated that, "The rotation principle has served its purpose and has enabled us to award our most prestigious competition to Africa for the first time and, depending on tomorrow's decision, to South America, for the first time in many years."⁵⁸ The news release on the website also stated that FIFA had an interest "to maintain true competition among several candidates."⁵⁹ Less than one year later, the decision to award the World Cups of 2018 and 2022 simultaneously was accompanied by a simple news announcement from FIFA President Joseph S. Blatter following the 58th FIFA Congress in Sydney, Australia, which read:

The Executive Committee of FIFA will decide the host countries for the 2018 and 2022 World Cups at the same time, and this will be before June 2011. Currently interested are Mexico, United States, England, Spain, Netherlands-Belgium, Russia, Qatar, China, Japan and Australia. If we can offer two competitions for eight years to our partners and broadcasters and give extra time for planning, the economic result for FIFA will be better. The existing rule that a continent cannot host the FIFA World Cup twice in a row will not be changed. This was to make sure that it would go to Africa otherwise it never would have. As the next two World Cups will be in the southern hemisphere, it is perhaps logical that Australia concentrates on the 2022 tournament. The two tournaments will be held in different continents.⁶⁰

This was somewhat surprising as the format for selecting future World Cup hosts was not even on the agenda for the 58th FIFA Congress, where the decision was made.⁶¹ Indeed, it was only six months previous that Sepp Blatter had suggested he might consider a format similar to that of the IOC, which would involve a preliminary technical evaluation stage, followed by the final section.⁶² But, in the end, this was not adopted.

The current process to select a host country is not very clearly laid out in FIFA governing documents. The only articles in the FIFA Statutes that deals with host cities for the World Cup do not give much guidance:

The Organising Committee for the FIFA World CupTM shall organise FIFA World CupTM in compliance with the provisions of the regulations applicable to this competition, the List of Requirements and the Organising Association Agreement.⁶³

...

The Executive Committee shall decide the venue for the final com-

petitions organised by FIFA. As a rule, tournaments may not be held on the same continent on two successive occasions. The Executive Committee shall issue guidelines in this connection.⁶⁴

Although it would appear to be more formalized, the regulations referred to appear to refer to regulations that are issued for a particular World Cup, and have no permanent basis in the FIFA Statutes or Regulations.

In general, bidders simply submit their bids to FIFA, FIFA conducts site visits, and then the Executive Committee votes for the host country.⁶⁵ In the past, when voting was not often actually resorted to, a reliance on negotiation between the parties to settle on a host appears to have been the norm.⁶⁶

All of this has led to concerns of bias within FIFA, particularly that of a European bias. Until the 2014 Brazilian World Cup, Europe hosted at least every second World Cup. This will not likely be helped by Sepp Blatter's comments in January 2010, when bids for 2018/2022 that there was a plan for "only a European candidate [to] be evaluated,"⁶⁷ despite no clear policy to do so. Comments such as these appear to have had an effect, leading Japan to drop its bid for 2018,⁶⁸ and Australia to do the same,⁶⁹ leaving the United States as the only non-European bid for the 2018 World Cup for a while.

Australia withdrew only after potentially obtaining some support from European delegates for its 2022 bid.⁷⁰ As Australia's bid withdrawal appears to have been "highly negotiated", it seems possible that the winning bid of the 2022 World Cup has been selected on anything but the merits.⁷¹

The U.S.A. Eventually withdrew its bid on October 15, 2010, ensuring that the 2018 World Cup would be a European affair. In withdrawing, FIFA made clear its desire to have a European World Cup:

We have had an open and constructive dialogue with the USA Bid for some time now, after it became apparent that there was a growing movement to stage the 2018 FIFA World Cup in Europe. The announcement of today by the USA Bid to focus solely on the 2022 FIFA World Cup is therefore a welcome gesture which is much appreciated by FIFA.⁷²

Of course, this paled in comparison to the controversy that erupted soon thereafter. In October of 2010, the British newspaper The Sunday Times went undercover, and obtained footage of FIFA vice-president Reynald Temarii and FIFA Executive Committee member Amos Adamu seemingly offering their votes in exchange for money. Temarii allegedly offered his vote for \$800,000 to build four soccer fields in Nigeria, but that the money should be paid to him directly, while Temarii asked for \$2.3 million to fund a soccer academy in Auckland, New Zealand.⁷³ They, along with four other officials, were banned from taking part in any football-related activity for periods of between one and four years, and were fined.⁷⁴ There was also concern about possible collusion in relation to the World Cup bids, but these allegations were dismissed by FIFA.⁷⁵

C. The Cricket World Cup

The Cricket World Cup is held every four years, similar to the Olympics,

57 *Id.*

58 FIFA.com, Rotation Ends in 2018, Oct. 29, 2007, <http://www.fifa.com/aboutfifa/federation/administration/releases/newsid=625122.html>.

59 *Id.*

60 FIFA.com, Joint Decision on 2018 and 2022 (May 30, 2008), <http://www.fifa.com/worldcup/bidders/2018/news/newsid=783630.html>.

61 58th FIFA Congress, Sydney, May 29 and 30, 2008, available at http://www.fifa.com/mm/document/affederation/bodies/fifa_congress_o8_agenda_47752.pdf. It is possible that it was covered under "Decisions Passed at 2007 Congress", but that is unclear to this author at this time.

62 David Bond, *Portugal and Spain to Launch Rival 2018 Bid*, Telegraph.co.uk,

Nov. 27, 2007, www.telegraph.co.uk/sport/football/teams/england/2326790/Portugal-and-Spain-to-launch-rival-2018-bid.html.

63 FIFA Statutes (2010), Art. 37.

64 FIFA Statutes (2010), Art. 76.

65 FIFA, Bidding Process for the 2018 FIFA World Cup and the 2022 FIFA World Cup, Jan. 15, 2009, available at <http://www.fifa.com/mm/document/affederation/administration/99/74/80/20182022invitationtobidcirculare.pdf> [hereinafter World Cup Bidding Process].

66 See Darrell Victor, *How the FIFA World Cup Host is Chosen*, Helium, <http://www.helium.com/items/1331764-how-the-fifa-world-cup-host-is-chosen> (last visited Apr. 24, 2010).

67 Owen Gibson, *England's 2018 World Cup*

Hopes Boosted by Europe-Only Bid Process, Telegraph.co.uk, Jan. 26, 2010, <http://www.guardian.co.uk/football/2010/jan/26/england-2018-world-cup-european-bid>.

68 *Japan Drops Bid to Host 2018 World Cup to Aim for 2022*, BBC Sport, May 4, 2010, <http://news.bbc.co.uk/sport2/hi/football/8659185.stm>.

69 Dan Silkstone, *Confidence High for 2022 as Australia's 2018 World Cup Bid Axed*, The Age, June 11, 2010, <http://www.theage.com.au/world-cup-2010/world-cup-news/confidence-high-for-2022-as-australias-2018-world-cup-bid-axed-20100611-y17a.html>.

70 *Id.*

71 *Id.*

72 USA Bid Committee to Focus on 2022

FIFA World Cup, FIFA.com, <http://www.fifa.com/worldcup/bidders/2022/media/newsid=1318374.html#usa+committee+focus+2022+fifa+world+cup> (Oct. 15, 2010).

73 ESPN.com, *FIFA Suspends Six Officials in Bribery Scandal*, espn.go.com/sports/soccer/news/_/id/5706065/fifa-suspends-six-officials-bribery-scandal (Nov. 18, 2010).

74 FIFA.com, *Ethics Committee Suspends Six Officials for Between One and Four Years*, <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=1336779.html> (Nov. 18, 2010).

75 *Id.*

the FIFA World Cup, and other major tournaments. Similar to the FIFA World Cup, the Cricket World Cup takes place after years of qualifying, and the Cricket World Cup takes about one-and-a-half months to complete.

The International Cricket Council (“ICC”) organizes worldwide cricket, and the Cricket World Cup. Initially based in London, England, the Council was known as the Imperial Cricket Conference, and was open only to Commonwealth countries. However, the Imperial Cricket Conference changed its name to the International Cricket Conference in 1965, and allowed non-Commonwealth countries to become members. In 2005, due largely to taxation issues, the ICC moved to its current home in Dubai, United Arab Emirates. There are various levels of membership, and rights that come with membership. Currently, ten countries have “Test” status, and are represented on the Board of Executives, and the Chief Executive’s Committee.⁷⁶

The first three competitions were hosted by England, as it was felt that England was the one country ready to devote the resources required to hosting the event. Event hosting is often undertaken by multiple countries within a region as joint hosts: for instance, the 2007 Cricket World Cup took place in eight countries that comprise the West Indies, and the 2011 Cricket World Cup will take place in India, Sri Lanka, and Bangladesh.

In addition to regional bidding, there appears to be an unofficial regional rotation system.⁷⁷ The unofficial rotation system was a source of controversy during the selection of the 2011 Cricket World Cup. The ICC selected a bid from the Asian Subcontinent when it was expected that Australasia would host the tournament.⁷⁸ This has led to some allegations that there was some sort of *quid pro quo* between the West Indies voting bloc and the Asian subcontinent voting bloc where the Asian subcontinent assisted the West Indies in fundraising for the 2007 Cricket World Cup in exchange for securing votes to host the 2011 Cricket World Cup,⁷⁹ although the reason for selecting the countries from the Asian subcontinent has since been claimed to be about the larger revenues that would be generated.⁸⁰ However, any major concerns were somewhat mollified, as the hosts for the 2011, 2015, and 2019 Cricket World Cups were selected at the same time, and Australasia was granted the 2015 Cricket World Cup, with England receiving the 2019 World Cup.⁸¹

Another source of controversy has surrounded the 2011 Cricket World Cup. Pakistan was set to be a host along with India, Sri Lanka, and Bangladesh. In March 2009, gunmen attacked the Sri Lankan cricket team in Lahore, Pakistan, killing six police officers, two bystanders, and injuring six Sri Lankan cricket players.⁸² One month later, the ICC removed the fourteen games that Pakistan was to host and granted them to the other hosts.⁸³ Pakistan has alleged that this would lead to a loss of at least \$11.1 million, given the payouts for hosting each match, and not including the other potential economic benefits.⁸⁴ There has also been legal action between the Pakistan Cricket Board, and the ICC, with Pakistan claiming that the ICC does not have the authority to strip it of co-host status, and the ICC claiming that Pakistan is still a co-host, it is simply not hosting any games.⁸⁵

D. The EURO Football Championships

The Union of European Football Associations (“UEFA”) holds the European Championships (“EURO”) every four years. Like the FIFA World Cup and the Cricket World Cup, the EURO Championships take place across a country, and often across several countries, following years of qualifying.

Like FIFA, UEFA is an organization registered under art. 60 of the Swiss Civil Code.⁸⁶ It is FIFA’s regional conference for Europe, and thus oversees all matters concerning football in Europe.⁸⁷ The decision-making organs in UEFA are the Congress and the Executive Committee. The Congress is made up of all members of UEFA. The Executive Committee, responsible for voting for a host city of a competition, is made up of a President and fifteen other members, elected by the Congress.

A European football championship was proposed by Henri Delaunay as early as 1927, but it was not until the late 1950s that he would see his dream realized. In 1958, qualifying began for the first EURO, to be held in France. The finals of the first Euro featured the Soviet Union and Yugoslavia, two countries then behind the Iron Curtain. The tournament has been widely rotated, with the thirteen tournaments to date being held in twelve different countries. Including the next two EURO, there will have been fifteen tournaments in fourteen countries. France will have hosted most often, three times, while Belgium and Italy are the only other countries to have hosted multiple EURO finals, with Belgium doing so once as a co-host with the Netherlands.

The EURO has a strong recent history of co-hosting the finals. In 2000, and 2008, the EURO was co-hosted by two countries (Belgium and Netherlands in 2000; Austria and Switzerland in 2008), and in 2012, there will again be co-hosting with Poland and Ukraine. While France will be the sole host of 2016, the 2020 EURO is likely to see continued co-hosting, as all of the bids involve co-hosting applications. These bids are: Bulgaria/Romania; Czech Republic/Slovakia; Slovenia/Italy/Croatia; and Serbia/Bosnia and Herzegovina/Croatia.

Interestingly, in the 2016 bidding process, UEFA first held a workshop for potential bidders.⁸⁸ Four potential bidders attended the workshop: France, Italy, Turkey, and a joint bid from Sweden/Norway.⁸⁹ The UEFA website describes the workshop as follows:

Discussions took place on a one-to-one basis and in plenary sessions, with UEFA experts providing the bidders with initial information on areas such as the bid process, stadiums, safety and security, accommodation, ground transport and airports, host city promotion and fan zones, legal matters, information technology and broadcasting matters. “It is important that we offer you the best of expertise, and the learning that we have built up over the last few tournaments,” UEFA General Secretary David Taylor told the bidders in welcoming them.⁹⁰

Following the workshop, UEFA received three bids from France, Italy, and Turkey. The day that the bidders handed over their bid documents to UEFA, UEFA released a report detailing the next steps and timelines, and the eighteen sectors that UEFA uses in their technical report to evaluate the candidates.

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⁷⁶ These countries are: Australia, Bangladesh, England and Wales, India, New Zealand, Pakistan, South Africa, Sri Lanka, West Indies, and Zimbabwe. International Cricket Council, International Structure and Contacts, http://icc-cricket.yahoo.net/the-icc/about_the_organisation/icc_committees.php (last visited Sept. 13, 2010). “Test” cricket comprises of the cricket games that last several days.

⁷⁷ Trevor Marshallsea, *Caught Behind in Race for Cup*, Sydney Morning Herald, Oct. 11, 2005, available at, <http://www.smh.com.au/news/>

<http://www.nytimes.com/2009/03/04/world/asia/04pstan.html>.

⁷⁸ Cricinfo, *Asia to Host 2011 World Cup*, Apr. 30, 2006, www.cricinfo.com/ci/content/current/story/245789.html.

⁷⁹ Cricinfo, *Bindra: No Deal With West Indies Board*, May 5, 2006, <http://www.cricinfo.com/india/content/story/246276.html>.

⁸⁰ *Id.*; Marshallsea, *supra* note 77.

⁸¹ Cricinfo, *Asia to Host 2011 World Cup*, *supra* note 78.

⁸² Jane Perlez, *For Pakistan, Attack Exposes Security Flaws*, N.Y. Times, Mar. 3, 2009, available at

<http://www.nytimes.com/2009/03/04/world/asia/04pstan.html>.

⁸³ *Pakistan Counts Cost of Cup Shift*, BBC Sport, Apr. 18, 2009, http://news.bbc.co.uk/sport2/hi/cricket/other_international/pakistan/8004684.

⁸⁴ *Id.*

⁸⁵ International Cricket Council, *ICC rejects Pakistan Cricket Board’s Legal Claims Over Hosting of Matches in ICC Cricket World Cup 2011*, ICC.com, May 14, 2009, http://icc-cricket.yahoo.net/newsdetails.php?newsId=5593_124223940&type=MEDIA_RELEASE.

⁸⁶ UEFA Statutes, 2010 Edition, art. 1(1), available at

http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997_DOWNLOAD.pdf.

⁸⁷ *Id.* arts. 3, 3bis.

⁸⁸ UEFA.com, *UEFA Workshop for 2016 Candidates*, Apr. 30, 2009, <http://en.uefa.com/uefa/management/newsid=825406.html#uefa+workshop+2016+candidates>.

⁸⁹ *Id.*

⁹⁰ *Id.*

UEFA Evaluation Process

Structure of the Tournament Requirements⁹¹

Concept	Sector	Key Parameters
Global Concept	UEFA EURO vision	Key motivations of the host and integration into the UEFA EURO vision
	Overall tournament concept	Location and distances between proposed venues, proposed match schedule, net stadium capacity
	Tournament legacy	Country long-term benefits, stadium usage after EURO, legacy initiatives
	Social responsibility and environment	Environment, health, society, culture
Country context	Political and economic aspects	Political and football structure and climate, public investment projections
	Legal aspects	Guarantees and contracts delivered to UEFA, existing legislation
Infrastructure	Stadiums	Stadium design and surrounding, stadium project management and operation
	Ground transport	International accessibility (transport and road system) of the host country, between and in the host cities, last kilometer accessibility
	Airports	Existing and planned passenger capacity of airports, public transport offer to city centre and stadium
	Accommodation and training centres	Existing accommodation capacity and quality, contracted accommodation, rate level, proposed team base camps
Technology infrastructure	National and international	telecommunications infrastructure, including at stadiums and other locations
	International broadcast centre	Facility details, travel and accessibility, local amenities
	Fan zones	Central location, accessible by public transport, safe and secure
Country operations	Safety and security	Vision and strategy, risk analysis, capabilities, action plan
	Host country and city promotion	Host city promotional activities, advertising in the host city
Tournament operations	Organisational and operational matters	Suitability of the LOC structure, status voluntary work in the host country
	Pre-tournament events	Suitability of proposed locations for draws (accessibility, draw hall facilities, accommodation)
	Financing (ticket & hospitality revenues)	Ticket prices, ticket and hospitality revenue

Similar to the IOC, UEFA also releases a technical report based on the above criteria. For UEFA, the report is composed following site visits to the bidding countries, and technical workshops.⁹² Unlike the technical report used by the IOC, the UEFA technical report does not have numerical evaluations of each bid, but simply a qualitative analysis of each factor.⁹³ Also unlike the IOC, UEFA does not engage in a two-step voting process, but simply incorporates the technical report into its single day of voting.

Two weeks after the publication of the evaluation report, the UEFA Executive Committee attends a presentation given by each bidder, and votes on the host country. The voting process is one where the lowest bid is eliminated using a preferential voting system,⁹⁴ where:

...each member of UEFA's Executive Committee entitled to take part in the voting procedure shall rank the bidders in order of strictly increasing preference. The most preferred bidder is given the number one (1); the second choice is given the number two (2); up to the least preferred bidder. Points shall be allocated based on their position on each ballot, starting with one (1) for the least preferred bidder and increasing by one for each directly higher level, with the exception of the most preferred bidder who shall be attributed a number of points equal to the number of bidders plus two (2).⁹⁵

Voters are also required to rank all candidates; they cannot abstain from one or more candidates.⁹⁶ Tie-breakers are by the vote of the chair.⁹⁷

However, not even UEFA's process, which aims to be "both transparent and accessible for the bidders, media and public alike"⁹⁸ is free from scrutiny. Following the selection of France over Turkey as the host of EURO 2016, there were allegations of bias on the part of Michel Platini, the President of UEFA, who is French,⁹⁹ although both Platini and Turkey's Senes Erzik, a Vice President of UEFA, both stepped out of the room during the final vote.¹⁰⁰

E. FIBA Championships

The Fédération Internationale de Basket-ball ("FIBA") World Championships are held every four years, similar to the FIFA World Cup. The Championships are held in several cities across a single country.

Located in Geneva, Switzerland, FIBA is organized under the laws of Switzerland. The body that votes for host countries for the FIBA World Championships is the Central Board of FIBA.¹⁰¹ The Central Board includes: a) the President of FIBA; b) the Secretary General of FIBA; c) the Treasurer of FIBA; d) Seventeen members from each geographic zone in the following numbers: Africa - 3; Americas - 4; Asia - 3; Europe - 4; Oceania - 3.¹⁰² Geographic representation also factors into the Presidency of FIBA, as the presidency rotates amongst the regions.¹⁰³ Interestingly, each geographic zone must have at least one person of each sex on the Central Board.¹⁰⁴

Similar to the FIFA World Cup, the FIBA Championships were created out of an interest that grew from Olympic competition. Also similarly, a South American country, Argentina, was the initial host, because they were the only FIBA member willing to do so. Argentina ended up winning the initial tournament, much like Uruguay in the FIFA World

Cup. Since then, the FIBA World Championships have made it to North American shores, and the home of the National Basketball Association, only twice: Toronto/Hamilton in 1994, and Indianapolis in 2002. Other hosts have been Yugoslavia, Puerto Rico, Philippines, and most recently, Turkey.

The current process is similar to that of the UEFA EURO. The National Federations first submit a letter of interest and attend a workshop that guides them through the bidding process. Following the hand over of the official bids, the Evaluation Commission conducts a study and site visits, and issues a report on the bids. Finally, the FIBA Central Board conducts a vote to select the host country.¹⁰⁵

For the 2014 FIBA World Championships, nine countries submitted letters of intent (Spain, France, Denmark, Russia, Saudi Arabia, Qatar, Italy, Greece, and China), and three were shortlisted by FIBA (Spain, Italy, and China). Spain won in the second round of voting over China,¹⁰⁶ in what seems to be a relatively drama-free affair.

F. Commonwealth Games

The Commonwealth Games are a series of events, similar to the Olympics, held every four years. Unlike the Olympics, only the countries of the Commonwealth of Nations, countries that were formerly part of the British Empire, participate. Most of the events are Olympic events, but there are some unique events, such as rugby sevens.¹⁰⁷

The Commonwealth Games Federation, headquartered in London, England, oversees the games, and as such, the selection of the host city. The Federation has a General Assembly and an Executive Board. The General Assembly is the body responsible for voting for the host city of the Commonwealth Games.¹⁰⁸ Although the General Assembly is a hodge-podge with includes the Executive Board, Life Vice-Presidents and "not more than 3 representatives of each Affiliated CGA [Commonwealth Games Association] to the Federation,"¹⁰⁹ the voting process is straightforward: every Affiliated CGA gets one vote, as does the Chairman of the Assembly.¹¹⁰

Recently, final voting has been only between two potential hosts. For the 2010 Games, it was between Hamilton, Canada and Delhi, India. For the 2014 Games, it was between Glasgow, Scotland and Abuja, Nigeria. Finally, for the 2018 Games, the bidding is between Gold Coast, Australia and Hambantota, Sri Lanka.

The process begins about 9.5 years prior to the actual Games, when the Executive Board drafts the Candidate City Manual.¹¹¹ Upon submitting a bid, and the \$95,000 fee,¹¹² the candidate cities participate in an Observer Program, where they tour the sites of the next Commonwealth Games, and in a seminar. The bid is submitted and an evaluation visit is conducted with the report of the evaluation commission being made public two months before the election of the host city.¹¹³

The Bid Manual also contains a questionnaire on the following topics: (1) Games vision and concept; (2) Political and economic climate and structure; (3) Legal aspects; (4) Customs and immigration formalities; (5) Environment, legacy/sustainability, and meteorology; (6) Finance; (7) Marketing and communications; (8) Sport and venues; (9) Commonwealth games village; (10) Medical and health services; (11)

91 UEFA, UEFA EURO 2016 Bid Handover 6-7 (2010), available at www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/General/01/44/85/80/1448580_DOWNLOAD.pdf.

92 *Id.* at 4.

93 UEFA, UEFA European Football Championship Final Tournament 2016: Bid Evaluation Report (2010), available at http://en.uefa.com/MultimediaFiles/Download/MediaRelease/uefaorg/MediaReleases/01/48/83/27/1488327_DOWNLOAD.pdf.

94 See Wikipedia, Preferential Voting, http://en.wikipedia.org/wiki/Preferential_voting (last visited Sept. 2010).

95 UEFA EURO 2016 Bid Handover, *supra* note 91, at 10.

96 *Id.*

97 *Id.* at 11.

98 *Id.* at 2.

99 Rob Draper, *Guus Hiddink Slams UEFA Decision to Grant France Euro 2016 Ahead of Turkey*, MailOnline, May 30, 2010, <http://www.dailymail.co.uk/sport/football/article-1282457/Guus-Hiddink-slams-UEFA-decision-grant-France-Euro-2016-ahead-Turkey.html>.

100 Rob Hughes, *Soccer Gets Out the Vote, The Presidential Way*, N.Y. Times, June 1, 2010, www.nytimes.com/2010/06/02/sports/soccer/02iht-SOCCER.html?_r=2.

101 FIBA.com, PR No2 - Bidding Process for the 2014 FIBA World Championship Opened, Jan. 10, 2008, www.fiba.com/pages/eng/fc/news/presRele/p/langid/1/newsid/23144/presReleArti.html.

102 FIBA, General Statutes 2006-2010, Art. 15.4 available at www.fiba.com/downloads/Regulations/Gen_Stat_E_2006.pdf.

103 *Id.* at Art. 14.5.

104 *Id.* at Art. 15.5.

105 FIBA.com, PR No2, *supra* note 101.

106 FIBA.com, PR No21 - Spain Elected Host of the 2014 FIBA World Championship, May 23, 2009, <http://www.fiba.com/pages/eng/fc/news/lateNews/fibaEven/14/FWCM/p/newsid/30283/arti.html>.

107 Although rugby sevens will be a part of the 2016 Olympic Games. Rugby is normally played with fifteen players per side, while rugby sevens is played with seven players a side. Less obviously, while standard rugby matches are 80 minutes long,

rugby sevens matches are played in two halves of seven minutes, with a one-minute break, or in the case of championships matches, ten-minute halves with a two-minute break. This allows an entire tournament to be played in a day.

108 Commonwealth Games Federation, Constitution, art. 12.5 (Oct. 2009), available at www.thecgf.com/about/constitution.pdf.

109 *Id.* at art. 12.1.

110 *Id.* at art. 12.2.

111 *Id.* at art. 19.2.

112 Commonwealth Games Federation, Candidate City Manual, 2018 Commonwealth Games (2009), art. 1.1.3, available at www.thecgf.com/games/2018-Candidate-City-Manual-Dec-2009.pdf.

Security; (12) Accommodation; (13) Transport; (14) Technology; and (15) Media operations.¹¹⁴

The Commonwealth Games has an official rotation policy. It reads: “The Commonwealth Games shall not be awarded in succession to countries in the same Region if countries from other Regions are making acceptable applications to act as hosts to the Commonwealth Games.”¹¹⁵ This would appear to closely track FIFA’s current rotation policy.

The 2010 Commonwealth Games, in Delhi, India, were been hit with controversy. Problems with construction were rampant, and countries considered pulling out of the Games altogether due to concerns with infrastructure and security. Just before the start of the Games, it was also revealed that India had promised payments of \$100,000 to the athletic federations of countries if they had secured the bid for the 2010 Games.¹¹⁶ Unfortunately, it was not a simple all-or-nothing, as the other candidate city, Hamilton, Canada, offered \$70,000.¹¹⁷ This payment apparently swayed many of the smaller nations in the Commonwealth and landed India the Games.¹¹⁸ The Commonwealth Games Federation banned these types of inducements shortly after India’s successful bid.¹¹⁹

III. Problems Created by the Current Processes

A. Lack of Competition

An uncompetitive process can run the risk of attracting too few bidders, leading to sub-optimal bids.¹²⁰ Michael Payne, discussing the transparency of bidding for broadcasting rights, found that more transparency yielded more bidders, and vice-versa.¹²¹ This is important for sporting bodies, as more bidders yields a higher price or better bids. Additionally, Payne found that “A city that is one of several on a short list is altogether easier to deal with than the same city once it is confirmed as the next Olympic host. The IOC learned this in Atlanta.”¹²² Payne also pointed to the Los Angeles games, when putting the need for multiple bids in stark terms:

The Olympic ideal is best served by having multiple bidding cities competing against each other. The day when the number of cities falls to one or two candidates is the day the IOC will no longer be in the driving seat. When that happens, as Los Angeles showed in 1984, the city will dictate its own terms. That could threaten the integrity of the Olympic brand.¹²³

A lack of competition may be created “naturally”, as bidders choose of their own free will not to bid on a particular event, or “artificially” as the organizing institution limits competition through rules. It would be very difficult to measure a “natural” decline in competition, and in any event, the number of bidders for events has increased over the past several decades, not decreased.

Artificial restraints on competition do exist, and can be measured. These restraints are most commonly created through regional rotation policies. These policies are usually created with beneficial intent, to spread the benefits and burdens of a particular event to various regions. It is possible that without regional rotation, South Africa would not have hosted a World Cup. Despite the benefits, regional rotation schemes still inhibit competition.

There are two types of rotation schemes: choosing a specific region to host an event, and barring a recent host region from hosting a future event for a period of time. If the former method is used, the number of bids is artificially limited to one region, reducing competition. This can be seen in the 2014 Brazilian bid for the 2014 World Cup, as there was only one bidder from South America. If the latter rotation scheme is

used, only one or two regions are barred from bidding, leaving the majority of regions to compete, hopefully leading to stronger bids. The 2018/2022 World Cup bidding process started out on the right foot with this, allowing all but South America and Africa to bid on the World Cup. However, by limiting the bid for the 2018 World Cup to Europe, FIFA eventually created artificial barriers to entry that may impact the quality of bids. This may not necessarily be a concern with Europe and the World Cup, but may be a concern in other situations.

There are two major concerns with a lack of competition. The first is a lack of incentive to put together a bid that exceeds the bare minimum. If there is no competition, then all the bid need be is technically sound enough to be palatable to the international organization. There is no incentive to cost-save, to create a special legacy (cultural, environmental, etc.), or to do anything over-and-above simply getting some infrastructure in place and promising to do well.

A second concern is gamesmanship. If a continent or region is picked for a particular event, then all of the potential hosts from that region are on notice that they need to bid, or risk being shut out for years, to “use it or lose it.” If a continent is banned from being the host of subsequent events for one or two rounds, a dark-horse bid from one region could emerge to spoil potential bids for other countries in the region. Imagine if Japan was to win the bid for the 2022 World Cup. Then countries such as South Korea, China, India, and Qatar, amongst others, would be shut out from bidding until the 2034 World Cup, if a country from a successful region cannot bid for two subsequent rounds. A country might try to ensure that another region wins the bid, so that they have a chance of their own to bid in the near future.

There are clearly problems with limiting competition in bidding. Aside from leaving impartiality and democracy at the door, a lack of competition may lead to sub-optimal bids and gamesmanship, both of which hurt the bids for the international organizations, and reduce their leverage. Having only one potential bidder, such as Los Angeles in 1984, is certainly not in the best interests of the organization. Yet, having bidding for the sake of competition in an effort to inflate the quantity and hopefully quality of the bids might also be inefficient.

B. Economic Inefficiency

The other side of the coin of a lack of competition is competition that exists for its own sake. Multiple candidacies are valuable, as the contest leads to better bids and more control over the bidding process by the sporting organization. When competition is artificial, then bids and states suffer. As bids cost cities and countries tens of millions of dollars, if not more, money is wasted on an event when there is no chance of winning the rights to host.

As mentioned above, in the 2018 FIFA World Cup host selection process, after the process was underway, FIFA President Sepp Blatter explicitly stated that only European countries would be considered for 2018. As a result, states dropped their bids for 2018, and focused on 2022. It was actually fortunate in this instance that there were simultaneous host selections, and that most potential bidders had already done the legwork for both the 2018 and 2022 bids, so resources did not go to waste. But if the selection for 2022 was to be held on schedule, four years later, there would likely have been more expenses to either retain the current budding team, or to train a new bidding team, and to update the bid generally to update changing times and needs.

C. Poor Decision-Making

While the adoption of technical evaluations has become more widespread, it is not yet universal. There is less information than might otherwise be ideal in making decisions. Persons who vote within international sporting organizations may be members of that organization for many reasons, such as their expertise and experience in the sport, or their political standing at home. Whatever the reason, it is not likely that they are chosen primarily because they are experts in undertaking an analysis as to which host city would be best for an event. This is not a bad thing, as these individuals contribute in many other positive ways, but it does mean that there should be tools made available to enable the members to make more informed decisions.

While members may make decisions based on their “gut” feeling, or

113 *Id.* at art. 1.1.8.

114 *Id.* at Part 2.

115 Commonwealth Games Federation, Constitution, Regulation 1.2(c).

116 Robert Craddock, *India Bought Votes to Win Host Rights of the Commonwealth Games*, *The Daily Telegraph* (Sydney), Sept. 24, 2010, <http://www.dailytelegraph.com.au/sport/india-brought-votes-to-win-host-rights/story-fn65mzk7-1225928642201>.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 172. While auction theory is generally concerned with “profit” in the monetary sense, it is likely that organizations that own the rights to mega-events care about profit as well, or at least, a high-quality bid as measured by any number of factors.

121 Payne, *supra* note 10, at 36.

122 *Id.* at 191.

123 *Id.* at 283.

based on other concerns, such as national pressures, it will be harder to do so when presented with clearly-presented objective criteria. Of course, as seen with Rio's bid for the 2016 Summer Olympic Games, the best technical evaluation does not guarantee a win, and other factors can, and should, be considered. Yet, with the economics of international sporting events reaching stratospheric levels, perhaps the selection of where to stage the events should be run more like a business.

D. Reduced Economic Transparency/Corruption

One of the concerns with the hosting of an event is the true costs associated with it. What "true costs" consists of is a debatable point. It is extremely difficult, if not impossible, to estimate the costs of the displacement of people for construction, the impact of jobs due to the event, the loss of man-hours of productivity as normal business grinds to a halt during the event, and so forth. Even costs such as stadia and housing seem difficult to pin down, when all is said-and-done. That, combined with the continual reappearance of "white elephants" (stadia and infrastructure that is rarely, or never, used again, or not used to anything approaching capacity), demonstrates that economic transparency leaves much to be desired.

The bid process does not do much to encourage economic transparency. As it stands, countries want to demonstrate that they can put on the flashiest show for the lowest cost. Often, it is claimed that current venues can be simply renovated, or that new venues can be built cheaply, or paid off with future use, with no support for the claim. This is exacerbated by the approach that organizations appear to take in regards to the host, which is one of "fire-and-forget". Once a host is selected, it appears to be left on its own until the eve of the Games, or until things get so out of control that intervention is required, as happened in Delhi in 2010.

IV. One-Size-fits-All Solutions that Do not Fix the Problem

A Permanent Site for Sporting Mega-Events

There have been calls from several commentators that there should be a permanent home for sports mega-events such as the Olympics and the World Cup. This is common with many major tournaments for golf and tennis, for example. The proponents argue that the cost of hosting a sporting event, and the political concerns with particular hosts, should counsel in favor of a permanent site.

The primary reason cited in favour of a permanent site is cost.¹²⁴ Frederic C. Rich feared that the escalating costs of the Olympics would mean that only the world's wealthiest nations could host the Games.¹²⁵ A secondary concern that has been cited is politics.¹²⁶ For example, the U.S. and U.S.S.R. boycotts of the Olympic Games in the early 1980s lead the U.S. Senate to pass a non-binding Amendment that "Expresses the sense of the Congress that the International Olympic Committee should establish a permanent Olympic facility on a site that insulates the games from international politics."¹²⁷

There are some advantages to having a permanent host for the Olympics. The notion that costs would be saved is realistic. Secondly, there would be benefits from having more stable management. Instead of having a municipal Olympic Committee that has different degrees of experience start from scratch every two years, a more experienced management team could be put into place, creating a core of expertise. In addition to top-flight management, there would also be top-flight facilities. With the requirement to build only one site, a permanent site could "get it done right" and build state-of-the-art facilities to last for years. Finally, and most importantly for this article, the 'bid circus' of planning, feasibility studies, bid presentations, and the building of facilities before being awarded the bid to demonstrate commitment would be eliminated.¹²⁸

On the other hand, there are some concerns with a permanent site. First, and the concern that looms largest, is the centralization of benefits. Pierre de Coubertin, founder of the modern Olympics, felt that an "ambulatory" host would encourage travel to foreign lands, and would spread the burdens and benefits of hosting the Games.¹²⁹ Some say this is a quaint notion in the age of jet travel,¹³⁰ and the internet.¹³¹ While this may be true, it is at least plausible that there are large groups of people who would not travel to cities such as Beijing, or to countries such as South Africa, absent a world-class sporting event. Additionally, while there are many instances of "white elephants," such as empty arenas in Greece, or unused infrastructure elsewhere, there are also success stories, such as the completion of the long-needed subway and rapid-transit lines for Beijing and Vancouver, projects that will help both cities long into the future.

Second, other regions of the world might come to feel "alienated" from the events, if the events never occurred in their backyard.¹³² Would the US media care as much about an Olympic Games that is always in Greece, several time zone away from its audience?¹³³ Third, while there is benefit to a highly-skilled centralized bureaucracy, there is also benefit to having a new team take over an event every four years to spread the experience of sport management, and of mega-event management more generally.¹³⁴

Fourth, nation and international politics would continue to come into play. While dealing with a new Olympic Committee, or a new World Cup Committee, etc., every few years is a demanding experience, with a steep learning curve, one also must remember that the host country is deeply involved in putting on the event, and expects the reward along with the risk. Since hosting an event is as much a burden as an honour, it is possible that the permanent host could call for payments from other countries to pay for the use and upkeep of facilities; that the permanent host simply neglects to put money into maintaining the facilities; or that there are problems with the participation by certain nationals. There are also competitive concerns if the permanent host does not allow other nationals to train at the facilities in the off-season, or if other countries simply stop putting money into facilities altogether, which is a large concern with "niche" sports such as bobsleigh, ski jumping, and others that require a large up-front infrastructure layout.

All of the above is on top of the possibility that a particular permanent host may not be acceptable to other countries.¹³⁵ There have been some that have called for Greece to act as a permanent host for the Olympics, given its history,¹³⁶ although this may be less palatable given Greece's financial collapse and "bailout" by the European Union. Even "traditionally neutral Switzerland"¹³⁷ would not be uncontested, given the recent tensions between the government and the Islamic community.¹³⁸ There may also be choice-of-law issues with a permanent site. Would the Court of Arbitration for Sport take all cases at first instance? Or would cases go through the permanent host's courts? This is not necessarily clear, depending on the cause of action.

Finally, there is the concern about how the site would be chosen.¹³⁹ If a bid process for a temporary site for a sporting event is fraught with problems, any process to establish a permanent facility for a sporting event has the potential to be even worse. Simply because a host country looks attractive now, does not mean that this will be so 20 years from now. Athens is constantly touted as the site for the Summer Olympic Games, due to its role as the birthplace of the Olympics.¹⁴⁰ Assuming

124 Barnaby Phillips, *Case for Permanent Games Sites*, Al Jazeera Blogs, blogs.aljazeera.net/africa/2010/07/05/case-permanent-games-sites (July 5, 2010); Charles Banks Altkruse, *Give the Olympics a Home*, N.Y. Times, Mar. 1, 2010, at A27; Frederic C. Rich, *The Legal Regime for a Permanent Olympic Site*, 15 N.Y.U. J. Int'l L. & Pol. 1, at 5 (1992).

125 Rich, *supra* note 124, at 5.

126 *Id.* at 6.

127 S. Con. Res. 115, 98th Cong. (1984). See also, H. Con. Res. 308, 98th Cong. (1984). This is in addition to H. Con. Res. 303, 98th Cong. (1984) ("A concurrent resolution expressing the sense of the Congress that there should be established in Greece a permanent site for the summer Olympic Games."); and S. Con. Res. 114, 98th Cong. (1984) ("A concurrent resolution calling on the President of the United States to pro-

pose a permanent fixed site or sites for the Olympic Games.").

128 These four points are addressed thoroughly in Toohey & Veal, *supra* note 29, at 283.

129 Rich, *supra* note 124, at 4.

130 *Id.* at 6.

131 Banks-Altkruse, *supra* note 124.

132 Toohey & Veal, *supra* note 29, at 284.

133 *Id.*

134 *Id.*

135 *Id.*

136 See Rich, *supra* note 124, at 7.

137 Altkruse points to Switzerland as a choice to host both the Summer and Winter Olympics, *supra* note 124.

138 Namely, the ban on minarets. Deborah Ball & Anita Griel, *Swiss Referendum Stirs a Debate About Islam*, Wall Street Journal Online, Nov. 6, 2009, <http://online.wsj.com/article/SB125738800597529989.html>.

139 *Id.*; see also, Rich, *supra* note 124.

Athens was an acceptable choice, and that is debatable, what about the Winter Olympics, FIFA World Cup, Cricket World Cup, the Commonwealth Games, FIBA Championships, etc.? Going by “birth-place” would conceivably land more than half of these events in England. But what about the Winter Olympics? While the Winter Olympics is limited regionally, requiring a stable winter climate, the other events have a truly global audience. This is taken into account by Barnaby Phillips as he considers China as a permanent host for the World Cup. He immediately nixes that idea, due to concerns with China’s political system and suggests the old standby England (who invented football, but are certainly not a power today); Brazil (the most successful World Cup team); and even South Africa (“At least those white elephant stadiums...would get used every four years”).¹⁴¹

Of course, Phillips is just engaging in idle speculation, but one could imagine all sorts of problems with each of those regions as a permanent host. That alone should give pause to the notion that a permanent host is a solution.

B. Award the Event to the Highest Bidder

A second option would be an auction of the event to the highest bidder. This has been suggested by Mark. F. Stewart and C.L. Wu, and is largely put forth as a solution to the millions of dollars spent to influence members of the IOC.¹⁴² The benefits, the authors claim, would be threefold:

1. The Process would become transparent, which would end the allegations of corruption against the IOC.
2. The auction would generate funds that could be used in a worthwhile way.
3. The huge waste of resources would be avoided.¹⁴³

The authors envision a *Vickrey* auction to put this plan into action. A *Vickrey* auction is where “the bids are sealed, the highest bidder wins and pays the second highest bidder’s price.”¹⁴⁴ This would then ensure that the Games would go to the bidder that truly valued them the highest, and that the incentive to under-state the value of hosting the Games would be minimized. Additionally, “as the bids are sealed there is less chance of collusion.”¹⁴⁵

Allowing for a bidding process like the one above would bias the hosting of mega-events towards advanced nations, and high-income cities. This cuts in two directions. On one hand, given the financial input required to host a mega-event, a very strong policy argument can be made that a developing country should not be hosting an event. On the other hand, this does not seem to stop a host from incurring massive amounts of debt to host an event.

While there may indeed be less money spent on lobbying (this assumes that there cannot ever be sufficient safeguards to prevent lobbying of committee members), this does not lead to an increase in transparency or efficiency. Hosts are historically, and notoriously, abysmal at estimating the true costs of hosting sporting events. Even in countries with a high degree of transparency such as Canada, the costs of the 2010 Winter Olympic Games have not always been clear.¹⁴⁶ In countries such as China, there may be no hope of accountability. A country may spend

millions upon millions for the right to win over those who can afford it, and lose money on the process, a reality that is acknowledged by the authors.¹⁴⁷

One might say that the authors also attempt to “have it both ways”, in regards to the ethics of committees. On one hand, they point to historical examples of corruption, and say, in effect, that the members of the committees should be excluded from the process, so money is not wasted. On the other hand, the authors advocate a fund that could be used “in a worthwhile way”. The authors are saying that they do not trust the organizations to keep a leash on their members to ensure a transparent bidding process, and to adhere to standards of ethics and accountability. On the other hand, the authors seemingly have little to no problem placing millions (or even billions) of dollars in the hands of these organizations to fund “worthwhile causes.” Without intending to cast aspersions on any organization, if one cannot trust someone to conduct a vote without allegations of graft and corruption, it is difficult to then think that these same people would be able to manage millions of dollars, likely going towards developing states with corruption problems of their own, and hope for the best.

Finally, and this is more of a normative point, but mega-events are, in theory, not about money, but a celebration of sport and culture.¹⁴⁸ Hosting the FIFA World Cup in England might make more financial sense than hosting it in South Africa. But, despite the costs, it can be said that there are intangible benefits that accrue to South Africa as a result of hosting the World Cup. They may not offset the enormous economic costs, but there is not denying the intangible events of hosting a worldwide event in countries such as South Korea, China, or South Africa.

V. Towards a Better Process

As we can see above, simply starting from scratch can lead to many problems. There cannot be a “one-size-fits-all” solution. Each organization has different needs. For instance, the IOC, FIFA, and FIBA are global organizations, the ICC and CGF are limited constituencies, but with a global reach, and UEFA is regional. FIBA, FIFA, UEFA, and the ICC select entire countries as hosts, while the CGF and IOC select cities. FIFA, FIBA, UEFA, and the ICC are single-sport organizations, while the IOC and CGF are multi-disciplinary. And the list goes on.

Although each organization has different needs, there are likely general “best practices” that can be discerned and applied. The “best practices” that this article suggests are: (1) a written policy in a governing document; (2) a high threshold to alter that policy; (3) the implementation of regional voting; (4) the publication of technical evaluations; and (5) “exit strategies” in case of host failure. None of these suggestions are revolutionary, many are already in place, at least in part, in some organizations, and all are likely easily implementable.

A. Write Process Clearly in Governing Documents

Any process that is adopted needs to be written down. This is basic to jurisprudence and transparency. Ideally, it would be set forth in a charter, or some other governing document. This would create a sense of permanency, and not lead to situations like the one leading up to the 2018 World Cup bid where Sepp Blatter was musing about an Olympic-style two-step process, leaving potential bidders unsure of what steps to take next. It would also allow for better evaluation of the transparency of the bid process by providing an external measurement.

An example of the benefit of a written policy is the experience with rotation policies. These policies have been explicit, such as FIFA’s, or implicit, such as that of the International Cricket Council. These policies may specifically choose the next region that will host the event, or be a bar on a continent or region from hosting an event twice in a row, as is the IOC’s implicit policy,¹⁴⁹ and the explicit policy of FIFA at this moment.

An implicit policy is sub-optimal. If the alleged policy is departed from, there is a potential for controversy. This is what happened during the bids for the 2011 Cricket World Cup. It is likely that Australasia was granted the 2015 Cricket World Cup as an apology, but this is more difficult to do if bids are not submitted for multiple events at once. If the right to host an event is granted one year, the election for the next event is held four years later, and the outcome is pre-determined, either

¹⁴⁰ Rich uses Greece as a placeholder, although his article generally relates to a fictional “neutral” permanent Olympic site, *supra* note 124; Phillips, *supra* note 124.

¹⁴¹ Phillips, *supra* note 124.

¹⁴² Mark. F. Stewart & C.L. Wu, The Right to Host the Olympic Games Should be Auctioned to the Highest Bidder, *available at* <http://mams.rmit.edu.au/cqagatzrut2.pdf> (last visited Sept. 10, 2010).

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.* at 5.

¹⁴⁶ Jeff Lee, *Cost of Vancouver 2010 Games Nearly \$1 Billion*, Vancouver Sun, July 9, 2010, *available at* <http://www.van->

couversun.com/sports/Cost+Vancouver+2010+Winter+Games+exceed+billion/3256899/story.html (quoting the member of a provincial political party alleging that the government accounting left out the costs of sponsorships, loss of productivity, and other factors).

¹⁴⁷ *Id.* at 4.

¹⁴⁸ For example, the host of the Olympics is required to include a program of cultural events during the Games, which is to be approved by the IOC Executive Board. Olympic Charter (2010), Art. 40.

¹⁴⁹ An example of this can be seen in the memoirs of Michael Payne, where he claimed that Nagano did not break any rules regarding its bid for the 1998 Winter Olympics, which Salt Lake City

a lot of bidding time and money is wasted, or there is no bidding process at all. In either case, with only one true bidder, there is no incentive for the bidder to make it an optimal bid.

Simply stated, a written process should be laid out in governing documents, such as a constitution, or in regulations appended to the constitution. It is ideal to have a more detailed process within the core document rather than one that refers to another document. This will likely reduce the ease of altering the process, assisting the second improvement.

B. Stabilize the Process

Many aspects of the bidding processes have been changed by the governing bodies over the years. Some of these aspects include the presence or absence of a rotational system, who votes for the host, whether or not there is a technical evaluation, and whether or not co-hosts are allowed. This article has taken an in-depth look at the historical processes of the largest mega-events, the FIFA World Cup, and the Olympics. Even in the brief histories of the other mega-events, it can be seen that the bid procedures change on a fairly frequent basis. This can make it difficult for potential hosts to structure their bids appropriately.

For instance, for the FIFA World Cup 2010, several bids were put forth to co-host the event, but were rejected as FIFA suddenly no longer allowed co-hosts. For the 2018 and 2022 World Cups, FIFA appeared to change its mind and allow potential co-hosts from Belgium/Netherlands and Spain/Portugal. FIFA, despite allowing co-hosting, frowned on the difficulties associated with co-hosting in the vaguest of terms, repeated verbatim in the Executive Summaries for both joint-bidders:

It should be noted that a co-hosting concept could pose challenges regarding the joint operational delivery of the FIFA World Cup™ in terms of ensuring consistent standards and implementation in various areas such as legal, IT, frequencies, safety and security. Therefore, in order to provide a more complete basis for evaluation of the co-hosting concept, further key operational details would be required, especially in view of the administrative, logistical and financial challenges of co-hosting a FIFA World Cup™.¹⁵⁰

A stable process prevents the denigration of a bidder for following the rules, and ensures that potential bidders know what the rules are. It makes the process less susceptible to manipulation, especially by the mere words of a single authority figure. The vote of the largest representative body of the organization, such as a congress, should be required to change the process. There could be a place for extraordinary circumstances, such as the Japan/South Korea 2002 World Cup bid, that grants some flexibility to the process. But the key is to make the process stable, and predictable.

C. Create A Regional Voting Structure

The current voting structure for many organizations appears to be along the lines of “one country/one vote”, but this is not always the case in practice as there are often problems with exactly how much that vote is worth. For instance, in the ICC, there are members who have more voting rights than others. Also common is over-representation of regions. The strongest example of this is the Executive Committee of FIFA, where more than 1/3 of the 24 members are European,¹⁵¹ which, if the six regions were equally weighted, is more than twice the number it should be.

Regional voting blocs can develop naturally. Sometimes, members of a region are in competition, such as Europe with the 2018 World Cup. Other times, absent direct competition, members of a region may choose to vote for another regional member to be the host of an event. This may be due to loyalty and comity with the region; the hope of “economic spillovers” from tourism as a result of the event, or from locals of the host country “getting away” from the event and travelling throughout the region; or as a *quid pro quo* to a regional partner whose support will be vital in a future bid to host an event. These are not insidious reasons, but regional imbalance may affect bids, if it comes down to the voting of regional blocs. It might simply be best to admit that regional blocs are likely to form and to work within that construct by formalizing these blocs. This would not be a huge stretch for most organizations as they already have regional sub-organizations.

There are several ways to balance the regions. The simplest way would be to give one region one vote. Who casts the vote for the region could be contentious. For instance, members of that region may have to compromise on who to cast their regional vote for. This may give regional powers such as Australia or Brazil more clout as they could drive the agendas of their region more effectively than any single country in Europe or Asia. This is not necessarily a positive or a negative, but simply a reality of the process.

A similar approach would be to give a certain number of votes to a region, ideally keeping the number of votes per region equal. For instance, Africa would have 3 votes, and Europe would have 3 votes. These votes could be divisible if the regions so chose. This would allow regions to combine or divide up votes for strategic purposes to select a particular host, or to divide up their votes to satisfy their constituencies in the event that multiple countries/cities in their region are bidding for a particular event. Vote-splitting would allow for nuanced voting, and would allow for a lower likelihood of deadlock as it would lower the likelihood of 18 votes splitting equally (six regions with three votes each) than six votes splitting equally (six regions with 1 vote each).

D. Technical Evaluations to Benchmark and Monitor

Another way to increase transparency could be to “shine a light” on the final decisions through the publication of written decisions. One way this could be done could be through the issuing of written decisions, like a court case. Yet, written decisions would delay the decision-making process, and may simply be a *post hoc* rationalization of the decision.

Technical evaluations serve a better role as they are often carried out by committees separate from the executive committees who vote for the hosts, and illuminate the strengths and shortcomings of particular bids. Technical evaluations are done at a preliminary stage, and could possibly be repeated at a final stage. This may be controversial in cases where the applicant cities with the highest technical evaluations did not necessarily advance to the next round, such as Qatar’s bid for the 2016 Olympic Games. If the technical evaluation is only preliminary to a popular vote, then the technical evaluations do not serve an illuminating purpose, but at most an informative purpose. If the process is more objective, as objective as an evaluation by a sub-committee can be, with numerical scores as the sole determinant, then the evaluations serve a stronger gate-keeping role.

Technical evaluations can also serve a benchmarking role. They can set out where a potential host is, and where it should be in the course of several years, leading to the final suggestion for improvement to the bidding process.

E. Create an “Exit Strategy”

Monitoring of progress and benchmarking by the international organizations would reduce the likelihood of hosts not completing their duties prior to the event. Yet, as Delhi demonstrated, even today it is possible to be “down to the wire” in preparation. Even with increased monitoring, it is possible that a host will simply not be able to carry out its duties, and there should be a process in place in case of failure. This is beneficial to the host selection process as it puts potential hosts on notice that the hosting of the event is a duty to be taken seriously, and that they are in danger of losing the right to the event, which they spent millions of dollars on obtaining, if they are derelict in that duty.

claimed, but that “With Atlanta hosting the 1996 Games, there was no chance of another North American city hosting the 1998 Winter Games.” Payne, *supra* note 10, at 226; see also Dick Pound, Inside the Olympics: A Behind-the-Scenes Look at the Politics, the Scandals, and the Glory of the Games 206-07 (2004).

¹⁵⁰ FIFA, Evaluation Reports on the Bids for the 2018 and 2022 FIFA World Cups™: Executive Summaries, 16, 36 (2010), available at

http://www.fifa.com/mm/document/tournament/competition/01/33/59/45/bid_evaluation_report_1811.pdf.

¹⁵¹ As of this writing, the European Executive Committee members hail from Switzerland, Spain, France, England, Belgium, Turkey, Cyprus, Germany, and Russia. FIFA.com, FIFA Executive Committee, www.fifa.com/aboutfifa/federation/bodies/exco.html (last visited Sept. 26, 2010).

Generally, there seems to be about eight to twelve years of lead-time between the selection of a host, and the commencement of an event. In that time, a lot can happen. It can be structural problem, such as a lack of financing, or a sudden event, such as a terrorist attack. In 1972, Colombia was selected to host the 1986 World Cup. Despite more than a decade of preparation time, it became clear that Colombia would not have the financial resources required to host the event, and the country withdrew from hosting in 1982. The next year, Mexico, who had hosted the 1970 FIFA World Cup, was chosen over the United States and Canada to host the 1986 FIFA World Cup. As an example of a sudden event, Pakistan was recently forced to withdraw from hosting responsibilities for the 2011 Cricket World Cup, following terrorist attacks and increased security concerns. As the event was co-hosted, the ICC swiftly shifted the fourteen games that would have been played in Pakistan to the three other hosts. Of course, not all problems lead to cancellations. The frantic build-up to the 2004 Athens Olympics, or the problems surrounding the 2010 Delhi Commonwealth Games are examples of “just-in-time” preparation.

Nevertheless, it is prudent to put procedures in place to ensure that the “show can go on”, in spite of host difficulties. To ensure that the “show goes on”, there would need to be a process to remove hosting duties from a host, and second, to determine a replacement host.

In determining a process to remove the right to host an event, the trick is to determine what contingencies should trigger the loss of that right. It is likely an easy call in the case of security issues near in time and place to the hosting of an event. The attack on a cricket team in Lahore, two years away from the Cricket World Cup, to be partially staged in Lahore, is an example of this. But what if the attack was in another city? Or against a football team? Additionally, a process should not allow an organization to strip the rights to host just because of jitters that infrastructure will not be finished, because that is a more uncertain outcome. Would the IOC have stripped Athens of the right to host, or would the Commonwealth Games Committee have stripped Delhi of the right to host? This is doubtful, but one could imagine a case where things were progressing so poorly, that an organization would “pull the plug”.

The occurrence of a sudden, unforeseeable event probably the less controversial occurrence, as it is likely easier to examine the degree to which the overall event is in jeopardy. If a natural disaster or a breach of security destroys venues or causes concerns for the safety of the athletes, the ability to rectify those concerns is a much less nuanced judgment call. Structural problems, such as debt or slow construction time are more precarious. These can be mitigated through the establishment of checkpoints. Every year leading up to the event, there could be certain goals that need to be met. Failure to meet these goals, say two years in a row, could lead to a re-evaluation of the host, and a possible can-

cellation, while missing the goals three years in a row could lead to cancellation, for example. These goals could be construction of stadia, of key infrastructure, of training of personnel, of changing visa rules, etc. This would make the process more objective, and thus more acceptable if it ever needed to be invoked.

It is one thing to strip a host of holding an event, but what happens afterwards? If a process to remove a potential host is put into place, a backup host should be considered. A logical choice would be to accept a previous host. It is likely to have the infrastructure largely in place to host an event, so it could do so on relatively short notice. Using the most recent host would make sense technically, as everything would be fairly up-to-date. However, this might invoke concerns of fairness, or other concerns if the most recent event was not up to standard. It is likely that any host that hosted the event within the past, say, three events would be capable of hosting another event on relatively short notice. The venues would typically be just over twelve years old, as most events are on four-year cycles, which may not make them state-of-the-art, but would at least be current-generation. This may also alleviate an economic concern with hosting sporting events, especially those with highly-specialized infrastructure requirements, like the Winter Olympics, the concern that the infrastructure will not be used in the future. How much daily use can a bobsleigh track, or an 80,000 person stadium have? But, if there is a chance that it could be used as a backup in the case of a failed host, then it is possible that there would be additional benefit from the infrastructure, even if it is only potential. It would also incentivize the host of an event not to immediately mothball venues. Finally, although another alternative is to create a “permanent backup host”, for all of the problems associated with selecting a permanent host, as discussed above, this may not be the best course of action.

VI. Conclusion

There are concerns with the bidding processes selected to host international sporting events. As these are events that cost millions of dollars to bid on, and range into the billions of dollars to stage, this is not simply a rhetorical problem. While there are many things that could go wrong with hosting an international sporting event, everything begins at the bidding process, where the light shines the brightest before the successful host begins the years of preparation needed to host an event.

The changes that need to be made to the process are not insurmountable. Through a written procedure, that is stable, and relies on regionally-balanced voting, many of the concerns that exist might be mitigated. With a better process, there would hopefully be an increase in transparency, a decrease in surprises, and overall, a better games. This benefits the organizations, the hosts, and most importantly, the fans.

The International Sports Law Journal

Sports Governing Bodies and Leveraging of Power: What is The Appropriate Governance Model?*

by Adam Pendlebury and Anna Semens**

Introduction

The commercialisation of sport has added a new layer of complexity to the role of the sports governing body. Their traditional regulatory function has assumed added significance as their regulatory choices affect the commercial freedoms of economically active sports stakeholders such as athletes and clubs. Governing bodies also commercially exploit

their respective sports through, for example, the sale of media rights or the conclusion of sponsorship agreements. This paper seeks to explore modern sports governance by investigating whether governance standards in sport have kept pace with the commercially generated changes to the functions of sports governing bodies. In particular, the paper explores whether the traditional regulatory function of sports governing bodies is capable of being employed to leverage unfair commercial advantage at the expense of stakeholders subject to their regulatory control. Initially, the paper interrogates the proposition that problems with governance standards in sport, such as leveraging and conflicts of interest, have emerged as a consequence of an assumption of immunity by the governing bodies. This assumption has three sources. First, the

* A previous version of this paper was given together with Professor Richard Parrish (Edge Hill University) at the European Union Studies Association Conference in Los Angeles, 2009.

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European model of sport has established the governing bodies as monopolies. Second, they have a duty to devise rules designed to protect the specificities of sport and third, they have been afforded a wide margin of discretion by the state in order to carry out these functions. The paper then adopts a thematic approach to explore the conflicts of interest and potential leveraging. Finally it considers how a system of supervised self governance could be workable if appropriate standards of internal transparency and external accountability are adhered to.

The European Model of Sport

Many European sports are organised on a pyramid model. At the pinnacle are the international or world governing bodies such as the Fédération Internationale de Football Association (FIFA). The international federations are the overall guardians of their respective sports and are responsible for setting rules, staging international tournaments and establishing the channels of responsibility between themselves and the other organisational units affiliated to them. Affiliated to the global federations are the continental federations, such the Union des Associations Européennes de Football (UEFA), whose role is to take care of the sport at the regional level, ensure enforcement of global rules and to represent the interests of its members, the national associations. Whilst the formal relationship between FIFA and UEFA is regulated via statute, informally tension exists between the two organisations given the pre-eminent status of the European football market. Affiliated to the continental (European) federations are the national associations which organise and regulate the sport in question within their national territory and associated to the national federations are the regional federations and leagues. At the base of the pyramid lie the sports clubs, players and administrators. Channels of authority tend to be rigidly hierarchical with disputes generated at the base of the pyramid having to be considered sequentially upstream.

The pyramid structure is defended on the grounds of organisational efficiency. The structure facilitates the pursuit of policy goals designed to maintain coherence within the pyramid between the professional game and grassroots sport. This flows from the duty of the governing body to act as the guardian of the sport at all levels. Consequently, the narrow economic interests of individual stakeholders should not be allowed to detract from the discharge of this duty. Furthermore, as the pyramid also implies competitive fluidity, particularly in terms of the system of promotion and relegation which operates in many sports, the governing bodies require clubs to commit to the entire structure and impose sanctions on participants which deters the formation of, and participation in, rival structures. It is also claimed that sports with multiple governing bodies lose public interest as the public prefer to associate with one national and international competition rather than with competing competitions.

The pyramid governance model has attracted criticism from some stakeholders such as clubs and players, who argue that it promotes undemocratic practices, particularly in relation to stakeholder representation and acts as a tool to maintain the regulatory and commercial dominance of the governing bodies. They also complain that the structure leaves governing bodies unaccountable, particularly where decisions of a regulatory nature impact on the commercial freedoms of the stakeholders. The supremacy of international / global governing body 'law' often frustrates stakeholders who identify conflicts with national and/or international law.

One such conflict concerned the issue of mandatory player release rules for international football and the fixing of the international match calendar. FIFA rules provide for the mandatory release of players for national association representative matches, a rule defended on the grounds that without such obligations, clubs would refuse to release players and international football could not function.¹ However, the FIFA regulations do not provide financial compensation for clubs who are required to release a player. The Association calling up a player is expected to bear the costs of travel actually incurred by the player as a result of the call-up. The club for which the player concerned is registered is responsible for his insurance cover against illness and accident during the entire period of his release. This cover must also extend to any injuries sustained by the player during the international match for which he was released.² Clubs refusing to comply with the mandatory release clause can be subject to a points or game forfeiture.³ For the larger clubs, at issue was the imposition of a rule which is used to strengthen the commercial viability of international football whilst denying the clubs a voice in the framing of the rules or a direct share in the profits generated. Furthermore, they objected to the related issue of the unilateral and binding determination of the coordinated international match calendar by the governing body. A challenge brought by Belgian club Charleroi, and supported by G14⁴, was due to be heard by the European Court Justice (ECJ) who were expected to provide guidance on whether the release rules and the fixing of the international calendar constituted unlawful restrictions of competition or abuses of a dominant position.⁵

An out-of-court settlement was negotiated between the parties at a meeting in Zurich in January 2008 at which representatives of FIFA, UEFA and clubs agreed 'on the intention to regulate their future relationship with a number of actions' including the establishment of a new body within the UEFA structure through which club interests could be channelled (the European Club Association), the dissolution of the G14, the withdrawal of the Charleroi ECJ case and the payment of financial contributions for player participation in European Championships and World Cups.⁶

A similar issue has been raised in handball, where Group Club Handball (GCH, an association of European Handball Clubs) lodged a complaint with the European Commission in April 2009 against the International Handball Federation and European Handball Federation in which GCH objected to the exclusive control of the federations over international competitions and their unilateral determination of the handball calendar and control over the clubs' players, who must be released for such events over long periods of up to 100 days, without financial compensation or insurance, in the middle of the clubs' winter season. GCH argues that such practice "constitutes an unjustified restriction of competition," and violates thus article 101 of the Treaty on the Functioning of the European Union (TFEU).⁷ This is the first time that the commission has been officially asked to examine the compatibility of player release rules and rules regarding sport club events with European Union competition law.⁸

Protecting the Specificities of Sport

The sports market operates under conditions that are different to those found in 'normal' industries. The governing bodies have a duty to promote the good of the game at all levels and in doing so have made regulatory choices that would be considered anti-competitive in other sectors. For example, in recognition of the mutual interdependence which exists between sporting competitors, the governing bodies engage in co-ordinated action such as in co-ordinating fixtures and the rules of the game. Whilst this would be considered collusive behaviour in normal markets, clearly sport could not operate without some level of co-ordination. But how far should cartelisation be tolerated and at what point does co-ordination unfairly restrict the commercial activity of stakeholders? For example, does the inability of some clubs to individually exploit their broadcasting rights undermine competition between undertakings and have consequential impacts on other markets such as the broadcasting sector? Can or should market objectives be qualified by other considerations such as the need to collectively exploit broadcasting rights for the purposes of ensuring horizontal and vertical solidarity in sport?

1 Annex 1, Article 1, FIFA Regulations for the Status and Transfer of Players, July 2005.

2 Annex 1, Article 2, FIFA Regulations for the Status and Transfer of Players, July 2005.

3 Annex 1, Article 6, FIFA Regulations for the Status and Transfer of Players, July 2005.

4 The G-14 was an organisation of leading European football clubs that existed between 2000 and 2008. It consisted of 14 teams initially, later expanded to 18.

5 Case C-243/06 *SA Sporting du Pays de*

Charleroi, G-14 Groupment des Clubs de Football Européens v Fédération Internationale de Football Association (FIFA), Reference for a preliminary ruling from the Tribunal de Commerce de Charleroi lodged on 30 May 2006. Hereafter referred to as *Charleroi/Oulmers*.

6 UEFA Media Release (2008), 'Victory for football as a whole', 15/01/2008, No.4, p1.

7 Ex Article 81 EC.

8 Sportcal.com, Sports Market Review, January 2010



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ASSER International Sports Law Series

Sports Betting: Law and Policy

Edited by

Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek

With a Foreword by Tjeerd Veenstra, Director of the Dutch De Lotto and Second Vice-President of The European Lotteries.

Betting and sport have been – to some extent – uneasy bedfellows probably since the dawn of time. After all, the essence of sport is *fair play* and illegal and unfair betting arrangements and the manipulation of the outcomes of sporting events are completely anathema and contrary to this fundamental concept and principle. Of course, with preventive measures in place, sport and betting can – and do, in fact – co-exist for their mutual benefit. National lotteries raise substantial sums of money for “good causes”, which include the funding of sports events and sports persons. In the last decade sports betting has changed quite fundamentally with the advent of modern technology – not least the omnipresence of the Internet and the rise of on-line sports betting.

This book looks at the law and the policy on betting and sport in more than forty countries around the world. Several chapters deal with the United States of America. In addition, several contributions deal with the way national legislation on sports betting is scrutinized in the jurisprudence of the European Court of Justice.

Sports Betting: Law and Policy, a publication in which a mine of useful information on an important subject of national and international sports law is assembled, is heartily commended to sports lawyers and all others with a particular professional, academic and policy interest in the subject, including those who are involved in the organisation and administration of national lottery schemes benefitting sport.

The editing team consisted of Prof. **Paul Anderson**, Associate Director, National Sports Law Institute, Marquette University Law School, Milwaukee, United States of America, Prof. **Ian Blackshaw**, Member of the Court of Arbitration for Sport, Prof. **Robert Siekmann** and Dr **Janwillem Soek**, both of the ASSER International Sports Law Centre, The Hague, The Netherlands.

The book appears in the ASSER International Sports Law Series, under the editorship of Prof. dr. Robert Siekmann, Dr. Janwillem Soek and Marco van der Harst LL.M.

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by

Ian S. Blackshaw

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Sports marketing is not only a global phenomenon, but also a major industry in its own right. This book breaks new ground in that it combines the theory and the practice of sports marketing agreements, which are at the heart of the commercialisation and marketing of sport. A particular feature of this book is the wide-ranging collection of precedents of sports marketing agreements, including, *inter alia*, sponsorship, merchandising, TV rights and new media, sports image rights and endorsements, event management and corporate hospitality, that are included and are explained and commented on in the text of the book. The book also covers the EU aspects, which are particularly important in this context, especially collective selling, of Sports TV rights and the drafting of the corresponding agreements; as well as the fiscal aspects of sports marketing agreements in general and sports image rights agreements in particular, which need to be taken into account in order to reduce the tax burden on the resulting revenues. The book also deals with the important topic of dispute resolution and, again, provides the reader with some useful corresponding clauses for settling disputes by ADR, particularly through the Court of Arbitration for Sport (CAS).

Prof. **Ian S. Blackshaw** is a Member of the Court of Arbitration for Sport in Lausanne, Switzerland.

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Edited by

Alexander Wild

With a Foreword by Prof. dr. Amaresh Kumar, Advocate, Supreme Court of India, New Delhi, and Secretary General of the Asian Council of Arbitration for Sport (ACAS)

This book deals with the most important decisions of The Court of Arbitration for Sport (CAS) in football disputes. These awards are analyzed by experts, practicing all over the world. Most of the authors were directly involved in the proceedings before the CAS. The commentaries cover a broad spectrum of disputes, such as contractual stability, protection of young football players, doping, football hooliganism, match fixing, players release, multiple club ownership, player agents and the stays of execution.

It fills a gap in the international sports law literature and provides an invaluable resource for all those involved in the legal aspects of the 'beautiful game', particularly extra-judicial dispute resolution, including administrators, regulators, football agents and their legal advisers. The book will also prove very useful to students and researchers in this particular field.

Alexander Wild is an Attorney-at-law at the Law Firm of Dr. Falkenstein & Partner, Stuttgart, Germany and a former research fellow of the ASSER international Sports Law Centre, The Hague, The Netherlands.

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As part of their role to promote the good of the game, the governing bodies have also adopted rules designed to promote competitive balance in sport. Sport, it is suggested, requires uncertainty of result to maintain public interest and its commercial viability. This uncertainty extends beyond a single match to include uncertainty of outcome over the course of a single season and over the course of a number of championships. Examples of co-ordinated action by a governing body designed to promote competitive balance includes limits on the number of teams participating in a league, reserve clauses, draft rules, roster limits, salary caps, transfer windows, revenue sharing, joint merchandising and the collective sale and reinvestment of broadcasting rights.⁹ In *Bosman* the ECJ accepted that 'the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results... must be accepted as legitimate'.¹⁰ Further, the ECJ ruled in the *Bernard*¹¹ case that football clubs may seek compensation for the training of young players who wish to sign their first professional contract with a club in another Member State. Despite the transfer rules being a restriction on the freedom of movement of workers, 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. This case is of particular pertinence as the ECJ for the first time makes specific reference to Article 165 (1) TFEU. The article states '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.' Whilst politically this was groundbreaking, the Court stated that 165 (1) merely corroborated their methodological approach adopted in *Bosman* and applied in the case of *Bernard*.¹² However it has been put forward 'that the Court's novel reference to art.165(1) TFEU might signal that the provision has not just confirmed but has in fact given some additional weight to the specificity and socio-educational function of sport, which could prove just enough to influence the outcome in certain cases'.¹³ What can be said is that the approach of the Court continues to recognise the specificity of sport. Nevertheless, each measure which purports to promote competitive balance, enhance the development of clubs and encourage the investment in youth players needs assessing on its own merits for, as Ross argues, some restraints which are justified on the grounds of competitive balance are actually profit enhancing schemes by leagues.¹⁴ Conversely, Noll argues that some governing bodies face financial incentives not to adopt measures designed to promote competitive balance as imbalance within a league generates significant revenues for governing bodies and the major clubs.¹⁵

As stated above, a governing body owes a duty to their respective sport to promote the education and training of young players so that a sustainable pool of talent ensures the long term viability of the sport. Traditionally this has been achieved through the adoption of rules regulating the transfer of players and rules limiting the eligibility of non-nationals. These rules have the potential to conflict with the national and European Union labour laws and in *Bosman*, the Court of Justice found that the use of the international transfer system and nationality quotas was incompatible with Article 45 of the TFEU¹⁶. Amendments made to the international transfer system in 2001 were approved by the Commission¹⁷ and in 2008, the Commission took a view that UEFA's home-grown player initiative was compatible with Community law.¹⁸

Transfer and eligibility rules may also be problematic because they impact upon the commercial freedoms of players and clubs and their

use may serve to reinforce the dominant regulatory position of the governing bodies by maintaining national segmentation in the product market. The use of these rules is justified by governing bodies with reference to the need to ensure the success and viability of national team sports. Such rules have the effect of maintaining a pool of talent eligible to represent their national team. The strength of national competition can be a major source of revenue for the governing bodies and in some sports, such as cricket, revenues generated through international competition ensures the viability of the game at club level.¹⁹ Protecting national team sports is acknowledged by the ECJ as a legitimate objective. In *Walrave*²⁰ the court held that the prohibition on nationality discrimination 'does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity'. However, other rules designed to protect national teams, such as the mandatory player release rules and the fixing of the international calendar discussed above, raise concerns that the governing bodies employ such rules to protect the commercial viability of the international tournaments they stage.

Maintaining the integrity of sporting competition is clearly a central function of a governing body. Without a perception of propriety in sport, spectators, broadcasters and sponsors would question the value of watching, broadcasting and sponsoring a competition which is fixed, distorted by drug users or in which the unpredictability of outcome is seriously questionable. In pursuit of this objective, governing bodies have adopted rules such as anti-doping regimes, club licensing schemes, rules on the ownership, control and influence of clubs, rules regulating players' agents and rules restricting the times in which transfers can take place (transfer windows). Many of these rules clearly carry economic consequences for those affected by them.

Limited State Intervention

The assumption of immunity also partly derives from the state and the deference with which legislatures and judiciaries have treated sport. Throughout Europe few states have adopted a comprehensive constitutional framework regulating the activities of the governing bodies.²¹ Even in interventionist states such as France, the government has gradually retreated from direct involvement in sport.²² In countries where the state has directly intervened in questions of sports governance, these interventions have conflicted with the rules of the international federations who have a policy of non-interference. For example, in Greece, the government passed a 2006 Sports Act in order to reverse the suspension imposed on the Hellenic Football Federation by FIFA after complaints by football's world governing body that Greek sports legislation conflicted with FIFA statutes regarding the independence of member associations.

Nevertheless, it would be far from accurate to assert that the state has no role in sports governance. Sport performs important public functions and even in traditionally non-interventionist states such as the United Kingdom, the state uses sport to implement broader social and economic policies. Where this role involves direct or indirect state financing of sport, the government has insisted that the sports governing bodies respond to governmental objectives and integrate state goals on good governance, anti-doping, non-discrimination and child protection into their constitutions.²³

The courts have also tended to restrict their scrutiny of sporting practices. As governing bodies tend to assume the form of unincorporated

9 See Parrish, R and Miettinen, S, (2008) *The Sporting Exception in European Union Law*, International Sports Law Series, Den Haag: TMC Asser Press. Ch1.

10 Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921, hereafter referred to as *Bosman*. Paragraph 106.

11 Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC*.

12 *Bernard* at paragraph 40.

13 Pijetlovic, k, (2010) 'Another classic of EU sports jurisprudence: legal implications of *Olympique Lyonnais v Olivier Bernard and Newcastle UFC* (C-325/08)', *European Law Review* 35(6), 857-868.

14 Ross, S. (2003), 'Competition law as a constraint on monopolistic exploitation by sports leagues and Clubs', *Oxford Review of Economic Policy*, 19(4), 569-584.

15 Noll, R. (2007), 'Broadcasting and team

sports', *Scottish Journal of Political Economy*, 54(3), 417.

16 Ex Article 39 EC.

17 Commission Press Release IP/02/824, 'Commission closes investigations into FIFA regulations on international football transfers', 5 June 2002.

18 Commission Press Release IP/08/807, 'UEFA rule on home-grown players: compatibility with the principles of free movement of persons', 28/05/08.

19 *Op Cit* Parrish, R and Miettinen, S.

20 Case 36/74 *Walrave and Koch* [1974] ECR 1405 paragraph 4, hereafter referred to as *Walrave*.

21 See for example Chaker, A.N. (1999), 'Study of National Sports Legislation in Europe', Strasbourg: Council of Europe.

22 Nys, J-F. (2006), 'Central government and sport', in: Andreff, W. & Szymanski, S. *Handbook on the Economics of Sport*, Cheltenham: Edward Elgar.

23 This being, for example, a condition of state lottery funding.

associations of members or private limited companies, challenges to their decision making are located within private law actions. For example, within the English courts, the actions of sports governing bodies have not previously been subject to challenge by way of judicial review.²⁴ Nevertheless, under private law challenge, the standards expected of that governing body are in effect the same as those demanded under judicial review, namely that the governing bodies must act rationally, proportionately and with procedural fairness and that they follow both the law of the land and their own rules.

The jurisprudence of the ECJ has also been influential in shaping the assumption of immunity formed by the governing bodies. In *Walrave*, the court declared that sport was subject to Community law 'only in so far as it constitutes economic activity'.²⁵ It went on to consider that the Treaty prohibitions on nationality discrimination did not apply to selection for national teams. Team selection was, according to the Court, 'of purely sporting interest and as such has nothing to do with economic activity'.²⁶ This judgment was interpreted as establishing a territory of sporting autonomy in which the decisions of the governing bodies were incapable of challenge as they fell within a 'sporting exception'.²⁷ That assumption has been progressively eroded in subsequent judgments, mostly notably in *Bosman*²⁸ and *Meca-Medina*.²⁹ In *Meca-Medina* the court held that 'it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.³⁰

The demise of the sporting exception brought about by the *Meca-Medina* judgment has implications for sports governance. Rules of the governing bodies previously defended on purely sporting grounds are now subject to scrutiny under the EU's competition policy regime. Article 101(1) TFEU prohibits collusive behaviour between undertakings that has as its 'object or effect the prevention, restriction or distortion of competition within the common market'. Given the need for co-ordinated action within the sports market it is clear that most decisions of the governing bodies are theoretically caught by this prohibition. However, the prohibition does not apply to agreements, decisions and concerted practices that satisfy the Article 101(3) criteria. A concern for the governing bodies is that this criteria does not allow for the expression of non-economic 'sports specific' justifications. In order to satisfy the exemption criteria, the contested agreement must contribute to improving production, distribution, technical or economic progress, allow consumers a fair share of the benefit, not contain indispensable restrictions, and not afford the possibility of substantially eliminating competition. Engagement with the exemption criteria can be avoided in circumstances where a case can be made that the contested rule does not amount to a restriction at all and thus falls outside the reach of the Treaty's prohibitions. In *Meca-Medina* the Court clarified the circumstances in which this determination could be made. The Court stated the importance of taking into account the overall context in which the

dispute rules were taken or produce their effects, assessing the objectives of the rules, examining whether the restrictive effects are inherent in the pursuit of those objectives, and whether the rules were proportionate in that they did not go beyond what was necessary to achieve the objectives. This analysis was employed by the Court to remove the disputed anti-doping rules from challenge under Article 101(1).

Leveraging: The Case law

Rules Designed to Maintain the Integrity of Sport

There are a number of issues that pose a great threat to the integrity or image of sport. Of particular pertinence are the issues of doping and match-fixing. Prior to the ECJ's ruling in *Meca-Medina*³¹ it was argued that the regulation of these concerns were purely sporting issues, and therefore, outside the scope of EC competition law.³² However, the new methodological approach in *Meca-Medina* no longer allows for this conclusion. Instead, each sporting rule has to be looked at individually to ascertain whether there has been an infringement of EC competition law. This approach acknowledges that rules to combat match-fixing and doping may have commercial implications. The key question for the purpose of this discussion is whether the rules in question are more than rules to guarantee integrity and instead examples of leveraging regulatory power to gain commercial advantage.

This discussion will commence with the ECJ's response to doping in *Meca-Medina*. The case concerned a complaint by two professional long distance swimmers who were suspended from competition following a positive test for a banned substance. They challenged the compatibility with Article 101 and Article 102 TFEU³³ of the anti-doping rules adopted by the International Olympic Committee (IOC) and implemented by the swimming governing body Fédération Internationale de Natation Amateur (FINA). The ECJ concluded that the anti-doping rules in question did not infringe Article 101(1) TFEU despite the fact that the penalties under the anti-doping rules were capable of producing restrictive effects on competition as they could lead to the exclusion of athletes from sport events. The ECJ found that the objective of the anti-doping rules was to ensure fair sport competitions with equal chances for all athletes as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The limitations of action imposed on the athletes by the anti-doping rules were considered by the ECJ to be 'inherent in the organisation and proper conduct of competitive sport'.³⁴ The ECJ also examined whether the rules were limited to what is necessary as regards the threshold for the banned substance in question and the severity of the penalties imposed. The ECJ found that the rules were proportionate in both cases.

It can be put forward that the ECJ was essentially saying that the IOC were not leveraging their regulatory functions to gain commercial advantage. If however, as Szyssczak notes, it was found that the anti-doping rules went beyond mere regulation to protect the IOC's own interests, and were thus excessive rules, then they may have amounted to infringements of EC law.³⁵ So what might the IOC's own commercial interests be? The main one would be the perception of the sport to investors such as sponsors or broadcasters. It is in the IOC's commercial interests to have a sport free from doping.³⁶ Making an example of athletes such as David Meca-Medina would convey a favourable image of the sports to would be investors. Therefore, if the threshold for banned substances was too low or the bans were of too great a severity then the IOC could be charged with hiding behind their role as a doping regulator to gain a commercial advantage. Since this could not be substantiated in *Meca-Medina* the rule was held not to infringe EC competition law.

Similarly, in June 2010 the Court of Arbitration for Sport (CAS) supported an appeal by the Union Cycliste Internationale (UCI) and the World Anti-Doping Agency to extend a two-year doping ban imposed in Italy on Alejandro Valverde, the Spanish cyclist, to make it global. While the UCI said the damage caused by the actions of Mr Valverde to the federation and to cycling as a whole "cannot be fully compensated for by this regulatory sanction"³⁷ it does go some way to protect the integrity of the sport. However, Valverde is expected to appeal against the ruling, calling it "totally unjust and illegal".³⁸

A related case to *Meca-Medina* is that involving the English National Investment Company (ENIC). The company who owned stakes in six

²⁴ *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302; *R v Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207; *R v Jockey Club, ex p Aga Khan* [1993] 1 WLR 909; *R (on the application of Mullins) v Appeal Board of the Jockey Club*, [2005] EWHC 2197; *Flaherty v National Greyhound Racing Club* [2005] EWCA Civ 117. In Scotland actions of Governing Bodies can be subject to judicial review. See *Crocket v Tantalum Golf Club* 2005 SLT 663.

²⁵ *Walrave* paragraph 4.

²⁶ *Walrave* paragraph 8.

²⁷ *Op Cit* Parrish, R. & Miettinen, S.

²⁸ *Bosman*, paragraph 106.

²⁹ Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, hereafter referred to as *Meca-Medina*.

³⁰ *Meca-Medina* paragraph 27.

³¹ See above for the methodological approach of the ECJ.

³² The CFI in *Meca-Medina* held that EC competition law did not affect purely sporting rules such as doping provisions. Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291, paragraphs 41-42.

³³ Ex Article 82 EC.

³⁴ *Meca Medina*, paragraph 45

³⁵ Szyssczak, E., 'Is Sport Special', in Szyssczak, E., et al. (eds.) *The Regulation of Sport in the European Union*, (Cheltenham: Edward Elgar Publishing 2007.) p.23.

³⁶ Andreff, W. (2000), 'Financing modern sport in the face of a sporting ethic', *European Journal of Sport Management*, 7 (1), 5-30

³⁷ Murray, C., 'UCI Welcomes CAS Decision to Make Valverde Doping Ban Global', *Sportical.com*, June 3rd 2010.

³⁸ *Ibid*.

professional football clubs in various Member States lodged a complaint against a rule adopted by UEFA in 1998 which stated that no two clubs or more participating in a UEFA club competition may be directly or indirectly controlled by the same entity or managed by the same person.³⁹ They argued that the rule restricted competition by preventing a diversity of ventures opportunity for would be investors. The rationale put forward for this rule is similar in character to that of an anti-doping provision. Preserving the uncertainty of result is essential in sport, so a rule preventing multiple ownership is necessary to suppress suspicion of match-fixing. If one company is allowed to own various teams competing in the same competition then the authenticity of the result could be questioned, as there is a possibility of a conflict of interest.⁴⁰

It is at this point worthwhile to explore the claimants' alternative argument which was posited before CAS.⁴¹ The claimants⁴² asserted that UEFA's predominant purpose for the rule was to preserve its monopolistic control over European football competitions rather than to safeguard the integrity of the game.⁴³ If this point was substantiated it would have been a good example of leveraging of regulatory power. As with the doping sanctions example in *Meca-Medina*, the potential commercial advantages of this rule for UEFA will be considered to assess the possibility of leveraging. Without the rule, the ENIC group or another investment company could buy up leading clubs which could form the basis for a breakaway European Super League. It would also be a risk for UEFA in the media sector if media conglomerates controlled a number of clubs in the domestic competition as central marketing by UEFA could be infringed upon. Inevitably this could lead to the search for UEFA Champions League sponsors becoming harder, as sponsors would also get a similar market presence throughout Europe with investment companies such as ENIC. In summary, the rule ensures that these commercial threats to UEFA cannot materialise.

After careful consideration of the ownership rule the Commission rejected the complaint concluding that there was no restriction of Article 101(1) TFEU because the objective of the ownership rule was not to distort competition, but to guarantee the integrity of the competitions organised by UEFA. It concluded that the rule 'aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competitions...'⁴⁴ The Commission also found that the rule did not go beyond what was necessary to ensure its legitimate aim: *i.e.*, to protect the uncertainty of the results in the interest of the public. In view of the above considerations, it would appear likely that the rule would not infringe Article 101(1) TFEU on application of the methodological approach of *Meca-Medina*. In both *Meca-Medina* and ENIC, despite the potential for the IOC and UEFA to use their regulatory powers to gain a commercial advantage, the ECJ and Commission decided that the rules in question were primarily aimed at ensuring the integrity of sport, they were inherent to it and there was no less restrictive way of achieving this aim. In other words they were not using their regulatory powers for the primary purpose of gaining a commercial advantage.

The Regulation of Sports Equipment / Clothing

The role that sports equipment plays in sport varies according to the particular type of sport. Sports such as motor racing and cycling are very equipment-intensive. The skill of the participant, although important,

is just one element of success. While other sports, such as swimming and diving, are generally thought to be less reliant on the equipment, FINA ruled in January 2010 that non-textile suits are illegal as they are seen as tantamount to technological doping.⁴⁵ The technological developments in relation to sports equipment can pose great challenges to governing bodies. They must ensure that sports maintain their unpredictability, their integrity and continue to be safe. Alongside this there has always been a role for governing bodies to play in setting basic minimum standards to guarantee the quality of sporting events. In football this would include the size of goal posts and the weight / size of the match ball.

There is no dispute that unpredictability, integrity, quality and safety are all of paramount importance in the regulation of sport. However, sports governing bodies have the opportunity to hide behind these regulatory functions to gain a commercial advantage.⁴⁶ This section of the work analyses the competition law issues that are raised in the regulation of equipment and the related issue of the sponsoring of events by sports manufacturers. It pays particular attention to the limits that have been placed on governing bodies setting conditions for an equipment manufacturer's access to the sport.

Governing bodies have the potential to impose requirements to the effect that only equipment of a certain manufacturer may be employed during certain competitions. This occurred in the case of the Danish Tennis Federation (DTF),⁴⁷ in which exclusivity contracts were allotted unilaterally by the DTF, without any objective selection criterion. In particular there was no mention of any technical or safety requirements and it would certainly fail to satisfy the inherency requirements of *Meca-Medina*. The actual dispute arose because players in official DTF tournaments could only use balls sold by the official network in Denmark. As a result of this, a parallel importer complained to the Commission about foreclosure of the market. Also, denominations such as "official ball" or "official supplier" were used which had the potential to confuse the consumers.⁴⁸ Following negotiations between the DTF and the Commission, amendments were made to sponsoring arrangements in order to guarantee full and fair competition on the market. Under the new arrangement a more open tendering process is held every two years to choose a sponsor. The selection criteria have greater transparency, are non discriminatory and open to all. The selected sponsor will be granted the denomination "sponsor of the DTF" (but not "official") and will become the only tennis ball supplier for tournaments organised by the DTF during the two-year period. The case was closed by negative clearance.⁴⁹ This case highlights that governing bodies cannot use their 'official' stamp of approval to give a chosen manufacturer an advantage over its competitors that is not justified on the basis of technical quality. If, however, the appointment process is fair and open, indiscriminate and does not shut out manufacturers from the market then they will be found to be acceptable.⁵⁰

An example of an inappropriate criterion would be a requirement that manufacturers pay a governing body a royalty fee over and above the cost of any quality approval scheme in order to gain access to the market. There is potential here for governing bodies to use their regulatory functions in an unfair manner in order to derive a commercial benefit. This would be another illustration of inappropriate leveraging of regulatory powers. An example of such a situation was the FIFA Denominations' Scheme. This was a testing, certification and licensing

39 ENIC owned stakes in six clubs - Glasgow Rangers FC in Scotland (25.1%), FC Basel in Switzerland (50%), Vicenza Calcio in Italy (99.9%), Slavia Praga in the Czech Republic

(96.7%), AEK Athens in Greece (47%) and in Tottenham Hotspur in England (29.9%).

40 See Lewis, A, 'EC and UK Competition Rules and Sport' in, Lewis, A, et al. (eds.) *Sports: Law and Practice*, West Sussex: Tottel Publishing 2008 p.424.

41 CAS 98/200 *AEK Athens and Slavia Praga*

v UEFA, August 20, 1999, Lausanne, Switzerland.

42 The claimants were AEK Athens and Slavia Praga who both qualified for the UEFA Cup in the 1998/99 season.

43 CAS 98/200 at paragraph 110.

44 Case COMP/37 806: *ENIC/UEFA*. Commission Press Release IP/02/942, 27 June 2002, 'Commission Closes Investigation into UEFA Rules on Multiple Ownership of Football Clubs'.

45 Report from FINA Swimwear Approval Commission, Presented to the FINA-Bureau, Dubai, UAE, 13 December, 2010

available at http://www.fina.org/H2O/docs/misc/Dubai-FINA-Bureau-SAC_1210_v13d_s-2%20in1.pdf

46 *Op Cit* Lewis at p436.

47 See Commission Notice OJ C 138, 09/05/96.

48 The use of such denominations has the potential mislead consumers into believing that the products which benefit from the denominations are technically superior to or of better quality than others, which is not always the case.

49 DN: IP98/355, 15/04/98, 'The Commission Conditionally Approves

Sponsorship between the DTF and its Tennis Ball Suppliers'.

50 For an example of an appropriate tendering process see: 'Supply of Tyres for Karting' (Case COMP/38316) where the Commission rejected a complaint by a company, Vega Spa, about an exclusive supply of tyres contract entered into by the International Commission of Karting (CIK) with a tyre manufacturer. One of the reasons for the rejection was that the tendering processes were transparent and indiscriminate.

scheme for footballs that specified minimum technical requirements for footballs to be used in FIFA-governed matches. A certification procedure was adopted where an independent agency would certify the balls as meeting the requisite standard. This procedure involved stamping a ball either "FIFA Approved", "FIFA Inspected" or "International Match Ball Standard". A licence fee was payable for one of the FIFA designations but no fee was payable for the "International Match Ball Standard". A complaint was made to the Commission by the World Federation of the Sporting Goods Industry, who represents sports equipment manufacturers. The basis of their argument was that FIFA was in abuse of a dominant position by imposing unfair licensing conditions in relation to the supply of match balls.

In rejecting the Federation's complaint, the Commission found the technical criteria to be uniform, objective and necessary for the guarantee of high standards for official matches.⁵¹ Further, they decided that the manufacturers who met these criteria were not compelled to pay the royalty fee as they could access the 'supply of footballs market' by obtaining the royalty free "International Match Ball Standard" designation. If on the other hand the manufacturers had no option but to pay the royalty fee to gain access to the market then FIFA would have been using their regulatory function in relation to the standards of match balls to gain a commercial benefit. This leveraging of regulatory power would have been in violation of competition law.

A clear example of using regulatory powers to gain a commercial advantage was evident in the case of *Adidas-Salomon AG v Draper & others*.⁵² The defendants were the organisers of the four Grand Slam tennis tournaments and the International Tennis Federation - together they comprised the Grand Slam Committee (GSC). The GSC Code included rules governing players' dress, restricting a manufacturer's identification to a size not exceeding four square inches. Adidas' 3-stripe was considered a manufacturer's identification and the logo exceeded the permitted size. As a result of this it was disallowed. Adidas claimed this decision was contrary to EC competition law as it put them at a competitive disadvantage in relation to other tennis clothing manufacturers. Adidas applied for an interim injunction prohibiting the implementation of the decision. The defendants argued that as a regulatory body rather than a commercial organisation it had discretion as to the application of the dress codes with which the court should not interfere. The court disagreed and awarded the injunction. In referring to the dress code the court stated: 'The preservation of a tournament's appeal by restricting on-court advertising was part of the economic activity of the promoter.'⁵³ It is not indispensable to playing a game of tennis that the player's shirt should not identify its maker but it may well be necessary to the maintenance of the economic value of the tournament as a whole. Therefore, the rule was not inherent to the playing of sport. It was a clear example of a governing body using its regulatory powers to gain a commercial advantage.

It is inferred from the DTF, FIFA Denominations and Adidas-Salomon examples that equipment / clothing approval or exclusive supply arrangements are susceptible to EC competition law. Sporting decisions, such as equipment approval schemes will not infringe the provisions if they ensure the safe and proper functioning of a particular sport,

are inherent to it and do not go further than is necessary to ensure the objectives. If, however, governing bodies are using their regulatory functions to gain a commercial advantage then they must be able to justify their decisions and ensure that they have not discharged their powers in an opaque manner that is disproportionate, arbitrary or discriminatory.

The Licensing of Events

The aforementioned examples have the common characteristic of a monopolistic governing body. In other words there is one national and one international governing body for each sport. The system is underpinned by rules that require teams and individuals not to join other organisations or to play in other competitions that have not been sanctioned by the regulatory body. This European model of governance is premised on the governing body being able to ensure a uniform application of the rules of the game, including disciplinary provisions, antidoping regulations and rules to protect the players.⁵⁴ This model does, however, give the governing body the ability to be active in the market for the organisation of new events in the sport. This opens up the possibility of the governing body using its regulatory functions to protect the primacy of its own events and to impose conditions on promoters wishing to introduce new competitions or participants wishing to compete in alternative competitions.

A governing body in this position was the Fédération Internationale d'Automobile (FIA).⁵⁵ The FIA has the regulatory monopoly in relation to motor racing. Importantly, its sanction is required for the licensing⁵⁶ of all motor racing events including the commercially valuable Formula One World Championship. Consequently, any independent organiser of a motor racing event has to obtain the FIA's sanction in order to attract any participants to the event it was organising. Following a failure by the FIA to authorise a rival championship a complaint was made to the European Commission. In 1999, the Commission issued a Statement of Objections concerning rules by the FIA which prohibited drivers and race teams that held a FIA licence from participating in non-FIA authorised events.⁵⁷ Circuit owners were prohibited from using the circuits for races which could compete with Formula One. The Commission came to the preliminary conclusion that these rules violated Articles 81(1) and 82 EC as they gave the FIA the control to block the organisation of races which competed with the events the FIA promoted or organised (*i.e.*, those events from which the FIA derived a commercial benefit, in particular Formula One). The Commission also objected to certain terms of the contracts between the Formula One Administration Ltd (FOA, subsequently Formula One Management Ltd), the company that administered the TV rights to Formula One races, and broadcasters because they made it possible to block the organisation of motor sport events that would compete with Formula One races. For example, the agreement with broadcasters imposed a severe financial penalty on them if they showed anything that would be deemed by FOA a competitive threat to Formula One. Finally, the Commission objected to the FIA rules according to which the FIA automatically acquired TV rights to all the motor sport events it authorised even if these were promoted by a different promoter.

The Commission closed the case after having reached a settlement in 2001.⁵⁸ The settlement provided in particular that the FIA would limit its role to that of a sport regulator without influence over the commercial exploitation of the sport and thus removing any conflict of interest (through the appointment by the FIA of a "commercial rights holder" for 100 years in exchange for a one-off fee). Further, the FIA would guarantee access to motor sport to any racing organisation and would no longer prevent teams participating in, and circuit owners organising, other races, provided the requisite safety standards are met. Finally, it would waive its TV rights or transfer them to the promoters concerned and remove the anti-competitive clauses from the agreements between FOA and broadcasters.

Prior to the agreement the FIA was providing an obvious example of leveraging. It was using its regulatory powers to gain a commercial advantage by failing to licence series which competed with its own events and abusively acquiring all the television rights to international motor sports events. This was a clear infringement of EC competition law that result-

⁵¹ Commission decision letter dated December 2000, Case No IV/F-1/35.266(FIFA).

⁵² [2006] EWHC 1318 (Ch).

⁵³ *Ibid* at paragraph 36.

⁵⁴ *Op Cit* Lewis at p416.

⁵⁵ For an in-depth discussion of competition law issues relating to the FIA see Cygan, A, 'Competition and Free Movement Issues in the Regulation of Formula One Motor Racing in: Szyzszak, E, et al. (eds.) *The Regulation of Sport in the European Union*, Cheltenham: Edward Elgar Publishing 2007-) pp.74-94.

⁵⁶ For an example of another governing body in this position see: *Motosyklistiki Omospondia Ellados NPID (MOTOE) v*

Elliniko Dimosio (C-49/07). Judgment of July 1, 2008. In this case, MOTOE sought to organise a series of motorcycle races in Greece. In accordance with the relevant national law, its request was forwarded to ELPA, a legal person and non profit making association, for it to consent for the purposes of granting the authorisation applied for. That consent was not forthcoming. It was held that ELPA was abusing a dominant position by failing to authorise events that would compete commercially with its own events.

⁵⁷ Commission press release IP/99/434 of 30 June 1999.

⁵⁸ Commission press release IP/01/1523 of 30 October 2001.

ed in a radical reform in the governance of motor sport. The conflict of interest the FIA had as a regulator and commercial rights holder was solved by the FIA limiting its role to that of a regulator without influence over the commercial exploitation of the sport. This sweeping change has not been replicated in other sports such as football where, as mentioned previously, UEFA are allowed to enter into commercial arrangements in addition to the making of sporting decisions. The advantage of a single governing body regulating the commercial and sporting aspects is that it allows money to filter down to the base of the pyramid and be invested in, amongst other things, the recruitment and training of young players.⁵⁹

It is important to explore at this stage, what distinguishes the FIA from bodies like UEFA. Cygan states that the difference can be summed up through the observation that in motor sport there is no equivalent level of amateur participation which exists in football where the 'jumpers for goalposts' metaphor characterises the accessible nature of the sport.⁶⁰ What he is implying is that there is no real grassroots level in motor sport deserving of special status in relation to legal regulation.⁶¹ It would therefore seem unlikely that Article 165 (1) would have been triggered as there would be little support for the argument that there is a contribution to education and general society. As a result of this recognition there was no persuasive argument for the FIA retaining both regulatory and commercial functions.

The grass roots justification may also be applied to the International Sailing Federation's (ISAF) refusal to sanction events organised by the Kiteboard Pro World Tour (KPWT). In 2010 the KPWT brought an action against IKA (an international class of ISAF) in the German courts, accusing it of acting anti-competitively by threatening to ban riders who participate in the tour from taking part in IKA-sanctioned events and from using terms such as 'World Cup' and 'World Championships' to describe its events. The court ruled against the tour. IKA dismissed the rival body on the basis that it was established purely for convenience of the tour and represents no national associations. The outcome of this case thus differs from the FIA case in that IKA was found to have a legitimate right to apply its own regulations, restricting competition to sanctioned events.⁶²

Appropriate Governance Models

The commercialisation of sport has added a new layer of complexity to the work of a governing body and has raised the questions of whether governance standards have kept pace with commercial developments. Is commercial leveraging an inevitable consequence of governing bodies performing the dual role of regulating their sport whilst also commercially exploiting it? Should these functions be separated and if not what principles should inform the relationship between them? Some commentators have posited the argument that all profit making functions should be taken out of the hands of sports governing bodies, thereby confining them to a purely regulatory role shorn of any potential conflict of interest.⁶³ This would however would be too radical a solution⁶⁴ and a more appropriate answer would be to ensure that the rele-

vant governing body adheres to good governance standards. Foster provides a useful framework within which these questions of governance standards can be explored.⁶⁵ He examines five models of sports regulation. The first is the *pure market model* in which sport is seen as a business, subject to the same type of regulation experienced by other businesses. Actors within sport are seen as economically maximising individuals whose relations are governed by contract. The danger with the free market approach is that sporting competition will be eliminated as the weaker participants struggle to compete with the strong. With the *defective market model* of regulation, competition law can be employed to ensure monopoly does not result from the market approach, although as explained above, competition law may struggle to give expression to legitimate non-economic sporting justifications. The *consumer welfare model* addresses other limitations of the pure market model. Regulation can protect the rights of the disadvantaged within sport through protective legislation. As is discussed above, many states throughout Europe have been reluctant to adopt a constitutional framework governing sport and where there has been specific state intervention, conflict with the governing bodies has emerged. The *natural monopoly model* assumes that sport is organised as a natural monopoly and that statutorily backed regulation is required in order to regulate its activities. Again, the development of a state constitutional framework regulating the choices made by the monopoly may be considered but is generally resisted by the states and the governing bodies. Finally, Foster identifies the *socio-cultural model* in which sporting values are considered more important than profit. The social and cultural significance of sport, and indeed the autonomy of the governing body, is protected from commercial pressures and litigation with a form of supervised self-government being employed to reconcile the regulatory and commercial functions of a governing body. Yet employing this model still requires consideration to be given to the circumstances in which the law emerges from the shadows in order to supervise the choices made by the governing bodies. This places the analytical focus on questions of appropriate governance standards in sport.

Any autonomy afforded to governing bodies must be matched by accountability and adequate transparency. Though governing bodies sit at the apex of a sport's governance structure, through which rules are enacted, Henry and Lee outline a shift from government to governance.⁶⁶ The traditional top down structure of sport has been eroded over the last three decades to the position where governing bodies no longer entirely control sport. Though national and continental governments regulate contractual frameworks, other stakeholders such as clubs, players and the media have been able to leverage their own power by forming strategic alliances. This has had a profound effect on policy as institutions adopt rules which are compromise measures.⁶⁷ An example of this occurred in 2006 when the English Football Association ruled that clubs could not pay agents on behalf of a player on the basis that there could be a conflict of interests. Players, clubs, and particularly, the Association of Football Agents reacted by threatening to challenge the entire transfer system. Following protracted negotiations, and without ever being formally enforced, the rule was reversed in 2009 in exchange for Premier League clubs agreeing to publish the fees they spend on agents.⁶⁸ Similarly, in a recent case in Germany athletes have written an open letter to broadcasters imploring them to increase the rights fee on offer.⁶⁹ This is a clear example of stakeholders negotiating control in the new governance structure. This form of negotiated control is increasingly common in modern sport. While self-regulation is often thought to be able to better respond to change, this can make rules more reactive than proactive and can lead to piecemeal legislation. The problem is compounded when national federations, which could be externally regulated are constrained by the rules of international federations, who set standards within which national federations must work.⁷⁰

Henry and Lee set out three dimensions of governance which must be adhered to for supervised self-governance to be effective in modern sport: *systemic*, which emphasises the need for mutual alignment between stakeholders; *political*, which addresses the need for government to 'steer' rather than 'command'; and *organisational* or *corporate governance* in which governing bodies are required to adhere to the expectations of good governance in terms of ethical standards of behaviour.⁷¹ Key prin-

59 *Op Cit* Szyszczak at p6.

60 *Op Cit* Cygan at p75.

61 The special status of football was recognised in *Bosman*.

62 Murray, C., 'Kiteboard Tour and Association Trade Blows after Court Rules on Anti-Competitive Claim', *Sportcal.com*, 19th April 2010.

63 See Weatherill, S., 'On Overlapping Legal Orders: What is the Purely Sporting Rule?' in Szyszczak, E., et al. (eds.) *The Regulation of Sport in the European Union*, Cheltenham: Edward Elgar Publishing 2007. p71.

64 *Ibid*.

65 Foster, K. (2000), 'How can sport be regulated?' in: Greenfield, S. & Osborn, G. (eds.) (2000), *Law and Sport in Contemporary Society*, London: Frank Cass. pp 267-281.

66 Henry, I and Lee, PC (2004)

'Governance and ethics in sport', in Beech, J and Chadwick, S (Eds.) (2004) *The Business of Sport Management*, Harlow: Pearson Education. p27.

67 See, Amara M, Henry I, Liang J, & Umichi K (2005), 'The Governance of Professional Soccer: Five Case Studies - Algeria, China, England, France and Japan', *European Journal of Sport Science*, vol. 5, no 4, pp. 189-206; *Op Cit*, Foster, 2000 and *Op Cit*, Henry & Lee, 2004)

68 Football League Clubs have their own regulations which banned dual representation evn before the FA mandate.

69 Sportcal.com, 'ARD and ZDF: We Can't Understand Why 'Unrivalled' Bid for IAAF Rights was Rejected', 25th February 2011.

70 *Op Cit* Foster at p277.

ciples include democracy; transparency; accountability; equity; independence; effectiveness; efficiency; and compliance with external legal norms. A governing body's duty to the sport at all levels is underpinned by expertise deriving from an historical familiarity with the sport and the tendency of sports governing bodies to employ former athletes in senior administrative roles.⁷² This increases the legitimacy of the governing body *vis-à-vis* stakeholders and assists with ensuring compliance with statutes and internal disciplinary systems. The legitimacy of these systems is paramount for the governing bodies as recourse to national or international courts is time consuming, expensive and divisive. However, many examples can be given when these principles were not adhered to. While many sports governing bodies have transformed over recent years, others still appear to display traditional management structures where management is undemocratic and self-serving.

One such situation is suggested to have occurred at the FIVB (International volleyball federation) where President Reuben Acosta was accused of falsifying accounts and personally profiting from a grant allocated to the federation by the International Olympic Committee. Acosta was later cleared of corruption by a Swiss court which ruled that, while some falsification of the FIVB's books had occurred, no criminal intent was involved.⁷³ Acosta has defended his actions stating that he was entitled to receive a fee from the sale of the FIVB's television and sponsorship rights and argued that by claiming a 5 per cent commission he saved the federation from having to pay the much higher rates that would have been demanded by commercial sports agencies. While this may be the case, it raises concerns that certain ethical standards may have been breached in the way in which contracts were conducted. FIFA officials too have been found in the Swiss Courts to have received money as bribes relating to the international sports agency ISL, FIFA's former marketing partner. The investigation into the failure of ISL and ISMM (ISL's holding company) was launched following an initial complaint by FIFA, although the governing body later withdrew from the case, saying that it wished to pursue the matter through the civil courts.⁷⁴

However, self-governance can be successful if adequate structures are in place. Henry and Lee note that the IOC in particular has been said to have had a self-perpetuating oligarchic tendency in which key management positions are awarded through an 'old boy's network'. In response to this, National Olympic Committees now have the power to elect IOC members. This has led to increased diversity and representation of opinions of marginal groups. Similarly, in 1994 the International Council of Arbitration for Sport was set up in response to arguments that CAS was the court of the IOC with the financing and management provided by them. ICAS is more independent.

In order to ensure fair outcomes are reached, internal processes of governing bodies must be subject to external scrutiny. This involves being responsible to stakeholders for the protection of sport. Where sports governing bodies perform a dual role of sporting and commercial functions, courts and internal governance structures have sought to keep these roles separate. Yet on a number of occasions sports officials have been accused of wrongdoing in their personal business contracts. Hassan Moustafa, for example, the president of the International Handball Federation (IHF), had a private contract with the Sportfive agency to lobby on behalf of the agency in North Africa and the Middle East while the agency was selling the IHF's television rights. According to the terms of the contract between Sportfive and Sport Group, Moustafa was asked to "use his good relationships to sports organisations and their decision makers" in North Africa and the Middle East and to "support Sportfive to the best of his abilities in its efforts to acquire the marketing rights for major events".⁷⁵ While the contract was altered

to meet the approval of the IOC ethics board, it still raises concern that the potential for personal gains could influence sporting decisions.

The aforementioned examples share the common characteristic of members of governing bodies acting in their own self interest as opposed to that of the federation. As previously outlined, the opportunity also exists for federations to exercise their monopoly power in order to protect the primacy of their own events. In cases where the sporting organisation is clearly leveraging its power for commercial gains not related to the public good of an event, courts are likely to rule against them. London's 2012 Olympic Games organisers, for example, may be forced to make concessions by the European Commission over restrictions that force UK residents to buy tickets with a Visa credit or debit card. Visa is one of the Olympic top-tier TOP sponsors and restrictions placed on ticket sales payments are part of its sector exclusivity. However, the precedent was set ahead of the 2006 FIFA World Cup in Germany, when organisers were forced into concessions by the European Commission following complaints that an online ticketing system favoured customers of Mastercard, then a World Cup sponsor.⁷⁶ The Office of Fair Trading, the UK competition watchdog, has already said that it is looking into the matter and is in talks with the European Commission. While Visa was afforded exclusivity over ticketing (plus merchandising and Olympic venue cash machine transactions) in Beijing (2008) and in Vancouver (2010), the previous two Olympics took place outside Europe and were not subject to EU regulations.

Conclusion

This paper has revealed that governing bodies' assumption of immunity has the potential to give rise to conflicts of interest. Leveraging of regulatory power to gain commercial advantage is a constant concern associated with sports regulated by a single governing body. It has been argued that rules concerning the integrity of sport, the licensing of events or regulation of equipment, could in fact be disguised attempts to protect the commercial interests of sports governing bodies. One way to solve this would be to adopt the FIA solution of separating commercial and regulatory functions and take all profit making functions away from sports governing bodies. However, this fails to take into account the specificities of sports expressly recognised in Article 165 TFEU, and a more pragmatic solution is to ensure governance standard of the monopolistic bodies are appropriate. Therefore, it is crucial that governing bodies are seen to have the public interest at heart. To achieve this trust, high standards of governance are essential with recompense through courts should these be breached. Too often governing bodies have operated as a closed shop, not performing their function as custodians effectively. As sports commercialise and become multi-billion pound industries, it is even more important to ensure that governing bodies, and those trusted officials in them, fulfil their duty. When self-governance falls short, it is imperative that courts exercise their power to protect the integrity of sport.

In summary, the varying disciplines, national identities and customs across Europe / the globe make it impossible to posit a single governance model, but key principles such as autonomy within legal limits, transparency and accountability in decision making, democracy and inclusiveness in the representation of stakeholders must underpin any effective modes. Good governance is a key challenge for Sports Governing Bodies which must be achieved in order to address the complex issues facing modern sport.

Abstract

As governing bodies have taken on more responsibility for exploiting their sports for commercial gains, their traditional regulatory function has been complicated. This paper explores whether governance standards have kept pace with commercial changes in the functioning of regulatory bodies, specifically addressing whether sports governing bodies unfairly leverage commercial advantage at the expense of stakeholders, subject to their regulatory control. It uses case law to demonstrate the interplay between sport and the law, charting the progressive slackening of the power of governing bodies, with rules previously defended on sporting grounds now subject to scrutiny under the European Union's competition policy regime. However, despite the potential for

71 *Op Cit* Henry, I and Lee, PC (2004) at pp 27-37.

72 For example, Michel Platini, a former professional football player and three times European player of the year, is currently President of UEFA.

73 Murray, C, FIVB Settles Long-running Corruption Dispute with Gojman, *Sportcal.com*, 9th March, 2010.

74 *Sportcal.com*, Swiss Prosecutors: Fifa

Officials Did Receive Money from ISL in Bribery Scandal, 25th June 2010.

75 *Sportcal.com*, Anti-Corruption Body Seeks Regulation after Moustafa-Sportfive Deal, 1st February 2010.

76 Ross, M., London 2012 'Could Be Forced to Back down' over Visa's Payment Exclusivity, *Sportcal.com*, 24th June 2010.

governing bodies to use their regulatory power to gain a commercial advantage, the paper highlights that rules aimed at maintaining the integrity of sport, that are utilised in a proportionate manner, will be legally acceptable. When governing bodies are adjudged to be using their regulatory function to gain a commercial advantage they must be able to justify their decisions and ensure that they have not discharged their powers in a manner that is disproportionate, arbitrary or discrim-

inatory. Therefore, any autonomy afforded to governing bodies must be matched by adequate standards of accountability and transparency. The paper will argue that the traditional top down governance system has been eroded and stakeholders have increasingly gained power. It posits that when self-governance falls short, it is imperative that the law exercises its power to protect the integrity of sport.

The International Sports Law Journal

The Unilateral Extension Option Through the Eyes of FIFA DRC and CAS

by Frans de Weger and Thijs Kroese*

Introduction

The extension option is the right of the player and/or the club to extend the employment contract for a certain period of time which is stipulated by the parties in an employment contract. There are many kinds of extension options. We have the reciprocal extension option in favour of the player and the club in which both parties are entitled to prolong the employment contract for a certain predetermined period and there is the unilateral extension option only in favour of one of the parties. In the daily practice of international professional football, we usually find unilateral extension options solely in favour of the club.

After the Bosman-case of 1995¹, in which the European Court of Justice decided that transfer compensation to be paid by a club for a player who had ended his contractual relationship with his former club was not permitted and was in violation with the free movement of people within the European Union. From that moment on, the clubs had to prevent the situation whereby their professional football player came to the end of their contracts and were able to leave for free. Therefore, the use of the unilateral extension option in favour of the clubs increased substantially.

At international level there is uncertainty regarding the validity of the unilateral extension option. For example, in South-America, where the unilateral extension option was very popular (and in some countries still is), as result of the general disputable validity of this clause, developments can be noticed that the unilateral extension option is disappearing in some countries. One can also notice from a recently published report that in Chili the unilateral extension option is totally banned, in Uruguay the option only still exists because the players' union disagrees with an absolute disappearance of the unilateral extension option and in Argentina the option can only be inserted in the contracts

of players beneath 21 years old and only for the duration of a maximum period of three years.²

The Dispute Resolution Chamber of FIFA (hereinafter DRC) as well as the Court of Arbitration for Sport (hereinafter CAS), as being the authoritative committees at international level in the world of professional football, provided the football world with several decisions related to this subject. With this article we trust to provide the international professional football world with a valuable survey of all relevant international jurisprudence from the DRC and CAS.

Structure article

This article will contain an extensive survey of all relevant decisions of the DRC and CAS related to the unilateral extension option. First the relevant decisions of the DRC will be discussed and analyzed.³ The most important decisions will be discussed in a chronological course of time as from the first published decision in 2004 until now. Since parties have the possibility to appeal against decisions of the DRC before CAS, the decisions of CAS will also be analyzed and discussed.⁴

In the conclusion we summarize the general line the DRC and CAS stand for with respect to the unilateral extension option and will answer two important questions: What conclusions can be drawn from analyzing DRC and CAS jurisprudence and what can be expected from future DRC and CAS decisions?

Please note that this article is meant for anyone interested in this subject. Although this article has a scientific character, it must be emphasized that it is intended to have great value for the daily practice of international professional football. The reason we discuss the unilateral extension option throughout the eyes of DRC and CAS is a result of the increasing internationalization and importance of the decisions of these committees within the international field of professional football, which will also have its impact at national level (certainly at the long run), such as for national arbitral courts. In this article the national laws will be excluded and will not be taken into consideration.

In this article we only discuss the *jurisprudence* related to this subject since the regulations of FIFA do not contain any provisions in respect thereof. However, it needs to be noted that the FIFA Regulations do provide for a provision related to the contracts of minors. In the Regulations of FIFA, the Regulations on the Status and Transfer of Players, is stated that players under the age of 18 cannot conclude contracts for a period longer than three years and that parties are forbidden to insert clauses that refer to longer periods than three years.⁵ This provision leaves no space for any other interpretation in order to assume that unilateral extension options (since they without any doubt refer to longer periods) are not permitted to be inserted in the youth contracts that have a duration of three years. Furthermore, apart from the jurisprudence, Circulaire 1171 of FIFA of 24 November 2008 is relevant to keep in mind while discussing the decisions of the DRC. This Circulaire provides the minimum requirements for players' contracts. One of the minimum requirements is remarkably enough the fact that unilateral exten-

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Jean-Marc Bosman', judgement of 15 December 1995, [1991] ECR I-4837.

2 The unilateral extension option provides for employment. If the possibility for a unilateral extension option would not exist, less players would be provided with contracts. See the report 'Contractual Stability in Professional Football', 'Recommendations for clubs in a context of international mobility', by Diego F.R. Compaire (Italy/Argentina), Gerardo Planás R.A. (Paraguay) en Stefan-Eric Wildemann (Germany), July 2009.

3 On the website of FIFA all published decisions of the DRC can be found, see: www.fifa.com.

4 On the website of CAS all published decisions of the CAS can be found, see: <http://www.tas-cas.org/>.

5 See article 18 par. 2 of the Regulations on the Status and Transfer of Players, edition 2010.

1 Case C-415/93, 'Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman Royal Club liégeois SA v. Jean-Marc Bosman. SA d'Economie Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Associations Européennes de Football v.

sions are not permitted and that extension- and termination rights are only permitted in case the clause is reciprocal and so in favour of both parties. Apart from these matters, the Regulations of FIFA as well as other Circulaires do not provide for any provisions related to this subject as result of which the decisions of DRC and CAS become even more relevant.⁶

Relevant decisions of the DRC

DRC 22 July 2004⁷

The first published decision of the DRC to be discussed is the case of 22 July 2004. In this case a player signed on 30 July 2004 an employment contract for the period as from 30 July 2003 until 30 June 2004. The contract was provided with a unilateral extension option in favour of the club with the possibility for the club to extend each year with a consecutive total of four years. It was agreed in the contract that the club had to inform the player five days before the beginning of the transfer period in case it wanted to extend the contract. Furthermore the club had the obligation to inform the player about the new conditions of the extended contract. On 24 July 2004 the club informed the player that they wanted to extend the contract as from 1 July 2004 until 30 June 2005 based on the same conditions as stated in the current contract. The player did not agree with the club and disputed on 3 June 2004 before the DRC the validity of the unilateral extension clause.

In this case the DRC is for the first time clear with respect to the validity of the unilateral extension option.⁸ The DRC decided in this case that unilateral extension options are in general problematic, since they limit the freedom of a party who cannot make use of this clause (the player) in an excessive manner. The DRC decided that the option concerned was not reciprocal since the right to extend was exclusively left to the discretion of one party (the club). In this specific case the extension option was solely in favour of the club. The club as the employer was the stronger party in the relationship. By referring to the clause by the club in order to extend the contract the player had no substantial advantage since the conditions remain unaltered. The DRC clearly pointed out in this decision that unilateral options in principle do not match with the general principles of labour law. The DRC did not found the latter consideration, but the DRC did clearly emphasize that unilateral extension option are not permitted. Despite the clear considerations of the DRC in this decision the DRC does create some openings in order to create a valid option. Following this decision one can sincerely wonder what the DRC would have decided in case the conditions in the new contract did alter in such a manner that a substantial increasing of the salary did exist. The club did appeal against the decision before CAS and this case will be discussed in that part of this article.

DRC 13 May 2005⁹

In a decision of the DRC of 13 May 2005 it seems the DRC gives us more handholds in order to decide whether a unilateral extension option is valid or not. In the contract of the player a unilateral extension option

was inserted in favour of the club for a period of three years. On 1 February 2005 the player decided to dispute the validity of the clause before the DRC. The player pointed out that he indeed could not agree with the extension as provided for in the contract. However, he was willing to continue negotiations for a new contract. The negotiations finally did not end in a successful way and the club's point of view remained unaltered and stated the option was valid. The club also pointed out that the player had accepted a payment of EUR 1,950 after the extension as result of the new contract and that he had also played in official matches after the extension. The club emphasized that the player with this stance indirectly accepted the unilateral extension option.

The DRC decided that a clause that gives one party the right to unilaterally extend or terminate the contract, without providing the counterparty with that same rights, is a clause with disputable validity. According to the DRC the unilateral extension option concerned had a potestative nature, since the contract was not provided with the new financial conditions and were not accepted after the negotiations between the parties.¹⁰ The DRC did not find it relevant that the player played several matches after the extension, since the player was in the reasonable presumption the negotiations would be ended successfully with regards to the financial conditions. At the moment he realized that the negotiations would not end successfully, according to the DRC, the player left the club. The DRC finally concluded that the contract had ended on 31 December 2004 and that no valid extension of the contract established. Just as with the before mentioned case, it is also justified to wonder in this case what the DRC would have decided in case the new conditions did establish a substantial advantage for the player. It is reasonable to assume that the unilateral extension option in this case might not have been potestative in case the contract provided for the new conditions after both parties had negotiated in respect thereof.

DRC 21 February 2006¹¹

In the following case of 21 February 2006 a player signed on 31 July 2003 a contract for the duration of one year. The contract was provided with a unilateral extension option in favour of the club. The club had the right to unilaterally extend the contract on an annual basis for a total of four consecutive years. It is interesting to note in this case that the contract was extended for a year as from 1 July 2004 until 30 June 2005 and that the player accepted the first extension. For the season 2005/2006 the club again wanted to unilaterally extend the contract. The player did not agree with this second extension, also because he had not received his salaries for over more than two months. The club finally brought the case before the DRC.

With regards to the general validity of the unilateral extension option the DRC referred to its earlier jurisprudence regarding this subject. Also in this case the DRC pointed out that the unilateral extension option is not valid due to its potestative nature, unless the new contract provides for the new financial conditions and that the conditions were accepted after parties had negotiated in respect thereof. That was not the case in this matter. As result of the extension for the period 2005/2006 the player did not have a substantial advantage because the conditions remained unaltered. The DRC decided that the unilateral extension option is in general not valid. However, the DRC emphasized that the player indirectly accepted the extension option due to his stance, amongst other because he continued to take part of training sessions and he even played official matches after the extension. The DRC also pointed out that the player went to FIFA on 22 November 2005, almost five months after the commencement of the extended contract (which he disputed). As result of these circumstances the DRC was of the opinion the option was valid.

For several reasons the mentioned case is very interesting. Apart from the fact that it is the first published case in which the DRC decided that a unilateral extension is valid, one can notice that the DRC comes up with more extensive considerations with respect to the unilateral extension option. In this case the DRC further gave us more openings for a valid unilateral extension option. Interesting is that the option concerned is to be considered valid, not only because the player had a substantial advantage, but also and foremost because the stance of the player was decisive in respect thereof. Furthermore it was noteworthy for

6 In order to understand the decisions in the best possible way, it must be noted that parties following the CAS rules do have a formal say with regards to the composition of the CAS committee. Furthermore it is important to refer to the principle of 'stare decisis'. By not applying the principle of 'stare decisis' to the decisions of CAS, it can be said that CAS in general treats each case one by one. However, this still does not automatically mean that CAS does not adjudicate in line with its earlier decisions.

7 No. 74508.

8 Furthermore see an unpublished decision of the DRC of 24 March 2004, in which the unilateral extension option (indirectly) came by. This case concerned the transfer of a player, whereby the old club refused to release the player since the club was of the opinion that the player was still contractually bound to the club. The

club pointed out that in case the contract ends, the internal rules of the relevant national association provided for the possibility to unilaterally extend the contract with one more year based on the same conditions in the current contract. This option can be seen as a tacit prolongation in case the club did not inform the player not to start negotiations for a new contract. The DRC could not agree with the club's point of view. Although the decision is not published, the decision can be consulted in the Dutch former magazine (SZ 375) Anton Sportzaken 2004/2 (no. 29) C3.

9 No. 55161.

10 A potestative clause can be seen as a condition that for its fulfillment is made subject to the will of one of the parties.

11 No. 261245. See also an earlier published case of the DRC of 24 October 2005, no. 105874 (2).

the DRC that the player brought his case before the DRC five months after the commencement of the extended contract he disputed. Moreover, the player even played official matches after the extension. Interesting in respect thereof is that in the before mentioned case (of 13 May 2005, no. 55161) the DRC did not take into account a similar argument of the club. In that case the club also pointed out that the player played several official matches and even accepted a payment of EUR 1,950 as result of the new contract. It could have been decisive in the earlier case (of 13 May 2005 no. 55161) that the negotiations were still pending as result of which the player would have been left in the reasonable presumption that these negotiations would end successfully. In the present case negotiations had not taken place. In other words, there are significant differences between both cases as result of which it seems fair to decide that the unilateral extension option in this case is valid. Last but not least, it might be presumed that a decisive argument in this case in order to decide the option is valid is the fact that the player had already accepted the first extension option despite the fact the DRC does not emphasize this as a decisive argument. However, it can be concluded and is therefore interesting to note that the DRC sincerely takes into account all particular circumstances of the case in order to decide regarding the unilateral extension option.

DRC 23 March 2006¹²

One month later, more precisely on 23 March 2006, the DRC again decided with respect to the unilateral extension option. Also in this case the DRC comes up with the same considerations and gives us openings under which circumstances an option can be valid. In earlier cases it was justified to wonder what the DRC would have decided if the contract provided for conditions that could have been seen as a substantial advantage. Now interesting in this case is that even if the conditions bring a substantial advantage for the player, then still the unilateral extension option can be invalid. The DRC decided that it must be a significant gain for the player.

Furthermore the DRC decided that the player did not sign another document (apart from the employment contract) in which he explicitly agreed with the extension of the contract. It must be noted that the DRC does not refer to this issue in its considerations. However, by making notice of this fact it still can be seen as an important matter. Finally the DRC (for the first time) made reference to the length of the new contract, in this case two years. The DRC had not made reference to this fact earlier. The DRC was of the opinion that the two year period was a seriously long time. The DRC decided that the option concerned curtailed the freedom of the player in an excessive manner and this was a disproportional advantage for the club. As result thereof the DRC decided that the unilateral extension option in favour of the club was not valid. The circumstances that appeared in earlier cases that could make an option valid were not present in this case.

DRC 12 January 2007¹³

In the following case the DRC for the first time gives us complete clarity and even conditions under which the unilateral extension option can be valid. In this case of the DRC of 12 January 2007, the Romanian player Lucian Sanmartean and the Greek club Panathinaikos concluded

an employment contract on 14 July 2003. The employment contract commenced on 15 July 2003 and ended on 30 June 2006. At the end of the contractual period the club preserved the right to unilaterally extend the contract each year for a total of two consecutive years. The salary for the first year was USD 180,000, which would increase with the amount of USD 20,000 per year. For the potential fifth year the salary would be USD 260,000. On the same date the player and the club also signed a standard agreement separately from the private employment agreement. On 14 November 2006 the player went to the DRC and asked the DRC to establish that the contract between him and the club was ended. The player referred to a case before CAS (TAS 2005/A/983&984 Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain, which case will be extensively discussed later on). The club was of the opinion that the option concerned was valid and referred to another case before CAS (CAS 2005/A/973 Panathinaikos FC v/ Sotirius Kyrgiakos, which case will also be extensively discussed later on).

The DRC first of all made notice of the CAS-case the player referred to.¹⁴ This case before CAS could be seen as leading with regards to the unilateral extension option. The DRC decided that the system of the unilateral extension option in general is not compatible with the Regulations of FIFA. However, the DRC also noticed that in consideration 110 of that same case five elements were mentioned in order to establish whether a unilateral extension option can be valid. In its consideration no. 9 the DRC emphasized the following:

"However, the Chamber also acknowledged that in pt. 110 of the said decision of the CAS, five elements were established which were to be analysed in order to decide upon the validity of a club's option to unilaterally renew an employment contract, if at all."

The following conditions the DRC referred to:

1. The potential maximal duration of the labour relationship shall not be excessive;
2. The option shall be exercised within an acceptable deadline before the expiry of the current contract;
3. The salary reward deriving from the option right has to be defined in the original contract;
4. One party shall not be at the mercy of the other party with regard to the contents of the employment contract;
5. The option shall be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract.¹⁵

In the following considerations the DRC discusses these conditions. With regards to the first condition the DRC points out that the maximum duration can be five years as stated in the Regulations of FIFA.¹⁶ The duration in this case was not excessive, because the total period (original contract including the option years) did not exceed the five years term. With regards to the second condition, the fact that the option must be invoked within an acceptable deadline before the end of the current contract, the DRC decided that five days before the opening of the transfer period was too short. The player was left in uncertainty till the latest moment. This was a huge disadvantage for the player as result of which the short term was not accepted by the DRC. In continuation the DRC puts the third condition to the test and established that the salary reward deriving from the option right was defined in the original contract. The fourth condition contained that one party shall not be at the mercy of the other party with regard to the contents of the employment contract. The DRC in this respect made a match with the question whether a salary increasing existed after the club invoked the option. The DRC referred in this respect to the CAS-case the club referred to.¹⁷ In that matter in case the option would be invoked the salary reward in the first year was 25% and in the second year 100%. In the present case before the DRC the increasing was 9% for the first year and 8,33% for the second year. The DRC concluded that the position with respect to the negotiations was not equal and that there was no apparent gain for the player as result of the extension. For that reason the player was at the mercy of the club with regards to the content of the employment contract. Despite the fact the club does not speak of

¹² No. 36858.

¹³ Unfortunately this case is not published. In the report 'Contractual Stability in Professional Football', 'Recommendations for clubs in a context of international mobility', by Diego F.R. Compaire (Italy/Argentina), Gerardo Planás R.A. (Paraguay) en Stefan-Eric Wildemann (Germany), July 2009, reference is made to the case 'Club Atlético Lanús / Javier Alejandro Almiron & Polideportivo Ejido SAD (FIFA 07/00789)'. However, also this case is not published. As far as we know and based on the report the unilateral extension option in the latter case was not valid because the decisive argument was that the player was absolutely

aware of the unilateral extension option. According to the DRC the player therefore explicitly accepted this clause.

¹⁴ TAS 2005/A/983&984 'Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain'.

¹⁵ The unilateral extension option could also be laid down in a document apart from the employment contract in which the player explicitly agrees to this clause. See DRC 23 March 2006, no. 36858.

¹⁶ See article 18 par. 2 of de Regulations on the Status and Transfer of Players, edition 2009.

¹⁷ CAS 2005/A/973 'Panathinaikos FC v/Sotirius Kyrgiakos'.

'significant', as the DRC did in its case of 23 March 2006 (no. 36858), it becomes more and more clear what the words 'substantial advantage' in substance mean. With regards to the last condition the DRC was of the opinion the clause concerned was established in the original contract. However, the DRC noticed in that respect that the option was mentioned in the middle of both contracts without laying emphasis on it in a different manner. As result thereof the unilateral extension option was not inserted in the contract in a correct manner. The player was not made fully aware of it. At the end the DRC decided on the basis of the five elements that the unilateral extension option in this case was not valid.

It must be noticed that the DRC in this matter also pointed out that the player in the relevant CAS-case the club referred to, explicitly accepted the first extension and solely disputed the second extension. According to the DRC this was an important matter for the CAS to decide as it did. Finally, we think it is very important that the DRC emphasized that the option, even if a unilateral extension fit with the five elements, still can be invalid. This can be derived from the words 'If at all' as considered in point 9 of the DRC-decision. In other words, the DRC points out that even if the option can be seen as valid, the five elements are at least of crucial importance. This can be seen as another presumption that the DRC is extremely reluctant with regards to valid unilateral extension options.

DRC 30 November 2007¹⁸

Although it now might be presumed the DRC is absolutely clear with respect to the unilateral extension option and the conditions under which it is valid, the following case brings us more uncertainty again. In the decision of the DRC of 30 November 2007 the DRC does not refer to the five elements of the before mentioned case. In the present case a player and a club signed an employment contract on 1 June 2003 valid until 31 May 2005. The contract was provided with a unilateral extension option in favour of the club. The club had the right to extend the contract for two seasons. The option had to be invoked before 30 April 2005 and the salary reward for the player was substantial. On 8 June 2005 the player informed the club per letter that the agreement was ended per 31 May 2005 and asked the club to pay him his outstanding salaries. On 23 June 2005 the player brought his case before the DRC.

The DRC had to decide whether the unilateral extension option concerned was valid. The DRC outlined that the last years lots of decisions of the DRC and CAS came by with respect to this subject. According to the DRC the general conclusion in these cases was that the unilateral extension option is not valid. The DRC referred in its case to the case of CAS of 2005/A/983 (which will be discussed later on) in which the CAS amongst others decided that the system of the unilateral extension option is not compatible with the system and rules of FIFA. Unfortunately for us the DRC did not have to decide any further with regards to the option concerned due to the fact the club had not invoked the option within the contractual term ending on 30 April 2005. The

DRC decided that the contract between the player and the club was therefore not valid based on that ground.

As said it is quite remarkable that the DRC in this case does not refer to the earlier mentioned conditions as given in the case of 12 January 2007. It can be derived that the unilateral extension option seems to be in general more invalid as thought at first sight. The DRC refers to a consideration of an earlier CAS-decision and lays emphasis on the fact that the unilateral extension option does not match with the FIFA Regulations. Despite the fact the DRC did not have to decide regarding the content of the option concerned, it does give rise to the suspicion, in particular by referring to considerations of the relevant CAS case in which is mentioned the unilateral extension option does not fit with the rules of FIFA, that the option in general is not valid.¹⁹

DRC 7 May 2008²⁰

Also the following case does not give rise to the suspicion that the DRC is accessible for arguments that the unilateral extension option can be considered as a valid clause. In the case of 7 May 2008 the committee reiterated that in general unilateral extension options, in accordance with its earlier jurisprudence till so far, are clauses with a disputable validity. A clause that gives a party the unilateral right to terminate or lengthen the contract, without providing the counterparty with that same rights, is a clause with a doubtful nature. In this case the DRC decided that the option concerned was exclusively in favour of the club, as being the stronger party in the relationship. The DRC was of the opinion the clause was not valid as result of its unilateral character. According to the DRC the clause was not legally binding to the player. Interesting in this case is that the DRC is relatively curt with regards to the unilateral extension option and simply decided the option concerned was not valid. The reason we do discuss this case is that the DRC once again refers to its earlier jurisprudence with regards to the option and remarkably enough does not refer the conditions as mentioned in the case of 12 January 2007. Taking notice of this decision without being aware of the general case history with respect to this subject, one could be in the justified presumption that unilateral extension option in the eyes of the DRC are not valid.²¹

DRC 9 January 2009²²

Perhaps the last published decision of the DRC of 9 January 2009 will give us more clarity. On 22 July 2005 a club and a player signed an official employment contract valid as from 1 July 2005 until 31 May 2009. The contract contained a unilateral extension option for the duration of one season. The financial conditions in the contract did remain unaltered. On 22 January 2008 the club informed the player that they invoked the option concerned for the new season. On 4 February 2008 the DRC received a claim of the club in which the club informed FIFA the player unilaterally breached the contract and that he was absent without a valid reason since December 2007. In this case the DRC had to decide whether a valid termination of the contract existed and what the height of a potential compensation would be.

The DRC noticed that the club had already invoked the option on 22 January 2008 for the season 2009/2010. In other words, 16 months before the ending of the current contract and - even more remarkable - thirteen days before the club inserted a claim with the DRC. According to the DRC this gave an adjust rise to the suspicion that the option concerned was only invoked in order to establish a higher compensation. Once again the DRC referred to its earlier jurisprudence and outlined that a unilateral extension option in general is not valid since it curtails the freedom of the player in an excessive manner and as result thereof leads to an unjustified disadvantage of the player's right towards the club, in particular, as was the case in this matter, if the salary reward did not increase.

In this case the DRC once again shows that the particularities of the case play an important (or even a crucial) role in order for the committee to decide whether the option is valid or not. The fact that the option has been invoked only thirteen days before inserting the claim gives a serious rise to the suspicion that the option was invoked only for a higher compensation. The question is what the DRC would have decided in case an increasing substantial salary reward did exist. In an earlier case

18 No. 117707.

19 In this respect it is remarkable that the DRC explicitly refers to the case before CAS in which the unilateral extension option was invalid (TAS 2005/A/983 & 984 'Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain'), while the DRC could also have referred to the other CAS case, in which the CAS decided the unilateral extension option was valid (CAS 2005/A/973 'Panathinaikos FC v/Sotirios Kyrgiakos'). In the DRC case it gives an adjust rise to the suspicion that the conclusion would not have been very positive with regards to the validity of the unilateral extension option concerned in case the DRC did have to decide with regards to its content and so validity. Unfortunately this cannot be said due to the fact the DRC did not have to decide

with respect to the content of the option concerned.

20 No. 58860.

21 Also in a decision of the same date of the DRC of 7 May 2008, no. 58996, reference is not made to the earlier mentioned decision of the DRC of 12 January 2007. In this case the DRC is also very consistent with regards to the option and decides that the option concerned is not valid. Also in a decision of the DRC of 10 august 2007, no. 87875, the DRC decided that the unilateral extension option concerned was not valid. Unfortunately this decision is not available at the moment on the website of FIFA since this particular decision is under construction. Noteworthy is that also in that decision reference was not made to the earlier decision (and the mentioned conditions) of the DRC of 12 January 2007.

22 No. 19174.

we have seen that even if a substantial salary reward exists, a unilateral extension option can still be invalid due to the particularities of the case. For example, in the earlier mentioned case of 21 February 2006 (no. 261245), the DRC decided the unilateral extension was valid, not so much because the player had a substantial advantage, but because the player's stance played an important role and gave cause for validity. In other words, it could be presumed that also in this case the unilateral extension option was not valid due to the club's stance, even if a substantial salary reward took place in this case. Once again, the particularities of the case seem to be of crucial importance.

In order to make an even better analysis of the validity of the unilateral extension option, it is of the utmost importance to analyze the decisions of CAS and to see what the opinion of CAS, as being the big brother of the DRC, is with regards to this subject. Perhaps CAS will bring us more clarity and certainty with respect to the unilateral extension clause and its validity (including perhaps any conditions), which decisions also have an important impact on the DRC decisions as we will see.

Relevant decisions of CAS

CAS 2004/Al678 Apollon Kalamarias F.C./Oliveira Morais, 20 May 2005. This first²³ CAS-case is the club's appeal of the DRC's decision of 22 July 2004 that has been mentioned earlier in this article.²⁴ The DRC had decided the option clause at hand was invalid and the player's contract had ended on 30 June 2004. On 6 August 2004 the Greek club appealed this decision, stating that the full length of the player's contract did not exceed the maximum of five years and the financial conditions in the option period had been negotiated. The player maintained that he was not aware of the effect of the unilateral extension option and that the club had not properly informed him.

CAS decided whether the player knew the contents of the signed contract and the consequences of this content, and concluded that the option was mentioned in the signed contract, so the player's statement that he was unaware of the club's option right could not be followed. However, CAS did maintain the option clause at hand was purely unilateral in favor of the club. In addition, CAS concluded that the fact that the club had the right to extend the contract up until only five days before the start of the transfer-period, was unreasonable towards the player. Should the club had decided not to extend the player's contract, the player would not have had enough time to find a new club, according to CAS. For abovementioned reasons, CAS decided that the unilateral extension option at hand was invalid.

This case does not contain particularly interesting considerations about the validity of a unilateral extension option in general, but it should be noted that this decision is perfectly in line with past DRC decisions. CAS is quite clear about their statement that the player should have a clear advantage from the option.²⁵

TAS 2005/Al983 & 984 Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barotti & Paris Saint-Germain, 12 July 2006. This case is - because of its impact in Uruguay and other parts of South-America - called the South-American 'Bosman-case'. In this case CAS decides about two Uruguayan players and an Uruguayan club. Relevant parts of CAS' considerations in this case cover the question related to the applicable law, which falls outside the scope of this article.

²³ An earlier decision that in a way covered the unilateral extension option is *TAS 2003/O/530 'A.J. Auxerre Football c/ Valencia CF SAD & M. Mohamed Lamine Sissoko'*, 27 August 2004. In this case the club tried to convert a 'trainee' contract into a professional contract using an extension.

²⁴ No. 74508

²⁵ In addition, this case is to be considered interesting because CAS referred to one of its decisions, stating that national federations should consider principles of cross border competitions. Therefore, CAS gives a possibility to exclude nation-

al laws by referring to a *Lex Sportiva*. In the case at hand, CAS passed on Greek law that allowed unilateral extension options.

²⁶ The DRC decision is not published on the FIFA website.

²⁷ Prof. Wolfgang Portmann, 'unilateral option clauses in footballers' contracts of employment: an assessment from the perspective of international sports arbitration', 7 *Sweet & Maxwell International Sports Law Review* (2007) no. 1, p. 6-16

²⁸ See Thijs Kroese, 'The unilateral extension option in theory and practice: a guideline', July 2008 (written in Dutch).

Nonetheless, this case can be considered as the landmark CAS-case of unilateral options. The most important elements of this case shall be discussed hereunder.

The Uruguayan 'Football Player's Statute' states - simply put - that the contract of a player can be extended with, in total, two seasons. Hence, Uruguayan Football uses a system that has the same effects as contractual unilateral option clauses. In case a club extends the employment contract, the conditions of the employment contract shall not be automatically increased: the player's salary only increases with the Consumer Price Index. Bueno and Rodriguez refused to accept the extension of their contracts. After they were suspended and did not play for four months, they both signed an employment contract with the French club Paris Saint-Germain. The Uruguayan club brought the case before the DRC, stating that the players - induced by Paris Saint-Germain - had breached their contract by signing a contract with the French club. The DRC decided the right to extend was purely unilateral and therefore invalid.²⁶ The club appealed before CAS.

CAS started by deciding which law was applicable in this case. CAS refers to a legal opinion of Prof. Portmann.²⁷ In his article, Portmann gives an explicit review of the case at hand. Portmann maintains - simply put - that in this case, in principle, Uruguayan Law should be applicable. After maintaining that applicable law can only be set aside by principle of public policy. He then analyzes the opportunities to set aside Uruguayan Law and therewith set aside the unilateral extension options. Portmann maintains that an excessive commitment is a principle of public policy in both International law and Swiss law and therefore could set aside the relevant Uruguayan law. In other words: should the unilateral extension option in favor of the club be considered as an excessive commitment by the player, the relevant Uruguayan law could be set aside. Portmann then gives five criteria (which have already been mentioned while discussing the unpublished DRC case of 12 January 2007) on the basis of which a specific option right should be judged to answer the question if the extension right is to be considered as an excessive commitment.

The value of Portmann's criteria

The DRC used Portmann's criteria in its decision of 12 January 2007. The criteria are being used in football practice all over the world and are being highly valued. During an earlier research one of the authors wondered whether Portmann's criteria should be considered as leading and as highly valued as the footballing practice has showed.²⁸ The main question in that research was - and remains for this article - had CAS intended Portmann's criteria as leading and decisive?

CAS mentions Portmann's criteria and applies them to the present case in one sentence under point 110 of its decision:

'... in this case, the regulations in the case meet hardly any of the criteria which prof. Portmann mentions in order for a unilateral option system, which prof. Portmann confirms does not comply with material Swiss law, to be considered. (...) These criteria are ...'

CAS then emphasizes that Portmann's analysis is based on different conclusions on which law should be applicable. Looking at the way the CAS-decision is built and its structure, CAS mentions Portmann's criteria in the part of its decision where the scope of art. 25 sub. 6 of the FIFA RSTP is being assessed. The article reads:

"The Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge (as the case may be) shall, when taking their decisions, apply these regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport".

Hence, Portmann's criteria are being mentioned and discussed in the part of the CAS-decision that assesses the question of applicable law. From point 113 of its decision, CAS assesses the validity of a unilateral extension option. In quite clear words, CAS maintains that the system of unilateral extension options in favor of the club are not compatible with FIFA regulations:

'123. Only the most talented players can hope to escape from this deadlock one day: when a club believes it will be able to obtain a worthwhile trans-

fer fee: It will ask the player to agree to the transfer which the club has negotiated. It will then be very difficult for the player to refuse this offer, the risk being that he will be kept on under the financial conditions which the automatic extension system helps to impose.

124. *Albeit in another form, this Uruguayan system does in fact appear to reintroduce transfer rights for clubs which are similar to those abolished by the successive reforms to the FIFA Regulations in 1997, 2001 and 2005. Agreeing to the introduction of systems of this kind and allowing them to continue to be applied would amount to draining the successive reforms which led to the abolition of the previous transfer system of their principal substance.*

125. *In this respect, normative standards allowing the unilateral extension of contracts and especially those which make this compulsory are, at the very least, contrary to the spirit of the FIFA Regulations. They effectively bypass the basic principles of the new FIFA regulations which very particularly protect the interests of training clubs through training compensation and the solidarity contribution (chapter VI of the 2005 FIFA Regulations), as well as the interests of all clubs, by maintaining contractual stability between clubs and professional players (chapter IV of the 2005 FIFA Regulations).*

126. *The principle of contractual stability is a value which the FIFA Regulations rightly recognize and uphold for the purposes of the new regulations. It is not admissible that this protection of the contents of a contract between clubs and players can be bypassed in order to serve only the interests of one party, in this case the club, which does not itself have to make a commitment.*

127. *So the Court of Arbitration considers that the unilateral contract renewal system is not compatible, in its very principle, with the legal framework which the new FIFA rules were designed to introduce.*

128. *In any case, the taking into account of any such system is ruled out pursuant to art. 25 paragraph 6 of the Regulations. As we have seen, this provision, does not allow the taking into account of any rules which are, as in this case, incompatible with those of the FIFA Regulations.*

129. *By redundancy, it clear that in spite of the absence of any provision expressly ruling out the compulsory unilateral option renewal system in the FIFA Regulations, a system of this kind is in any case contrary to the Swiss law which is applicable secondarily in cases where the FIFA rules are not themselves complete.'*

When CAS starts assessing whether the unilateral extension at hand is valid, Portmann's criteria are never mentioned. Instead, CAS draws abovementioned clear conclusions. In the case at hand, CAS had to assess the validity of the unilateral extensions based on the Uruguayan system, instead of a unilateral extension option on which the player was contractually bound, and was therefore not bound by the Pacta Sunt Servanda principle. One might state that such a circumstance makes that the considerations in this case cannot be leading when assessing the validity of a unilateral extension option that is controlled by the Pacta Sunt Servanda principle. However, it must be noted that the aforementioned consideration 127 clearly states that the unilateral renewal system in the case at hand - by its very principle - is not compatible with

the legal framework which the FIFA rules were designed to introduce. The system's principle (shortly put: unilateral extensions in favor of the club) is to be considered as incompatible with FIFA regulations. Contractual unilateral extension options share this principle. The fact that the basis of this principle now lies in contractual freedom, rather than regulations, law or collective bargaining agreements, does not alter this.

In our opinion, the DRC therefore seems to overestimate the value of Portmann's criteria in that specific case. Hence, we feel that the case at hand is - from an 'option point of view' - not interesting because it contains Portmann's criteria, but merely because CAS states - quite clearly - that the very principle of a unilateral extension in favour of the club is to be considered as incompatible with FIFA's regulations.

CAS 2005/A1973 Panathinaikos Football Club v/Sotirios Kyrgiakos, 10 October 2006

This is the first and only CAS-decision in which CAS declares the unilateral extension option at hand valid. The player signed a two year contract, that contained to unilateral extension options: one for two more years, and one for another year. Since the extension option was mentioned in the contract, CAS seemed to take the Pacta Sunt Servanda principle as a starting point.²⁹ Secondly, CAS considers of relevance that unilateral extension options are considered valid in applicable national law. CAS also emphasizes in point 59 of its decision, earlier jurisprudence of CAS and DRC clearly state that the unilateral extension clause is one of disputable validity. Because none of the CAS decisions have ever stated unilateral extension options are - under any circumstances - invalid, every case should be analyzed and decided considering all relevant circumstances. In this case, all relevant circumstances pointed towards the validity of the clause. The player had admitted that - albeit indirectly - he had been aware of the fact that he was committed to the club for a period of five years. Further, as a result of every extension, the player received a significant increase of salary and the player had accepted the first extension of two years without protesting against its effects. By accepting the first extension the player had - consciously - accepted the effect of the extension options.

Apart from the fact that this is the first and only CAS-decision in which CAS declares a unilateral extension option valid, it is also an important decision because of the fact that CAS clearly emphasizes that the relevant circumstances of each and every case can and will be decisive. The Portmann-report is ignored and none of its criteria are explicitly mentioned. CAS emphasized the value of FIFA's principle of contractual stability by using the Pacta Sunt Servanda principle as a starting point. However, as clearly stated above, the relevant circumstances can, and often will be, decisive.

Immediately, one discovers a link between this CAS-decision and the only DRC-decision that declares a unilateral extension option valid: in both cases, the player had already accepted the first extension, without protesting against its effect!

CAS 2006/A1157 Club Atlético Boca Juniors v/Genoa Cricket and Football Club S.p.A., 31 January 2007

In this last³⁰ CAS-case, a 15 year old player signed a contract with Boca Juniors. The club had included two unilateral extension options in the contract, giving itself the right to extend the contract twice, for periods of one year each. When the player signed a three-year contract with club Genua, Boca Juniors blocked the transfer because it maintained that the player was still bound by his contract. Boca maintained that it had successfully extended the contract. The Single Judge of the Players' Status Committee now had to decide whether the player should receive a provisional transfer certificate, granting him the right to provisionally transfer to Genua. Referring to DRC and CAS jurisprudence considering the unilateral extension option, the Single Judge granted the player permission to transfer. The Single Judge emphasized that both DRC and CAS had - in general - disputed the validity of the unilateral extension option. The club had presented the Single Judge with the aforementioned Portmann-report. The Single Judge maintained the case at hand did not gratify all of its criteria. The club then appealed this decision before CAS.

²⁹ See also dr. mr. S.F.H. Jellinghaus' annotation in 'Jurisprudentie in Nederland', Arbeidsrecht 194, May 2007, no. 5.

³⁰ An earlier CAS-case that dealt with a unilateral extension option was TAS 2006/A1082-1104 'Real Valladolid CF SAD v/ Diego Barretto Cáceres & Club Cerre Porteno', 19 January 2007. In this case the unilateral extension option was considered invalid, because of its incompatibility with FIFA regulations. In this case, CAS referred to its decision in the aforementioned CAS-decision of 12 July

2006, 2005/A1983 & 984, 'Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain'. One last CAS-case that handled some sort of unilateral option clause was the CAS-decision of 2006/O1055 'Del Bosque, Grande, Miñano Espín & Jiménez v/ Besiktas', 9 February 2007. In this case, however, the unilateral option clause referred to the right to terminate the relevant employment contract. Therefore, this decision falls outside the scope of this article.

CAS decided that the Single Judge had clearly stated that the club had been unable to show that the unilateral extension option was valid. Interesting about this case is not so much because CAS agrees with the decision of the Single Judge. Even more interesting is CAS' statement that it did not agree with the way the Single Judge had come to its decision. CAS maintained that the Single Judge had awarded too much weight to the Portmann-report. The CAS-panel maintained that it did not want to award the report such value, and that it has troubles following the way Portmann reaches his conclusions. Any further decisions on the aspect were needless, because CAS wanted to rule this decision in a broader context. Eventually, CAS ruled in favor of the player, based on other arguments than the invalidity of an option clause in general.³¹ CAS explicitly emphasized in this award that nothing that it had stated had to be taken as an indication that CAS had formed any view as to whether the unilateral extension option in the player's contract was valid and enforceable. However, this case can still be seen as an interesting one with respect to the issue of unilateral extension options. More specifically, despite the fact that the aforementioned statements regarding the validity of the option concerned can be entitled as an *Obiter Dictum*, CAS did lift a corner of the veil regarding its point of view on the opinion of Dr. Portmann. The statements regarding the unilateral extension option show that the international footballing community has been considered Portmann's criteria as leading, while CAS does not seem to share this analysis. In line with our concerns regarding the Portmann-report, CAS is now also reticent on this report's value. CAS' statement in this case, reviewed in conjunction with the fact that in the previously mentioned case of 10 October 2006, CAS has ignored the Portmann-report and its criteria, leads us to the conclusion that meeting the Portmann-criteria alone is not enough and should therefore not be considered leading in the assessment of the validity of unilateral extension options.

CAS 2009/A/1856 - Fenerbahçe Spor Kulübü v/Stephen Appiah & CAS 2009/A/1856 - Stephen Appiah v/ Fenerbahçe Spor Kulübü, 7 June 2010

In this more recent case in 2010, CAS decided on a side note with regards to the unilateral extension option. With regards to its judgment regarding the option, this case can also be considered as an *Obiter Dictum*, just as the case before CAS of 2007 between Boca Juniors and Genua (CAS 2006/A/1157 Club Atlético Boca Juniors v/Genoa Cricket and Football Club S.p.A., 31 January 2007). CAS referred to the well-established jurisprudence of the DRC and CAS that unilateral extension options are unlawful and as a general rule, will not be binding. CAS decided that the validity and enforceability of the unilateral extension option in the employment contract of the player Stephen Appiah with the Turkish club Fenerbahçe is not accepted under Swiss law (and referred to the before mentioned case of CAS 2005/A/983&984 Penarol c. Bueno, Rodriguez & PSG). Furthermore, CAS observed that when the option in this matter of the player concerned was exercised (i.e. on 22 January 2008) the dispute between the parties was already a matter of fact. In this case the player was injured for a long period as result of which the Panel noted that any reasonable club, with still a long period of time to exercise an option, would wait and execute the option in relation to an injured player only after the full recovery of such player and not while the player's physical health is unclear. Therefore, CAS was satisfied that the execution of the unilateral extension option was artificial and aimed to increase the claim for compensation in the financial dispute that was

already launched. Therefore, CAS was of the opinion that Fenerbahçe's right to extend the contract for the 2009/2010 season must be dismissed without further consideration.

Interesting in this case is that Fenerbahçe executed the option during the period player Appiah was injured. CAS noted it was therefore quite remarkable that the club did not wait to execute the option until the player was fully recovered. Just as the DRC decided in its case of 9 January 2009 (in which the club executed the extension option 16 months before the ending of the employment contract concerned; no. 19174), CAS emphasized that the execution of the unilateral extension option also in this case was only invoked by Fenerbahçe in order to establish a higher financial compensation.

Conclusions

What conclusions can be drawn from analyzing DRC and CAS jurisprudence?

After analyzing DRC and CAS jurisprudence, it can be concluded that neither of the committees till so far have found a uniform answer to the question related to the validity of unilateral extension options. The DRC seems to have a general way of analyzing the validity, maintaining that the clauses in general have a disputable validity and are in general not valid. The DRC constantly refers to its own jurisprudence regarding the unilateral extension option, which means that it has tried to formulate a starting point when assessing the clause's validity.³² CAS does no such thing, dealing with each case individually and making the relevant circumstances decisive in each case. CAS is not bound to earlier jurisprudence due to the absence of the so-called 'Stare Decisis'-principle.³³ As a result thereof, each case will be dealt with individually, making future jurisprudence quite uncertain.

Nonetheless, one general conclusion can be drawn: unilateral extension options are - by their very principle - in general incompatible with FIFA regulations and principles of global labor law. Indeed, both DRC and CAS have only once ruled in favor of a valid option.³⁴ In that respect it cannot be left unmentioned that both cases had the extraordinary circumstance of the player accepting an earlier extension option that was based on the same option clause. Both players in these cases only started protesting when their clubs had already extended their player's contracts for the second time (and even more interesting was that in the DRC case the player even brought his case to FIFA five months after the commence of the extended contract).

After analyzing all relevant jurisprudence of CAS and DRC, we can conclude that both DRC and CAS have not gone so far as to declare unilateral extension options invalid *under any circumstance*. The DRC refers to its jurisprudence in similar cases, but rules every case on the basis of specific relevant circumstances. CAS does not sustain a clear line of reasoning by referring to its own jurisprudence, but bases its decisions solely on the circumstances of the case at hand.³⁵ For example, in a case before CAS of 10 October 2006 all relevant circumstances pointed towards the validity of the clause.³⁶ Apart from the fact that this is the first and only CAS-decision in which CAS declared a unilateral extension option valid, it is also an important decision since the CAS panel clearly emphasized that the relevant circumstances of each and every case can and will be decisive.³⁷ CAS emphasized in this case the value of FIFA's principle of contractual stability by using the *Pacta Sunt Servanda* principle as a starting point and decisive factor.³⁸

31 The arguments were mainly based on the fact that the player was a minor, and therefore falls outside the scope of this article.

32 DRC 22 July 2004, no. 74508, DRC 13 May 2005, no. 55161, DRC 24 October 2005, no. 105874, DRC 21 February 2006, no. 261245, DRC 23 March 2006, no. 36858, DRC 30 November 2007, no. 117707, DRC 7 May 2008, no. 58860, DRC 9 January 2009, no. 19174 and DRC 15 May 2009, no. 59081.

33 It must also be noted that under CAS rules the parties have a formal say in the composition of the CAS committee. The

composition of the CAS panel will change each case.

34 DRC 21 February 2006, no. 261245 and CAS 2005/A/973 'Panathinaikos Football Club v/Sotirios Kyrgiakos', 10 October 2006.

35 An earlier decision that in a way covered the unilateral extension option is TAS 2003/O/530 'A.J. Auxerre Football c/ Valencia CF, SAD & M. Mohamed Lamine Sissoko', 27 August 2004. In this case the club tried to convert a 'trainee' contract into a professional contract using

36 CAS 2005/A/973 'Panathinaikos

Football Club v/Sotirios Kyrgiakos', 10 October 2006.

37 An earlier CAS-case that dealt with a unilateral extension option was TAS 2006/A/1082-1104 'Real Valladolid CF SAD v/ Diego Barreto Cáceres & Club Cerre Porteno', 19 January 2007. In this case the unilateral extension option was considered invalid, because of its incompatibility with FIFA regulations. In this case, CAS referred to its decision in the aforementioned CAS-decision of 12 July 2006, 2005/A/983 & 984, 'Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti &

Paris Saint-Germain'. One last CAS-case that handled some sort of unilateral option clause was the CAS-decision of 2006/O/1055 'Del Bosque, Grande, Miñano Espín & Jiménez v/ Besiktas', 9 February 2007. In this case, however, the unilateral option clause referred to the right to terminate the relevant employment contract.

38 See also dr. mr. S.E.H. Jellinghaus' annotation in 'Jurisprudentie in Nederland', arbeidsrecht 194, May 2007, no. 5.

39 TAS 2005/A/983&984 'Club Atlético Peñarol v. Carlos Heber Bueno Suárez,

In an important CAS decision of 12 July 2006³⁹, which can be considered as the landmark CAS-case of unilateral options, CAS refers to the Opinion of Dr. Portmann.⁴⁰ In his article, Portmann gives an explicit review of the case at hand. Portmann gives us five criteria on the basis of which a specific option right should be judged in order to answer the question whether or not the extension right is to be considered as an excessive commitment. In its decision of 12 January 2007, the DRC used Portmann's criteria as leading for valid options. Since then, the criteria are being used in football practice all over the world and are being highly valued.⁴¹

However, it is noteworthy in respect of the validity of unilateral extension options that after the mentioned cases before the DRC of 12 January 2007 and CAS of 12 July 2006, DRC nor CAS in later cases referred directly to the criteria of Portmann. Moreover, in later cases the DRC is extremely reluctant in establishing options valid.⁴² Also CAS is reluctant and states, for example in a more recent case of 7 June 2010 between the player Appiah and the club Fenerbahçe, that the validity and enforceability of a unilateral extension option is not accepted.⁴³ So, a relevant question in that respect is, what will DRC and CAS decide in the future in case they will have to adjudicate whether or not a unilateral extension option is valid?

What can be expected from future DRC and CAS decisions?

In order to create and establish a valid unilateral extension option, it seems to be of the utmost importance to meet *at least* the five criteria as mentioned and laid down in the DRC-decision of 12 January 2007 and the CAS-decision in the '*Bueno & Rodriguez-case*'.⁴⁴ However, as mentioned before, these criteria cannot be considered as absolutely leading in assessing the validity of unilateral extensions.

After having read the decisions of the DRC and CAS it can be concluded that the criteria of Dr. Portmann must not be interpreted as absolutely leading by CAS and DRC in future cases. In the case before CAS between Bueno & Rodriguez of 12 July 2006⁴⁵, the CAS panel seems to give us a slight warning that in future cases CAS might be more than skeptical with regards to the validity of unilateral extension options. The message of this case: please be aware, meeting with the five criteria may not be sufficient. The particular circumstances of each case will (now) be (even) more decisive. Please be aware that The DRC does not refer to the criteria anymore in later cases and CAS in its case of 31 January 2007 between Boca Juniors and Genua give us more doubts with regards to the value awarded to the criteria. Also the case before CAS of 7 June 2010, between the player Stephen Appiah and the Turkish club Fenerbahçe Spor Kulübü, shows us that the validity and enforceability of a unilateral extension option cannot be accepted, according to CAS in this case.⁴⁶

Nonetheless, a general declaration of invalidity under any circumstances is not to be expected. The use of unilateral extensions is common in professional football all over the world, and openly declaring

such clauses invalid under any circumstances would have serious consequences. In that respect one should take into account that each case shall be decided on the relevant circumstances of that specific case. In our opinion, DRC and CAS will be more inclined to declare an extension option valid, if all five mentioned criteria are met. However, to be sure and to increase chances of validity, we would advise to add a sixth and seventh criterion to the list.

Firstly, although this cannot be derived from the decisions of CAS and DRC, it would be advisable that the extension period is proportional to the main contract. For example, a main contract for the period of one year, with an extension option for four years does fall within the five-year maximum that is mentioned in FIFA Regulations. These clauses, however, can be considered as a disguised probation period solely in favor of the club and can therefore in our opinion not be considered as legally valid.

Secondly, it would be advisable to limit the number of extension options to one.⁴⁷ For example: a player's contract is signed for a period of one year. The contract contains a unilateral extension option that gives the club the right to extend the contract twice, for one year each, such as was the case in the matter between Boca and Genua. Again, the total period of 5 years (main contract of three years and two extensions of one year) falls within the FIFA Regulations and matches the five criteria mentioned by the DRC and CAS, but it still bears a substantial risk that this kind of option by the DRC or CAS will eventually be considered as an unreasonable commitment of the player, being the weaker party in the employer-employee relationship.

It should be noted that from the analyzed jurisprudence one main criterion is deemed most important by DRC and CAS: the player should receive a significant increase in salary due to the extension. Furthermore, a club should explicitly mention the extension option in a contract by making the player sign the clause concerned, in addition to the player's contract. In order to avoid any misunderstanding, we would advise to put the extension option in bold characters above the player's signature.

In conclusion, it can be said that even if all Portmann's criteria (plus the additional ones laid out in this article) are met, this still does not automatically mean the extension option will be valid. A declaration of validity appears dependent on another requirement, which cannot easily be put into words, but comes down to the fact that the relevant circumstances of a specific case shall always be decisive: has the player accepted an earlier extension? Did the player explicitly agree with the effects of the option (in writing, verbally or can it be drawn from his stance)? How did the player behave after the club's extension? Did the player still play in any official matches and did the player keep training with his team after the extension? Did the club only invoke the option in order to establish that it can then claim higher compensation? In short: apart from the aforementioned criteria, all relevant circumstances of a specific case should point towards validity of the unilateral extension, in order to establish a valid clause.

Following the decisions of CAS and DRC, one can come to the conclusion that the validity of a unilateral extension option increases in case the player accepted an earlier option in his contract or in case acceptance followed due to his stance, for example by continuing taking part of training sessions and official matches after the extension. On the other hand, the DRC will be more inclined to come to an invalid option in case the contract is not provided with conditions that will bring the player a substantial advantage. Also the fact that the extension option is executed by the club solely in order to claim higher compensation, will not speak in favour of the club.

Finally, it is noteworthy to mention, as referred to in the introduction of this article, that in South-America, where the unilateral extension option was (and in some countries still is) extremely popular, the disputable validity of the clause has caused it to fall somewhat into disuse. We will wait and see what happens further.

Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain.

⁴⁰ Prof. Wolfgang Portmann, 'Unilateral option clauses in footballers' contracts of employment: an assessment from the perspective of international sports arbitration', 7 Sweet & Maxwell International Sports Law Review (2007) no. 1, p. 6-16

⁴¹ Unfortunately this decision is not published on the website of FIFA.

⁴² See for example, DRC 30 November 2007, no. 117707, DRC 7 May 2008, no. 58860, DRC 9 January 2009, no. 19174 and DRC 15 May 2009, no. 59081.

⁴³ CAS 2009/A/1856 '*Fenerbahçe Spor Kulübü v/Stephen Appiah*', CAS 2009/A/1857 '*Stephen Appiah v/*

Fenerbahçe Spor Kulübü', 7 June 2010.

⁴⁴ CAS-decision of 12 July 2006, 2005/A/983 & 984, '*Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*'.

⁴⁵ CAS-decision of 12 July 2006, 2005/A/983 & 984, '*Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*'.

⁴⁶ CAS 2009/A/1856 '*Fenerbahçe Spor Kulübü v/Stephen Appiah*', CAS 2009/A/1857 '*Stephen Appiah v/ Fenerbahçe Spor Kulübü*', 7 June 2010.

⁴⁷ See DRC 22 July 2004, no. 74508.

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Transnational Sports Law

by Franck Latty*

Certain legal expressions are in everyday use in doctrine or practice, as if their meaning was obvious, despite the conceptual vagueness that continues to surround them. The notion of “Transnational Sports Law” undoubtedly falls into this category. With this contribution, I aim to demonstrate that, regardless of the meaning given to the expression, the addition of the adjective “transnational” has conceptual virtues that provide sports law with a pertinent analytical framework.

Yet it is still necessary to acknowledge the existence of “sports law”, something which is rejected by a certain school of thought. For E. Grayson, for example

“No subject exists which jurisprudentially can be called sports law. As a soundbite headline, shorthand description, it has no juridical foundation; for common law and equity create no concept of law exclusively relating to sport. Each area of law applicable to sport does not differ from how it is found in any social or jurisprudential category [...]”¹

Rejecting the idea of sports law, these authors entitle their discipline “Sport and the law”, which consists of analysing the manner in which the law - namely state law (e.g. employment law, contract law, criminal law, etc.) - applies to the sporting domain. At best, certain of these authors recognise that the particularities of sport give rise to an independent offshoot of state law². This restrictive doctrinal approach can be criticised for at least two reasons:

- i) First of all, because it can only be relevant for certain countries - generally through common law - which have not adopted legislation in the sporting domain. However, other states - often by tradition of civil law - have legislated on the subject. This is very much the case for France, which since the second half of the 20th century, has developed an increasingly dense body of legislation that is now grouped together in a sporting code³ covering numerous aspects of sporting activities. The code essentially allocates responsibilities in terms of the organisation of sporting activities between government, regional authorities, associations, companies, federations, the National Olympic Committee, etc., specifying the rights and obligations of the different parties involved (athletes, trainers), as well as organising the anti-doping effort; it also regulates the practice of sporting activities (sports facilities, insurance, hygiene and safety, etc.) and includes other measures relating to the funding of sport. Through a system of public service delegation, French law even operates a form of nationalisation of the national federations: although they retain association status under private law, their decisions are regarded as administrative decisions and come under the competence of the administrative judge. Undoubtedly, therefore, there exists French sports law of state origin which even attracts to it the sporting standards of the federations, thus invalidating the theory of “Sports and the Law”.
- ii) Secondly, the “Sports and the Law” theory is state-centred, ignoring the law produced by the sporting bodies, whether they are international (the international federations and the International Olympic Committee, in particular) or national in scope. However, it is these bodies which, even before the states, organise sporting competition in its manifold aspects (rules of play, technical rules, qualification of

athletes, anti-doping rules, in some cases the status and contracts of athletes, etc.). Taking the view that these standards cannot claim to have the quality of legal rules amounts to having a highly restrictive conception of the law, which is well out of step with the realities on the ground. The “Sports and the Law” theory finds its roots in the state positivism that necessarily links the law to the state, the sole entity capable of imposing compliance through physical constraint⁴. However, pluralist theories have shown that neither power nor law are in essence linked to the state, but that they manifest themselves in any organised social group, whether it be pre-, infra-, supra- or para-state⁵. From this perspective, it becomes clear that sporting bodies do indeed produce legal rules - a fact which in no way prejudices their degree of autonomy with regard to the law emanating from the states.

Having confirmed the existence of sports law, resulting both from public (state or even, by extension, inter-state) and private sources (the rules of sporting bodies), it is now necessary to analyse what the adjective “transnational” adds to or takes away from the concept.

An *a contrario* approach would permit the exclusion of sports law of national scope from the notion. Once the idea of transnationality involves going beyond a defined national territory, both the state rules applicable to sport and the rules of the national sporting bodies have to be set aside. It should, however, be noted that the rules of the national federations are often merely a transposition of the rules laid down by the international federations.

Transnational Sports Law can also be distinguished from International Sports Law⁶, as the concept of international law (understood as international public law) originally refers to the law applicable to inter-state relations. With the diversification of international society, international law these days involves more varied subjects (intergovernmental organisations and private bodies, to a certain extent), of which it governs the status or relations. International law still only intervenes infrequently in the field of sport, so that, logically, the sporting bodies are not characterised as a subject of international law - with the possible exception of the International Olympic Committee, which has succeeded in obtaining quite unique status, not dissimilar to that of the International Committee of the Red Cross⁷.

With the *a contrario* approach proving insufficient to precisely define the concept of Transnational Sports Law, a positive definition becomes inevitable. If we depart the sporting domain for a moment, it appears that the notion of transnational law, very common in legal literature and even in practice, is characterised by an ambiguity which, far from constituting an obstacle to its application to the field of sport, on the contrary helps to highlight the diversity of the legal phenomenon that is sports law.

Three meanings can be drawn from this: a wide meaning, based on the theory of Jessup, covering any rule with external scope (I); a hybrid meaning, characterising the legal relations between public and private entities (II); a strictly private meaning, referring to the sectoral rules produced by self-regulated private global parties (III). While the last of these is the most meaningful from a conceptual point of view, the fact remains that the first two help to illustrate the varied dimensions of sports law.

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1 E. Grayson, *Sport and the Law*, 2nd ed., London, Butterworths, 1994, p. xxxvii. See also the presentation of the debate given by authors in favour of sports law: S. Gardiner *et alii*, *Sports Law*, Cavendish, London-Sydney, 1998, pp. 71 and 72; R. Parrish, *Sports Law and Policy in the European Union*, Manchester, Manchester University Press, 2003, pp. 6 et seq.

2 T. Davis, “What is Sports Law”, *Marquette Sports Law Review*, vol. 11, 2000-2001, pp. 211 et seq.

3 www.legifrance.gouv.fr

4 See the writings of Kant, Hegel, Carré de Malberg, Kelsen etc.

5 See in particular Santi Romano, *L'ordre juridique*, 2nd edition, Paris, Dalloz, 2002, particularly p. 81; M. Virally, *La pensée juridique*, Paris, LGDJ, 1960, chapter XV on the pluralism of legal orders.

6 *Contra*, see J. Nafziger, *International Sports Law*, 2nd Ed., Transnational Publ. Dobbs Ferry, N.Y., 2004, 376 p., for whom the conception of International Sports Law is close to that explained in the first part of this paper.

7 F. Latty, *Le Comité international olympique et le droit international*, CEDIN, Perspectives internationales n° 21, Paris, Montchrestien, 2001, xix + 235 p.

I. The wide conception: Jessup's transnational law

1. The spread of the expression "transnational law" within legal circles owes a great deal to the book of the same name published in 1956 by the renowned American lawyer Philip Jessup, who went on to become a judge in the International Court of Justice during the 1960s. Mindful of going beyond the traditional distinctions between internal law and international law and between public and private law, Jessup proposes the grouping together under a single description of all rules with an extra-national dimension:

"I shall use, instead of "international law" the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."⁸

Apart from the rules of public international law and the national rules of private international law, the concept also encompasses internal law with international scope - public and private (civil or criminal) - and the principles applied to legal relations forged directly between private bodies. Defined in this way, transnational law embraces all legal rules, independently of their origin, that exceed the framework of a single national legal order. Through this emphasis of the existence of standards that were little known at the time, such as the law of international organisations or the general principles resulting from arbitration case law, Jessup raised the issue of the traditional boundaries of international law, which amounts to a success still palpable today in terms of the theory of transnational law.

Applied to sports law, Jessup's Transnational Law would make it possible to group all standards into a single set "*which regulates actions or events that transcend national frontiers*" in the area of sport. The private rules of the international federations and the International Olympic Committee would thus sit alongside the few rules stemming from the international legal order, such as the 2005 UNESCO Convention against Doping in Sport, the conventions of the Council of Europe against doping and violence in stadiums, and the texts imposing a sporting embargo on certain nations (United Nations Convention against Apartheid in Sport of 10 December 1985, Resolution 757 (1992) of the Security Council imposing an embargo on Yugoslavia). To this list can be added the numerous *soft law* texts adopted by the United Nations General Assembly, UNESCO and other international bodies⁹. Finally, the state rules likely to be applied to transnational sporting relations, for instance the Swiss law on associations - the IOC and most international federations have their headquarters in Switzerland - would also come under Transnational Sports Law.

2. Nonetheless, Jessup's theory is not intended to be merely descriptive, as his proposal consists of suggesting that any judge (national or international, public or private) faced with a dispute transcending state borders may choose the rule of transnational law which they regard as being most commensurate with reason and justice for the resolution of the dispute¹⁰. From this perspective, Jessup's theory has not met with the anticipated success, insofar as each judge is the organ of an established legal order that does not leave them the latitude to import external standards at will. But what about specifically in relation to sport?

There is no doubt that if a sport-related dispute is being heard by a

judge at a state court - which is tending to become rarer due to the more widespread recourse to arbitration -, they would give precedence to their national law and take the applicable international law into account only if their Constitution recognised its value¹¹, while the laws of another state would be implemented if the mechanisms of private international law referred to it¹². Similarly, they would apply the laws of international sporting bodies if so authorised by national law, via an explicit reference¹³ or by means of contractual mechanisms. However, under no circumstances would a state judge be authorised to draw on a patchwork of transnational rules potentially concerning the situation in dispute. It is for this reason that the French *Conseil d'Etat* traditionally considers the rules of the international federations to be devoid of legal effect in French law unless they have been transposed by the national federations¹⁴.

At the level of the Court of Arbitration for Sport, this is more of a grey area, as the CAS's arbitration rules leave its arbitrators considerable room for manoeuvre. Within the framework of the appeals process, in addition to the "applicable regulations and the rules of law chosen by the parties" and, secondarily to "the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled", the CAS may apply "the rules of law, the application of which the Panel deems appropriate"¹⁵. In practice, it can be observed that the CAS's divisions sometimes have differing interpretations of these provisions on the applicable law. While all divisions in the first instance apply the rules of the sporting bodies concerned, some make abundant reference to state law, sometimes making the sporting rules secondary to this¹⁶, while others spontaneously free the sporting standards from any national legal order¹⁷. Moreover, at the level of the relevant ad hoc division at the Olympic Games, "The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate"¹⁸. The divisions of the CAS therefore enjoy a degree of freedom of choice in terms of the rules to be applied, which appears to correspond to Jessup's recommendations. The theory of Transnational Law is therefore implemented, at least to a certain extent, at the level of the CAS, not solely in its descriptive aspects (diversity of the rules applicable to transnational sporting relations) but also in its operational aspects (application of the most relevant rules by the judge).

II. The hybrid conception: transnational law as the law governing mixed relations

The adjective "transnational" is commonly used in a specific sense to qualify relations between a state and a foreign private entity, especially in the context of investment law. The practice of state contracts (a petrol concession contract, for instance) gives rise to "hybrid"¹⁹ or "asymmetrical"²⁰ relations between the state and a foreign private company. The term "transnational" takes into account the atypical nature of these legal relations in which contractual equality and state sovereignty are opposed, without in many cases being wholly reduced to either national or international law. These contracts generally include an arbitration clause providing for a tribunal to rule on disputes between the parties. This is commonly referred to as "transnational arbitration" or "mixed arbitration". Much has been written about the law applicable to disputes of this type

8 Ph. C. Jessup, *Transnational Law*, New Haven, Yale U.P., 1956, p. 2.

9 On international sports law, see *infra* Andreas Wax: Public international Sports Law - A "Forgotten" Discipline? and F. Latty, *La lex sportiva - Recherche sur le droit transnational*, Leiden/Boston, Martinus Nijhoff Publishers, 2007, pp. 652 et seq.

10 Seer Ph. C. Jessup, *op. cit.*, pp. 106 et seq.

11 In France, article 55 of the Constitution envisages that international treaties have a value superior to the law.

12 See E. Loquin, "Sport et droit international privé", in *Lamy Droit du sport*, nos 186-95.

13 The French law of 1975 (amended on sev-

eral occasions since 1984) thus envisaged that the sports federations were responsible for ensuring "compliance with the technical and ethical rules of their disciplines laid down by the international federations, the International Olympic Committee and the French National Olympic and Sports Committee".

14 See for example the Conseil d'Etat's advisory opinion dated 20 November 2003, in *Revue juridique et économique du sport*, no. 72, September 2004, p. 65: "The international sports federations are subject to the legislation of the state where each of them has its headquarters and the regulations which they lay down do not apply within France's internal law."

15 Art. R58 of the Code of Sports-related Arbitration. "In the latter case, the Panel shall give reasons for its decision".

16 See for example C.A.S. 94/126, *N. / F.E.I.*, 9 December 1998, § 3; C.A.S. 98/208, *N. J. Y. W. / F.I.N.A.*, 22 December 1998, § 9.

17 See for example C.A.S. 92/80, *B. / F.I.B.A.*, 25 March 1993, § 10; C.A.S. 2003/A/507, *Strahija / F.I.N.A.*, 9 February 2004, § 6.1. See F. Latty, *La lex sportiva...*, *op. cit.*, pp. 547 et seq. (distinction made between the "statist" approach and the "transnationalist" approach within CAS case law).

18 Art. 17 of the Arbitration Rules for the Olympic Games (Vancouver 2010). The arbitration rules for other major interna-

tional competitions (FIFA World Cup, UEFA European Championship, Commonwealth Games) envisage similar provisions (see for example art. 18 of the arbitration rules for the final phase of the FIFA World Cup 2010).

19 Z. Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", *BYIL*, 2003, p. 153.

20 Th. Wälde, "The Specific Nature of Investment Arbitration", in Ph. Kahn / Th. Wälde, *New aspects of International Investment Law*, Hague Academy of International Law, Leiden/Boston, Martinus Nijhoff Publishers, 2007, p. 94.

by transnational tribunals: law of the contracting state? International public law? Other rules? In view of certain decisions reached in disputes of this type where general principles belonging to no identified legal order have been applied²¹, some authors have posited the idea of transnational law specifically tailored to these mixed relations²². Since the 1980s, however, the debate has lost its momentum and interest due to the exponential development of Bilateral Investment Treaties (BITs) between states. With the majority of disputes relating to investments now being raised on the basis of one of these BITs (even in the absence of contractual relations between the investor and the state), the transnational courts of arbitration are almost always called upon to settle disputes by applying international (public) law²³.

How does this hybrid conception of transnationality relate to sports law?

1. In the first place, Transnational Sports Law understood in this way could offer a characterisation of the standards adopted by the World Anti-Doping Agency (WADA). This body at the origin of the world anti-doping code and associated international standards is formed jointly by representatives of the public authorities and representatives of the Olympic movement²⁴. Formally at least, the standards which it produces are acts of private law, since the agency has foundation status under Swiss law despite its premises being located in Montreal. However, it is not out of the question to consider that the agency's mixed composition in a way reflects upon the law which it produces - transnational law in the hybrid sense of the term. The world anti-doping code and the international standards do not, however, possess any intrinsic legal force. They have an effect only insofar as the sporting bodies transpose their content into their own anti-doping regulations, while the states have adopted the UNESCO convention against doping, the main objective of which is to recognise the Code. But it is precisely because the WADA's global anti-doping programme is the product of co-regulation within the agency that it can obtain the consent of both the sporting bodies and the public authorities.
2. Secondly, and *de lege ferenda*, the practice of State Contracts referred to above could effectively be found to apply at major international competitions (the Olympic Games or the FIFA World Cup, for example). The legal framework developed for the staging of these events does not guarantee full legal security to the sporting institutions, which are only contractually bound to the host city (for the Olympic Games) or to the chosen federation (in the case of the FIFA World Cup). However, the holding of such events on a country's soil involves commitments on its part, if only to provide access to its national soil to athletes from all over the world. The states supply plenty of highly precise guarantees, appended to the bid and then to the organisation contract²⁵, but in the event of a state defaulting, the sporting body risks only being able to count on its own resources to remind the state of its commitments. In practice, certain "hiccups" crop up now and then, such as the attempt by the Chinese authorities, on the eve of the opening of the Beijing Games, to limit accredited journalists' access to websites deemed by it to be "subversive"²⁶, a problem

eventually resolved via discreet "Olympic diplomacy"²⁷. Similarly, in the build-up to the 1976 Montreal Games, the Canadian authorities refused to let Taiwanese athletes enter their territory, as their country was not recognised by Canada²⁸.

Consequently, the international sporting bodies might seek to secure their legal relationship with the host state by entering into a "state contract" similar to those which foreign private companies make with the destination states for their investments. Subject to international law (so as to avoid national law, which the contracting state has the power to amend to its advantage), such agreements strengthen the position of the private body, which is placed on equal footing with the sovereign state. The presence of arbitration clauses whereby any dispute is submitted to transnational arbitration also possesses certain dissuasive virtues which might suffice to prevent disputes between the body and the state hosting the event. A proposal of this type was formulated during the 1980s by the authors of a study commissioned by the IOC on the improvement of its legal status²⁹, but it failed to get past the Olympic drawing-board stage and subsequent changes to international investment law mean that its revival would not be worthwhile.

3. Lastly, it has to be acknowledged that the development of Bilateral Investment Treaties is likely to offer protection to international sporting bodies whose international events must be held on the territory of sovereign states. These treaties generally contain provisions whereby the state parties guarantee the investor parties equal, fair and non-discriminatory treatment (national treatment and/or treatment of the most favoured nation), together with full and complete protection and security. Some contain a clause concerning respect of the commitments made vis-à-vis investors, while the freedom of payments and money transfers relating to the investments is guaranteed. These treaties again offer the investors direct lines of recourse against the state, usually before the International Center for the Settlement of Investment Disputes (ICSID) or according to the arbitration regulations of the UNCITRAL (United Nations Commission on International Trade Law).

It is also worth noting that Brazil, which is due to host the FIFA World Cup in 2014 and the Rio Olympic Games in 2016, concluded a BIT in 1994 with Switzerland, the "home country" of both the FIFA and the IOC³⁰. Due to Brazil's failure to ratify it, the treaty has not entered into force, but there is nothing to prevent this case being used as a basis for reasoning. If a state, through its behaviour, was to present an obstacle to the successful staging of the World Cup or the Olympic Games, or more prosaically, if it failed to fulfil the guarantees provided in terms of freedom of transfer of capital, for example, could the FIFA or the IOC not invoke its international liability on the basis of a BIT in force? The crucial and novel legal issue would be to determine whether the sporting competition could be regarded as an investment, as transnational case law fluctuates on this definition³¹. After all, it has to be acknowledged that the construction of the infrastructure required to stage the Olympic Games or the World Cup involves investments made not by

21 Most notably the sentence *National Iranian Oil Company c. Sapphire*, 15 March 1963, *ILR*, vol. 35, p. 136.

22 J.-F. Lalive, "Un récent arbitrage suisse entre un organisme d'Etat et une société privée étrangère" (*A recent Swiss arbitration case between a state body and a foreign private company*), *Ann. suisse de droit international*, 1962, pp. 273-302, which talks about an "autonomous transnational law for state contracts". V. also J.-F. Lalive, "Contracts Between a State or a State Agency and a Foreign Company", *ICLQ*, 1964, p. 1008; Ch. Leben, "La théorie du contrat d'Etat et l'évolution du droit international des investissements", *Collected Courses of the Hague Academy of International Law*, 2003, t. 302, pp. 316 et seq.

23 See our chronicle "Arbitrage transnational et droit international général", published in the *Annuaire français de droit international* from 2008.

24 See article 6 of the WADA Statutes and R. Pound, "The World Anti-Doping Agency: an Experiment in International Law", *International Sports Law Review*, July 2002, no. 2, pp. 53-59.

25 Concerning the requirements of the CIO on the subject, see F. Latty, *La lex sportiva...*, *op. cit.*, pp. 584 et seq. The state guarantees demanded by FIFA are not included in any public FIFA regulation. However, the reading of the bid evaluation reports for the 2018 and 2022 World Cups, which include a paragraph headed "Legal and Government Guarantees", per-

mits the identification of the nature of FIFA's requirements in this area. They concern access to the state's territory for the competitors and persons affiliated to FIFA, security during the event (and the exclusion of any liability of FIFA in this regard), currency exchange, FIFA's commercial rights, the use of national anthems and flags, telecommunications and the importing of the equipment required for the event's organisation. These guarantees are also required to include total tax exemption for FIFA and its affiliates.

26 Essentially websites of human rights defence bodies or those in favour of a Free Tibet...

27 "Internet: sous la pression, Pékin assou-

plit sa position" (*Internet: under pressure, Beijing softens its stance*), *Le Monde*, 3-4 August 2008.

28 See the report written by J.-L. Chappelet *e.a.* within the framework of the Enlarged Partial Agreement on Sport (Council of Europe), *The Autonomy of Sport in Europe*, Strasbourg, 1 December 2008, EPAS (2008), pp. 14-15.

29 B. Simma / Ch. Vedder, *Suggestions for Improving the Legal Position of the IOC as Regards to its Relationship with States and Intergovernmental Bodies*, 1985, study not published but referred to in F. Latty, *La lex sportiva...*, *op. cit.*, pp. 598-599. V. also the debate on the sedentarisation of the OG, launched at the time of the boycotts, when several proposals were formulated.

the IOC or the FIFA but by local partners not protected by the BIT. Having said that, it is also noteworthy that the Switzerland/Brazil BIT includes international property rights and expertise in the definition of the investment³², which would make it possible to include the international competition within the scope of the treaty. Once past the *a priori* surmountable obstacle of the existence of an investment, it would remain to be verified that the state concerned has indeed breached its international obligations resulting from the treaty. At the end of the process, the system would enable the body to obtain recompense for the damage incurred³³, although it is doubtful that the CIO or FIFA would wish to “jurisdictionalise” their generally peaceful relations with the states. So the corrective or even simply dissuasive virtues of this mechanism, which is highly (overly?) favourable to investors, should still not be neglected.

III. The private conception: transnational law as a form of global sectoral self-regulation

We will now deal with the final manner in which Transnational Sports Law can be conceived, and in terms of the overall analysis of sports law, it is the most useful of the three.

1. Once again, it is in the economic sphere that this specific conception of transnational law has been developed, to refer to the self-regulation of international economic players. Observation of the contractual practices of private operators from international commerce and analysis of commercial arbitration case law in this field have led certain authors to propose the theory of a new *lex mercatoria*³⁴ or New Law Merchant³⁵ - in reference to the *lex mercatoria* of the Middle Ages, developed by market traders as a remedy for the legal insecurity arising from the multiplicity of feudal laws. The repetition of standard contracts for commercial uses and the formulation by the arbitrators of general principles of law are supplying this new *lex mercatoria* which, for a part of the doctrine, could even be used in relation to state contracts³⁶. Taking as a basis the institutionalist theory of the Italian lawyer Santi Romano³⁷, the existence of a “*lex mercatoria* legal order” concurrent with the legal orders of the states has even been propounded, an idea which has been written about extensively³⁸.

The debate on the *lex mercatoria*, the existence of which is still debated³⁹, has had the merit of promoting the idea that legal communities depending on transnational solidarity are likely to self-regulate outside the framework of state law. Moreover, the phenomenon is not limited to the economic field, as an examination of the religious domain shows. The Catholic Church, the most institutionalised of the three main monotheist religions, is a grouping of a transnational community of followers subject to the canon law produced by the Church. Like the *lex mercatoria*, canon law is therefore a manifestation of the legal phenomenon characterised as “transnational law”: a law produced by private parties, without intervention

from the states and beyond their borders, and intended to govern activities within the community concerned. Several transnational legal orders can be said to exist: commercial, religious... and sporting.

The law produced by the international sporting bodies (International Olympic Committee, international federations, continental federations, etc.) in effect constitutes a legal phenomenon similar to the *lex mercatoria* or to religious laws, insofar as these bodies - which are private entities - are at the origin of globally or at least extranationally-applied rules, designed to govern the system of sporting competition. Thus the neologism “*lex sportiva*” is being increasingly used as a direct reference to the *lex mercatoria*, either to indicate the set of transnational sporting rules⁴⁰, or in a more limited sense, referring only to the case law of the Court of Arbitration for Sport⁴¹. Like the arbitrators of international commerce, the CAS has formulated a whole series of legal principles, either inspired directly by internal laws or deduced from the necessities of the sporting competition⁴². Applying to the Olympic Movement as a whole, these principles combine with the Olympic Charter and the World Anti-Doping Code to ensure the unity of the transnational sporting legal order. Considerably more institutionalised, through the Olympic Movement, than the *lex mercatoria*, the *lex sportiva* constitutes a particularly clear manifestation of “transnational law”.

2. The *lex mercatoria* theory's sole aim is not to describe the “internal coherence”⁴³ specific to the community of economic operators. It encompasses an “external” dimension which requires the verification of its “survival” when it comes up against state or inter-state standards. This question of the degree of autonomy of transnational standards is precisely that which is endlessly posed on the subject of sporting standards. In this regard, the theory of transnational law offers a framework that makes it possible to understand this question in terms of relations between legal orders, or “relations between systems”, as Kelsen would say⁴⁴. Santi Romano, who has defended a pluralist conception of the law distinct from Kelsen's monism, has very specifically insisted on the different relations likely to be forged between legal orders: a relationship in which one order is the presupposition of another; a relationship in which several orders which are independent of each other depend on another; relevance granted unilaterally by one order to another from which it is independent; a relation of succession between several orders⁴⁵.

Due to the difficulty of verifying, in a few lines, the degree of autonomy of the *lex sportiva* as regards legal orders likely to restrict its effectiveness⁴⁶, only a few main “trends” will be mentioned, concerning the relationship between the transnational sporting legal order and the national, international and European Union legal orders.

Insofar as the international sporting bodies have internal legal statutes, they are by nature subject to the legal order of their headquarters. This being so, the liberalism of Western democracies per-

Some of them involved the conclusion of contracts between the IOC and the states, covering the status of the permanent Olympic site and governed by international law (see F. C. Rich, “The Legal Regime for a Permanent Olympic Site”, *New York University Journal of International Law and Politics*, vol. 15, 1982, pp. 1-53).

30 Agreement between the Swiss Confederation and the Federative Republic of Brazil concerning the Reciprocal Promotion and Protection of Investments, Brasilia, 11 November 1994.

31 See M. Sornarajah, “The Definition of Foreign Investment”, in A. H. Qureshi / Xuan Gao (Ed.), *International Economic Law: Critical Concepts in Law*, New York, Routledge, vol. 4, 2011, pp. 153-163; K. Yannaca-Small, “Definition of ‘Investment’: an Open-ended Search for a Balanced Approach”, in *Arbitration under international investment agree-*

ments: a guide to the key issues, New York, Oxford UP, pp. 243-269.

32 Art. 1er, § 2, of the Switzerland-Brazil BIT of 1994.

33 These issues will be developed in our study “Sporting competition and international investment law. Some legal theories on the approach to the 2014 World Cup and the 2016 Rio Games”, to be published in the *Brazilian Yearbook of International Law*, 2011.

34 B. Goldman, “Frontières du droit et *lex mercatoria*”, *Archives de philosophie du droit*, 1964, vol. IX, pp. 177-192; “The Applicable Law: General Principles of Law - The *Lex Mercatoria*”, in J. D. M. Lew (Ed.), *Contemporary Problems in International Arbitration*, Dordrecht, Martinus Nijhoff Publishers, 1987, pp. 113-125.

35 C. Schmitthoff, “International Business Law”: A New Law Merchant”, *Current Law and Social Problems*, University of

Toronto, 1961, pp. 129 et seq.; “The New Sources of the Law of International Trade”, *International Social Science Journal*, Vol. XV, p. 2.

36 See *supra* II.

37 Santi Romano, *L'ordre juridique*, *op. cit.*

38 See Ph. Kahn, “Droit international économique, droit international du développement, *lex mercatoria*: concept juridique unique ou pluralité des ordres juridiques”, in *Etudes offertes à B. Goldman*, Paris, Litec, 1982, pp. 97-107; E. Loquin, “L'application des règles anales dans l'arbitrage commercial international”, in *L'apport de la jurisprudence arbitrale*, publication C.C.I. no. 440/1, 1986, pp. 67-122.

39 See K. Highet, “The Enigma of the *Lex Mercatoria*”, *Tul. L.R.*, 1989, pp. 613-628; M. Mustill, “The New *Lex Mercatoria*: the First Twenty Five Years” in M. Bros, I. Browlie (ed.), *Liber Amicorum for Lord Wilberforce*, Oxford, Clarendon Press,

1987, pp. 149-183; V. L. D. Wilkinson, “The New *Lex Mercatoria*: Reality or Academic Fantasy?”, *J. Int'l Arb.*, June 1995, vol. 12, no. 2, pp. 103-117.

40 See for example E. Loquin, “Sport et droit international privé”, *op. cit.*, no. 186-90.

41 See for example J. A. Nafziger, “*Lex Sportiva*”, *I.S.L.J.*, 2004, pp. 3-8.

42 See F. Latty, *La lex sportiva...*, *op. cit.*, pp. 301 et seq.

43 Ph. Kahn, “Droit international économique, ...”, *op. cit.*, p. 100.

44 H. Kelsen, “Les rapports de système entre le droit interne et le droit international public”, *Collected Courses of the Hague Academy of International Law*, 1926-IV, vol. 14, pp. 227 et seq.

45 S. Romano, *L'ordre juridique*, *op. cit.*, pp. 107 et seq.

46 For a more in-depth examination of this question, see F. Latty, *La lex sportiva...*, *op. cit.*, pp. 415 et seq.

mits the self-regulation of the associations as long as they do not come up against the public order of the states concerned. Even in this last scenario, as regards the multiplicity of sovereignties, the transnational standard deprived of effects on a given territory is likely to continue to be applied in the rest of the world. What is more, the increasingly widespread recognition of the CAS by sporting bodies is having the mechanical effect of dispensing with the state judge and often with the application of the states' laws. The recognition by the states of the World Anti-Doping Code through the 2005 UNESCO Convention against doping is also helping to ensure the application of the anti-doping standards of the sporting bodies, without the states' laws presenting an obstacle any longer.

The issue of doping aside, inter-state solidarity is too weak in the sporting field for the international legal order to be able to channel or even just effectively rival the *lex sportiva*. At European Union level, on the other hand, the autonomy of the *lex sportiva* is likely to be

affected as soon as its standards have an economic scope, which is increasingly the case with the commodification and professionalization of sport since the Samaranch era. This is because the integration of twenty-seven states into a single legal order is permitting the transnational standard to be effectively countered. The loss of autonomy is only limited, however, due to the recognition of sport's particularities by European Union law⁴⁷.

The concept of Transnational Sports Law therefore offers a suitable theoretical framework for the analysis of the system of relations forged between the sporting legal order and the "public" legal orders - the sole obstacles to the unlimited development of the *lex sportiva*.

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⁴⁷ See S. Weatherill: "Fairness, Openness and the Specific Nature of Sport: Does

the Lisbon Treaty Change EU Sports Law?"

Is There Such A Thing As EU Sports Law?*

by Stephen Weatherill**

1 Introduction

The simple answer to the question posed in the title to this paper is: *yes*, there is such a thing as EU sports law!

But most simple answers tend to mislead, and the risk is real here too. There is such a thing as EU sports law, in the sense that since the entry into force of the Treaty of Lisbon on 1 December 2009 sport has been explicitly recognised as an area in which the EU has authority to intervene. However, this is apt to mislead in two quite different senses. First, it obscures the point that December 2009 was certainly a notable milestone in the shaping of EU sports law, but that in fact the relevant newly-introduced Treaty provisions are cautiously drafted and limited in their scope. They emphatically do not elevate the EU to the position of general 'sports regulator' in Europe. So, in short, one should not get *too* excited about them. Second, a focus on the Treaty reforms of 2009 obscures appreciation that for some 35 years the EU has *already* exerted an influence on sports governance in Europe. Beginning with its famous *Walrave and Koch* judgment in 1974¹ the Court of Justice has subjected sport to the requirements of what was then EC law, and is now EU law, in so far as it constitutes an economic activity. So sport has been brought within the *explicit* scope of the EU Treaties only as late as December 2009 but well in advance of that date sport, though unmentioned by the Treaty, was required to comply with its rules in so far as it constituted an economic activity - which meant, most prominently, that sporting practices fell to be tested against the Treaty prohibitions against practices which are anti-competitive or which obstruct inter-State trade or which discriminate on the basis of nationality. So an EU sports law (of sorts) developed as a result of the steady accretion of decisional practice where sporting rules exerted an economic effect and interfered with the fulfilment of the EU's mission.

This paper begins by considering the provisions on sport which were introduced into the EU Treaties by the Lisbon Treaty with effect from December 2009. It then steps backwards to show how, beginning in 1974, EU law has affected sport by subjecting its practices to control,

initially in the name of promoting free movement of players across borders and more recently in the name of competition law. So there was already, pre-2009, a type of 'EU sports law'. The EU did not stipulate how sport should be organised: but it did rule out choices that contravene the Treaty. The paper then reflects on whether the provisions introduced in 2009 are likely to change the shape of this pre-existing EU sports law. They might! It then concludes: *yes*, there is such a thing as EU sports law, and it is of practical importance and intellectual interest, but it is less systematic and comprehensive than one would expect to find at national level.

2 The Lisbon Treaty

The overall structural effect of the Lisbon reforms is formally to abolish the three pillar structure crafted for the EU at Maastricht twenty years ago. From 1 December 2009 the European Union has been founded on two Treaties which have the same legal value: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It is the amendments to what was the EC Treaty, and is now the TFEU, which grant sport its newly recognised formal status within the EU's legal order.

However, inspection of the detailed content of this competence newly granted by the Member States to the EU is rather deflating, at least for those who would advocate a more aggressive role for the EU. The details are found in the rambling Part Three of the TFEU, which is entitled 'Union Policies and Internal Actions', specifically in Title XII of Part Three *Education, Vocational Training, Youth and Sport*. Under the post-Lisbon re-numbering the relevant Treaty Articles are Articles 165 and 166 TFEU.

Article 165 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.' Article 165(3) adds that the Union and the Member States 'shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe'.

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¹ Case 36/74 [1974] ECR 1405.

Article 165(4) provides that in order to contribute to the achievement of the objectives referred to in the Article, the European Parliament and Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States; and that the Council, on a proposal from the Commission, shall adopt recommendations.

Sport has been included in the Treaty, but there is no intent to elevate the EU to a position of primary importance. A legislative competence is conferred on the EU - but a feeble one. What is created is merely a supporting competence for the EU, the weakest type of the three principal types of competence mapped in Title I of Part One of the TFEU. The basic competence descriptor is found in Article 6(e) TFEU: 'The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States'. The areas of such action shall, at European level, include (inter alia) 'education, vocational training, youth and sport'. Moreover the provisions are drawn carefully and narrowly, stressing that the Union shall do no more than 'contribute' to the promotion of European sporting issues. And though legislation may be adopted, it is confined to 'incentive measures, excluding any harmonisation'.

This cautiously drawn formula is designed to reassure those who fear the rise of the EU as a sports regulator. The Commission's 2007 White Paper on Sport, following the Nice Declaration of 2000, had declared that 'sporting organisations and Member States have a primary responsibility in the conduct of sporting affairs, with a central role for sports federations'.² The Lisbon Treaty is consistent with this deferential attitude. The EU's role, though formally recognised, is plainly designed to be limited and it lacks concrete shape.

The Lisbon reforms create institutional momentum. May 2010 saw the first formal meeting of sports ministers within the EU's structure. An EU budget stream will be created. It is likely to be small, but the pre-Lisbon position whereby any sports related project needed to be fitted often awkwardly into some other project where the EC did hold a competence has been brought to an end.³ The Commission's 2007 White Paper on Sport already provided a framework for EU action, and the entry into force of the Lisbon Treaty is likely to help in facilitating a coherent and financially secure, if modest, pattern of development.

3 EU sports law before 2009

With effect from 2009 the EU is competent to adopt legislation affecting sport. But, as explained, the scope of that legislative competence is narrow. It certainly does not allow the EU to usurp the proper place of sports organisations in selecting their preferred system of governance nor does it envisage the setting aside of applicable national law. However it is a long-standing accusation of those engaged in sports governance that the EU damages the autonomy of decision-making that is so cherished by sports federations. This complaint relates to the requirement that sporting practices must comply with EU law in so far as they exert economic effects. EU free movement law and competition law apply to sport (and to all other economic activities) and in principle they always have done, ever since the entry into force of the original Treaties in the 1950s. This puts into perspective the deceptive modesty of the Lisbon

reforms. 2009 heralded the advent of the EU's - negligible - role as a legislator in the field of sport, but the EU has long been an influence. It is here, in understanding how and why EU free movement and competition law has been applied to sport, that one appreciates that there has emerged a brand of 'EU sports law'.

The Court has consistently taken the view that in so far as it constitutes an economic activity sport falls within the scope of the Treaty and sporting practices must comply with the rules contained therein. But they *may* comply, even if apparently antagonistic to the foundational values of the Treaty. In the landmark decision in *Walrave and Koch* the Court accepted that the Treaty rule forbidding discrimination on grounds of nationality does not affect the composition of national representative sides. Such 'sporting discrimination' defines the very nature of international competition, and EU law does not call it into question.

So EU law applies to sport, but it is not assumed that sport is merely an industry like any other. There is scope for sport to show why it is special. And it is here, in assessing the strength of such claimed 'special' status, that the EU begins to shape its own distinctive sports law - one that, more concretely, decides whether there is enough that is distinctive in the nature of sport to deserve insulation from the normal assumptions of EU trade law, in particular those provisions which control obstacles to cross-border trade, anti-competitive practices and discriminatory practices.

The core of the challenge is well captured by the Court in its famous *Bosman* ruling:

'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.'⁴

The Court, while finding that the particular practices impugned in *Bosman* fell foul of the Treaty because they did not adequately contribute to these legitimate aims, showed itself in principle receptive to embrace of the special features of sport. So sport's distinctive concerns were not recognised by the Treaty but they were drawn in to the assessment of sport's compliance with the rules of the Treaty.

The story of the manner in which first the Court and more recently the Commission developed EU law in its application to sport is told in full elsewhere.⁵ There have been disputes along the way, typically where sports bodies protest that the EU's institutions have been insufficiently respectful of sporting autonomy. At a more theoretical level it has sometimes been left obscure whether sporting practices escape the scope of the Treaty or whether they fall within it but are treated as justified.⁶ Interesting and important though such objections and debates are, they do not undermine the core of the narrative which is that both Court and Commission have committed themselves to applying EU trade law with due appreciation of the legitimate concerns and the special status of sport. This commitment is persuasively captured by the notion that the institutions have accordingly sought to shape a type of 'EU sports law'.

Deliège provides a good example. The litigation concerned selection of individual athletes (*in casu*, judokas) for international competition.⁷ Participation was not open. One had to be chosen by the national federation. If one was not chosen, one's economic interests would be damaged. This was a classic case which brought the basic organisational structure of sport into contact with the economic interests of participants. The Court stated that selection rules 'inevitably have the effect of limiting the number of participants in a tournament' but that 'such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted'.⁸ Accordingly the rules did not in themselves constitute a restriction on the freedom to provide services prohibited by the Treaty. So a detrimental effect felt by an individual sportsman does not mean that rules are *incompatible* with the Treaty. The *Deliège* judgment is respectful of sporting autonomy, but according to reasoning which treats EU law and 'internal' sports law as potentially overlapping.

The application of the Treaty competition rules to sport was a matter carefully avoided by the Court in *Bosman* itself. But the Commission

2 COM (2007) 391, page 2. Full documentation is available via http://ec.europa.eu/sport/white-paper/index_en.htm.

3 Eg the European Year of Sport in 2004 was necessarily presented in the governing legal measure as the European Year of Education through Sport, based on what was then Article 149 EC on education: Dec 291/2003/ EC [2003] OJ L43/1.

4 Case C-415/93 [1995] ECR I-4921 para 106.

5 See eg R Parrish, *Sports law and policy in the European Union* (2003); S Weatherill, *European Sports Law* (2007); E Szyszczak, 'Is Sport special?' in B Bogusz,

A Cygan, and E Szyszczak (eds), *The Regulation of Sport in the European Union* (2007); S Van den Bogaert and A Vermeersch, 'Sport and the EC Treaty: a Tale of Uneasy Bedfellows' (2006) 31 ELRev 821.

6 For extended analysis see R Parrish and S Miettinen, *The Sporting Exception in European Law* (2007); also S Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule'?' in Bogusz, Cygan, and Szyszczak (n 5 above).

7 Cases C-51/96 & C-191/97 *Deliège v Ligue de Judo* [2000] ECR I-2549.

8 Para 64.

came to adopt a functionally comparable approach to sport: that is, it did not exclude sport from supervision pursuant to the relevant Treaty provisions but equally it did not rule out that sport might present some peculiar characteristics that should be taken into account in the analysis. The Commission's *ENIC/UEFA* decision offers an illustration.⁹ It concluded that rules forbidding multiple ownership of football clubs suppressed demand but were indispensable to the maintenance of a credible competition marked by uncertainty as to the outcome of all matches. A competition's basic character would be damaged were fans to suspect the clubs were not playing to win. The principal message here is that sporting practices typically have an economic effect and that accordingly they cannot be sealed off from the expectations of the Treaty. However, within the area of overlap between EU law and 'internal' sports law there is room for recognition of the features of sport which may differ from 'normal' industries. That, in short, is where 'EU sports law' grows.

Meca-Medina and Majcen v Commission concerned the status under EU law of anti-doping controls.¹⁰ The Court of Justice stated that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.¹¹ And if the sporting activity in question falls within the scope of the Treaty, the rules which govern that activity must satisfy the requirements of the Treaty 'which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition'.¹² A practice may be of a sporting nature - and perhaps even 'purely sporting' in *intent* - but it falls to be tested against the demands of EU trade law where it exerts economic effects. But, just as in *Bosman*, the Court in *Meca-Medina* did not abandon its thematically consistent readiness to ensure that sport's special concerns should be carefully and sensitively fed into the analysis. It took the view that the general objective of the rules was to combat doping in order for competitive sport to be conducted on a fair basis; and the adverse effect of penalties on athletes' freedom of action must be considered to be inherent in the anti-doping rules. The rules challenged in *Bosman* were not in the Court's view necessary to protect sport's legitimate concerns but in *Meca-Medina* the Court concluded that the sport's governing body was entitled to maintain its rules. It had not been shown that the rules concerning the definition of an offence or the severity of the penalties imposed went beyond what was necessary for the organisation of the sport.

Meca-Medina serves as an authoritative statement of the *conditional autonomy* of sports federations under EU law. And in addition, and central to the primary importance of the ruling, it is an assertion of the need for a case-by-case examination of the compatibility of sporting practices with the Treaty. This aspect of the ruling was duly emphasised in the Commission's White Paper on Sport issued in July 2007¹³ as a basis for rejecting the pleas of sports federations for a general exemption from the application of EU law. A general exemption is 'neither possible nor warranted', in the judgement of the Commission.¹⁴

There is an EU sports law and policy to be extracted here, albeit that its character is influenced by the eccentric development generated by the Treaty's absence of any sports-specific material and the essentially incremental nature of litigation and complaint-handling. Formally what

is at stake is a batch of decisions determining whether or not particular challenged practices comply with the Treaty. One may disagree with the outcomes and, moreover, one may lament the uncertainty of case-by-case adjudication¹⁵, but one can readily discern thematic principles binding together the decisional practice - respect for fair play, credible competition, national representative teams, and so on. And challenged practices, ranging from rules against multiple club ownership¹⁶ to selection for international competition¹⁷ to collective selling of broadcasting rights¹⁸ to anti-doping controls¹⁹, survived scrutiny pursuant to EU law. The EU was not competent to mandate *by legislation* the structure of sports governance in Europe, and even after the entry into force of the Lisbon Treaty in 2009 its legislative reach is not remotely of this length. But, in the application of the EU Treaty rules on free movement and competition, EU sports law has taken shape.

4 The impact of the Lisbon Treaty on pre-existing EU sports law

The result of the evolved pattern sketched above is that sports bodies need to engage with EU law - they need to persuade the Court and/or the Commission of the virtue of their practices as essential elements in the organisation of sports. Some are smarter than others. UEFA, in particular, is notable for adapting its strategy towards a more co-operative model.²⁰ The good sense of this strategy is all the plainer after the entry into force of the Lisbon Treaty in December 2009. Sporting bodies can no longer sensibly claim that sport is none of the EU's business. And the most intriguing aspect of the newly introduced Treaty provisions dealing with sport is not the attribution of a *legislative* competence to the EU. That, as explained, is unlikely to yield anything striking. The tantalising question is whether the long-established shape of 'EU sports law', as an accumulation of decisions concerning free movement and competition law, will be altered as a result of the Lisbon reform.

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'. One can readily anticipate that sporting bodies will reframe their defence of established practices by appeal to (in particular) 'the specific nature of sport'. The Treaty - federations will argue - directs that the specific nature of sport be taken into account, and who better to grasp and preserve that specific nature than the federations themselves. So the argument that the EU and sport do not overlap is dead - the argument that from December 2009 the Lisbon reforms should be read as having created a more generous zone of sporting autonomy is a good deal more interesting. In comparable vein sporting organisations will doubtless not be slow to champion sport's 'social and educational function' - now recognised at the level of the Treaty.

But these arguments are by no means compelling. A response is: in fact the Court and the Commission have always taken account of the specific nature of sport, and they have never denied its social and educational function (in some contexts). As explained, rules against multiple club ownership, systems of selection for international competition, collective selling of broadcasting rights and so on have been given a green light under EU law in the past. Another view of Article 165 TFEU is that it simply codifies the core of the Court's long-standing acceptance that sport is special - but that *how* special it truly is must be determined on a case-by-case basis.

Lisbon: something new or something familiar? On verra. It is, however, notable that the Declarations on Sport agreed at Amsterdam and Nice, which, though not legally binding, are still comparable in content to the Lisbon provisions, were duly considered by the Court in *Deliege*²¹ and in *Lehtonen*²² but treated as mere confirmation of its established practice. It resisted any temptation to soften its approach. In the first 'post-Lisbon' sports-related judgment, *Bernard*²³, the Court similarly used Lisbon to 'corroborate' its own case law, which suggests it is not minded to alter course - although the judgment is brief on the point. It seems probable that sport can, at last, rely on explicit wording contained in the Treaty to structure its argument that sport is 'special'. But this is likely to be revealed as no more than a confirmation of how the Court has always treated sport since *Walrave and Koch*.

However, the direction to 'take account of the specific nature of sport' does not exhaust the innovative character of Article 165 TFEU. Article

9 COMP 37.806 ENIC/UEFA, IP/02/942, 27 June 2002.

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

11 Para 27.

12 Para 28.

13 COM (2007) 391. Full documentation is available via http://ec.europa.eu/sport/white-paper/index_en.htm.

14 Staff Working Document, available via the site mentioned in n 13 above, pp. 69, 78.

15 See eg J Zylberstein, 'Collision entre idéaux sportifs et contingences économiques dans l'arrêt *Meca-Medina*' 2007/1-2 CDE 218; J Hill, 'The European Commission's White Paper on Sport: a step backwards

for specificity?' (2009) 1 International Journal of Sport Policy 253.

16 Note 9 above.

17 Note 7 above.

18 Decision 2003/778 *Champions League* [2003] OJ L291/25.

19 Note 10 above.

20 B García, 'UEFA and the European Union: From Confrontation to Co-Operation' (2007) 3 Journal of Contemporary European Research 202.

21 Cases C-51/96 & C-191/97 n 7 above paras 41-42.

22 Case C-176/96 [2000] ECR I-2681 paras 32-33.

23 Case C-325/08 [2010] ECR I-0000 para 40.

165(2) provides that 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.' There is material here that could be deployed as part of legal argument: especially 'fairness' and 'openness'. Are these candidate principles of EU sports law? It is at least possible that whereas prior to the entry into force of the Lisbon Treaty in 2009 one had to dig deep into decisional practice in order to find 'principles' of EU sports law, now Article 165 TFEU offers them up in more overt fashion.

Building a systematic set of 'principles' of EU sports law is an attractive project, and one encouraged by the Lisbon Treaty reforms.²⁴ Beyond that task, one would wish to inquire further what bite 'fairness' and 'openness' might offer in practice. Are they aspirational, or are they operational? Take 'openness': is it a vague aim, devoid of practical legal significance, or can it be made concrete? Might be employed to argue for example that EU law, interpreted in the light of Article 165(2) TFEU, does not tolerate rules that exclude non-nationals from competitions designed to crown a national champion? Access restrictions vary state by state, sport by sport, and it is at least possible that recognition of the promotion of openness as a feature of the European dimension of sport will strengthen the force of a legal challenge by an excluded participant. Similarly 'fairness' may have more than presentational value. The promotion of 'fairness' was cited as a rationale of UEFA's Financial Fair Play Regulations in a written answer given in 2010 by M Barnier on behalf of the Commission in response to a Parliamentary Question about debt in European football.²⁵ Admittedly this does not amount to formal approval of the Regulations, which, as the answer makes explicit, must comply with basic EU trade law, but as a minimum it shows how the Lisbon changes, specifically embrace of 'fairness', are re-structuring the way in which the interaction of EU law and sport is examined - even if this does not necessarily mean that eventual outcomes will be different.

5 Conclusion

After Lisbon there is no longer any doubt that the EU has a legitimate, if subordinate, role in the field of sport. There will be legislation (of a supporting nature): there will be a budget. And the Treaty does at last

contain material capable of nourishing the Court's interpretation of the free movement and competition rules in the particular context of sport. The specific nature of sport is now written into the Treaty. One would suppose that sporting bodies would no longer waste time claiming EU law has no application to their activities and instead seek to rely on the wording of the new provisions as a basis for minimising the transformative effect of EU law on their practice. However, since the Court and the Commission have not in the past blindly applied EU law to sport as if it were a 'normal' industry it remains to be seen whether Lisbon really changes anything or whether instead it simply confirms existing practice. That latter seems more probable.

So the heart of 'EU sports law' is the well-established pattern according to which sporting practices are checked for compliance with EU trade law, most conspicuously free movement and competition law. This inquiry has always involved assessment of sport's special character - and, since 2009, this is explicitly recognised by the Treaty. However, EU law is far from comprehensive in its reach. There is very little legislative activity at EU level which concerns sport directly, and its 'negative' effect - the Treaty prohibitions - is focused on practices which are anti-competitive or which obstruct inter-State trade. The EU has little to do with defining property rights or contract law or crime. So: there is such a thing as EU sports law, but it is very different from - and much less comprehensive than - any understanding of sports law at national level. And yet, in so far as the strongest claim that the label 'sports law' is intellectually coherent is built on the inquiry into how far one should recognise that sport is sufficiently different from 'normal' commercial activity to deserve distinct legal treatment, both EU sports law and national sports law are asking thematically similar questions. And, at both EU and at national level, the hottest topics in sports law tend to concern disagreement over whether the applicable legal standards are adequately attuned to the special features of sport.

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²⁴ For a slightly fuller, but still preliminary, attempt see S Weatherill, 'Fairness, openness and the specific nature of sport: does the Lisbon Treaty change EU sports law?', forthcoming in ISLJ.

²⁵ E-4628/2010, available via <http://www.europarl.europa.eu/sides/getDoc.do?language=MT&reference=E-2010-4628&secondRef=0&type=WQ>.

Towards a Typology of (International) Comparative Sports Law (Research)

by Robert C.R. Siekmann and Janwillem Soek*

1. Introduction

Sports law is an independent field of law: it complies with the requirements that can be set for the existence of fields of law.¹ Sports law consists of a private and a public segment. The private segment is formed by the rules of organised sport. Organised sport is built up of national organisations for each sport, which are members of regional (continental) and global federations. This segment is a hierarchical pyramid with global federations such as the world football association FIFA at the top, with UEFA as the regional organisation for Europe. There is also the Olympic Games, under the auspices of the International Olympic Committee, which heads the national Olympic Committees and with which global federations cooperate.

The rules of organised sport are largely of a transnational character. For each sport there is in fact a single legal order in which the national and international levels are highly integrated. The rules of football, for example, are the same worldwide and there are uniform regulations for transfers of professional footballers from one club to another.

The private segment of sports law, also known as *lex sportiva*, forms the core of the legal field. There is also a public segment that bears far

more of an incidental character in terms of regulations. This consists primarily of national legislation and a number of regional and universal treaties that relate particularly to sport. Naturally, sport is in general subject to the national and international public legal systems. In the European Union, for example, the jurisprudence of the European Court of Justice has led to the development of what could be described as European sports law.²

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¹ Timothy Davis, *What is Sports Law?*, Marquette Sports Law Review, Spring 2001, pp. 211-346. See also: Robert

Siekmann, *What is Sports Law? A Reappraisal of Content and Terminology*, The International Sports Law Journal 2011/1-2 (forthcoming; inaugural lecture of 10 June 2011 at the newly established special chair for International and European Sports Law of Erasmus University Rotterdam, The Netherlands).

² Stephen Weatherill, *Is there such a thing as EU Sports Law?*, The International Sports Law Journal (ISLJ) 2011/1-2 (forthcoming).

Writing from an international private law perspective, Kokkini already stated in 1988 that if one reviews the comparative law publications of recent decades, it is easy to see that, with the exception of the recognition that comparative law is not a branch of objective law, such as family law or maritime law, and that it can be helpful in achieving many objectives, there is as yet no generally accepted theory about comparative law. Those engaged in comparative law appear to be very enthusiastic about distinctions. Almost everyone active in the field feels obliged to introduce at least one new distinction, which, needless to say, reduces the chances of reaching a consensus about the theoretical principles of comparative law - and this is not even taking the confusion caused by the use of the same terms to mean different things into account. A few examples of such distinctions are:

- a. internal and external comparative law (comparing legal systems of countries with the same or a different social system);
- b. national and international comparative law (bilateral, between two national legal systems, or multilateral up to and including universal);
- c. comparative law in the stricter and wider sense (the study of normative rules as such or also including the reasoning of law and the wider environment of the rules);
- d. horizontal and vertical comparative law (comparing legal systems that are equivalent by law, i.e. sovereign legal communities, or comparing rules of a 'lower' and 'higher' order, such as national and supranational rules, for example); and: e. macro and micro comparative law (comparing legal systems or groups of legal systems in their entirety or comparing specific parts of different legal systems).³

The above-mentioned distinctions (hereafter: "Kokkini-criteria") in principle can also be relevant in the context of (international) comparative sports law research (international is used here in the ordinary meaning according to which comparative sports law per definition is "international"; international sports law in fact is a pleonasm; cf., "national" = bilateral according to "Kokkini-criterion" a); bilateral means international, between two states (!)). The character of each of these criteria may be described as follows:

- a) internal/external: socio-political;
- b) national/international: geographical;
- c) strict/lato sensu: literal v sociological/teleological (spirit of the law) legal interpretation;
- d) horizontal/vertical: hierarchic; and
- e) macro/micro: scope of the legal comparison. Of course, the follow-up of a) - e) might be changed in a more logical order: geographical / socio-political / hierarchic / interpretative/ scope (this order is used in this article below).

As already stated, one of the few points on which there is consensus among authors concerns the recognition that comparative law can be helpful in achieving many objectives. An overabundance of literature has been published about these objectives, as authors seek to outdo each other in maximising ideals and expectations in relation to comparative law. According to Kokkini, efforts have been made to place the different objectives of comparative law into two broad categories: theoretical and practical.⁴

It is remarkable that a criterion regarding the purpose(s), the *ratio* of legal comparison is missing amongst the "Kokkini-criteria" themselves. Of course, there may be a purely academic/scientific or theoretical purpose. However, legal comparison is a scientific research method for practical purposes too, like unification or harmonization of the law (international perspective), or the national perspective of improvement of the law also in the light of "best practices", "lessons learned" from elsewhere,

from abroad. So, an additional criterion as to purpose has to be formulated: f) theoretical/practical.

From the perspective of contributing to the developing of a theory of legal comparison, regarding sports law in principle the following options of types of legal comparison would exist: 1) the comparison between national sporting rules and regulations (per sport and theme) ("private part"); 2) the comparison between international sporting rules and regulations (per theme) ("private part"); 3) the comparison between national legislation (per theme) ("public part"); 4) the combined comparison between 1 and 2 on the one hand and 3 on the other. Additionally, for example the globally valid Laws of the Game (association football) might be scrutinized for improvement by comparing them with those of *other*, in particular comparable team sports (why, for example, not introducing the temporary ban from the playing field which is known from ice hockey, etc. etc.?) The striking aspect of (international) comparative sports law is of course the role played by what is called here the private segment or part, that is the NGO or transnational law of sporting organisations. So, in the context of (international) comparative sports law research, a criterion must be added to the "Kokkini-criteria": g) private/public (or public/private if as a starting-point is taken that the public part is of a hierarchically higher legal order and not the circumstance that the private part is the hard core/inner circle of sports law). Combined, private/public legal comparison could be also a special example of horizontal/vertical comparative research. The same would apply to the combined thematic comparison between international (INGO) and national (INGO) sporting rules and regulations (for example, of course only in case the international rules and regulations are not to be "copied" at the local level for reasons of hierarchy (cf., for example the WADA Code)). As to the internal/external "Kokkini-criterion" it should be noted that countries may have similar social systems at large, but different sporting systems (cf., interventionist and non-interventionist national sports models in the European Union (and beyond), see below); the opposite is less imaginable, but might also be true.

In this article, I will present the international comparative research that was undertaken by the ASSER international Sports Law Centre in the previous decade, in most cases in cooperation with other national and in particular international sports law centres and individual researchers at those centres or connected with universities. The ASSER experience is used here to apply and test the "Kokkini-criteria plus" in practice. To the survey will be added an example of the legal comparison between *continental* sports systems, the European and North American ones (re: the "Americanization" debate in Europe). This can be considered macro legal comparison at the private, NGO (transnational) level, since it concerns jurisdictions, that is sporting jurisdictions, at large.

In chronological order the following research projects were undertaken and reported on:

- Klaus Vieweg and Robert Siekmann (eds), *Legal Comparison and the Harmonisation of Doping Rules; Pilot Study for the European Commission, Beiträge zum Sportrecht Band 27*, Berlin 2007 [EU commissioned study 2001];
- Promoting the Social Dialogue in European Professional Football (Candidate EU Member States), November 2004 [EU-commissioned study; see also: Robert C.R. Siekmann in ISLJ 2004/3-4 pp. 31-33];
- Football Hooliganism with an EU Dimension: Towards an International Legal Framework, November 2004 [EU-commissioned study];
- Janwillem Soek, *Sport in National Sport Acts and Constitutions: Definitions, Ratio Legis and Objectives*, The International Sports Law Journal (ISLJ) 2006/3-4 pp. 28-31 and 33-35 [Netherlands Ministry of Sport commissioned study];
- Robert Siekmann, *Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector*, ISLJ 2006/3-4 [G-14 European Football Clubs Grouping commissioned study];
- Health and Safety in the Sport Sector, May 2009 [EU-commissioned study];
- Study into the Identification of Themes and Issues which can be Dealt with in a Social Dialogue in the European Professional Football Sector, May 2008 [EU-commissioned study];

3 D. Kokkini-Iatridou *e.a.* [and others], *Een inleiding tot het rechtsvergelijkend onderzoek* [An Introduction to Comparative Legal Research], Deventer 1988, pp. 3-5. See also, generally on comparative law: Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, third edition, Oxford 1998.

4 S. Kokkini-Iatridou, *op.cit. supra* n. 3, pp. 26-27.

5 See also: *Bestrijding van doping in de sport: een internationale terreinverkenning in publiekrechtelijk perspectief* [The fight against doping in sport: an international survey from a public law perspective], October 2001 [Netherlands Ministry of Justice commissioned study]

- Study into the Identification of Themes and Issues which can be Dealt with in the European Professional Cycling Sector, October 200 [EU-commissioned study];
- The Role of Member States in the Organizing and Functioning of Professional Sport Activities, November 2009 [EU-commissioned study]; see also: Robert Siekmann and Janwillem Soek, *Models of Sport Governance in the European Union: The Relationship between State and Sport Authorities*, ISLJ 2010/3-4 pp. 93-95 and 98-102⁶;
- The Implementation of the WADA Code in the European Union, August 2010 [commissioned by the Belgian EU Presidency];
- Study on the Equal Treatment of Non-Nationals in Individual Sports Competitions, December 2010 [EU-commissioned study];
- European Social Dialogue in Professional Basketball (forthcoming) [EU-commissioned].

And the following books consisting of thematic country-per-country studies of a comparative European/worldwide nature were published in the ASSER international Sports Law Series:

- I.S. Blackshaw and R.C.R. Siekmann (eds), *Sports Image Rights in Europe*, The Hague 2005 (second edition, forthcoming 2011);
- R.C.R. Siekmann, R. Parrish, R. Branco Martins and J.W. Soek (eds), *Players' Agents Worldwide: Legal Aspects*, The Hague 2008;
- I.S. Blackshaw, S. Cornelius and R.C.R. Siekmann (eds), *TV Rights and Sport: Legal Aspects*, The Hague 2009;
- P. Anderson, I.S. Blackshaw, R.C.R. Siekmann and J.W. Soek (eds), *Sports Betting: Law And Policy* (forthcoming);
- R. Siekmann and J.W. Soek (eds), *National Models of Sport Governance in the European Union* (forthcoming 2011).

These books were preceded by the following documentary volumes (books) of a comparative nature:

- Robert C.R. Siekmann and Janwillem Soek (eds), *Basic Documents of International Sports Organisations*, The Hague/Boston/London 1998;
- Robert C.R. Siekmann, Janwillem Soek and Andrea Bellani (eds), *Doping Rules of International Sports Organisations*, The Hague 1999;
- Robert C.R. Siekmann and Janwillem Soek (eds), *Arbitral and Disciplinary Rules of International Sports Organisations*, The Hague 2001.

The studies and reports will be presented hereafter according to the criteria of belonging to the public, private or private/public parts of sports law. In each case, at the end a typology according to the "Kokkini-criteria" plus the two additional ones (theoretical/practical (purpose), and private/public (sports law) will be given. This in fact will be a typology along the lines of the "orientation" of research. It should be noted that the results/findings of the research are not delivered here, being irrelevant in this context. Neither a typology of the methodology used in the operational/implementation phase of research will be given (cf., desk research and use of the internet regarding literature and documentation, distribution of a questionnaire amongst stakeholders like sport and other pertinent ministries, national and international sport governing bodies and organisations, etc.). The test of the studies and reports against the "Kokkini-criteria plus" focuses on the starting-point of the research, since the criteria deal with the issue of the point of departure of research. It is possible that the private and public segments of sports law are equally represented at the start, but that as a result of research it turns out that most information available is of a private character, or the opposite conclusion might apply. For example, before the WADA Code was adopted in 2003, all national and international sport governing bodies (per sport) had their own doping regulations, whereas only a restricted number of countries in the world had a public law on anti-doping in sport. In the opposite case, health and safety matters in sport are mainly governed by public law.

2. Studies and reports: a survey

2.1. Public studies and reports

2.1.1. National framework legislation on sport: National Sports Acts and sport governance (2006) [hereafter: "Sports Acts"]

The study concerned a subject in the public segment of sports law, namely the phenomenon of national laws of general purport concerning sport, i.e. framework legislation that governs the relationship between public authorities and organised sport in a country. Many countries in the world have a national

Sports Act, based on provisions of their Constitutions or otherwise (there are also countries that only have a Constitutional provision). Furthermore, some countries that do not have such legislation are considering whether they should introduce it. In December 2001, in the Netherlands Parliament a motion concerning the advisability of enacting national sports legislation was tabled. As a result of this, the State secretary for Sport requested the sports law section of the Faculty of Law of the Free University of Amsterdam to deliver an advisory opinion on this matter. The general question needed answering whether sports legislation at national level would be appropriate. In the Free University's opinion of September 2003 it was concluded that there was no reason to enact national legislation specifically concerning sport. The State Secretary for sport followed this conclusion. Some years later, however, it became apparent that the Netherlands government was still struggling with the question of sports legislation which covered different aspects (funding, football hooliganism, doping, etc.). The starting point was not that a Sports Act had to be prepared, but that a solid and careful study had to be undertaken into the usefulness and need for a 'foundation' for the sports policy of the Dutch government. From that perspective, the T.M.C. Asser Institute in November 2005 was asked by the Ministry of Sport to examine by means of a 'quick scan' which countries in the European Union had enacted a Sports Act. In these Acts, the definition of the term 'sport' had to be examined in addition to the factors which had motivated the various legislators to enact such laws.

With regard to the distinction between countries with and without national sports legislation, the following should be noted in the context of sport governance in Europe. In 2004 André-Noël Chaker published a study on "Good governance in Sport - A European survey" which was commissioned by the Council of Europe. The Council of Europe was the first international organization established in Europe after the Second World War. With 46 Member States, the Council of Europe currently represents the image of a "wider Europe". Its main objective is to strengthen democracy, human rights and the rule of law. The Council of Europe was the first international intergovernmental organization to take initiatives, to establish legal instruments, and to offer an institutional framework for the development of sport at European level.⁷ The study covers the sport-related legislation and governance regulations of twenty European countries. The aim of this study was to measure and assess sport governance in each of the participating countries. For the purposes of this study the term "sport governance" had been given a specific meaning. Sport governance is the creation of effective networks of sport-related state agencies, sports non-governmental organisations and processes that operate jointly and independently under specific legislation, policies and private regulations to promote ethical, democratic, efficient and accountable sports activities. The legislative framework of the countries under review was analysed according to whether they have references to sport in their constitutions and whether they have a specific law on sport at national level. There are two distinctive approaches to sports legislation in Europe. Countries have adopted an "interventionist" or a "non-interventionist" sports legislation model. An interventionist sports-legislation model is one that contains specific legislation on the structure and mandate of a significant part of the national sports movement, generally speaking including a general national Sports Act. All other sports-legislation models are deemed to be non-interventionist.⁸

It is a distinguishing feature of law that in time, after a shorter or longer period, it is amended, replaced or repealed. A new government will have different ideas, possibly as a result of altered social conditions. This is no different in the field of sport. Attention to national regulation of sports activities and the role of public authorities in this has

6 This article will also be published in the Research Handbook on International Sports Law (James A.R. Nafziger and Stephen F. Ross, eds., forthcoming, 2011).

7 See: Robert C.R. Siekmann and Janwillem Soek (eds), The Council of

Europe and Sport: Basic Documents. T.M.C. Asser Press, The Hague 2007, at p. XIX.

8 André-Noël Chaker, Good governance in sport - A European survey, Council of Europe Publishing, Strasbourg,

increased considerably in many parts of the world, particularly in the last decade. In the People's Republic of China, interest in sports law developed in the run-up to the Olympic Games in Beijing (2008) and various universities now offer sports law courses and conduct fundamental research. China has a national Sports Act of 29 August 1995. At the end of 2010, an international scientific conference was held in Beijing on the reform of the national Sports Act.

Ideally, countries wishing to introduce a national Sports Act, reform the existing Act or introduce a completely new Act should have a review in which all possible substantive options are shown for each topic and sub-theme. That model would then be based on an inventory of all existing national Sports Acts in the world. Such an inventory could offer public authorities optimal choices. Comparative research should reveal the differences and similarities between Sports Acts, not only in purely textual terms (in terms of the letter of the law), but also in the light of the background, the reasons (*ratio legis*) for the Act as a whole (see the preamble) and its operative provisions (see the explanatory government memoranda etc.).

The purpose of this type of study is to create the systematic review outlined above, which may provide building blocks (components) and their variants for national framework legislation on sport. Such research has never before been conducted on a global scale with such a substantive scope. The Asser Institute did broaden its aforementioned 'pilot study' for the Ministry of Sport on its own initiative beyond the European Union to include 50 countries, but the theme was limited and did not extend to background information such as official notes etc. Furthermore, the study is no longer up to date.

For an even better understanding of the significance of the national Sports Acts, a broader political perspective of these Acts needs to be defined. What is the national sports policy of the relevant countries? Is there an integrated government vision of the role and function of sport in society and what are the ideas of organised sport itself regarding that role and function? After all, national laws are only a legal instrument to give shape to such policy. The study of national Sports Acts in this broader light could lead to a typology of different types of national sport governance models in the world.

N.B. The typology of the legal comparison in this Study according to the "Kokkini-criteria plus" is as follows: international / external / horizontal / lato sensu / micro / practical / public.

2.1.2. The role of EU Member States in the organizing and functioning of professional sport activities (2009) [hereafter: "Sport governance"]

In December 2009, the European Commission (Employment, social affairs and equal opportunities DG) commissioned the T.M.C. Asser Instituut (ASSER International Sports Law Centre) to undertake a study on "The Role of Member States in the Organising and Functioning of Professional Sport Activities". The background of the Study is as follows.

Article 39 of the European Community Treaty (EC Treaty) establishes the free movement of workers in what became the European Union. It prohibits all discrimination on the basis of nationality. The European Court of Justice has confirmed that professional and semi-professional sportsmen are workers within the meaning of this Article and consequently, Community law applies to them.⁹ This implies the application of equal treatment and the elimination of any direct or indirect discrimination on the basis of nationality. The Court particularly stated that Article 39 EC Treaty not only applies to the action of public authorities but also extends to rules of any other nature aimed at regulating gainful employment in a collective manner and that obstacles to freedom of movement for persons could not result from the exercise of their legal autonomy by associations or organizations not governed by public law.¹⁰

In light of recent developments in the field of sport, however, certain international sport authorities have advocated the adoption of rules that

might be contrary to Community law and in particular to the free movement-of-workers principle. National sport authorities, being members of the international sports authorities, should also apply the rules adopted at the international level. Therefore, the implementation at the national level of such rules would be contrary to EC law.

For example, the European Commission has published an independent study on the "home-grown players' rule" adopted by the European football governing body. This rule requires clubs participating in the European-wide club competitions - Champions League and UEFA Cup (as from the 2009/2010 season: Europa League) - to have a minimum number of "home grown players" in their squads. Home grown players are defined by UEFA as players who, regardless of their nationality or age, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. Compared with the "6+5" rule adopted by the world football governing body FIFA, which is incompatible with EU law, the Commission considers that UEFA has opted for an approach which seems to comply with the principle of free movement while promoting the training of young European players.¹¹ The "6+5" rule provides 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 of the club. The European Commission, as guardian of the EC Treaty and within the framework of its competences, can initiate infringement proceedings before the European Court of Justice (ECJ) against Member States that have breached Community law. According to the case-law, an infringement procedure can be initiated against a Member State if government authorities of that Member State are at the origin of the infringement.¹² As to the actions of private entities, the ECJ has indicated that Member States might be responsible for breach of EC law by private entities, recognised as having legal personality, whose activities are directly or indirectly under State control. Possible criteria that are mentioned in this context are, in particular the appointment of the members of the entity's management committee by state authorities, and the granting of public subsidies which cover the greater part of its expenses.¹³

Therefore, the fundamental element authorising the Commission to initiate an infringement procedure against a Member State is the existence of behaviour breaching Community law that can be attributed to the State. The same reasoning applies also in the field of professional sports activities, where in order for the services of the Commission to launch the infringement procedure, behaviour - breaching Community law attributed to the State must be present. Consequently, it is essential to determine whether and to what extent, Member States participate directly or indirectly in the organisation of professional sports activities.

Community law on the free movement of workers and in particular Article 39 of the EC Treaty being directly applicable in the Member States' legal orders, means that every EU citizen who considers that his/her rights have been violated might go and seek a redress in front of the national administrative authorities and jurisdictions. If the application of EU law is at stake, national courts may request a preliminary ruling from the European Court of Justice, which is entitled to give rulings about the compatibility of sporting rules with the EU legal order. In the White Paper on Sport, adopted in 2007¹⁴, the Commission reaffirmed its acceptance of limited and proportionate restrictions (in line with EU Treaty provisions on free movement and European Court of Justice's rulings) to the principle of free movement in particular as regards:

- The right to select national athletes for national team competitions;
- The need to limit the number of participants in a competition; and
- The setting of deadlines for transfers of players in team sports.

In order to improve knowledge of the functioning of sport regulations across the EU and to outline the general trends in Europe, analysis of national sport legislation is required in order to determine whether and to what extent, Member States participate directly or indirectly in the organisation of professional sport activities, with a view of clarifying the different levels of responsibility. This country-by-country analysis is to cover:

- a) Organisation of professional sport activities: The way in which

September 2004.

⁹ Case 13/76 Donà, ECR 1976, p. 1333 and Case C-415/93 Bosman, ECR 1995, I-4921.

¹⁰ Case C-415/93 Bosman, ECR 1995, I-4921.

¹¹ Cf., IP/08/807 of 28 May 2008.

¹² Case C-95/97 Région wallonne v. Commission, ECR 1997, I-1787.

¹³ Case C-249/81 Commission v. Ireland, ECR 1982, 4005.

¹⁴ COM (2007) 391 final, pp. 14-15.

professional sport activities are organised with particular focus on whether the organisation is:

- part of general organisation of sport activities or whether there are separate special rules regulating professional sport activities;
 - underpinned by general law, framework law or specific rules governing sectoral sport activities;
 - at the level of the state, or has devolved to, for example, the regional/local level.
- b) Organisation and functioning of sport authorities: The way in which sport authorities are organised and function, with particular focus on whether the sport authorities
- are private actors or whether they act or operate under the auspices of the State;
 - have State participation in any of their responsibilities for the organisation of professional sport activities (for example, nomination of members of governing bodies, financing, and adoption of regulations governing professional sport competitions).
- c) Discrimination: Whether there are direct or indirect discriminatory rules and/or practices with regard to Community citizens. The following fields of professional sport activities must be covered: football, basketball, volleyball, handball, rugby and ice-hockey (as to both men and women championships, and in both first and second divisions).

The final purpose of the study was to determine, on the basis of the information gathered and the research undertaken, to what extent the organising and functioning of professional sport activities might be attributed to the State in the European Union.

N.B. the typology according to the "Kokkini-criteria plus" is as follows: international / external / horizontal / stricto sensu / macro / practical / public.

2.2. Private studies and reports

2.2.1. Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector (2006) [hereafter: "SD EPFL/G-14"]

The purpose of this study was to investigate whether EPFL and G-14, as European employers' organizations may participate in a possible Social Dialogue with FIFPro under the EC Treaty in the professional football sector. An additional question to be answered was which themes might be relevant to be put on the agenda of a European Social Dialogue in particular from the perspective of G-14.

One precondition is of course that the objects, the mandate (and the tasks) of EPFL and G-14 must (implicitly or explicitly) allow them to deal with "industrial relations" including a Social Dialogue. It was examined whether this is the case on the basis of the Statutes of both organizations, as presumably the status of employers' (interest) organization is a *conditio sine qua non* for admittance to a Social Dialogue. In this context, it was also important with regard to EPFL whether "industrial relations" and Social Dialogue were part of the objectives of the national Leagues (at the time EPFL had 15 members). The national Leagues could only have mandated EPFL to deal with these aspects at European level if they themselves were expressly or otherwise empowered under their Statutes to do so. In view of the question concerning the (in)dependence of EPFL and G-14 in relation to UEFA and FIFA as well as of the Leagues in relation to the FAs the objectives of UEFA and FIFA had also to be taken into account.

The social partner organizations must be able to function freely, without outside intervention. This may be considered as an implicit condition for meaningful participation in a Social Dialogue in a free, democratic community of States and in its individual Member States. In the football world the clubs are affiliated to their national FA which is represented in the international federations UEFA and FIFA. This is termed a "pyramid model" with FIFA at the top, UEFA at the European regional intermediate level and the FAs at the bottom. Football is administered according to this model. The model consists of levels of administration which transcend the clubs. The question therefore was whether EPFL and G-14 as clubs' organizations for the purposes of a Social

Dialogue can operate sufficiently independently from the governing bodies. With regard to EPFL not only the relationship to the Leagues/members which must have commissioned EPFL to deal with "industrial relations" including a Social Dialogue is important, but also the way the Leagues were affiliated to the FAs at the national level.

Apart from that, employers' and employees' organizations and EPFL and G-14 alike had to fulfil certain (explicit) criteria which were developed by the European Commission. In this context, the question could be asked which lessons were to be learned from previous practice regarding the application of the criteria in other industrial sectors, for it could be presumed that the (manner of) application of the criteria in principle also determines their precise meaning and importance. What was the "case law", what useful precedent exists?

There is another EU perspective which is even broader than that of the criteria and which deserved to be examined here. What did it mean for the possibility of participation of EPFL and G-14 in a Social Dialogue that "the specific characteristics of sport" should be taken into account in the European context (Treaty of Nice)? Finally, the question of which themes might be particularly relevant for G-14 in a Social Dialogue was examined.

N.B. The typology according to the "Kokkini-criteria plus" is as follows: international / external / horizontal / stricto sensu / micro / practical / private.

2.2.2. The identification of themes and issues which can be dealt with in a Social Dialogue in European professional football (2008) [hereafter: "SD football agenda"]

The White Paper on Sport states that in the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions. The Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector.

In previous years several initiatives were undertaken by FIFPro, EFFC and the Asser Institute in the form of EU subsidized studies, seminars and conferences in order to promote Social Dialogue in the European professional football sector and make potential social partner organisations aware of the instrument of Social Dialogue for settling issues through negotiations between management and labour by way of a European collective bargaining agreement for their mutual benefit. Additionally, in the so-called Louvain Report conclusions were presented on the representativeness of the parties concerned. The Asser Institute undertook a separate study into the position of G-14 regarding participation in a Social Dialogue at the European level.

In November 2006, at the concluding stage of the campaign, the outcome of a FIFPro conference in Brussels with all stakeholders, including the international football governing bodies UEFA and FIFA present, was that consensus in principle exists about the usefulness of initiating the process to establish an official Social Dialogue Committee under the EC Treaty. FIFPro and EPFL were prepared to take the lead.

The purpose of this study was to identify the "content" of a Social Dialogue in the European professional football sector, once a pertinent Committee would have been officially established under EU auspices, that is possible themes and issues which are suitable to be considered and discussed in a Social Dialogue, the formal framework for setting an agenda of topics being Article 136 et seq. of the EC Treaty.

The envisaged study was a follow-up to the previous studies that were undertaken to promote Social Dialogue in the European professional football sector in accordance with Articles 138 and 139 of the EC Treaty. In those studies inter alia social partner organisations at the national level in EU member states and candidate countries were identified and it was investigated whether a Social Dialogue existed at that level between management and labour. The first phase of operations was concluded. The second phase was the establishment of a Social Dialogue. This study was expected to facilitate Social Dialogue in the European professional football sector by anticipating the third phase in which an agenda for the Social Dialogue had to be set.

This study would help social partner organisations and other stake-

holders at international and national level to become aware of the possible options regarding themes and issues which can be dealt with between management and labour in a Social Dialogue at the European level. The study was expected to facilitate the start of negotiations once the official Social Dialogue Committee would be established in the European professional football sector. It would offer social partner organisations a helpful instrument for determining their thematic framework. A similar effect was *mutatis mutandis* to be expected with regard to Social Dialogue in professional football at the national level of EU member states and candidate countries.

Regarding the executing of this study, the following remarks should be made:

An essential aspect to be researched in this context was to what extent the agenda and the way of dealing with themes and issues is determined by the fact that the broader framework of a Social Dialogue in European professional football in fact includes pertinent rules and regulations of the international football governing bodies UEFA and FIFA.

The practice in other industrial sectors having an official Social Dialogue Committee in operation, was studied in order to identify themes and issues which *mutatis mutandis* could be usefully introduced also in a Social Dialogue in European professional football ("best practices" / "lessons learned").

N.B. The typology according to the "Kokkini-criteria plus" is as follows: international / external / horizontal / stricto sensu / micro / practical / private.

2.2.3. Study into the identification of themes and issues which can be dealt with in Social Dialogue in European professional cycling (2009) [hereafter: "SD cycling agenda"]

The White Paper on Sport states that in the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions. The Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector.

In October 2007 AIGCP (Association Internationale des Groupes Cyclistes Professionnels), EPCT (International Professional Cycling Teams) and CPA (Cyclistes Professionnels Associés) announced that they had jointly requested the European Commission to establish a Social Dialogue Committee in the professional cycling sector in Europe. AIGCP, EPCT and CPA stated that they are convinced that this Social Dialogue, under the umbrella of the European Commission, will be a good tool to renew and modernise professional cycling and its governance.

The purpose of this study was to identify the "content" of a Social Dialogue in the European professional cycling sector, once a pertinent Committee would have been officially established under EU auspices, that is possible themes and issues which are suitable to be considered and discussed in a Social Dialogue, the formal framework for setting an agenda of topics being Article 136 et seq. of the EC Treaty.

This study would help social partner organisations and other stakeholders at international and national level to become aware of the possible options regarding themes and issues which can be dealt with between management and labour in a Social Dialogue at the European level. The study was expected to facilitate the start of negotiations once the official Social Dialogue Committee will be established in the European professional cycling sector. It would offer social partner organisations a helpful instrument for determining their thematic framework. A similar effect was *mutatis mutandis* to be expected with regard to Social Dialogue in professional cycling at the national level of EU member states and candidate countries.

Regarding the executing of this study, the following remarks should be made:

An essential aspect to be researched in this context is to what extent the agenda and the way of dealing with themes and issues is determined by the fact that the broader framework of a Social Dialogue in European professional cycling in fact includes pertinent rules and regulations of the international cycling governing body UCI.

The practice in other industrial sectors having an official Social Dialogue Committee in operation, was studied in order to identify themes and issues which *mutatis mutandis* could be usefully introduced also in a Social Dialogue in European professional cycling ("best practices" / "lessons learned").

In December 2008, a "riders' meeting" was organised in Barcelona in cooperation with CPA to discuss the theme under consideration with representatives of their national member associations and individual professional cyclists.

In May/July 2009, regional workshops were planned to take place in Madrid, Berlin, Brussels, Paris and Rome for discussion of the theme under consideration with stakeholders.

N.B. The typology according to the "Kokkini-criteria plus" is as follows: international / external / horizontal / stricto sensu / micro / practical / private.

2.2.4. The equal treatment of non-nationals in individual sports competitions in the EU Member States (2010) [hereafter: "Non-nationals"]

This Study was commissioned by the European Commission to an international research group which was headed by the T/M/C. Asser Institute and further consisted of Edge Hill University, United Kingdom and Leiden University, The Netherlands. On behalf of the research team, the Study's findings were presented by Professor Stefaan van den Bogaert, Leiden University, at the European Sport Forum in Budapest (Hungary) on 21-22 February 2011.

In its 2007 White Paper on Sport, the Commission indicated its intention to launch a study to analyse access to individual competitions for non-nationals. In the 2008 Biarritz Declaration, the European ministers called on the Commission to provide clearer legal guidelines on the application of EU law to sport organisations concerning the highest priority problems they face, thereby paying due attention to the specific characteristics of sport and noting the concerns and difficulties encountered by international, European and national sport organisations in governing their sport. This study will enable the Commission to answer the EU sport ministers' call.

The Court of Justice of the European Union expressly determined in the case of *Ruckdeschel* that the general principle of equality is one of the fundamental principles of EU law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified. With this statement, the Court of Justice has instituted a superior rule of law with general application. The fundamental principle of equal treatment finds specific expression, in particular, in the general prohibition of any discrimination on grounds of nationality, as laid down in Article 18 TFEU and further specified in Articles 45, 49 and 56 TFEU.

The prohibition of discrimination on grounds of nationality has already been applied on several occasions to the sports sector. It is now established case law that sport falls under the scope of application of the Treaty in so far as it constitutes an economic activity. The Court of Justice made this particular statement in *Walrave and Koch*, the first ever Court ruling on a sports issue, a case which turned around nationality discrimination in cycling. The Court displayed sensitivity towards the specificity of sport, which was later officially recognized in the Nice Declaration on Sport, ruling that the prohibition of nationality discrimination does not preclude rules or practices excluding foreign players from participation in certain matches for reasons which are not of an economic nature and are thus of purely sporting interest.

The Court has consistently reaffirmed this restriction on the scope of EU law in subsequent case law (e.g. *Donà*, *Bosman*, *Deliège*), adding that such rules of 'purely sporting interest' must remain limited to their proper objectives. This has for a long time offered matches between national teams shelter from the application of the Treaty free movement and competition rules. In its recent *Meca-Medina* ruling, the Court of Justice refined this approach in a competition law context, in practice dismantling the concept of rules of purely sporting interest but replacing the idea with a new test. The Court held that for the purposes of the application of the competition law rules to a particular case, account must firstly be taken of the overall context in which the decision was taken or produces its effects and, more specifically, of its objectives; sub-

sequently, it has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them. These findings can be transposed to the free movement context. It constitutes a new standard by which the Court of Justice of the European Union will in the future evaluate sports rules and practices.

The Court has also dealt with nationality discrimination at club level in sport. So far, it has always firmly branded these discriminatory measures as incompatible with EU law. In the wake of the judgments in *Donà* and *Bosman* there appears to be limited room for sporting federations to treat domestic players more favourably than foreign players who are protected by EU law. The decisions in *Kolpak* and *Simutenkov* have made it clear that third-country nationals who are legally residing in a host Member State and can also often rely upon a directly effective equal treatment provisions contained in international agreements concluded between the EU and the third-country from which they originate. In these cases, the Court categorically held that the justificatory arguments relating to the maintenance of a traditional link between a club and its country or the creation of a sufficient pool of players for the national team were not such as to preserve the contested nationality clauses.

However, by the same token, the Court also acknowledged that 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. The Court has thus not completely shut the door to all nationality clauses but has left it to the self-regulatory autonomy of the sporting associations to elaborate rules or practices at club level that are compatible with the requirements of EU law. The European Football Association UEFA has made use of this opportunity to introduce the so-called '4+4' or 'home-grown' rule, which requires clubs to include in their teams a minimum number of domestically trained players. The CJEU has not yet pronounced on this rule, which has already received support from the European Commission and the European Parliament. Conversely, both European institutions appeared reluctant towards the proposal of World Football Association FIFA to gradually introduce the '6+5' rule, requiring football teams to start official matches with minimum 6 players eligible to play for the national team of the club. This was generally regarded as unjustifiable discrimination. Nevertheless, in the 2008 Biarritz Declaration of the sports ministers of the European Union, the ministers clearly expressed their interest in further discussion on the initiatives of international federations to encourage the teams of professional clubs to develop the presence of athletes capable of qualifying for national teams, in order to strengthen the regional and national roots of professional clubs, albeit in compliance with EU law. Despite extensive jurisprudence and countless discussions at political level, the issue of nationality clauses even in team sports has thus not yet been settled.

Until now, the situation with regard to equal treatment of non-nationals in individual sporting disciplines has been the subject of much less debate and legal scrutiny. Traditionally, individual sports have been organised on a national basis with one sports federation organising its respective sport within its territory. This has endowed sport with a distinctly national character. The development of an internal market supported by free movement and citizenship rights has the potential to call into question this traditional feature of the so-called 'European model of sport'. This is generating debate amongst some Member States and sports organizations who are concerned for the purity of national competitions should EU non-discrimination law apply to their constitutional arrangements. For example, for cultural reasons it has been suggested that the conferment of 'national champion' titles should be reserved for nationals of the Member State within which the competition takes place. There is also concern at the prospect of some athletes being able to take part in the national championships of more than one country. Eligibility rules for international competitions and championships that are based on the representation of states (legal nationality), are logically a (co)determining factor for the nationality of sportspersons in competitions at the national level that are qualifiers for these international competitions.

Rules designed to maintain the purity of national competitions can

lead to the adoption of discriminatory measures. For example, with effect from March 2008 the Belgian Swimming Federation adopted new rules excluding non-nationals from participating in national swimming championships in Belgium. The report provides a comprehensive list of such measures and the sports in which these restrictions present themselves. Some sports raise specific issues in this respect. For example, the participation of non-nationals in the national championships of sports with direct elimination, such as tennis or fencing, may exert a more significant impact on the outcome of the competition than in other sports. Furthermore, the report specifies the level at which the discriminatory provisions are adopted. In determining whether the discriminatory measures involve access to sports, the conditions relating to the actual practice of sports, the determination of national records, the award of medals or titles, or any other aspect of the sport, the report investigates the objectives pursued by these measures and the consequences on each sport of removing the restrictions. In doing so, the report comprehensively enquires into the ongoing debate within the sports movement concerning the definition of the 'specificity of sport' and its application in EU law to both the economic and non-economic aspects of sport. This allows for the presentation of a typological analysis of the discriminatory measures identified.

This typology against which the directly or indirectly discriminatory measures identified is measured is essentially the same as in the context of discriminatory measures at club level and primarily consists of the Treaty rules on freedom of movement. Furthermore, the Treaty provisions on Union citizenship, which is destined to be the fundamental status of nationals of the EU Member States (*Grzelczyk*) is duly regarded in this respect.

According to settled case-law, EU citizens lawfully resident in the territory of a host Member State who find themselves in the same situation as home State nationals can rely on Article 18 TFEU to receive the same treatment in law irrespective of their nationality in all situations which fall within the scope *ratione materiae* of EU law. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 21 TFEU. In addition, where and whenever necessary, also instruments of EU secondary legislation such as, in particular, Directive 2004/38 on the rights of citizens and their family members to move and reside in the EU and Regulation 1612/68 are taken into consideration. Essentially, all discriminatory rules are grouped in four different categories: firstly rules of purely sporting interest; secondly, rules which are inherent in the organisation of the sport and necessary to pursue the objectives outlined and which therefore do not constitute a restriction of EU law; thirdly, those rules which are discriminatory but capable of justification and proportionate; and finally those rules which are discriminatory and cannot be justified and must therefore be dismissed.

Additionally, the report undertakes an assessment of the likely impact of the Lisbon Treaty which establishes sport as a competence of the EU. Article 165(1) TFEU provides 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'. Article 165(2) adds that Union actions 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'. The likely impact of these provisions on the jurisprudence of the Court is considered. In particular, the report will consider whether these provisions constitute the legal basis for eliminating the discrimination in question or a means of insulating such measures.

First, in the Study a full evaluation of the situation per country is provided concerning the provisions in sports (competition) regulations that are discriminatory based on nationality in the sports disciplines selected, and relating to access and all other aspects of individual sports competitions. The level at which the discriminatory provisions identified are adopted (national, regional or local sports federations) is specified and it is indicated whether they are imposed at lower levels of this pyra-

mid-shaped hierarchy. Information regarding any regulatory provisions that are discriminatory on grounds of nationality established under public administrative decision is provided.

Second, a typology analysis of the discriminatory measures identified is given. It is indicated whether the discriminatory measures involve access to sports (participation in competitions), conditions relating to the actual practice of sports, the award of medals and titles, etc. The various criteria that hamper access to competitions either directly or indirectly, are listed. A detailed list of the various objectives identified as underlying the establishment of discriminatory measures is presented. Particular attention is given to the selection of national champions, determining national records, the award of titles and medals to nationals, avoiding the award of national titles to athletes in different Member States, etc.

For the purposes of this Study the term “non-nationals” was defined as follows:

“citizens, their family members, and workers from other EU Member States, as well as citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of the Member States (third country nationals).”

The term “individual sports competitions” was defined as follows:

“national competitions involving individual sportspersons, regarding sports disciplines practiced in a professional or amateur capacity within the European Union.”

The individual (“non-team”) sports disciplines that are covered in the Study, are the Olympic sports disciplines concerned (Winter and Summer Olympics). There are 26 Olympic sports which are whether individual disciplines themselves or to which individual disciplines belong: triathlon, modern pentathlon, tennis, table tennis, badminton, rowing, canoe/kayak, athletics, aquatics, archery, boxing, judo, shooting, weightlifting, wrestling, taekwondo, equestrian, gymnastics, skating, luge, biathlon, bobsleigh, cycling, skiing, fencing and sailing (see: www.olympic.org/en/content/Sports/).

Partly in the light of the findings of this study, the European Commission intends to ‘issue guidance on how to reconcile the Treaty provisions on nationality with the organisation of competitions in individual sports on a national basis’.¹⁵

N.B. The typology according to the “Kokkini-criteria plus” is as follows: international / external / horizontal / lato sensu (cf., “objectives underlying the establishment of discriminatory measures”) / micro / practical / private (the public segment concerns a priori illegal discriminatory regulatory provisions, since they are established under public administrative decision; so they were not part of the legal comparison exercise).

2.3. Private/public studies and reports

2.3.1. Legal comparison and the harmonization of doping rules (2001) [hereafter: “Doping harmonization”]

In 2000, an international research group consisting of sports law experts from the University of Erlangen-Nuremberg (Germany), the T.M.C. Asser Institute for International Law, The Hague (The Netherlands), the Max Planck Institute for Foreign and International Criminal Law, Freiburg i.B. (Germany), and the Anglia Polytechnic University, Chelmsford (United Kingdom), was asked by the European Commission to undertake a research study on “Legal Comparison and the Harmonisation of Doping Rules” within the framework of the “Pilot Project for Campaigns to Combat Doping in Sport in Europe”.

The final report of the research study was presented on 7 November 2001 and was discussed at an international conference in Brussels, which was organised by the T.M.C. Asser Institute with the support of the

Flemish Ministry for Sports during the Belgian EU Presidency. The conference was attended by representatives of international sports federations, as well as sports ministries and national sports organisations from the EU Member States.

The European Commission commissioned the study during the initial stages of the drafting of a World Anti-Doping Code. In the years following the publication of the study, work on the World Anti-Doping Code continued and was finally completed with the adoption of the “WADA Code” in 2003. The study may be considered to have contributed significantly to the completion of this work, as it provided the drafters of the Code with an important tool, giving them an overview of the doping rules and regulations of national and international sports organisations, including a comparative analysis, as well as a survey and analysis of the relevant public law legislation available. Since the study may be considered to form part of the travaux préparatoires underlying the WADA Code, which in the meantime has entered into force and is being applied in practice, the undersigned consider it necessary that the study reflecting the legal situation in 2001 be published as a book. This publication in particular wishes to promote a better understanding of the background of the harmonisation of doping rules and regulations, the results of which may be found in the WADA Code a milestone in the campaign to combat doping in sports.

The Study contains a public law part and a part concerning sports rules and regulations on anti-doping. Both parts are presented in a comparative, thematic form. The first part consists of a comparative legal analysis of anti-doping activities, in particular with regard to combating doping by means of criminal law in the 15 EU Member States at the time. In the sports rules and regulations part, the results of the study of the pertinent national instruments in the EU Member States for the then 35 Olympic international sports - together with the regulations of the International Olympic Committee (IOC), the International Paralympic Committee (IPC) and the Olympic international sports federations - were delivered. Aspects such as the following are considered in this part: definition of doping (description of the doping offence), the purpose of the ban on doping (arguments against the use of doping), system of sanctions, etc.¹⁶

N.B. The typology according to the “Kokkini-criteria plus” is as follows: international / external (public level: the EU is to a certain extent a supranational body, but cf. interventionist v non-interventionist national sport models in the EU) / horizontal (on both levels: public and private) / stricto sensu / micro (one issue: doping) / practical (cf., the drafting of a WADA Code) / private and public.

2.3.2. Promoting Social Dialogue in European professional football (candidate EU Member States) (2004) [hereafter: SD football (candidates)]

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

In this report, three key questions which are relevant in a Social Dialogue context have been examined:

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

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Developing the European Dimension in Sport*, COM(2011) 12 final, Brussels, 18.1.2011, p. 13.

¹⁶ Cf. also, Janwillem Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, The Hague 2006 (PhD, Erasmus University Rotterdam).

The project was intended to inform about and thereby promote the concept of the Social Dialogue and of collective bargaining at the sectoral level of the professional football industry in the EU candidate countries (now Member states plus Bulgaria and Romania). The aim was to contribute to facilitating the start of consultations of management and labour at national and Community level and, in pursuance thereof, the establishment of relevant contractual relations by the exchange of information and experience on a European basis, in particular regarding employment contracts and collective bargaining agreements. In addition, the current EU legal developments concerning labour and sports was presented, followed by a comparison with the relevant law in the candidate countries. Differences between the EU and national law were indicated and solutions for avoiding conflicts were provided. Besides promoting the Social Dialogue in the professional football sector in the candidate countries the objective of the project was also to identify the national law that is not in conformity with EU law and to propose solutions to remove any conflict.

It was expected that the project will be helpful to pave the way for starting the Social Dialogue in professional football in the EU candidate countries at national and European level by creating awareness amongst organizations involved of the possibilities the Dialogue offers for establishing effective industrial relations and, in particular, by creating common ground amongst management and labour for the purpose of future negotiations.)

This project regarding the candidate countries was carried out in cooperation with the European Federation of professional Football Clubs (EFFC). It in fact is an addendum to the similar project that was undertaken by the EFFC with regard to the 15 "old" Member States in 2003-2004. In the Final Report on that project proposals are made to the European Commission for the reasoning it could adopt when dealing with a joint request from organizations who wish to establish a Social Dialogue Committee in European professional football. These proposals in principle are also fully applicable to the 10 "new" Member States, being now part of the family of EU nations.

N.B. The typology according to the "Kokkini-criteria plus" is as follows: international / external / horizontal / stricto sensu / micro / practical / private and public.

2.3.3. Football hooliganism with an EU dimension: towards an international legal framework (2004) [hereafter: "Football hooliganism"]

Under the terms of Article 29 of the Treaty, the European Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field of police cooperation. Due to the various international and European competitions involving both national and club teams and the resultant travelling of large numbers of supporters together with the associated social and often violent disorder, football has a highly visible profile. This international dimension has made it necessary to approach security in connection with football matches in a way that extends beyond national borders. Within the EU framework, the focus is mainly on the coordination of police measures (cf., Council recommendation on guidelines for preventing and restraining disorder connected with football matches, 22 April 1996; Council Resolution on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media policy, 9 June 1997; Council Resolution concerning a handbook with international recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one Member State is involved, 6 December 2001 (previously, 21 June 1999); Council Decision concerning security in connection with football matches with an international dimension, 25 April 2002).

Apart from the existence of the Council of Europe's Convention on spectator violence and misbehaviour at sports events and in particular at football matches, of 19 August 1985, an international legal framework is still lacking and fundamental legal differences between Member States make it difficult to envisage the generalized application of restrictions on attendance at matches in other Member States by persons convicted of football-related offences.

Because of the lack of an international legal framework and the fundamental legal differences between Member States, tackling transnational football hooliganism in the EU is mainly based on "ad hoc", i.e., specific cooperation agreements and policy arrangements between individual Member States in connection with individual international competitions and matches. This results in the conflation of an 'instant coordinated approach' with a 'permanently coordinated basis'.

The purpose of the study is to determine what the fundamental legal differences between Member States (and candidate countries/Member States since 1 May 2004) exactly are and to evaluate what the precise consequences are of the absence of an international legal framework. On the basis of the results of this research, recommendations will be made for the development of a common and consistent international legal framework.

The following information was collected and analysed for the purposes of this Study:

- international legislation (treaties, decisions of intergovernmental organizations, etc.);
- an additional aspect was the *transnational* law and policy situation of the country (cf., possible bilateral treaties, agreements, or ad hoc arrangements etc. with neighbouring countries to control the cross-border movement of groups and persons concerned).
- all the laws, regulations and administrative provisions constituting the legal framework of the EU Member States and candidate countries and all the corresponding implementing measures applicable in the event of football hooliganism as well as the official documents (Memoranda, Notes to Parliament etc.) that form the basis for the Government's general policy in this field within the framework of general criminal and administrative law.
- decisions of national and international courts and tribunals;
- the academic literature in respect of the relevant legislation and court decisions;
- rules and regulations of national football associations and UEFA/FIFA as well as official policy documents regarding "football hooliganism"

N.B. The typology according to the "Kokkini-criteria plus" reads as follows: international / external / horizontal / stricto sensu / micro / practical / private and public.

2.3.4. Health and safety in the sport sector (2009) [hereafter: "Health and safety"]

In September 2008, in the framework of the project "Moving forward towards European social dialogue in the sport sector: Content and Contact" (CC-project), EURO-MEI together with its managing partner EASE and its strategic partner the EOC EU Office (formerly EU Sport Office), commissioned the T.M.C. Asser Institute for international law, The Hague, The Netherlands, to undertake a comparative research study on health and safety in the sport sector. As the sport sector is in full development on all levels, not much European research exists so far on this topic. The project was undertaken in order to extend the knowledge on health and safety in the sport sector and thereby to help professionalise the sector. The research was financed by the European Commission through the above-mentioned project.

EASE and EURO-MEI are willing to be proactive to defend the specificities of the sector through European social dialogue. To prepare their social dialogue, EASE and EURO-MEI agreed to start with soft issues: issues on which a consensus is easily reached. Health and safety is one of them. The specificities of sport related to health and safety have not been taken into account yet at the different levels of the sector. The sport workers (players but also trainers and coaches) in many European countries are facing a lack of regulation specific to sports regarding health and safety issues. On the basis of the study and the results of the Conference on health and safety in the sport sector that was held in Lisbon on 1 and 2 April 2009 EASE and EURO-MEI would like to find similarities and opportunities for harmonisation and to define best practices in health and safety in the sport sector. Once the European social dialogue in the sport sector will be effective, autonomous agreements and process-oriented texts (such as joint declarations) between the European social partners on those issues could provide a kind of har-

monisation that could help many countries to address the health, safety and well-being of workers in the sport sector.

The below comparative survey on health and safety in the sport sector is descriptive and includes a general listing of health and safety issues in a broad sense in the sport sector as well as a listing of measures taken to prevent risks and injuries and promote workers' (players', trainers', coaches') health (best practices, innovative actions) on the basis of the research undertaken. It covers relevant information on the present 27 EU Member States.

N.B. The typology according to the "Kokkini-criteria" is as follows: international / external / horizontal / stricto sensu / micro / practical / private and public.

2.3.5. The Implementation of the WADA Code in the European Union (2010) [hereafter: "WADA Code"]

The fight against doping has become an increasingly important theme on the EU agenda.

On this subject, the White Paper on Sport published by the European Commission on 11 July 2007 stated the following:

"The EU would benefit from a more coordinated approach in the fight against doping, in particular by defining common positions in relation to the Council of Europe, WADA and UNESCO, and through the exchange of information and good practices between Governments, national anti-doping organisations and laboratories. Proper implementation of the UNESCO Convention against Doping in Sport by the Member States is particularly important in this context.

The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States."

In the past few years, activities in this field have essentially concentrated on the Code of the World Anti-Doping Agency (WADA) which is the subject of the Copenhagen Declaration and the UNESCO Convention against Doping in Sport. Naturally, the work of the informal European working party, the 'EU Working Group on Anti-Doping', actively contributes to this.

Despite the increased interest in this subject, in practice the central objective of the Code, i.e. to ensure harmonised, coordinated and effective anti-doping programmes at both an international and national level with regard to the detection, deterrence and prevention of doping, is still far from being realised for a variety of reasons. The necessity for a European framework for cooperation in the fight against doping, on the basis of the Code, therefore requires further study.

An initial requirement for the achievement of strict agreements on a EU level is that reliable information is available about the state of affairs in each Member State.

With a view to the Belgian Presidency of the European Union in the second half of 2010, the Flemish Minister for Sport, Philippe Muyters, asked the T.M.C. Asser Institute of International Law in The Hague to carry out a thorough study of the application of the Code within the European Union and to catalogue its findings.

The study's inventory was undertaken on the basis of information collected from the relevant government departments and/or agencies with primary authority in the area of sport in each Member State and the National Anti-Doping Organisations (NADOs) in the European Union. As far as Belgium is concerned, a distinction was made between the four different authorities authorised to fight doping, namely: the Flemish Community, the French Community, the German-speaking Community and the Joint Community Commission.

N.B. The typology according to the "Kokkini-criteria plus" is as follows: international / external / horizontal / stricto sensu / micro / practical (the implementation of the WADA Code) / private and public.

2.3.6. Comparative continental sports law: an "Americanization" of European sports law?

In the years shortly before the beginning of this century, in sporting and sports law circles in Europe a discussion started concerning the "Americanization" of European (EU) professional sport. The sports models of North America and Europe were compared.¹⁷ Some of the European sports model's features appeared to be under threat, as part of a trend which may be labelled 'Americanization' in recognition of the lurking desire to eliminate traditional rules of the game (such as promotion and relegation) which may inhibit wealth maximization on a North-American scale. Weatherill's contribution to the debate proceeded from the assumption that it was realistic to suppose that European sport, particularly football, would become ever more lucrative in the next few years in the wake of the media revolution, perhaps eventually to the extent that it would compare financially with the dominant sports in North America, but that there are aspects of the American model that will prove unpalatable in Europe.¹⁸

Nafziger observes that comparative legal commentary on the organisational structure of sports, particularly of professional sports, is substantial and growing. One of the main themes in Europe has been the relationship between a rather pristine European Sports Model, as it has been called, and the growing commercialization of sport. This theme has been expressed variously in analyzing the regulatory power of the European Union over sporting activity and in contrasting the European Sports Model with a so-called North American Sports Model. Both models are largely policy constructs, and the North American Model may simply be that which the European Model is not. Even so, the models help each of us see our own sports culture as others see it. Although the European Sports Model has been the subject of many writings, in-depth comparisons between it and the North American Model are infrequent. Comparing the models highlights core values, sharpens analysis, and yields new insights. A few preliminary observations may be useful in defining the models. First, they are just that: models, that is general representations of reality rather than precise descriptions of organisational structures. Second, a functional analysis and evaluation of the European Sports Model inevitably must take account of the legal constraints, particularly European Union law.¹⁹

In the context of the debate of an "Americanization" or even

¹⁷ On 9 March 2000, an Asser Round Table Session entitled *The americanisation of sports law - the American and European sports models compared* was organised at the office of law firm CMS Derks Star Busmann Hanotiau in Utrecht and in cooperation with the Sports Law Centre of Anglia Polytechnic University and *Sportzaken* magazine/The International Sports Law Journal (ISLJ). Participants in the LLM/MA Sports Law Course of Anglia Polytechnic University, which was hosted by the T.M.C. Asser Institute in The Hague from 8 to 11 March, attended the Session. Speakers were Dr. Simon Gardiner, Sports Law Centre, Anglia Polytechnic University, Chelmsford, United Kingdom, Aaron Wise, Siller Wilk LLP, New York, United States of America, Dr. Martin Schimke, Wessing &

Berenberg-Gossler Attorneys, Hamburg, Germany, James Gray, Pierski, Fitzpatrick & Gray, Milwaukee, United States of America, and Prof. Dr. Paul de Knop, Free University, Brussels, and University of Tilburg, The Netherlands. Mr Eric Vilé, CMS Derks, chaired the Session. The Session was sponsored by the FBO, the Dutch Federation of Professional Football Organisations. Simon Gardiner's and Paul de Knop's contributions were published in *The International Sports Law Journal*, No. 2, 2000, pp. 17-20. The official programme explained the Round Table's topic as follows: "In recent years, especially in the post-Bosman period, professional sport in Europe appears to have been increasingly influenced by what are regarded as characteristics of the traditional North American model of sport. The

growing commercialisation in European professional football, in particular, makes it relevant to thoroughly consider the usefulness and adaptability of legal and institutional instruments that are available in the United States where the major leagues of American football, baseball, basketball and ice hockey have for decades now been 'big business'. This Round Table Session examines themes such as the appropriateness of closed leagues and the role of commissioners, the system of sports franchises, the relocation of clubs, anti-trust law and the collective selling of broadcasting rights, the phenomenon of club owners, cross-ownership, sponsoring, licensing and merchandising, the farm system, collective bargaining agreements and players' unions, the regulation of the sports agent, the application of salary

caps, salary arbitration and free agents, the draft system, and questions of intellectual property rights. In addition, specific developments that are taking place in the "sports industry" of the United States and Europe at the time of the Round Table Session are evaluated."

¹⁸ Stephen Weatherill, *Resisting the Pressures of 'Americanization': The Influence of European Community Law on the 'European sport model'*, S. Greenfield and G. Osborn, eds., *Law and Sport in Contemporary Society*, London 2000, p. 155 et seq.; reproduced in: *Willamette Journal of International Law and Dispute Resolution* 37 (2002), and: Stephen Weatherill, *European Sports Law: Collected Papers*, The Hague 2007, pp. 175 and 155.

¹⁹ James A.R. Nafziger, *A Comparison of the*

*Typology of the Asser research studies and reports according to
the “Kokkini-criteria” plusminus (or: minusplus) (in chronological order)*

<i>studies and reports</i>	<i>internal/ external</i>	<i>horizontal/ vertical</i>	<i>stricto/ lato sensu</i>	<i>micro/ macro</i>	<i>practical/ theoretical</i>	<i>national/ international</i>	<i>private/ public</i>
Doping harmonisation	external	horizontal	stricto sensu	micro	practical	international	private/ public
SD football (candidates)	external	horizontal	stricto sensu	micro	practical	international	private/ public
Football hooliganism	external	horizontal	stricto sensu	micro	practical	international	private/ public
Sports Acts	external	horizontal	<i>lato sensu</i>	micro	practical	<i>national</i>	public
SD EPFL/G14	external	horizontal	strict sensu	micro	practical	international	private
SD football agenda	external	horizontal	stricto sensu	micro	practical	international	private
Health and safety	external	horizontal	stricto sensu	micro	practical	international	private/ public
SD cycling agenda	external	horizontal	stricto sensu	micro	practical	international	private
Sport governance	external	horizontal	stricto sensu	<i>macro</i>	practical	international	public
WADA Code	external	horizontal	stricto sensu	micro	practical	international	private/ public
Non-nationals	external	horizontal	<i>lato sensu</i>	micro	practical	international	private

“McDonaldization” of European sports, it is Halgreen’s belief that the European sports culture is unique and worth protecting, with its extraordinary mix of amateur and professional, commercial and non-commercial interests alongside each other, serving a very important role in European societies. However, in a time of increased internationalization and globalization, it was his realistic assertion that it will not be possible simply to “dismiss” the American Model of Sport purely for political, ideological or protectionist reasons²⁰. This is because European sport *is* part of a global sports economy, and many professional European sports, faced with the tough and unfamiliar challenges of a commercialized sports environment, have already demonstrated a strong tendency to combine the European and American sports systems in one form or another.²⁰

The “Americanization” debate which from to time comes back to the stage in Europe, is an example of international comparative legal and organisational comparison between continents and not individual countries. It concerns non-governmental sports law, the law of the “autonomous” private sports organisations which as such is of a transnational character, not public legislation regarding sports. Of course, European sports law which sets the limits to the sporting law is the law of a supranational intergovernmental organisation of states, whereas the North American Model comprises two completely sovereign states, Canada and the United States of America which set the limits to sport by national legislative instruments.

European and North American Models of Sports Organisation, The International Sports Law Journal (ISLJ) 2008/3-4, p. 100.

²⁰ Lars Halgreen, *European Sports Law: A Comparative Analysis of the European and American Models of Sport*, Copenhagen 2004, pp. 16-17.

²¹ Several years ago, the Asser Institute was requested by the Singapore Sports Council who referred to the “Sports Acts” study (2006) for the Netherlands government, to present a research proposal for

the purpose of the revision of the Sport Council Act (1973). Particularly, because of the Singapore ambition to create in the country a podium for the staging of international sporting mega events the question was whether the adoption of a new Sport Act could be drafted and how. The Asser Institute then proposed a worldwide study along the lines of what is described as follow-up research in the paragraph on the “Sports Acts” pilot study, pp. 5-6 *supra*.

N.B. A study on the “Americanization” issue would start from the following “Kokkini-criteria” qualifications: international (or: national = bilateral); two sports systems on both sides of the Atlantic ocean, including on the one hand Canada and the United States of America, and on the other the public international organisation EU with now 27 Member States); external (!); horizontal; stricto or lato sensu; macro (!); theoretical or practical (practical: when the North American Football League (NFL; American rugby) established a branch in Europe, it could have been useful to first have available a study on the state of affairs in European (EU) sport in an organisational and legal sense); and private (cf. public: EU law, i.e. the jurisprudence of the European Court of Justice has adjusted the European sports model to some extent in the past decade by opening it up, as it were into a more liberal, “American” direction; however, at the opposite, in North American pro sports there do exist closed leagues with salary caps, drafts, etc. for promoting a level playing field).

3. Summary and conclusion

The European Union regularly commissions legal comparative research in areas of sports law. Such research serves to provide a picture of which private and possibly, public sport rules exist in areas of sports law in the Member States. The surveys are intended to provide information that can be used by the European Union for relevant policy development. According to the new sport provision in the Lisbon Treaty, Article 165, any harmonization of the laws and regulations of the Member States” by the European Union is excluded. Of course this type of studies and reports still could theoretically (scientifically, academically) be used for unification/harmonization purposes. Used outside the EU framework the “Doping harmonization” study is a clear example of a harmonization report; the “WADA Code” study - by monitoring of the implementation of the Code - in fact also fulfills this purpose. On the other hand, there are possible studies and reports which are meant to be used by an individual country by way of “best practices”/“lessons learned” from abroad. The “Sports Acts” study is a study of this “national” type.²¹ The national/international (= bilateral/multilateral) “Kokkini-criterion” is now here finally deleted as having turned out to be meaningless at least in the context of (international) comparative sports law; bilat-

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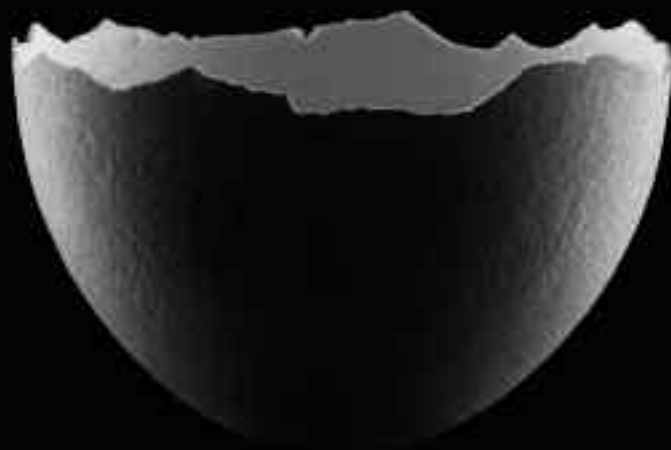
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**ALBANIAN CHEMIST
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FRASHERI STREET HAD
TWO EGGS ON BROWN
TOAST FOR BREAKFAST
THIS MORNING**



ALBANIA · ARMENIA · BOSNIA & HERZEGOVINA · BELARUS · CROATIA · CZECH REPUBLIC
HUNGARY · POLSKA · POLSKA · SLOVAK REPUBLIC · SLOVENIA · URBAN

WOLF THEISS

eral also means international and why not trilateral etc. research if and when a country looks for inspiration abroad to revise its Sports Act or other relevant legal instruments?! Instead of this distinction, it is a much better option to use this criterion in the sense of “best practices” (national) v unification/ harmonization research. So, now we have three new criteria: practical/theoretical, national/international (in a new meaning) and private/public added to the “Kokkini-criteria” (plus) whereas one criterion: national/international (in the old meaning) has disappeared (minus).

N.B. The “Americanization” debate is an example of continental comparative sports law (Europe/North America). Its typology is emphatically “external” and “macro”.

Sports law is two- or double-layered: there are private and a public segments - the (I)NGO part of the law on the one hand (sporting rules and regulations) and legislation as well as treaties on the other hand. The specific institutional characteristics of organized sport are “juridified” by and in its own, private rules and regulations. In the context of comparative law research, this crucial feature of sports (law) may be charac-

terised as an example of “sport specificity”. So, the double stratification of sport and thereby sports law is the major, core aspect of (international) comparative sports law. Minor specific characteristics are a result of adapting the initial “Kokkini-criteria” to organised sport and sports law. “External” means in the sporting context for example research into interventionist versus non-interventionist states, not only in Europe but also worldwide. “Macro” means In the sporting context comparative research into sport governance at large regarding national and/or international sport governing bodies (cf., the comparison between legal systems or jurisdictions of national states under the law of nations). Like in the inter-state context, this may also apply to comparative research regarding several crucially differing types of sports governance (see, the “Americanization” debate). If sport governance is macro, Sports Acts research is relatively micro. Generally speaking, sport governance in the private segment concerns internal sport governance (“intra sport”), whereas Sports Acts concern the relationship between state and national organised sport which may be characterised as external sport governance (“intra state”). So, there are two (interrelated) types of sport governance.

The International Sports Law Journal



Basketball Arbitral Tribunal

An Innovative System for Resolving Disputes in Sport (only in Sport?)*

by Dirk-Reiner Martens**

The Geneva-based International Basketball Federation FIBA (Fédération Internationale de Basketball) has set up the Basketball Arbitral Tribunal (BAT)¹, which is a true arbitral tribunal under Swiss law. It provides arbitral proceedings for disputes between (professional) players, player agents and clubs, mostly regarding players’ wages or commission claims of agents. The following is a presentation of the BAT Arbitration Rules, which are designed for a quick and inexpensive dispute resolution.

1. Introduction

When one speaks of sports arbitration, one first and foremost thinks of the Court of Arbitration for Sport in Lausanne, Switzerland (CAS). CAS is in fact by far the largest institution of its kind, which is evidenced by the fact that the Court records approximately 300 new requests per annum.

Nevertheless there are a number of other bodies for resolving disputes in sport, which - whether rightly or wrongly - designate themselves as arbitration courts. A decisive criterion for answering the question of whether or not it is a genuine arbitration court or just an internal body of the association intended to resolve disputes is whether both parties to the dispute have the same influence on the appointment of the arbitrators. For, quite rightly, it is considered to be a crucial advantage of arbitration that the parties can themselves decide on who their judge(s) are - however, both parties must have this right equally.

Applying the above criterion as a basis, many of the “arbitration courts” established at sports associations cannot qualify as arbitration courts because it is often only the associations who determine the “arbitrator” or “arbitrators” either directly or indirectly. The athletes, who are usually the “claimants”, have no influence on the composition of the ruling body. Many countries take the legal view that tribunals of this kind are

not arbitration courts and therefore do not make any final and binding rulings.

The international basketball federation FIBA (Fédération Internationale de Basketball) based in Geneva has taken a different approach as far as disputes between (professional) players, players’ agents and clubs are concerned. For these disputes, which are frequent and are usually about players’ salaries and claims to commission by their agents, FIBA has established a genuine arbitration court under Swiss law called the Basketball Arbitral Tribunal (BAT), which is introduced and explained below.

2. FIBA’s Mission Statement for the BAT

Under 3 - 289 of the FIBA Internal Regulations FIBA establishes “[...] an independent Basketball Arbitral Tribunal (BAT) for the simple, quick and inexpensive resolution of disputes arising within the world of basketball in which FIBA, its Zones, or their respective divisions are not directly involved and with respect to which the parties to the dispute have agreed in writing to submit the same to the BAT.”

The characteristics of BAT emphasised in bold above are briefly outlined below:

2.1 “FIBA, its Zones, or their respective divisions are not directly involved”

This criterion serves first and foremost to distinguish the BAT from a merely internal body for the resolution of disputes. As explained in the Introduction above, according to the legal view of many countries a tribunal cannot qualify as an independent arbitration court if only one party to the dispute has an influence on the appointment of the “judge(s)”.

If, for example, the dispute concerns the transfer of a player from Club A in Austria to Club B in Germany, then according to FIBA’s rules and regulations, FIBA’s General Secretary (initially) decides whether there is a contract in existence which prevents the transfer, so FIBA is “directly involved”. If such a legal dispute were to be finally decided by

* A German language version of this article was published in the German Arbitration Journal (SchiedsVZ) in SchiedsVZ 2010, Heft 6, pp. 317 et seq.

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1 The BAT was previously known as FIBA Arbitral Tribunal (FAT) and has been renamed as of 1 April 2011 to Basketball Arbitral Tribunal in order to underscore the court’s independence.

the BAT, only FIBA would have an influence on the appointment of the BAT arbitrator because, according to the rules and regulations of the BAT, FIBA has control - even if it is only indirect control - over the choice and appointment of the arbitrators. In such a case therefore the BAT could not act as a genuine arbitration court. That is why in international basketball disputes, in which FIBA is “*directly involved*”, particularly disputes about transfers and doping cases, are decided not by the BAT, but in internal appeal proceedings and ultimately by the CAS as the court of last instance.

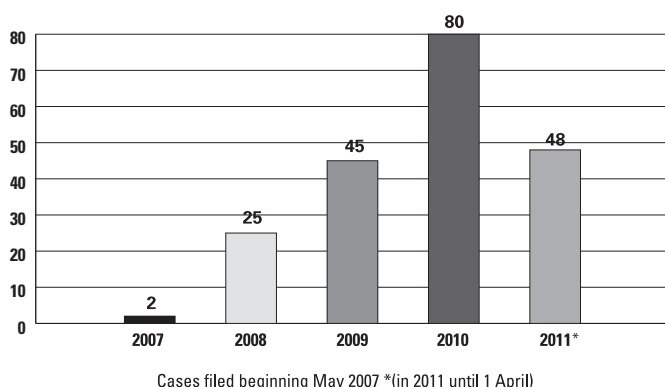
The case is different with disputes between clubs, players and agents, for which the BAT was created (cf. 3 - 291 of the FIBA Internal Regulations: “*The BAT is primarily designed to resolve disputes between clubs, players and agents.*”). Here, FIBA is precisely not “*directly involved*”, as it has no jurisdiction whatsoever to decide disputes between third parties about players’ salaries or agents’ commission.

FIBA’s Internal Regulations therefore rightly describe the BAT as “*independent*”, that is independent from the parties to the arbitration.

2.2 “the parties to the dispute have agreed in writing”

Arbitration courts require a unanimous declaration of will by the parties that they want any future disputes, or disputes which have already arisen, decided by an arbitration court. The voluntary nature of this declaration of will is an important criterion of arbitration and, as a matter of principle, this also applies fundamentally in the field of sport, even if, because of its monopolistic structure, the athlete often does not have any other choice but to “*voluntarily*” agree to an arbitration clause: For example, an athlete can only take part in the Olympic Games or championships of the Olympic sports associations if he/she has also signed an arbitration agreement in favour of CAS when registering for a competition.

However, the BAT’s jurisdiction is based on a completely voluntary agreement. This voluntariness is not altered by the fact that, due to the players’ agents’ market power, the clubs - if they do not want to do without top class players - often have no choice but to agree to the jurisdiction of the BAT. In just the three years of BAT’s existence it has proven to be so attractive that numerous agents uncompromisingly insist on the agreement of an arbitration clause in favour of this arbitration court - in some countries where the sport of basketball enjoys a particularly high degree of popularity this is the case practically without exception insofar as foreign players are concerned. It may be an indication of BAT’s success that more than 180 applications for BAT proceedings have been filed in less than four years.



2.3 “simple, quick and inexpensive resolution of disputes”

The speed with which the BAT has grown in popularity is doubtless also because the above criteria “simple, quick and inexpensive” are largely fulfilled.

Sport is extremely fast-moving and it is quite right that a call be made for legal disputes to also be resolved quickly. The CAS also has to permanently deal with the time pressure exerted by the litigating parties for a quick decision. Nevertheless, the CAS is unable to fulfil the requirement stipulated in the BAT rules and regulations that the dispute resolution be “*simple, quick and inexpensive*” to the same extent as the comparatively uncomplicated and, to a high degree computer-aided, arbitration proceedings of the BAT. This is mainly due to three particular features of BAT proceedings, which in combination are probably without precedent in international (including commercial) arbitration.

2.3.1 The fact that dispute resolution by the BAT is, without exception, envisaged to be through a single arbitrator means that the often drawn-out procedure for appointing a panel of three arbitrators and, as the case may be, of challenging individual arbitrators is avoided. Experience gained so far shows that the parties to BAT proceedings do not consider it to be a disadvantage that they do not have a say in the appointment of their judge (cf. 4 below re the nomination of arbitrators).

2.3.2 In BAT proceedings an oral hearing takes place only upon the application of one of the parties or by virtue of a decision by the arbitrator. The fact that an oral hearing has been requested (expressly for the purpose of bringing about a settlement) in only two cases since the BAT was established shows the wide acceptance of this particular procedural feature.

2.3.3 BAT proceedings probably achieve the greatest expediting and simplification effects by the fact that the recommended arbitration clause in favour of BAT, which is usually adopted verbatim (cf. Preamble 0.3 of the BAT Arbitration Rules), and the underlying BAT Arbitration Rules provide for the dispute to be decided not on the basis of any national legal system but *ex aequo et bono*, i.e. according to justice and fairness.

“*Unless the parties have agreed otherwise the arbitrator shall decide the dispute applying general considerations of justice and fairness without reference to any particular national or international law.*” (15.1 of the BAT Arbitration Rules)

It stands to reason that to begin with this particular feature of the BAT procedure first met with considerable scepticism in the legal profession. Nevertheless, it has now been recognised that the advantages of such a choice of law by far outweigh the disadvantages: Almost without exception BAT proceedings have an international component so if the legal system underlying the disputed contractual relationship were used there would always be the serious effect of delay caused by an arbitrator, who is not familiar with that legal system, having to catch up on the legal provisions that apply. For the respondent will often object - in order to complicate and thereby delay the proceedings - that a Swiss, German or English arbitrator’s knowledge of the law cannot take sufficiently into account the particular features of, for example, a player’s contract concluded under Turkish law. It is worth noting that based on past experience, had a national legal system been applied instead of a ruling *ex aequo et bono*, the BAT arbitration awards would have turned out differently in only a few exceptional cases, and even then only marginally differently.

Finally, it goes without saying that the above rules for expediting and simplifying the procedure also mean that the costs are considerably reduced.

3. The BAT Arbitration Rules

The BAT Arbitration Rules are designed to make the decision about disputes quick and inexpensive, as required by FIBA’s mission statement (cf. 2 above).

The wording of the BAT Arbitration Rules can be downloaded from FIBA’s website (www.fiba.com) under “*Experts*”. There, one can also find further information about BAT such as, for example, the arbitral awards rendered so far and answers to “*Frequently Asked Questions*”.

A few details of the BAT Arbitration Rules are briefly outlined below:

3.1 The BAT’s seat

The BAT’s seat and the place of the individual BAT arbitration proceedings is Geneva. This is the case even if an oral hearing does actually take place and does so in, for example, Munich, not Geneva. Thus Switzerland’s Federal Code on Private International Law (“*Schweizer Bundesgesetz über das Internationale Privatrecht*” - “*IPRG*”) also applies, particularly Chapter 12 thereof which stipulates the framework of international arbitration proceedings held in Switzerland.

3.2 Arbitrability

Under 3 - 291 of the FIBA Internal Regulations the BAT was created “*primarily to resolve disputes between clubs, players and agents*”. Thus - to the extent that players and clubs are concerned - the legal disputes to be decided concern employment contracts, which at the same time raises the question of their arbitrability. Contrary to the legal systems of many other European countries, who do not allow employment disputes to be submitted to arbitration, Switzerland is considerably more liberal in this regard and provides that “*all pecuniary claims*” are arbitrable. Under Swiss law there is therefore no doubt about the arbitrability of the disputes to be decided by the BAT. The effects of the lack of arbitrability on enforcement are discussed under paragraph 7.

3.3 Language

BAT proceedings are only held in English unless the parties and the arbitrator agree otherwise. Documents in another language must be submitted with an English translation.

3.4 Computer-Aided Proceedings

BAT proceedings are further expedited by the fact that the BAT Arbitration Rules expressly provide for communication by e-mail, which nearly all the parties make use of. The use of this type of communication is also promoted by the fact that there is an electronic “Request for Arbitration” form on FIBA’s website, which is used increasingly more often: More than half of the Requests for Arbitration are now submitted electronically. BAT proceedings thus come pretty close to the ambition of “paperless arbitration”.

The full texts of all past BAT (FAT) arbitral awards are also published on FIBA’s website because the BAT Arbitration Rules expressly stipulate that the awards are not confidential unless ordered otherwise by the arbitrator. This is supposed to allow the users of BAT to better assess the chances of their respective position succeeding before a claim is filed.

An internet platform has been set up for the arbitrators, which they can access with just a password and on which, not only all of the documents relating to the pending proceedings are stored, but so too is a lot of other useful information, such as past decisions of the BAT, statutory texts and templates of arbitral awards.

3.5 Written Submissions/Time Limits

The BAT Arbitration Rules basically provide for only one set of written submissions by each of the two parties unless the arbitrator decides otherwise (12.1 BAT Arbitration Rules). The arbitrator issues any procedural orders with short time limits.

Even the arbitrators themselves have to comply with short time limits: They must render the arbitral award within six weeks after the completion of the proceedings. (16.2 of the BAT Arbitration Rules)

3.6 Arbitral Award

Under 16.1 of the BAT Arbitration Rules the arbitrators must draw up a “*written, dated and signed award with summary reasons*”.

However, as of May 2010 there is an important exception to the rule that the arbitral award must include “*summary reasons*”. Players in lower salary categories and particularly female players had increasingly complained that access to BAT arbitration proceedings involved costs that were too high in view of their low salaries, especially since the clubs, against whom Requests for Arbitration are filed, often do not pay their share of the costs, requiring the claimant to also advance their share in order for the proceedings to proceed (9.3 of the BAT

Arbitration Rules). 16.2 of the BAT Arbitration Rules valid as of 1 May 2010 now provides that arbitral awards in proceedings where the value in dispute does not exceed €30,000 will be issued without reasons unless one of the parties files a request for an arbitral award with reasons. Time will tell whether the resulting considerable reduction in the costs will cause the number of BAT proceedings to increase even further.

4. The BAT Arbitrators

The BAT arbitrators are appointed by the BAT President and are placed on a closed list, which can also be inspected on FIBA’s website. The

(sole) arbitrator for the particular proceedings is assigned to the case by the BAT President on a rotational basis.

The BAT currently has a list of five arbitrators, two from Switzerland and one from each of Germany, England and Ireland.

Since it was established, the President of the BAT has been Gabrielle Kaufmann-Kohler, a professor and high profile specialist in arbitration law based in Geneva.

5. Appeal

The BAT Arbitration Rules initially provided for two stages of proceedings with the possibility of an appeal to the CAS. This rule was abolished in the spring of 2010 so now there is only the possibility of recourse to the Swiss Federal Tribunal (*Schweizerisches Bundesgericht*) in accordance with Art. 190 Switzerland’s Federal Code on Private International Law (*IPRG*).

However, this appeal mainly only allows a review of procedural issues.

6. Costs

The BAT charges the parties a non-reimbursable handling fee as well as an advance on costs for the arbitrator’s fees. The handling fee ranges from €1,500 (if the value in dispute is less than €30,000) to €7,000 (if the value in dispute is more than €1 million).

The advances on costs are fixed by the BAT Secretariat.

7. Enforcement

Decisions by the BAT are genuine arbitral awards, which are in principle open to enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). However, a problem arises in connection with the arbitrability of employment disputes, which are often the subject of dispute, because Article V (2) of the New York Convention stipulates the following:

“*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

- a. *the subject matter of the difference is not capable of settlement by arbitration under the laws of that country; ...*”

There are therefore many countries, where the New York Convention is likely to prevent the enforcement of BAT awards, which are based on a dispute between players and clubs. FIBA addresses this dilemma using association law under 3 - 300 of the FIBA Internal Regulations:

“300. *Honouring of BAT Awards*

In the event that a party to a BAT Arbitration fails to honour a final award or any provisional or conservatory measures (the “First party”) of BAT, the party seeking enforcement of such award (the “second party”) shall have the right to request that FIBA sanction the first party. The sanctions can be imposed by FIBA:

- a. *A monetary fine of up to EUR 100.000; this fine can be applied more than once; and/or*
- b. *Withdrawal of FIBA-license if the first party is a player’s agent; and/or*
- c. *A ban on international transfers if the first party is a player; and/or*
- d. *A ban on registration of new players and/or a ban on participation in international club competitions if the first party is a club.*

The above sanctions can be applied more than once.

301. *The second party shall send to FIBA with his request a complete file of the BAT proceedings.*

The decision on the sanction is taken by the Secretary General or his delegate. Before taking his decision he shall give the first party an opportunity to state his position.

302. *The decision to sanction the first party shall be subject to appeal to the FIBA Appeals Tribunal according to the Internal Regulations governing Appeals.”*

FIBA has - at the request of the winning party - made much use of the possibility of sanctioning parties, who are unwilling to pay. In actual fact - as far as is known - no BAT (FAT) arbitral award has yet been enforced under the New York Convention. A sanction under 3 - 300.d. proves to

be particularly effective because it is also the case in basketball that practically no top class club can survive without foreign players, whose registration can be banned under the above-mentioned provision.

It is not surprising that there have been several attempts to have the sanctioning procedure described here overthrown, however so far without success:

- The basic admissibility of a system similar to the one described above has been confirmed in a judgment by the Schweizerisches Bundesgericht [Swiss Federal Tribunal] of 5 January 2007 (ATF 4P.240/2006), which concerned comparable sanctions by the international football association, FIFA:

"The contested arbitral award [by the CAS] does not concern enforcement, rather it concerns sanctions based on association law. The Swiss law governing associations recognises that a breach of a member's duties can result in sanctions such as club or association penalties [...]. If, in order to achieve its purpose, a private club (like the Respondent in the present case) issues rules and provisions, to which its members submit, it is in principle lawful that it provides for sanctions in order to ensure the members' obligations. This is also conceivable in contracts under private law; notably for example the agreement of a contract penalty."

- In the internal appeal proceedings (cf. 3 - 302 of the FIBA Internal Regulations) an Eastern European club ordered by BAT (FAT) to pay players' salaries, argued against the sanctions that, although it was willing to pay, due to national currency regulations it would only be able to fulfil the arbitral award once it had been recognised under the New York Convention - knowing full well that in that country also the lack of arbitrability could be claimed to prevent enforcement. The internal appeal before FIBA was unsuccessful and the club decided not to carry the matter further to CAS. As a result, the club paid the sum owed by it according to the award.

- In another country the association of top level clubs has deleted the arbitration clause in favour of BAT (FAT) from the standard player contract and made a resolution to the effect that such clause will no longer be accepted. It remains to be seen whether the player agents are willing to abide by that rule.

8. Closing Remarks

The proceedings created by FIBA for the resolution of disputes between clubs and players or agents enjoy extraordinary popularity, as expressed by an agent with his following comment:

"First of all, I would have never thought BAT would function so good, so quickly!"

Extremely organized, punctuality in deadlines, impeccable procedures, people ready to assist and to help anyone save time and money, especially if you have in mind that a case can proceed and be judged even without travelling to Geneva, imagine the costs if all cases would have to include a trip there, a player, club gm, lawyers etc, how many times, how many nights per time ... Excellent. I really think few people in the market have yet realized what it offers ... "

It stands to reason that the clubs, who are usually the respondents, are much less enthusiastic than players about BAT and FIBA's assistance in "enforcing" BAT arbitral awards. Nevertheless, when the agents insist the clubs feel forced to agree to an arbitration clause in favour of BAT so that they are not always on the losing side when they are fighting for the best foreign players.

In view of the substantial popularity, which BAT enjoys amongst its small circle of users, the question remains as to whether the international (commercial) arbitration scene should take a closer look at those aspects which make the BAT proceedings so attractive:

8.1 The advantages of arbitration that were once celebrated as plus points, namely the costs and duration of the proceedings, now appear to be seen much more critically. Arbitration proceedings are becoming increasingly expensive and often take far too long.

Nevertheless the expediting and cost-reducing effects of BAT proceedings can be transferred to "normal" proceedings only to a very limited extent. A large number of BAT proceedings owe their existence to the fact that it had become common in many Eastern and South-Eastern European countries to simply ignore players' contracts and to sack players, who had lost the coach's confidence, even if their contracts had fixed terms and had not yet expired.

The clubs speculated - usually rightly - that the players would give up lawsuits, which were often conducted for years, in a foreign language and according to a foreign legal system before the state courts of the respective contracting country, and would not pursue their rights any further. In BAT proceedings, if the facts of the case are like that, a substantive defence to the claim is often difficult; the task of the BAT arbitrators is therefore comparatively simple and other possible procedural gorilla dust is largely prevented by the BAT Arbitration Rules.

8.2 It stands to reason that probably the biggest advantage of BAT proceedings is that FIBA can support the enforcement of arbitral awards with sanctions and can therefore make costly and time-consuming enforcement proceedings under the New York Convention unnecessary (to the extent they are legally possible at all). However, such "support measures" are only possible in the context of organisations, who threaten their "members" with disadvantages, which they can also enforce if arbitral awards are not honoured. This is primarily the case with the monopolistically and hierarchically organised structures in sport, but is also conceivable in similarly structured organisations.

8.3 Those factors which lead to significant simplification and expediting effects in BAT proceedings (single arbitrators, hearing only upon request, ex aequo et bono, computer-aided proceedings) could also be sensibly used in a number of non sports-related arbitration proceedings. Particularly, the increased use of modern communication technology can lead to quicker and thus less costly proceedings in the entire arbitration practice without the risk of loss in quality.

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(For more information see page 133)

Intellectual Property Rights in Basketball

by Lucio Colantuoni and Cristiano Novazio*

1. Introduction

1.1 Background

Traditionally, “intellectual property” connotes a legal system of protection of immaterial goods that have significant economic importance: it refers to the result of human creativity and imagination such as, for example, artistic and literary works, the industrial inventions and the trademarks. Intellectual property rights (IPR) influence three dimensions of a community: socio-cultural, economical and environmental. Copyright and Image Rights particularly affect the cultural/artistic process, to the point that they can influence freedom of expression. Patents and Trademarks become such an integrated part of the product and of the industrial/commercial processes that they regulate significant and economically relevant aspects (production, use and circulation).

Intellectual Property can be divided into two categories: Industrial Property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Copyright may subsist in creative and artistic works (e.g. books, movies, music, paintings, photographs, and software) and gives the copyright holder the exclusive right to control reproduction or adaptation of such works, for a certain period of time. A patent may be granted for a new, useful, and non-obvious invention, and gives the patent holder a right to prevent others from practicing the invention without a license from the inventor, for a certain period of time.

Trademark is a distinctive sign, which is used to distinguish products or services of different businesses.

In this work, we will analyze the specific role of intellectual property rights regulation in sports industry. Of course, American legal system can be defined as the true forerunner of marketing applied to sport. In particular, the absolutely innovative legal review on celebrities’ image rights established by American law represented a significant turning point, which has significantly influenced European experience. In addition, legal practices such as licensing and merchandising have constituted for several decades a fundamental component of sports law in USA and, therefore, they have a high level of sophistication and complexity that are not found in other jurisdictions¹.

The analysis will continue pointing out some peculiarities of basketball context and, in this regard, the experience of English and Italian systems is not fully developed, because within these countries, this sport, even if extensively played, does not have a great commercial impact and,

therefore, ip rights infringements very rarely occur. Consequently, this paper will focus on the American experience, where basketball has a great market and the Courts have stated important principles on ip rights.

1.2 The Importance of IP Rights in Sports

IPR are generally important in business and, in particular, in sports business. They have a value and importance on their own, and also as marketing tools. Branding of sports, sports events, sports clubs and teams, through the application and commercialisation of distinctive marks and logos, is a marketing phenomenon that, in the last 20 years, has led to a new lucrative global business of sports marketing².

A growing part of the economic value of sport is linked to intellectual property rights. In an increasingly globalised and dynamic sector, the effective enforcement of intellectual property rights around the world is becoming an essential part of the health of sports economy. Use and exploitation of intellectual property (IP) in a sports business context are, in themselves, unremarkable. IPR within sport have become an extremely important asset, as for many modern commercial businesses.

After the Second World War, as the influence of cinema and, later, of television grew, so, slowly, did the status of the professional footballer as a sports and television personality who could sell commercial products through advertising, sponsorship and merchandising. In fact, commercial exploitation of the image rights of famous sports persons is a big business.

Equally, licensing and merchandising rights in relation to major sports events, such as FIFA World Cup and Olympic Games, are “hot properties”, commanding high returns for the rights owners and concessionaires alike³. Likewise, sports broadcasting and new media rights are also money-spinner.

In relation to the commercialisation of sports events, it is essential to have trademarks, copyrights or other legal protections of event marks and logos. Otherwise, there is nothing that an event organiser can exploit for business purposes, like media or merchandising rights, which provide a lucrative source of income for sport in general and sports event in particular.

In sum, the role played by intellectual property rights in connection with organization and promotion of sporting events and commercial exploitation of athletes and teams is crucial and significant and has not to be underestimated. Indeed, without exploitation of such rights, many major sports events could not be staged - as there would be nothing that could be commercialised and exploited and, therefore, no financial returns available for defraying costs. As with the granting and commercial exploitation of all intellectual property rights, attention to details is the key to their success; as also is a holistic approach, especially one that reflects and respects the special characteristics and dynamics of sport.

2. The International Discipline of Intellectual Property Rights: Brief Legal Background

The intrinsic characteristics of IPR - that they can circulate with extreme facility outside national borders - has led to a strong acceleration of previous initiatives in order to achieve international harmonization. The following part reviews past and recent international agreements.

Paris Convention for Protection of industrial property⁴, signed in Paris on March 20, 1883, constitutes one of the first treaties on intellectual property.

Berne Convention for Protection of Literary and Artistic Works⁵, signed in 1886, is the oldest international treaty in the field of copyright.

These two Conventions, conducted in the ambit of WIPO⁶, only

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¹ English legal system is also of great interest, in particular for its peculiar approach to the issues of image rights, which are protected through the doctrine of passing off. Italian system in this area of law is also important, because, through a careful interpretation of labor law, it combines personal and financial aspect of image right. In practical terms, then, for several years, the Italian clubs are trying to develop a more targeted marketing

policy, although at still low levels, especially when compared with other rich countries’ experience.

² S. Gardiner, *Sports Law*, Third Edition, 2006, p. 400.

³ I. Blackshaw, *Sports licensing and merchandising - the legal and practical aspects*, 2002, in *International Sports Law Journal*, 22-25

⁴ Paris Convention was revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and it was amended in 1979.

⁵ The first major revision took place in Berlin in 1908, and this was followed by revisions in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris in 1971.

supplied a general picture, and any State can provide protection remaining within one's border in honour of principle of territoriality.

The international community, however, did not have a single source for intellectual property obligations and norms until 1994 Uruguay Round of General Agreement on Tariffs and Trade created the World Trade Organization (WTO) and included Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Significance of TRIPS Agreement is three-fold. It is the first single, truly international agreement that:

- establishes minimum standards of protection for several forms of intellectual property
- mandates detailed civil, criminal, and border enforcement provisions; and
- is subjected to binding, enforceable dispute settlement. TRIPS, in effect, lays the groundwork for a strong and modern IPR infrastructure for the world community.

In the international landscape, there are other treaties specifically dedicated to the matter of intellectual property, such as:

- PCT (Patent Cooperation Treaty): this Treaty makes possible to seek patent protection for an invention simultaneously in a large number of countries by filling an "international" patent application;
- Madrid Agreement Concerning International Registration of Marks, and Protocol Relating to Madrid Agreement: Madrid system for registration of international trademarks offers the owner of trademark the possibility to protect his brand in several countries (members of the Madrid Union) simply by presenting the request at his national or regional patent office;
- Geneva Copyright Treaty: Contracting Party must ensure that enforcement procedures are available under its law in order to permit an effective action against any act of infringement of rights covered by the Treaty. Such action must include expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

3. Intellectual Property Rights in the Field of Sport

Intellectual property rights have an unchallenged value and they are generally very important in business and in sports in particular. World Bank's Global Economic Prospects Report for 2002 confirmed the growing importance of intellectual property for today's globalised economies, finding that "across the range of income levels, intellectual property rights (IPR) are associated with greater trade and foreign direct investment flows, which in turn translate into faster rates of economic growth".⁷

This phenomenon is so important that Sports Rights Owners Coalition (SROC), which includes 37 sports institutions - from soccer's Premier League and FIFA to cycling's Tour de France and World Snooker - seeking international treaties in order to "protect and promote the special nature of sport" and its intellectual property rights in a fast-changing digital world. In particular, the purposes of SROC are to enable:

- discussion and sharing of best practice on key legal, political and regulatory issues,
- raising awareness of new developments and innovation in sports rights, and
- sport to take joint actions in order to protect and promote their rights.

Actually, SROC members are looking to national governments and international treaty organisations such as European Union, WTO and WIPO in order to:

- fully recognise, protect and promote the special nature of sport and sports rights,

- provide comprehensive protection for sports rights, including their names, logos and marks, outlaw ambush marketing and ticket touting/scalping,
- create a regime for sports betting that enables sport to protect its integrity, and establishes a fair return.

In the international sport area, mark is undoubtedly the intellectual property right that finds the widest application. A great variety of entities may be used as trademarks, obtaining a different protection in connection with the national law system of reference.

An important exception is surely constituted by Olympic Movement Symbol (five interconnected rings in blue, yellow, black, green and red) that has a special trade mark protection on international and national level.

In sport application, the following entities have been object of registration as marks:

- the name - like former NBA player Michael Jordan;
- the nickname - like NBA player Shaquille O'Neil "Shaqtus";
- the image - like FI stars Jacques Villeneuve and Damon Hill;
- the sporting slogans and mottoes, like Erik Cantona, the soccer player, who registered the slogan "Ohh aah Cantona" as a trade mark;
- the sport club names and logos;
- the distinctive autograph of a famous athlete;
- the name and associated logos of sport events;
- the mascot of a sport club⁸.

The main problem of trying to use trade mark law in order to obtain protection against an unauthorised use of a celebrity's name or image is that this use is likely to be merely descriptive of the character of the goods the name is attached to, rather than an indication of trade origin, and therefore not an infringement of trade mark owner's rights⁹. For example, the owner of copyright of footage on Alan Shearer while playing football could include his name in the packaging of a video of that footage, notwithstanding the fact that Shearer's name is registered as a trademark, because it would be used merely to describe what was inside the packaging, not to indicate that Alan Shearer himself had produced or authorised the production of the video.

Copyright and patent law can also find application in the specific field of sport.

In particular, copyright protects:

- the names of a sport event: usually it is not qualified for protection as literally works, but when they are with distinctive logo they may be qualified as artistic works;
- the music of a sporting event: for example, the music that introduces UEFA Champions League transmission benefits from copyright as a musical work;
- the photographs of sports athletes and sport events can benefit from copyright protection as artistic works.

Patents may be obtained in connection with building and operations of new sports installation and facilities: for example the case of golfer Bernard Langer, who has registered the patent of inverted putting grip, and former basketball player Kareem Abdul Jabbar, who obtained the patent for sky hook scoring shot.

3.1 Image Rights in Sports

In sports market there is another category of rights which needs to be protected and it concerns, specifically, athletes' personality rights, like name and image rights. This kind of right, known in different jurisdiction by a variety of names, including right of publicity (USA), right to privacy (UK) and right of personality (Italy), stands in a difficult juridical qualification zone that presents certain connections with the right of intellectual property. There are two aspects of image rights' protection. There are those who wish to control their image's use as a form of privacy. There are others, like sportsmen, with a high reputation, who wish to control their image's use as it affects their income.

In the United States, right of publicity, is defined as intellectual property, whose infringement constitutes an offence and practice of unfair competition. Historically, US Courts refused to recognize a celebrity

6 WIPO is an intergovernmental organization that became in 1974 one of the specialized agencies of United Nations. WIPO has two main objectives. The first is to promote protection of intellectual property worldwide. The second is to ensure administrative cooperation among intellectual property Unions, established

by treaties that WIPO administers.

7 See usinfo.state.gov/products/pubs/intelprp.

8 S. Gardiner, op. cit., p. 405.

9 J. Taylor - S. Boyd - D. Becker, Image rights, in Adam Lewis, Jonathan Taylor, Sport: law and practise, 2003

right to privacy. Later, the courts stated that all private individuals had a basic right to be left alone and they started to recognize a right of privacy as a way to protect private individuals against outrageous and unjustifiable inflictions of mental distress by press and advertisers. Afterwards, it became obvious that in order to prevent unfair enrichment of others at the expense of celebrity reputation, right to privacy was extended to include right of publicity. Therefore, the American courts legitimated a commercial view of image rights; this evolution is reflected in the linguistic tenor of some of the numerous regulations that have given an expressed protection rule, as it is testified by Personal Rights Protection Act of Tennessee, where "every individual has a property right in the use of his name, photograph or likeness in any medium, in any manner" (Section 47-25-113).

In United Kingdom, it appears very difficult to protect famous persons' name and image due to the absence of a specific law protecting personality rights. Famous persons have to rely on a rag bag of laws, such as trade mark and copyrights law and common law doctrine of passing off. The latter¹⁰ is intended to protect the good commercial reputation of all those economic activities that do not possess the necessary characteristics to obtain a full protection from intellectual property rights (such as patents, marks and copyrights). Three elements are required to constitute a case of 'Passing Off', namely:

- reputation or goodwill acquired by claimant on his goods, services, name or mark;
- misrepresentation by defendant leading to confusion (or deception); causing
- damage to claimant.

In substance, according to British provisions, image's right technically do not exist, but they acquire a status of similar intellectual property right.

Italy had traditionally qualified image rights only as a right of personality. Due to American influence, however, it is nowadays defined as a right of double nature, both personal and patrimonial. Although embracing the American thesis, Italian system has followed a different juridical path.

In the United States right of publicity was a judge-made common law creation that has anticipated the subsequent recognition through legislation. While in Italy image right constitutes a codified right [Art. 10 of Civil Code - abuse of other people's image and art. 96-97 L.D.A. (disposition on copyright)], that remained the same even after the above influence. Italian Courts, in short, have only supplied a different interpretation of a rule that has never been changed.

Particularly, professional athletes' image rights constitutes, nowadays, an essential component of sports marketing. In fact, endorsing products or lending image has become for some athletes more lucrative than their professional contract. At the root of this commercial mix there are athletes, whose value is constituted by their image, over which they have a complete ownership. This is a developing area of law, which can be broadly understood by reference to what rights rest in a person (normally famous) in order to exploit those rights that arise from their own image or personality. It is, to some extent, founded on copyright and trademark but, generally, arises out of the imposition of a contractual obligation or reservation to the person involved of certain rights that stem from the use of that person's name or image. In fact, many sports organizations are adept in leveraging this asset to their own benefit by forging commercial relationships with their athletes and in turn, using athlete's visibility in order to forge marketing relationships with spon-

sors and others. Clubs want to maximise their assets to please their shareholders and, within these assets, there are players' images and brands. In order to control these assets they need to contractually acknowledge their existence.

Assuming that image rights do become a species of intellectual property, whether in law or in practice, one of key practical questions will concern the precise circumstances in which such rights may be infringed. If a third party (a pirate merchandiser or a rival sponsor) uses any of licensed player's signs without his consent, what the player or the authorised licensee can do about depends on whether the courts, in the jurisdiction concerned, recognise any legal right to player's signs under intellectual property, advertising, privacy laws. The existence of goods and services bearing the individual's name or image (and therefore the possible implied suggestion that the individual has approved or endorsed the products), without any authorisation, can in some cases seriously damage the value of a sporting personality's licensing rights in his image. Not only does the individual suffer the loss of royalties he might have earned, but also his image may depreciate in value by affixing his name and image to inferior goods or materials. It may also deprive him of another lucrative endorsement contract, due to loss of exclusivity. Many jurisdictions now protect athletes against these harms, and the underlying trend towards a proprietary right in personality will remain. Image rights will become a permanent part of the sports marketing spectrum, alongside TV rights, sponsorship rights and merchandising rights.

3.2. TV Rights in Sports

Sport has overwhelming global appeal transcending national, cultural, religious, and gender boundaries, as well as socio-economic class. Sale and exploitation of sports broadcasting rights around the world, which contributes huge sums to many sports and sports events are the most important and lucrative potential revenue streams in sports marketing, which include sponsorship, merchandising, endorsement of products and services, and corporate hospitality.

The best illustration of how much sports programming has increased in value over the years is National Football League (NFL)¹¹. In 1962, NFL signed its first national television contract for a total of \$4.65 million a year, or \$320,000 for each team. In 2010, 32 NFL teams earned a total in excess of \$20 billion in rights fees.

The United States has a much more diverse set of sports leagues available for broadcasting than any other part of the world. There are major professional sports leagues for baseball, American football, basketball and hockey, which have been in existence for decades and which have lucrative broadcasting contracts with various commercial broadcast networks, local broadcast stations, direct broadcast satellite services, and cable networks.

In addition, college basketball, college football, professional soccer, professional golf, professional tennis, and automobile racing enjoy wide broadcast exposure.

The importance of media right in the European football is exemplified by English FA Premier League, which has sold its broadcasting rights for the 2007-2010 seasons for a record sum of £1.7 billion. In Italy, profits for 2008-2010 seasons in "Serie A" have been about €1.4 billion in total, while the forecast for 2010-2016 seasons is about €900 million per year.

The most important legal issues, raised in the commercialisation and exploitation of sports broadcasting rights, are:

- ownership of sports broadcasting rights, including the position of individual sports persons, teams, clubs, venue owners;
- the different methods of protecting them, including copyright;
- the different methods of exploiting them, including collective selling and buying, as well as 'pay per view' and 'free to view' arrangements;
- the so-called new media rights, including the 'streaming' of sports broadcasts on Internet (so-called 'webcasts') and on the so-called 'third generation' mobile phones¹²;

There is a widespread agreement that broadcast of sports event constitutes a copyrighted work. Focal point of the discussion on nature of sports media rights is the determination of the moment when a broad-

¹⁰ Tort of passing off protects goodwill and reputation of individuals and companies, which arises as a result of their business activities. Claimant must demonstrate that there has been a misrepresentation and public has been deceived into believe that trader's goods or services are those of claimant. Damage as a result of passing off must also be established.

¹¹ NFL produce an annual series of interrelated football games involving all of its 28

member clubs, annual division championship race, a nine-game post-season playoff tournament, and ultimately a Super Bowl game and league champion. See, on point, G.R. Roberts, The single entity status of sports league under s.1 of the Sherman Act: an alternative view, 1986, 60 Tulane Law Review 562, p. 569.

¹² See W. Fisher, Nothing but the internet, in Harvard Law Review, March 1997.

casting of sports event receives its copyright protection. In other words: can an event itself be protected by copyright law, or is it only its broadcast, which receives its intellectual property law protection?¹³ The former hypothesis would increase revenue of holders of those rights and stimulate long-term strategic investment in this industry.

On the other hand, if sports media rights are protected only as broadcasting rights, it would create incentives for competitors of exclusive rights holders to seek the ways to exploit sports events, by creating an alternative content, which might be of interest to particular segments of audience¹⁴. This aspect has been object of many debates, and the majority of authors stated that sports media rights have to receive their copyright protection already at the stage of sports performance¹⁵.

It must be clear that this kind of copyright is not an absolute right. It can be compromised, limited or overruled by other rights and public interests, such as, for instance, right to fair competition, right to information, right to access to artistic heritage, right to coherent cultural development, right to innovations and expansion of new forms of media products, fair use, sports parody, etc.¹⁶

New formats for content delivery have become a very attractive way to reach viewers, and their share of media market has increased exponentially. Digital technology diversifies consumer choice. For some segments of consumers, new media platforms can be seen as a partial substitution of traditional ones. In this situation, technological tensions are unavoidable, in particular, if traditional broadcaster is not interested or simply unable to provide its content via new media. In the domain of premium sports, those tensions are even more severe, inasmuch as sports media rights constitute the major engine for development of new media platforms. Usually, companies which operate in this market are not able to obtain rights to broadcast sport event, because most of these rights are distributed by event organisers on the principle of exclusivity. This model is seen as a main requirement of traditional media, which prefers obtaining all media rights to sports event, even if some of them are not exploited in their entirety.¹⁷

This helps them to preserve *status quo* and does not allow dissemination of media rights between many potential content operators. For example in Italy, during 1998/1999 "Serie A" season, the most important TV broadcasters (RAI, Mediaset and Telemontecarlo) signed an agreement in order to share out some of TV rights on football matches. AGCOM (the Authority that ensures equity within broadcasting market), with its sentences n. 6633 and 6662 on 3.12.1998, stated that the above agreement was against market rules because - *de facto* - it left out other competitors. Nowadays, with a new law in the matter of TV rights in sport (D.Lgs. 9/2008), applicable from 2010-2011 season (not only in football but also in all professional sports), it will be forbidden to TV broadcasters to keep more than one platform right. Each broadcaster can only buy one of the rights on the market (for example, one can buy the satellite broadcasting rights, but not the digital ones, which it could eventually license to others).

3.3. Licensing and Merchandising in Sports

Due to the fact that intellectual property shares many of the characteristics of real and personal property, associated rights permit intellectual property to be treated as an asset that can be bought, sold, licensed, or even given away at no cost.

Licensing and merchandising are generic names given to agreements which provide for use of name, logo, trade mark, livery colours and

other properties of and relating to a person, club or organization in order to brand or publicise goods and services which are not directly connected with the core business of that person, club or organization.

Sport licensing is reputed to be worth more than \$ 125 billion in global sales, with the US, Far East and Western Europe represent 85% of the global licensing market. Success of sports licensing depends not only on negotiating the best possible commercial and financial arrangements, but also on carefully drafting licence agreements¹⁸ in order to reflect the particular circumstances and dynamics of sporting events they are related to.¹⁹

Licensing of intellectual property rights in connection with sport and sporting events is becoming an even more popular phenomenon. Sports licensing and merchandising programmes offer a wide range of possibilities including:

- sports events and team logos and emblems ("logo licensing");
- sports events and team mascots ("character licensing");
- sports stars licensing ("personality licensing");
- sports clothing and footwear licensing ("product licensing").

Copyright, logos, patents and trademarks are licensed to persons or organizations who wish to exploit a name, reputation, event or personality and, thus, merchandising of national and international sports events, emblems and mascots and personalities is now a common practice for many major sporting events.

Nowadays, television and popularity of sport has meant clubs coming to terms with a much more complex and lucrative financial environment and many top clubs are turning to marketing and 'branding' as a means of maintaining and extending their competitiveness. A brand is a fundamental resource for clubs and brand management is a key strategy for professional sports teams. Marketing and branding are increasingly important in sports industry.

A sports club has a number of likely advantages over other branded products:

- 1 brand loyalty: fans rarely switch allegiance between clubs and their products;
- 2 brand longevity: football appeals to all age groups and increasingly across the social classes;
- 3 low marketing expenditure: football has little need to spend on marketing its product because of its established position in the marketplace.²⁰

Merchandising in sports area has undergone an incredible development during the end of the '80's and the beginning of the '90's. In this field, the United States anticipated everyone with the experiment of the National Football League (NFL), which in 1963 was the first sports organization that formally and officially defined a licensing program for all its affiliates. Nowadays, sport licensing industry ranks as one of the top revenue producers in licensing world.

Elsewhere, merchandising is growing in importance as a potential source of additional revenue for sports clubs, but remains under-utilized, especially in Europe.

This is especially true in Italy, where revenues currently account for only 25% of total revenues. More specifically, according to estimates provided by Italian Soccer League (Lega Calcio), revenues derived from merchandise account for only about 3% of total revenues of Serie A teams.

In England, in 1990, following National League Baseball Association example, Arsenal Football Club were one of the first clubs to register its name, to stop traders outside the football ground selling the club logo at an undercut price. Following this, League and all individual clubs now jealously protected 'official' club and League products from reproduction or imitation by non-club producers. Now, all top clubs have extensive club shops or superstores and some of them have one in different places selling exclusive, official club products.

4. Intellectual Property Right in Basketball: The NBA Case

4.1. General Background

In the United States, recent litigations reflect the continuing struggle over the extent to which sports leagues, teams and athletes are able to

13 O. Andriychuk, The legal nature of premium sports events: IP or not IP - That is the question, in *International Sports Law Journal*, 2008/3-4, p. 52.

14 Ibid.

15 See O. Andriychuk, op. cit., p. 52. For the author, such owner-friendly approach is justified by a range of mainly legal evidences, which are summarized in a formula "each commercially attractive event of an artistic nature, regardless of predictability of its results and its aesthetic creativity, shall be granted a copyright status".

16 Ibid.

17 O. Andriychuk, op. cit., p. 65.

18 For a complete study of a licence agreement see B.B. SIEGAL, Merchandise licence agreement: an overview of key provision, in <http://www.alabar.org/sections/intellectualproperty/pdf/BruceSiegal-LicenseAgreements.pdf>.

19 I. Blackshaw, Licence to thrill, 2000, 5 *Sport and Character Licensing*, 6-8.

20 S.Howard-R.Sayce, Branding, sponsorship and commerce in football, in www.le.ac.uk/sociology/css/resources/factsheets/fs11.html.

control - and prevent the unauthorized use of - their intellectual property rights.

Whether it is a sports league's right to exploit all broadcasts of its games or the colours and uniforms of its teams, or an athlete's right to prevent others from using his image for commercial gain, intellectual property rights have been - and will continue to be - a heavily litigated subject for professional sports leagues, teams, and athletes, as well as those looking to "cash in" on the commercial value of those rights.

Within basketball sector, NBA (National Basketball Association) is considered as the most successful U.S. sports league overseas in attracting fans and their money. Indeed, generating \$3.2 billion a year in revenue, NBA is undoubtedly the world's leading basketball league.²¹

Courts have traditionally regarded NBA and similar professional sports leagues as joint ventures²², which are associations of "two or more persons formed to carry out a single business enterprise for profit for which purpose they combine their property, money, effects, skill, and knowledge".

For example, the enormous merchandise licensing revenues that NBA receives is the result of the background legal rules concerning a team's intellectual property rights and the economics concerning sale of such property rights.

In particular, NBA utilizes a particular organizational structure in order to negotiate merchandising and licensing agreement with third parties. Rather than having its teams negotiate separately with different companies, NBA League has created an entity to act as an exclusive negotiating agent for all League and clubs in merchandising and sponsorship activities.

This entity is NBA Properties Inc. that acts as the league's licensing arm; League also controls trademark and logos of all teams outside each team's own area. In addition, all twenty seven teams have granted NBA Properties the exclusive right to internationally licence and use their marks. Incomes collected from such deals are pooled and shared evenly among the teams.²³

4.2. Protecting Broadcasting Right and Information about NBA Events

4.2.1 Introduction

Sports television is an unique form of broadcasting compared to other programming genres due to the relationship between a professional sports league and a broadcast network.

The most unique characteristic of sports television is that a league and a television network sign a multi-year contract for broadcasting rights. Television networks pay large sums of money to a sports league for right to broadcast a certain number of games over a certain number of years. Then, the television network sells commercial time during these games to advertisers.

This type of relationship exists due to the fact that Federal government, according to Sports Broadcasting Act (SBA), grants to a sports league to act as a cartel and collectively package and sell broadcast rights of its games to television networks.

Whether broadcast on radio or television, practically any professional sports event comes with these warranties, which secure a very valuable right: i.e. the right to protect original works of authorship, better known as copyright. Such right are valuable for everyone, but in the world of professional sports, like basketball and their billion dollar industries, copyrights are more than just important, they are essential to survive.²⁴

Regarding copyrights issues, within NBA League, a growing conflict can be underlined, which is basically caused by two following factors:

- the enormous suggestive and economic value of US basketball, that implies several infringement attempts by third parties in promoting their business;
- the development of new technologies that broadens the range of possible uses of rights.

4.2.2. Judicial Cases

If the legal protection of sports appears clear in those events organized by NBA, the preservation of elements connected to the game, that are focused on meeting public information, is more problematic.

In fact, due to copyright law, US Congress has accorded protection on telecasting of live games, but it has become fundamentally clear, since **NBA v. Motorola**²⁵ case, that facts relating to underlying games do not warrant that same protection.

This leading case is in many ways the watershed ruling which defines where sports leagues' ability to control third parties' use of game-related information ends and the public domain begins.

The original conflict between NBA and Motorola came about through technological progress.

American National Basketball Association (NBA) sued Motorola for transmitting real-time information about basketball matches with a two-minute delay to users of Motorola's "Sports Trax" device, a hand-held pager that displayed updated scores and statistics of NBA games as they were played. Information available included score, team in possession of the ball, free-throw bonus, time elapsed and time remaining.

NBA also sued STATS for transmitting slightly more comprehensive real-time game information via Internet (scores delayed by 15 seconds and statistics by one minute). STATS had originally approached NBA in order to obtain a licence for this service, but could not agree terms, so it had, then, decided to launch its service without NBA's permission.

The District Court had previously found in favour of NBA and, subsequently, Motorola and STATS appealed to New York Court of Appeals.

This Court had to decide whether the unauthorized transmission of "real-time" information on matches in progress constituted an infringement of the event organizer's copyright or property right.

The Court of Appeals found that Motorola and STATS had not infringed NBA's copyright over recorded broadcasts because they only reproduced facts, not the protected expression or description of the game that constituted the broadcasts. Furthermore, by not using any images of the broadcasts, but merely factual information which anyone could acquire without the involvement of a cameraman or director, they had not infringed any copyright.

Furthermore, the Court found that the unauthorized use of game statistics gathered via public sources, such as television or radio, did not amount to misappropriation or violate NBA's broadcast rights.

The Judge scrutinized the claim through a copyright preemption analysis, as well as a "hot-news" misappropriation claim. The court pointed out that the fact gatherers were not within the stadium, and that in recording these statistics from information in the public domain they had not misappropriated anything that was subject of copyright.

The Court also ruled that the facts underlying sports games cannot themselves be copyrighted. Thus, once the broadcast is in public domain, news sources may expend their own resources to collect and transmit purely factual information about the game by watching broadcasts themselves, and not infringe any copyright held by a sports event organizer.

Because underlying facts in a copyrighted work are not considered copyrightable, a third party wishing to use those facts need not to obtain any license. Therefore, scores and statistics broadcast during a sporting event do not themselves come under the umbrella of copyright protection, as does the broadcast itself.²⁶

In another important, although less widely publicized case, involving sports event organizers' ability to use credentials to restrict media action, NBA challenged a violation by New York Times of the terms of NBA's media credentials²⁷.

The case involved NY Times photographers sent to cover NBA games through the use of media credentials. These credentials, which explicitly limited use of photographs for "news coverage of the game" only, state as follows: "*The use of any photograph, film, tape or drawing of the game, player interviews or other arena activities taken or made by the*

21 M. A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, in *Journal of Sport and Entertainment Law*, Harvard Law School, Vol. I, n.1, 2010, p. 42.

22 M. A. McCann, *op. cit.*, p. 52.

23 S. Rosner - K.L. Shropshire, *The business of sport*, 2004, p. 185.

24 H. M. Burch, *A Sports Explosion: Intellectual Property Rights in Professional Athletic Franchises*, in *Sports Lawyers Journal*, 1998.

25 *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841, 41 U.S.P.Q.2d (BNA) 1585 (2d Cir. 1997).

26 For a closer examination see E. DE LA ROCHEFOUCAULD, *Collection of sport-related case law*, in http://multimedia.olympic.org/pdf/en_report_264.pdf, p. 73 ss.

27 *National Basketball Association v. The New York Times Corporation*, No. 602858/00 (Sup. Ct. N.Y. City).

accredited organization or the individual for whom this credential has been issued shall be limited to news coverage of the game by the organization to which this credential is issued, unless expressly authorized in writing by the NBA".

When NY Times sold these photographs to the public at a profit, NBA brought suit claiming that NY Times sale was a violation of the terms of press credentials.

Unlike Motorola, which involved information in the public domain, NBA v. NY Times dealt with restrictions on what media could do outside the arena with information gathered inside the arena.

NBA argued that in obtaining credentials, members of press are consenting to a contract with NBA for a limited license that conditions access to the arena on media organization's agreement to restrict its use of any film or photographs of the game to "news coverage".

NY Times moved to dismiss on copyright preemptive grounds, arguing that it held the copyright to its photographers' photos, and that NBA could not restrict those rights.

The Court, in denying NY Times' motion to dismiss, concluded that the issue was one of contract and not copyright, and that NBA has demonstrated *prima facie* evidence of a binding contract.

This case gave demonstration that, through the use of contractually based credentials, sports event organizers can control distribution of factual information gathered within a private arena, including facts distributed via blogs.

However absent such contractual restrictions, Motorola teaches that control over dissemination of real-time information is likely limited at best, once the information has entered the public domain.

The inherent limitation of credentialing, however, is that only those who have accepted the contract restrictions - such as event attendees and members of the press - are bound by them.

4.3. Name and Image Rights of College Athletes: an Emerging Ground of Dispute

4.3.1 General Topics

For an individual athlete, no intellectual property is as important as his or her right to publicity: it gives the athlete the exclusive right to capitalize on the fame achieved, through talent and hard work on courts and fields.

In the United States, while the right of publicity is not recognized under Federal law and not uniformly recognized in each state in the U.S. and it is differently applied in those states that do recognize the right, it has gradually achieved acceptance by many state courts and state legislatures.

It is common opinion that exploitation of sportsmen's names and images only regards professional sports. This rule is infringed by American sports, in which there are high levels college championship that receive great consideration by media and commercial operators, who want to exploit such events.

National Collegiate Athletic Association (NCAA) is a semi-voluntary association of 1,281 institutions, conferences, organizations and individuals that organizes athletic programs of many colleges and universities in the United States and Canada.

Very often College basketball refers to US basketball competitive governance structure established by National Collegiate Athletic Association (NCAA). Basketball in NCAA is divided into three divisions: Division I, Division II and Division III.

NCAA basketball, a part of the larger sports universe, has become its own big business. But this has happened in a relatively short space of time, with broadcast and cable television serving as a powerful handmaidens.

In 2010 NCAA announced that it has signed a 14-year, \$10.8-billion contract with CBS and Turner Broadcasting to televise its men's basketball tournament. The deal will funnel at least \$740-million annually to

NCAA member colleges. More than 95 percent of the NCAA's revenue comes from its tournament contract.

Under the new agreement, which includes Internet, wireless, and marketing rights, every game will be shown live on one of four national television networks. CBS shares early-round coverage with TBS, TNT, and true TV.

Advertisers from Nike to Chevrolet have also been attaching themselves to NCAA sports, and in some cases, individual players, for some time now.

In fact, on March 10, 2009, for example, Nike announced it would outfit the players of five NCAA teams for tournament play - Duke, Gonzaga, Memphis, Michigan State, and the University of Oregon. Nike would equip these players head-to-toe with a "360 treatment, providing base-layer apparel, unique uniforms, and customized footwear".

4.3.2 Intellectual Property Rights in NCAA World

On July 21, 2009, former UCLA basketball player Ed O'Bannon filed in the United States District Court, Northern District of California a class action suit against videogame publisher Electronic Arts, Inc. ("EA"), the National Collegiate Athletics Association ("NCAA") and Collegiate Licensing Company ("CLC") regarding use of athletes' images for DVDs, TV, photos, memorabilia and advertising.²⁸

Ed O'Bannon is arguably one of the most recognized collegiate athletes of the last 30 years. There are numerous examples of commercial products that specifically use the likeness and image of Mr. O'Bannon for promotional purposes.

The class action lawsuit was filed on behalf of O'Bannon himself, former student-athletes who competed in Men's Basketball and current student-athletes.

In the complaint, O'Bannon contends that the NCAA has violated his right of privacy, as well as the right to publicity of the classes by licensing their likeness and image, without permission and for profit, and that NCAA has not shared that revenue with the classes.

NCAA asserts that they have the right to license O'Bannon and classes' likeness and image because they signed "Form 08-3a", where student-athletes authorize NCAA to use their "name or picture to generally promote NCAA championships or other NCAA events, activities or programs".

O'Bannon counters saying "Form 08-3a" is illegal, because it is vague and ambiguous, and was signed by student-athletes without representation, and was coerced from student athletes in exchange for their eligibility to practice and compete in their sport.

NCAA requires that any student-athlete completes every year NCAA's "Form 08-3a", also known as the Student-Athlete Statement. The most relevant issue is on its Part IV, stating "*Promotion of NCAA Championships, Events, Activities or Programs*" (About Us) which states, "*You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs*"; (Addendum A): "*If student-athletes do not sign this form, they are deemed ineligible for practice and competition until the Student-Athlete Statement is signed and completed*". This is the form that NCAA references in their claim that they have the right to license likeness and image of former student-athletes

On February 9, 2010 the Federal judge denied NCAA's motion for dismissal in O'Bannon v. NCAA and this ruling means that NCAA's licensing contracts, and many other types of documents, will be subject to discovery.

However, O'Bannon has a strong argument that "Form 08-3a" is illegal. The actual language of "Form 08-3a, Part IV" is vague and ambiguous. It does not provide any information on when, where, and how NCAA may "generally promote" events or activities.

There are two core areas of law implicated by O'Bannon v. NCAA.

Firstly, by requiring student-athletes to forgo their identity rights in perpetuity, NCAA has allegedly restrained trade in violation of Sherman Act, a core source of federal antitrust law. Here's why: student-athletes, but for their authorization of NCAA to license their images and likenesses, would be able to negotiate their own licensing deals after leaving college. If they could do so, more licenses would be sold, which

²⁸ US District Court for the Northern District of California, O'Bannon v. National Collegiate Athletic Ass'n, case 4:09-cv-03329-CW. For more information see M. ZYLSTRA, Ed O'Bannon vs. NCAA: An examination of O'Bannon's

legal claim that the NCAA illegally uses the likeness and image of former student-athletes, in Business Law, 2009, available on <http://firemark.com/wp-content/uploads/2009/12/Michelle-Zylstra-BLAW-205-paper.pdf>.

would theoretically produce a more competitive market for those licenses. A more competitive market normally means more choices and better prices for consumers.

Secondly, according to the plaintiffs, NCAA has deprived them of their “right of publicity”. The right of publicity refers to property interest of a person’s name or likeness, i.e. one’s image, voice or even signature.

In assessing O’Bannon’s claims, a Court will consider the extent to which student-athletes possess a real “choice” when presented with Student-Athlete statement and similar documents. On that front, O’Bannon appears emboldened by NCAA policies on student-athletes’ access to legal counsel. According to O’Bannon, neither NCAA officials nor college athletic officials advised student-athletes that they could seek legal advice in connection with release of future compensation rights. Particularly given the lack of “life experience” of most incoming student-athletes, such a policy may be viewed as arguably exploitative and also one that creates a disparity in bargaining power.

Stakes of O’Bannon v. NCAA case are enormous. If O’Bannon and former student-athletes prevail or receive a favorable settlement, NCAA, along with its member conferences and schools, could be required to pay tens of millions, if not hundreds of millions, of dollars in damages (particularly since damages are trebled under federal antitrust law). The marketplace for goods may change as well, with potentially more competition over the identities and likenesses of former college stars.

A victory would also necessitate substantial changes in the relationship between NCAA and student-athletes. Namely, NCAA could be required to advise student-athletes of the importance of legal counsel and of ways in which student-athletes can obtain counsel.

Proponents of such outcome would likely hail the creation of a more equitable bargaining relationship between student-athletes and NCAA. Critics, in turn, would likely bemoan a more litigious experience for both student-athletes and athletic department officials. They might also be worried about diminished NCAA protection of student-athletes, with swindlers and charlatans potentially having easier access to student-athletes as they transition into the real world.

Another case law also supports O’Bannon’s claim (assuming that his Right of Publicity was violated) and this case involves another UCLA basketball player, Kareem Abdul-Jabbar, formerly known as Lew Alcindor.

In Abdul-Jabbar v. GMC²⁹, the Court, finding there were sufficient facts to state a claim, reversed the judgment of district court, and remanded for trial on the claims alleging violation of the California common law right of publicity, Section 3344, and Lanham Act.

Facts of this case show that Kareem Abdul-Jabbar was named Ferdinand Lewis (“Lew”) Alcindor at birth and played basketball under that name throughout his college career and into his early years in the NBA.

While in college, he converted to Islam and began to use the Muslim name “Kareem Abdul-Jabbar” among friends. Several years later, in 1971, he opted to record the name “Kareem Abdul-Jabbar” under an Illinois name recordation statute and thereafter played basketball and endorsed products under that name. He had not used the name “Lew Alcindor” for commercial purposes in over 10 years. GMC used Abdul-Jabbar’s former name in a commercial.

The Court stated that “[a] rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth”. The appellate court addressed the question of whether an individual has a right to publicity in their former name. (Abdul-Jabbar was identified through his years at UCLA and in his early years in NBA with his birth name, Lew Alcindor.) General Motors ran an advertisement during 1993 NCAA men’s basketball tournament, which created an association between the three consecutive years of Alcindor’s being named most outstanding player in the NCAA tournament, and the same number of consecutive years (three) that the Oldsmobile 88 had been named Consumer Digest’s “Best Buy.” The commercial showed no visual image of Alcindor, the person, but it only showed a graphic of the name. The district court ruled against Abdul-Jabbar, finding that he had abandoned his use of the name and there-

fore General Motors’ use of it could not be construed as an endorsement. The appellate court reversed and remanded stating that the “right of publicity protects celebrities from appropriations of their identity not strictly definable as “name or picture””. The court held that “by using Alcindor’s record to make a claim for its car, GMC has arguably attempted to “appropriate the cachet of one product for another””. This means that a person’s former name can remain attached to their persona and warrant protection when the appropriator sufficiently attempts to link their product to that name. Ninth Circuit held that reference to “name or likeness” is not limited to present or current use, and to the extent GMC’s use of the plaintiff’s birth name attracted television viewers’ attention, GMC gained a commercial advantage.

4.4. Licensing and Merchandising in the NBA Context

Professional sports teams, as well as colleges and universities with major sports programs, often - through widespread press and media coverage - become synonymous with particular colour schemes. With that recognition, there has been an increasing need to prevent goods or merchandise by third parties from appropriating those team or school colours for their own financial gain.

In addition, leagues and team franchises retain the rights to use player names and likenesses to promote sport, league and brands represented. Furthermore, league may also collaborate with franchise management to promote both the team and the athlete in just one marketing campaign.

Creative and cooperative uses of the contractual agreements between these groups enable promotional ventures with expansive goals. The results have been tremendous over the last two decades, as money for celebrity athletes in professional sports has burgeoned to staggering numbers.

NBA uses a regimented approach to manage its product and profit from the talents of its stars. The uniform player contract, between a player and team, includes a group licensing agreement. This agreement allows the league to use player likenesses to promote the league, its teams and the players themselves. The proceeds earned from the use of player images are shared equally by NBA teams.

Three main objectives direct the NBA’s licensing and merchandising efforts.

First, use of player likeness aids general promotion of sport, league and its product.

As soon as NBA draft ends, experts begin making projections and there is anticipation of the upcoming season, league launches promotional events and opportunities for fans to get a first look at rookies in pre-season summer professional leagues and exhibition games. League negotiates contracts with television networks and airs television advertisements to promote special match-ups between conference rivals or teams with a lengthy competitive history. In addition, the stars of opposing teams are featured to create a compelling storyline for the game. Events such as NBA All Star Weekend showcase the league’s best and most popular players on a larger stage where the sport is marketed to the world.

Second, NBA uses the right of publicity in a focused marketing context. In fact, league has endorsement agreements with several companies. These sponsors are permitted to use their association with NBA and its players in marketing campaigns. However, NBA retains the right to review the product in the context of these campaigns. NBA oversees television, radio and internet marketing and ensures that its sponsors adhere closely to specific terms of their agreements.

Lastly, NBA Properties, Inc. manages global merchandise licensing for the league and its teams. This arm is responsible for licensing all forms of fan memorabilia, including replica and authentic team jerseys and apparel, and other souvenirs, such as “bobbleheads” and calendars. Fans buy these items to support their favourite players and teams, which, in turn, support the league and promote the game of basketball.

²⁹ Abdul Jabbar v. General Motors, 75 F.3d 1391 (9th Cir. 1996).

4.5. NBA Player Tattoos between Trademark and Copyright

Tattoos are almost ubiquitous these days, with body piercing likely following closely behind. With advertising increasingly displaying skin, actors, actresses, and sports figures display both forms of body art on television, the silver screen, billboards, and Internet for consumer product and service providers who hope to benefit from increased sales.

Certain National Basketball Association (NBA) players have proposed wearing tattoo advertisements during televised games as well, but NBA insists it will prohibit the practice. In response, NBA Players Association has stated it believes tattoo advertising is permissible and would likely file a grievance with the National Labour Relations Board (NLRB) if NBA thwarts a tattoo advertising campaign.

In recent years, tattoos issues has become frequent in NBA and in some cases involved proceeding in front of courts.

In May 1996, former basketball player Dennis Rodman filed a lawsuit against a manufacturer who was producing and distributing a long-sleeved T-shirt bearing colourable replications of ten of Rodman's body tattoos, including the tattoo of Rodman's daughter; each such tattoo is placed on the shirt in the same place as the actual tattoo is found on plaintiff's body³⁰.

In advertising and promotional materials issued by or authorized by defendants to sell their spurious shirt, defendants have regularly and prominently used the Rodman's name, generally referring to the shirt as their "Dennis Rodman Tattoo T-Shirt," and have otherwise represented to the public and the trade that the shirt was authorized by the plaintiff, which is clearly false.

The defendants was selling their imitation merchandise without player's permission or agreement and have not obtained any license to manufacture, distribute or sell the same. On the contrary, Rodman has formally demanded that they desist from selling such infringing shirts, but defendants have ignored such demands and refuse to cease such acts.

As a result of Rodman's great public visibility and public's association of player with these tattoos, the tattoos have attained, and now possess, a secondary and distinctive trademark meaning to the general public, particularly to sports fans.

Rodman claimed the manufacturer violated sec. 43 (a) Lanham act prohibiting "any false designation of origin, false or misleading representation of fact...likely to cause confusion, or to cause mistake, or to deceive as to affiliation, connection or association of such person with a particular product".

Due to the investment of substantial money, time and energy in advertising, publicizing and promoting accomplishments and excellence of Dennis Rodman, he has developed a separate right of publicity and the said identification of the player in association with promotion, advertising and sale of the manufacturer's infringing shirt use of such tattoos constitutes a wilful infringement of the Rodman's separate right of publicity.

Dennis Rodman obtained a preliminary injunction from a New Jersey Federal district court judge, barring a New Jersey based manufacturer's sale of t-shirt bearing reproduction of his well known tattoos, including one of his daughter. This preliminary injunction enjoined defendants from continued manufacture, sale or advertising of the t-shirts.

More recently, another case³¹ involved tattoos dispute, but in a different way, connected with copyright. One can note that tattoo industry has not previously taken into account copyright law, therefore it is interesting to analyze this case.

At the time, Rasheed Wallace had just been traded to play for NBA franchise Portland Trailblazers and made his home in Portland, Oregon. Also working in Portland area, Matthew Reed was a self-employed graphic artist, a licensed tattoo artist, and owner of TigerLily Tattoo and Design Work, where he would sketch artwork and then transfer the artwork to the skin in the form of tattoos. Reed had applied his works on several athletes, including Rasheed Wallace, who visited TigerLily for a tattoo.

As his routine in tattoo business, Wallace and Reed met to discuss ideas for the artwork. Wallace presented his own ideas for incorporating an Egyptian-themed family design of a king and a queen and three children with a stylized sun in the background. Reed listened to the ideas, took notes, and made sketches.

Wallace suggested some changes, including a headdress for the king and a change to the orientation of the staff the king was holding, all of which Reed incorporated in the final drawing.

Wallace paid \$450 for the tattoo. Reed considered the price low, but believed he and his business would receive exposure and recognition from the tattoo being on an NBA player. Indeed, Reed admitted to observe without concern the tattoo during televised NBA games in which Wallace participated as a player. Moreover, Reed expected that the tattoo would be publicly displayed on Wallace's arm and conceded that such exposure would be considered common in the tattoo industry.

That all changed in spring 2004 during Detroit Pistons' championship run, when Reed saw the tattoo highlighted in an advertising campaign promoting Nike's products in a commercial broadcast on television and over Nike's website on Internet.

Although the advertisement featured Wallace as an NBA basketball player, it also included a close up of the tattoo that filled the screen and then showed the tattoo being created by a computerized simulation with a voice-over from Rasheed Wallace describing and explaining the meaning behind the tattoo.

The advertisement resulted from an agreement that Wallace had with Nike to promote Nike's products. In order to create and produce the advertisement, Nike also engaged Weiden & Kennedy as its advertising agency.

However, Nike, the advertising agency, and Wallace had overlooked one other player off the basketball court. Reed, after seeing the commercial advertisement, filed an application to register copyrights drawings relating to the tattoo.

On February 10, 2005, Reed filed a complaint in the United States District Court for District of Oregon against Nike, Inc., Rasheed Wallace, and Weiden & Kennedy.

In Count I, Reed alleged copyright infringement against both Nike and Weiden & Kennedy based on copying, reproducing, distributing, or publicly displaying Reed's copyrighted work without Reed's consent.

The remaining two counts were against Wallace individually. Count II claimed contributory infringement based on Wallace allegedly holding himself out to Nike, as the exclusive owner in the tattoo, which conduct induced Nike to reproduce, distribute, and publicly display Reed's copyrighted work. In the alternative to Count II, if Wallace were found to be a co-owner of the artwork, then Count III sought an accounting for which Reed would share in any revenue that Wallace realized from the advertisement.

Subsequently, the parties dismissed the case, however, presumably pursuant to a confidential settlement agreement.

4.5.2. Tattoos as Copyright: Brief Comments on Reed v. Wallace Case

Given recent instances of lawsuits over copyright in tattoos (see Reed v. Wallace), this paragraph examines implications that come along with granting intellectual property rights in art that is permanently placed on the human body.³²

Elements of a copyright infringement cause of action are: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original".

Absent direct proof of copying, this may be inferred where the defendant had access to the copyrighted work and the accused work is substantially similar to the copyrighted work.

In the case of tattoo, body piercing, or other form of body art, the "access" and "substantially similar" standards ought to be easily met - the actual artwork that was transferred to human body or otherwise applied to the skin is at issue.

Assuming the plaintiff owns a valid copyright (and a defendant proves no other defence), then defendant who reproduces, prepares a derivative work based on, or distributes copies of the tattoo, for instance, without consent, permission, or authority of copyright owner, thereby, directly infringes the copyright.

³⁰ United States District of New Jersey, Rodman v Fanatic Inc and others., case n. 96-2103.

³¹ Oregon District Court, Reed v. Wallace, case n. 3:2005cv00198.

³² For a complete examination see C. A.

Harkins, Tattoos and copyrights infringement: celebrities, marketers, and businesses beware of the ink, available on http://legacy.lclark.edu/org/lclr/objects/LCB10_2_Harkins.pdf.

In addition to the defendant who commits an act of direct infringement (e.g., Nike and Weiden & Kennedy's alleged use of the tattoo or a copy of the tattoo in an advertising campaign), United States Supreme Court recently recognized secondary liability for copyright infringement, including theory of contributory copyright infringement.

Thus, Reed alleged that Wallace intentionally induced and encouraged Nike and Weiden & Kennedy to infringe Reed's copyright by failing to advise those defendants of Reed's ownership interest in the tattoo.

If the Court should consider tattoos as a co-ownership, a co-owners in a copyrighted work may use that work to generate revenues. If their use generates revenues, however, and absent an agreement to the contrary, they must share any profits with the other co-owner in the copyrighted work.

Known as an "accounting" theory, plaintiffs sometimes assert an accounting cause of action in the alternative to a claim for contributory copyright infringement, which Reed did here.

Wallace may have researched and come up with the idea for an Egyptian-themed family design with a stylized sun in the background and made additional changes to Reed's sketch.

This arguably could make Wallace a co-author in the work he brandishes on his upper right arm, one of the more distinctive tattoos in sports.

Authors of a joint work are co-owners of any copyright in the work.

A joint work is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole".

Secondly, a collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.

Nothing prevented Wallace from pursuing his own copyright in 1998 or any time thereafter. Nor did anything prevent Nike, via a transfer from Wallace, from filing an application at any time.

Indeed, Reed did not file his applications for copyright registration until after having viewed the commercials in 2004, with his first application filed months later and his second application filed a year later. Simply put, Wallace and Nike could possibly have had copyright registrations before Reed even filed his first application. Even when there are competing applications, Copyright Office generally accepts both applications and ownership becomes an issue for courts to decide.

5. Conclusions

5.1 General Remarks

Intellectual property plays a critical role in furthering economic progress and welfare of world's citizens. The reason is simple. Intellectual property is, typically, both a key input into and a byproduct of successful innovation, which is a principal factor in fostering a dynamic, growing economy. In this context, intellectual property licensing is generally efficient, because it enables firms to combine complementary factors of production, reduces transaction and production costs, and reduces free-riding by others. Intellectual property, therefore, is a highly valued asset, and it has been granted substantial legal protection by the nations of the world. It is important that those protections are preserved.

In the information age, with technology advancing at an accelerating rate, simply implementing the TRIPS Agreement is not enough to establish a robust intellectual property system. Advances in information technology, biotechnology and other fields require updating of national and international laws that protect IP. Fortunately, WIPO has led the way in developing new international norms to meet these challenges. WIPO also has led the way in simplifying and streamlining the procedures for seeking, obtaining, and maintaining rights in multiple countries. Through its "Global Protection Services" and its harmonization treaties, it saves creators and national IP offices a great deal of time

and effort. WIPO also makes available its excellent technical assistance for establishing and improving IPR systems worldwide. Countries should look to both the WTO and to WIPO, when crafting their IPR systems. However, global harmonization of principles and standards affecting intellectual property is unlikely to be achieved in the near term. Against this backdrop, it is less than surprising that efforts to date to seek convergence have been few and the accomplishments limited. Nonetheless, useful foundations have been laid, and there is reason to believe that some progress can be made.

5.2 Basketball Industry and IP Rights

IPRs in sports represent a central issue that needs continuous study, due to new applications deriving from praxis that offer many possibilities of exploitation of these rights, but, at the same time, they raise the risk of infringements.

New technology is continually affecting all sports, making information and viewing available to fans through several different mediums - no longer just TV and radio. In particular, Internet is rapidly advancing progress of sports technology, while simultaneously sparking a number of copyright and trademarks infringement issues. In fact, internet is very difficult to be regulated and has been generally describes as "the new wild west" and also "world's photocopying machine". As a source of information, it is a particularly valuable communications and marketing tool for sport, not least sports, clubs and personalities³³. Anyway, Internet has also developed into an important vehicle for sale and purchase of a wide variety of goods and services - "e-commerce" - including sporting ones.

By focusing the debate on American basketball, there is another area of conflict, closely linked to the development of Internet, which deserves to be briefly discussed, namely that of arbitration procedures governing by the U.N.-based World Intellectual Property Organization (WIPO) in order to resolve domain name disputes concerning NBA' domain names. Known in the wired world as "cybersquatting", it is the practice of pre-emptive registration of domain names for well-known or developing brands.

In this kind of disputes, complainants must establish each of the following elements:

- i the domain name is identical or confusingly similar to the trademark or service mark in which Complainants have rights;
- ii Respondent has no rights or legitimate interest in respect of the domain name; and
- iii domain name has been registered and is being used in bad faith.

In a case³⁴ (NBA Properties v. Adirondack), arbitrator William Mathis ruled against NBA Properties in their quest to take control of Internet domain name "www.knicks.com".

The arbitrator concluded that NBA Properties could not prove it has "rights" to "knicks" trademark, even though it is the merchandise arm for the NBA. Domain name was registered by NY-based Adirondack Software in 1995. Therefore, the arbitrator "found no evidence that Adirondack had registered the domain name in 'bad faith,'" either to sell for profit or to "mislead the public."

Recently, in a case³⁵ (NBA Properties v. Domains Plus) involving the domain name "www.denvernuggets.com", NBA and Denver Nuggets basketball team have filed a complaint with World Intellectual Property Organization to get the domain name "DenverNuggets.com". The domain name currently forwards to NBAtix.com, which sells sporting tickets.

NBA Properties contended that the domain name was essentially identical to the registered trademark Denver Nuggets and it submitted that they had not licensed or otherwise permitted Respondent to register a domain name incorporating its trademarks.

The Panel found that the domain name *denvernuggets.com* was confusingly similar to the trademark Denver Nuggets, because the domain name replicated the complainants' trademark in its entirety, and the addition of the ".com" ending was not sufficient to distinguish the name from the complainants' trademark.

The Panel found that the use of this confusing domain name in connection with the linked ticket resale site NBAtix wrongly suggests an

33 S. Gardiner, op. cit., p. 424.

34 WIPO Arbitration and Mediation Center, NBA Properties, Inc. v. Adirondack Software Corporation,

Case No. D2000-1211.

35 WIPO Arbitration and Mediation Center, NBA Properties Inc. v. Domains Plus, Case No. D2009-0514.

affiliation between the respondent's business and that of the complainants'. It is clear that respondent knew complainants' rights and sought to profit from the perceived association with the mark.

Finally, this dispute has regarded also basketball players, for example NBA stars Steve Nash³⁶ and Chris Bosh³⁷.

In the first case (Stephen J. Nash v. HOOPology.com), a company registered the disputed domain name (stevenash.com). This is identical to Steve Nash's mark.

The only use to which the domain name has been put is basketball-related (thus demonstrating knowledge of Complainant and the value of his name) and commercial, consisting of "sponsored links" and other links to commercial websites. Respondent has also offered to sell the disputed domain name to the public.

His registration and subsequent use are, for the same reasons, in bad faith under the Policy, as an attempt either to profit from sale of the disputed domain name or misleadingly to divert fans or consumers using Internet to search for Complainant, all for Respondent's commercial gain. Respondent's conduct following Complainant's email communications to him reveals that he registered the disputed domain name in bad faith in a "blatant" attempt to attract consumers by creating a likelihood of confusion with Complainant's mark as to the source, sponsorship, affiliation, or endorsement of Respondent's websites.

In the second bizarre court ruling (Bosh v. Zavala), NBA Toronto Raptors forward, Chris Bosh, was awarded nearly 800 "cybersquatted" domain names.

Luis Zavala and his company Hoopology.com unlawfully registered "www.chris-bosh.com" domain name, which displayed advertisements using Bosh's name to generate revenue, but had no actual association with Bosh.

In April 2009, the Court ruled that "www.chris-bosh.com" domain name had to be transferred to Chris Bosh and also awarded \$120 000 in damages, for violation of Bosh's rights under the US Federal Anti-Cybersquatting Consumer Protection Act.

As Mr Zavala had insufficient funds to pay the \$120 000 damages, the court ordered Zavala to transfer nearly 800 other domain names he owned to Bosh. These domain names incorporated the names of various professional athletes, college and high school athletes as well as well known entertainers, product names and other entertainment properties.

According to Bosh's lawyer, he had no intention of keeping the domain names and would give the domain names back to their rightful owners (at a fee for reasonable expenses occasioned with the transfer).

In conclusion, sports figures and celebrities have learned to protect their image, reputation and trademarks in traditional media; now, they have to police Internet as well. Like other entertainment organizations, sports leagues and professional athletes depend on control over their property rights to produce significant revenues for them. As new technologies create additional ways for sports organizations to exploit those rights and as potential revenues continue to increase, many high-stakes contests will be played out in court and other tribunals.

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³⁶ WIPO Arbitration and Mediation Center, Stephen J. Nash v. HOOPology.com, case No. D2009-0225

³⁷ Bosh v. Zavala (08-CV-04851-FMC-MANx) (C.D. Cal. Sept. 24, 2009).

Ancient Chinese Football

by **Bram Cohen***

The very first sources that refer to kicking against a ball come to us from the Chinese. At the time of the Western Han dynasty (206 BC-24 AD), Liu Xiang wrote his *Analects of Tactics*, in which he described *zu-gu*¹, the football of the Chinese people. For a long time, it was thought that *zu-gu* (*zu* means 'shooting with the foot'; *gu* means 'ball') was played from around 500 BC on. But archaeologists have not remained idle. Numerous historical writings, inscriptions and remains have been found from the period predating the fifth century BC. These sources show that the Chinese were playing football nearly 5000 years ago.

Part of these writings and inscriptions contain legends that attribute the introduction of football to the mythical Yellow Emperor Huang Di, who ruled around 2690 BC. One legend describes how the Yellow Emperor cut off his own head and ordered his subjects to play football with it. Huang Di introduced his subjects to writing, music, bows and arrows, carts, boats, earthenware and the breeding of silkworms. We might as well add football to that list of accomplishments. In the city of Xi'an in the northwest of China, one can find stone balls, as works of art and as burial artefacts, that are just under 3000 years old.

We know next to nothing of the rules of the very earliest form of Chinese football. What we do know is that football had a certain significance as a cult activity.

During the Zhou Dynasty, which came to power in the eleventh century BC and lasted roughly 700 years, it was no longer just the notables who played football, but also the common people. They must have

played the game with considerable fanaticism, because the rules were tightened up to prevent it from degenerating. The players used a ball made from eight pieces of leather that were sewn together. The ball itself was filled with feathers and hair. The air-filled ball was invented later on.

It definitely wasn't waywardness that inspired the Chinese to play football: during the Han Dynasty (206 BC-220 AD), soldiers were ordered to play football to improve their physical strength and enhance their discipline and military enthusiasm. Such measures were taken in response to the incursions by northern peoples.

The same period saw the development of a football idiom, as well as books written about *zu-gu*. *Jucheng* meant pitch, *jushi* goal, *li* or *chang* the rules of the game, *zhang* the referee and *ping* the linesman. These are all concepts that are familiar enough today, but which we have only known since the end of the nineteenth century. In *Yantielun*, the historian Huan Kuan describes how football is played by soldiers in the streets. Soldiers probably contributed to football's popularity among the common people.

These writings about *zu-gu* show that the rules of the game were brought in line with the Chinese conception of the cosmos. According to this conception, the universe was round and the earth quadrangular, and so the ball needed to be round and the pitch quadrangular. Twelve months meant twelve goals, and as the year had 24 solar signs, each team counted twelve players.

The Chinese couldn't get enough of it. Football flourished until the end of the sixth century AD. During the Han Dynasty, the Chinese still regularly played football in honour of the Emperor's birthday. *Zu-gu* became a game - a form of entertainment that many people participated in - but at the same time it was subject to growing athletic profes-

* Bram Cohen, *De Geschiedenis van het Voetball* [The History of Football], Amsterdam 1996, pp. 5-8.

¹ The transcription from the Chinese is arbitrary. Tsuh-kuh (the usual English transcription) is transcribed here as *zu-gu*.



Cuju is ancient Chinese football

sionalism. Winning teams received a silver goblet and valuable fabrics, while the losers could count on *schadenfreude* and sometimes even a good hiding.

But not everyone was happy about football. Officials condemned the game and had nothing good to say about the highly paid (!) players, who in their opinion were nothing more than hooligans. We might as well leave aside whether this was the first time people expressed concern about the loss of a civilised preserve of gentlemen amateurs.

During the Tang Dynasty (618-907 AD), improvements were made to both the ball and the players' gear. *Zu-gu* underwent further popularisation and professionalisation. People didn't always stick to the team of twelve any more, occasionally playing with sixteen men to a team.

In the following 300 years, *zu-gu* was professionalised and regulated to such an extent that according to some historians, this was the cause of football's declining popularity among the Chinese around 1200. Teams that could consist of as many as 24 or even 32 players gave demonstrations at the Imperial court. These court players also mingled with the people and showed them their skills. In this period, the air-filled ball was perfected by the introduction of a primitive ball pump.

Incidentally, the players weren't all men. The Mongols defeated the

Chinese and founded the Yuan Dynasty in 1279, which lasted for close to a century. The Mongol Emperor Shizu encouraged his subjects to play *zu-gu*, and not just the men - women could join in on the game as well!

This highly developed, regulated game gradually disappeared from the scene after the Mongolian defeat and the Chinese return to power. Fewer and fewer people still played the game. The rulers at the time of the Qing Dynasty (1644-1911) might have been able to breathe new life into *zu-gu*, but they preferred a kind of football that was played on ice and that did not involve goals.

The Chinese sometimes had the curious habit of simply quitting with something. They were on the verge of conquering the world when, plagued by internal troubles, they suddenly turned around and went home. The Portuguese, with whom they had come face to face, were left behind in a state of bewilderment. This is more or less what happened to *zu-gu* too. Around 1500, only very few Chinese were still playing football. The ball had lost its appeal. It was far more common - later in England and France - for football to be temporarily played less due to political and social factors, only to return in all its splendour later on.

The International Sports Law Journal

A Study on Legal Protection of Olympic Intellectual Property

by Gao Fei*

1 The scope of Olympic intellectual property and the origin of its legal protection

Olympic intellectual property means the exclusive rights applying to trademarks, specific symbols, patents, productions and other creative achievements, associated with specific Olympic entities. Safeguarding Olympic intellectual property entails protecting the relevant rights of individuals.

Olympic intellectual property includes the following three types: (1) the property rights belonging permanently to the IOC including the Olympic name, symbol, emblems, flag, motto, anthem, and all matters relating thereto; (2) the property rights which emerge during the period of bidding, construction and organisation of Olympic Games including the Olympic symbol, name, motto, and so on; (3) the property rights obtained by organisations or persons through legal means including the broadcasting rights to Olympic programmes, authorised commodities of Olympic intellectual property, Olympic-related productions and patents relating to these¹.

The concept of Olympic intellectual property began in the 1970s when Peter Ueberroth explored the Olympics' commercial operation; it developed rapidly in the 1980s. The legal protection of Olympic intellectual property arose from official agreement in the Nairobi Treaty, and in launching enforcement and safeguarding Olympic intellectual property, the IOC has registered the relevant trademarks for commodities and services. By 1981, 21 countries had signed the Nairobi Treaty, which stipulated that any State party to the treaty be obliged to refuse or to invalidate the registration as a trademark and take appropriate measures to prohibit using the relevant trademark or other sign for business purposes, as well as ban the use of any sign consisting of or containing the Olympic symbol, as defined in the Charter of the International Olympic Committee. By 15 July 2003, the number of signatories to the

Nairobi Treaty had risen to 41, granting Olympic intellectual property further protection through legal channels.

2 Features of the protection of Olympic intellectual property

When considering intellectual property, Olympic intellectual property certainly bears the general features of intellectual property generally, i.e. its monopolistic and geographical aspects. However, in terms of specific intellectual property, its legal protection features some differences compared to the general concept of intellectual property, with the main aspects being the following:

2.1 Legal protection of Olympic intellectual property is subject to the Olympic Charter. Although following the development of the Olympic movement as a whole, the Olympic Games bear an increasingly close relationship to the legal order, and while the movement enjoys legal protection and support, the Olympic movement is not subject to the laws of individual countries. The impact of the Olympic Games and the joint efforts of the many countries involved mean that the Olympic Charter is respected by the countries' individual legal systems, especially in terms of intellectual property as enshrined in the Olympic Charter. Many of these countries have adopted relevant regulations governing protecting Olympic intellectual property in their own legal systems. The protection of Olympic intellectual property is deeply rooted in the Olympic Charter.

2.2 The legal protection of Olympic intellectual property is without limitation. This is one of the key features in its protection of intellectual property, attaching particular obligations relating to Olympic intellectual property. Non-limitation has been enshrined definitively in the Olympic Charter, which states that: in terms of the Olympic Charter, all rights to the Olympic symbol, flags, motto and anthem are collectively reserved by the IOC; each NOC is responsible to the IOC for their observance of this provision. Furthermore, each NOC applies to use the Olympic symbol and Olympic emblems, which continue to be registered as trademarks. The relevant trademarks therefore enjoy no limitation.

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1 Chen Guangping, Study of the Legal Issues of Protection of Olympic Intellectual Property, Journal of Beijing College of Political Science and Law, Version 2, 2004

2.3 The uniqueness of the authority entity.

In China, the person who owns copyrights, patents and trademarks must be a natural person, corporation or collectivity. These property rights are exclusive and specific, and they are safeguarded by law with the approval of relevant provisions. Without the authorisation of the rights' owners, no person or collectivity may use, occupy or utilise intellectual property. If this is nevertheless done, the violator will be charged with a tort and will bear the applicable legal liability. The exclusive rights of the Olympic Games, which are protected by the content of the Olympic Charter, the regulations of the Olympic host city contract and the relevant law and regulations of the host country, are only reserved by Olympic organisations, including the IOC, NOC and OCOG. Olympic intellectual property has now become a sacred symbol. Any person or collectivity using Olympic property without a licence authorised by the IOC may be punished by law.

2.4 Scope

The general intellectual properties borne by an authorised country are legally effective, and protected by law, but other countries bear no liability for them. Because legislative differences and independence are seriously restricted by region, the effectiveness of legal protection is limited to their domestic boundaries. The relevant entity desiring protection in another country must comply with the provisions of the legal order and regulations of that country, and procedural conditions must be authorised.² However, Olympic intellectual property is collectively and individually referred to as being subject to the exclusive property rights of the IOC; in particular, the IOC shall determine the conditions under which the Olympic symbol, flag, motto and anthems may be used for any advertising, commercial or profit-making purpose whatsoever, including when related to the property rights of Olympic arts and productions. Based on the relevant provisions of the Olympic Charter, all members of the IOC shall bear the responsibility and the duty of protecting Olympic intellectual property, as safeguarded by the relevant laws and provisions applicable in the Olympic host city contract. The protection of Olympic intellectual property is thus an objective international responsibility with the relevant force of constraint, and it shall not be limited by region.

2.5 Usage of the licence for the protection of Olympic intellectual property

Based on the provisions of the Olympic Charter, the IOC may transfer its intangible assets throughout the world to partners who have adequate funds, international impact, significant influence and an excellent reputation, to serve the host country. Once the partner receives authorisation approval from the holder, both sides may create the contract.

The licensed person may only use the Olympic symbol in the period and region specified in the contract, so as to ensure that the IOC protects the Olympic sponsors and global partners, all of whom may benefit from using Olympic intellectual property. Thus, the IOC may not allow any unlicensed party to compete for the benefits with its sponsors and partners and regards this as unfair competition, leading to violations in terms of ambush marketing. Accordingly, using the licence and authority of Olympic intellectual property that must be approved by the IOC, NOC and OCOG can be collectively and constantly safeguarded by law.

3 Legal protection of Olympic intellectual property in China

The legal protection of Olympic intellectual property became more relevant when Beijing won the right to serve as the host of the 2008 Olympics. The present system of Chinese law features relatively complete legislation on intellectual property, along with the protection of Olympic intellectual property, specifically trademark law, copyright law, patent law, anti-unfair competition law, sports law, advertising law and

specific symbol management legislation. Certain provisions in the constitution, civil law, criminal law and product quality law also relate to the protection of intellectual property.

When bidding for the Beijing Olympics, the Chinese government clearly promised to honour the Olympic Charter and the host city contract, and it signed an official acknowledgement of this when winning the right to host the Games. In October 2010, Beijing enacted local legislation, The Regulation of Protection of Olympic Intellectual Property, Beijing, and on 30 January 2002, the state department approved the Protection of Olympic Emblems Act in the 54th Administrative Conference.

All of this encompassed laws, regulations, rules and treaties, all of which set up the important legal base for protection of the Chinese Olympic brand. After applying successfully to host the Olympics, the Chinese government and the IOC attached considerable importance to protecting Olympic intellectual property and strengthened this through legislation, administration, jurisdiction and information dissemination. It should be noted that China did indeed achieve some successes in respect of protecting Olympic intellectual property, but many issues still exist.

3.1 China's existing laws are not able to protect Olympic intellectual property fully, with many detailed provisions needing to be improved, particularly when it comes to the criterion of 'ambush marketing' to which the IOC attaches great importance; this could be a legislative and legal 'blind spot'. 'Ambush marketing' violations are very familiar, and need to be countered through improved legislation.

3.2 China's existing legislation and regulations do not form a perfect match with the legislation and regulations protecting Olympic intellectual property, because China still applies its specific emblem management regulations to safeguard Olympic intellectual property. Many provisions of this legislation cannot therefore be applicable for safeguarding this specific intellectual property, especially the definition of 'unfair competition' and 'ambush marketing', where existing laws and regulations have no clear illustration of this. Applying higher levels of legislation and regulation to safeguarding Olympic intellectual property is also still weak.

3.3 The IOC does not advocate the right of owners to settle disputes through litigation channels to protect Olympic intellectual property, which causes further difficulties in executing the necessary efforts to safeguard Olympic intellectual property in China. This is because the period of using Olympic intellectual property is short, and extended litigation periods and the burdens of a lawsuit are unable to play a major role in the relevant protection.³ In particular when a rights owner becomes the plaintiff in a lawsuit, or parties lodge a claim against a rights owner, the issues may relate to more comprehensive legal ones: for instance, could a specific subject within the relevant party be charged as a defendant, or what is the legal status of the BOCOG? Such conflicts exercise a negative impact on the Olympic Games and the Olympic movement.

4 Tort and legal liability of Olympic intellectual property

When Beijing was successful in winning the right to host the 2008 Olympic Games, some companies and unauthorised entities in China illegally used Olympic intellectual property for commercial purposes. The wide coverage and considerable number of violations inflicted considerable damage on the IOC and BOCOG, and severely infringed their legal rights. Accordingly, the Chinese government and the industrial and commercial administration meted out harsh punishments. In Beijing city alone, there were 199 cases involving Olympic symbol torts between 2002 and 2005, with fines of 2,164,000 Yuan imposed. The tort cases involved 78 foreign companies, and goods exported to 25 countries. Nationwide there were 1,357 cases involving suspected Olympic symbol tort violations involving fines of 16.93 million Yuan, and many ambush torts still cannot be processed.

4.1.1 Some aspects of Olympic intellectual property torts in China

If activities not authorised by the IOC involve the use of the Olympic

2 Huang Qingnanm, *The New Intellectual Property Law*, China University of Political Science of Law Press, March 1995.

3 *The Explanation and Guidance of Olympic Symbol Protection Act*, BOCOG, China Democracy and Law Press, March, 2002

slogan, motto or related matters for propaganda purposes to support the Olympics, such non-profit-making activities could be defined as well-meaning, although it is technically a violation of the Olympic Charter.

4.1.2 Should any companies or enterprises use Olympic intellectual property for business purposes, it is defined as intentional behaviour, as well as a serious tort.

4.1.3 Where any company or person uses Olympic intellectual property under false pretences and shields their tort behaviour, this is defined as 'ambush marketing', to which the IOC attaches great importance, making it a main target to be combated.

4.1.4 Reproducing or forging any content of Olympic intellectual property, or circulating in the market produces an adverse social impact and causes serious damage to the image of the Olympic movement.

4.1.5 Beyond authorisation

Some sponsors, collaborating parties and relevant administrations obtaining licence approval to limited content from the IOC do not comply with the provisions of such contracts, secretly augmenting the content and scope without authorisation. For instance, enterprises or individuals do not comply with the stipulations of a contract which would prohibit them from using licensed Olympic intellectual property for business purposes, or they add content to the contract without authorisation.

4.2 The legal liabilities assumed by violators

4.2.1 Assuming administrative liability

Violators must assume administrative liability when infringing Olympic intellectual property. According to Chinese Trademark Law, Copyright Law, Patent Law, Anti-unfair Competition Law, the Specific Symbol Management Act and others, the industrial and commercial administration of the state council must apply the compulsory penalty for any infringement concerning an Olympic intellectual property tort. The subject of law enforcement is the industrial and commercial administration, which shall have the rights granted by law to ascertain the administrative liability of the infringer. This is to safeguard the legal rights of the Olympic intellectual property rights owners, including: the protection of benefits of Olympic sponsors and collaborating parties, or imposing administrative correction measures in order to recover normal market competition, such as: ceasing an illegal act, removing negative effects, compensating any losses to the rightful owner, imposing a fine, confiscating the illegal gains if any, suspending business permits, imposing administrative penalties. It should be noted that a party who refuses to accept the punitive decision of the industrial and commercial administration may appeal to the people's court.

4.2.2 Assuming civil responsibilities

Article 106 of the general principles of civil law stipulates that: 'Any citizen or corporation in violation of a contract or not fulfilling other duties shall assume civil liability.' Article 118 stipulates: 'If any citizen or corporation's legal rights concerning copyright and the right to publication, patent, trademark, discovery, invention and scientific and technological achievement are stolen, altered or pirated, the rights owner has the right to demand that the infringement ceases, that negative effects be removed or compensation be awarded.' Anyone infringing Olympic intellectual property and the legal rights of rights owners and sponsors, or ultimately causing damage, shall assume the relevant civil liability in accordance with the law. According to the relevant laws and regulations, the people's court grants the subject rights to the enforcement of law

for applying the compulsory penalty. As the subject of law enforcement, accepted cases of Olympic intellectual property infringement initiated by the people's court are classified into two types. One is that a party who refuses to accept the punitive decision of the industrial and commercial administration may appeal to the people's court. The other is that the party whose rights have been infringed does not need to ask the industrial and commercial administration for administrative remedy, but may seek the remedy directly from the people's court, so as to receive powerful judicial protection. The civil penalties for infringements granted by the people's court include: ceasing infringement, removing the negative effect, compensating losses, confiscating the illegal gains, if any, or imposing large fines commensurate with the severity of the case. A party refusing to accept the sentence of the people's court may appeal to the higher court. The party must comply with the effective verdict of the people's court.

4.3.3 Assuming criminal liability

Article 10 of the Olympic symbol protection provisions stipulates that: 'Anyone using the Olympic symbol for fraudulent activities is in violation of criminal law governing crime or fraud or other crime.' Articles 213 to 218 provide comprehensive regulation of the general protection of intellectual property, and several aspects of penalties applying to safeguarding Olympic intellectual property. Where a party infringes Olympic intellectual property in serious contraventions defined in the relevant content of the criminal law, the party must assume criminal liability and shall be severely punished.

5 Conclusion

Since the development of the Olympic movement, the huge market value of Olympic intellectual property has been growing constantly, while the commercialisation of the Olympic Games continues to advance the close connection between the Olympic movement and the law. Not only is the Olympic movement seeking legal protection and support, but also this impacts the law of each country involved, creating respect for the Olympic Charter. The legal protection of Olympic intellectual property is deeply embedded within the Olympic Charter, and thus each country's practice is being integrated so as to constantly improve the legal protection accorded to Olympic intellectual property.

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**MEMORANDUM OF UNDERSTANDING FOR COOPERATION
BETWEEN THE ASSER INTERNATIONAL SPORTS LAW CENTRE
AND THE LAW SCHOOL OF WUHAN UNIVERSITY**

Considering the close, traditional ties between the Peoples Republic of China and the Kingdom of the Netherlands

Considering that close cooperation in the field of international sports law between our institutions would be conducive to strengthening ties

Considering that close cooperation in the field of education and research in international sports law between our institutions would be an important contribution to the promotion and development of international sports law – our institutions being located in the western and eastern hemisphere of the world respectively

We have decided – by signing this agreement – to create a framework for cooperation, in particular focusing on the following terms of cooperation:

- the exchange of information and library services;
- the joint organization of specialized courses;
- the joint organization of conferences, seminars and workshops on topical issues of international sports law;
- the exchange of students and trainees in sports law;
- the joint undertaking of studies;
- the publication of books;

All decisions regarding this cooperation will be taken after mutual consultation between the institutions

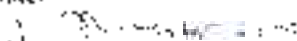
The agreement is valid for a period of four years, to be renewed by mutual agreement

Signature:



Prof. Robert Siekmann
Director
ASSER International sports law centre
The Hague
The Netherlands

Date:




Prof. Junxin Kan
vice dean
Law school of Wuhan University
Wuhan
China

Date:



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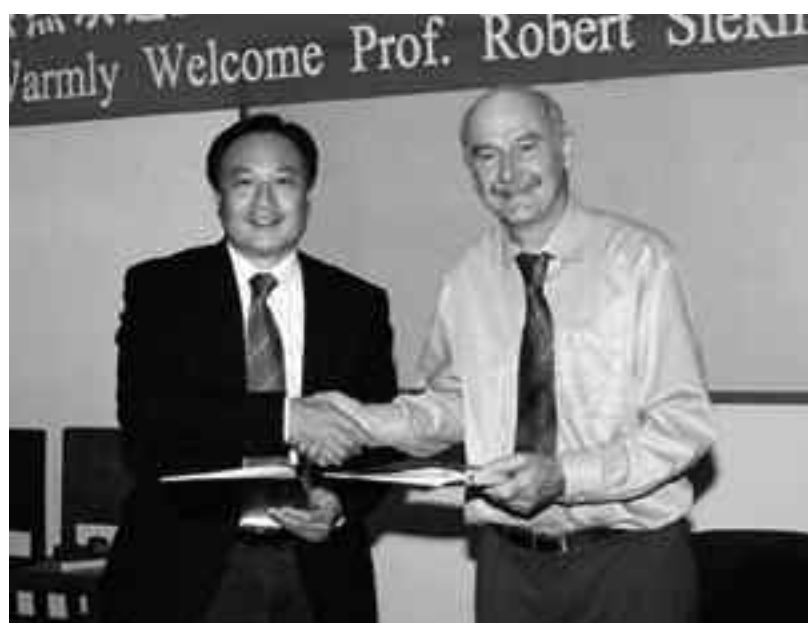



Prof. Junxin Kan

武汉大学法学院 副院长

中国武汉

日期：

Prof. Junxin Kan en Prof. Robert Siekmann exchanging the Chinese and English versions of the Memorandum of Understanding for Cooperation between the ASSER International Sports Law Centre and the Law School of Wuhan University, Wuhan, China, 11 November 2010.

You Cannot Reject the Olympic Medal? - Commentary on the CAS Abrahamian Case

by Shuli Guo and Xiong Yingzi*

Introduction

Since the Atlanta Olympic Games in the USA in 1996, the International Council of Arbitration for Sport (ICAS)¹ has established its special tribunal in the Olympic host city, which is called the Court of Arbitration for Sport (CAS) Ad Hoc Division (AHD). This tribunal deals with any disputes involving the Olympic Games within ten days prior to the ceremony and during the entire Games themselves.² The AHD always follows the '3F' principle (fair, fast, free) and settles disputes concerning the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate, aiming at preserving neutrality and protecting parties' interests fairly. The ICAS also set up the AHD for the 2008 Beijing Olympic Games, operating from 31 July 2008 and eventually ruling on nine cases; six were considered relevant for eligibility, one involved a penalty for an official and the final two concerned disputes over competition results.³ Here we would like to develop commentary on one of the resulting disputes concerning honour within the Olympic Games, applying some principles of sports law.

Case review

Facts

On 14 August 2008, the Men's Greco-Roman wrestling 84kg semi-final (Bout 112)⁴ was held between the athlete Ara Abrahamian, a Swedish national, and the Italian wrestler, Andrea Minguzzi ('Minguzzi'). The Italian athlete won the first round of the bout, and the Swedish athlete won the second. Going into the third round, the referee judged Abrahamian to have lost his second round point, and the Italian wrestler was awarded this point because Abrahamian had fouled and thus deserved a warning. This enabled the Italian to enter into the final without the third round. The Swede was absolutely dissatisfied with the referee's 'revision'. Arguing intensely with the referee, Abrahamian decided to quit. But thanks to exhortation from colleagues, he participated in the subsequent games and won the bronze medal. However, at the award presentation, Abrahamian threw the medal on the floor and left, shocking all those present.⁵

The following day, the International Olympic Committee ('IOC') decided to penalise Abrahamian as follows: first, he was disqualified from the Men's Greco-Roman wrestling 84kg; secondly, he was excluded from the XXIX Olympic Games in Beijing in 2008; third, his Olympic identification and accreditation card was immediately cancelled and withdrawn.⁶

The first application

On 16 August 2008, the Swedish National Olympic Committee ('SNOC') and the Swedish athlete Abrahamian filed an application with the AHD in Beijing, with Federation Orestes Molina Gonzales ('FILA') as the application respondent. In the application, the SNOC and Abrahamian pointed out that FILA had not applied proper internal appeal procedures and that it had not acted in accordance with the ethical principles of the Olympic movement and the principles of fair play as declared in the *Olympic Charter*.⁷

The appellants provided several reasons in support of their argument. On the one hand, they argued, it was absolutely unreasonable and inappropriate that the warning issued to Abrahamian at 1 min 41 sec of the second round was opposed by the judge, and that it was repeated after the end of the second round, leading to an entire change within the overall competition result. On the other hand, in procedural terms, the Swedish coach immediately requested a 'video check review' to ascertain whether the warning was justified in accordance with the FILA rules, but his request was denied, thus allegedly violating FILA rules. In short, the application hoped that FILA would establish an internal jury pursuant to the *Olympic Charter* and FILA's own rules, so that the

athlete or any others harbouring suspicions about the result could be granted satisfaction.

As the respondent, FILA did not participate in the tribunal or submit any opinions.

After the hearing and discussion, the Panel summed up its conclusions as follows:

First, the Panel needed to clarify the grounds on which the appellants were appealing. In this instance, the appellants had not challenged the 'warning' which led to the athlete losing, not for his disqualification by the IOC or for being stripped of his medal. Apart from this, 'FILA is required to establish an internal appeal jury according to the *Olympic Charter* and its rules and to act during competition in response to claims from athletes.'

Second, the Panel found that the grounds below indicated that no internal appeal jury had been constituted, which violated the *Olympic Charter* and its own rules.

- Firstly, a fundamental principle of the *Olympic Charter*⁸ is: 'Every individual must have the possibility of practising sport, without discrimination of any kind, indicating the Olympic spirit of mutual understanding, friendship, solidarity and fair play.. This emphasises that everyone has the equal right to take part in the Olympic Games, so that 'fair play' has been the general principle, as important as the principles of 'friendship' and 'solidarity'.
- Secondly, the *Olympic Charter* Rule 49: 'Each IF is responsible for the technical control and direction of its sport at the Olympic Games; all elements of the competitions, including the schedule, field of play, training sites and equipment must comply with its rules... The holding of all events in each sport is placed under the direct responsibility of the IF concerned.' It conveys that in the specific event, the IF should answer for all the technical arrangements. In this case, FILA should take charge of all the technical arrangements for wrestling. By-law to Rule 49 of the *Olympic Charter*: 'The necessary technical officials (referees, judges, timekeepers, inspectors) and a jury of appeal for each sport are appointed by the IF concerned, within the limit of the total number set by the IOC Executive Board upon the recommendation of the IF concerned.' This clearly stipulates that each IF should set up an internal jury of appeal.
- Thirdly, Article 36 of the *FILA Constitution*: 'All FILA members (FILA Bureau members, wrestlers, coaches, referees, doctors and leaders), through their FILA membership, can appeal only to FILA in the event of disputes arising from the current Constitution and all the FILA Regulations or of all sporting conflicts which can arise between them and which they cannot settle amicably.'
- Given all this, the Panel appeared to determine that the requirement of the application is reasonable, which is supported by the *Olympic*

* Shuli Guo, Law Professor, PhD., Xiangtan University, China; Xiong Yingzi, LLM Student, Xiangtan University.

1 In accordance with CAS rules, the ICAS was established in 1994 to oversee amendment of the statute and rules of CAS, and CAS sponsorship and staffing.

2 Shuli Guo, *The Theory and Practice of the 2008 Beijing Olympic Games Sports Arbitration*, *Rule of Law Studies*, 2010, No.2, p.23.

3 Zhu Wenyin, *Comment on the Arbitration Awards of the Beijing Olympic Games*, *Journal of Tian Jin Physical Education Institute*, 2009, No.1, p.48.

4 Since the 2000 Sydney Olympic Games, the Greco-Roman system changed from

'Double elimination' to 'Group match', so that 20 athletes are divided into 6 groups. Two groups have 4 athletes, with the winners in each group entering the semi-final directly, and there are also 4 groups with 3 athletes, with the winners of each group entering the quarter-final. Winners of the semi-final can compete to be the champion and losers compete for the bronze medal in the subsequent games.

5 CAS arbitration NO CAS OG 08/007 <http://www.tas-cas.org/recent-decision> cited on 10 Jan 2010

6 CAS arbitration NO CAS OG 08/007 <http://www.tas-cas.org/recent-decision> cited on 10 Jan 2010

7 CAS arbitration NO CAS OG 08/007 <http://www.tas-cas.org/recent-decision> cited on 10 Jan 2010

Charter and FILA's own rules; it is necessary and possible to do this. Considering that there were no further requirements, the Panel would not decide '...whether the decision of the judge is reasonable or not', or '...whether it infringes the rights of fair play of the athlete.' FILA was also severely criticised by the Panel for defaulting on the arbitration proceedings.

The second application

In August 2009, after the end of the Beijing Olympic Games, the SNOG and Abrahamian as the appellants again filed an application to the CAS in Lausanne. The appellants asked for a modification of the IOC's decision made on 16 August 2008, from 'suspension' to a 'warning', returning the bronze medal, taking into account the cause and reactive effect.⁹

The appellants claimed first that, when the IOC issued its justification, it admitted it had completely disregarded the emotion and frustration felt by an athlete faced with a referee's judging decision. Abrahamian explained that his reaction was not in disrespect of his fellow competitors or against the Olympic movement. It was a reaction to the way in which FILA had violated its own rules and the *Olympic Charter*. Moreover, they maintained, the IOC decision was not a reasonable balanced judgment as to the proportionality of the penalty and the rules of the *Olympic Charter*. In light of the above, the IOC's note in its answer and defence was that the medal ceremony constituted a culminating victory ceremony and was thus a highly symbolic ritual, so that any disruption is of itself an offence and an insult to all the athletes, the Olympic movement, the public and the IOC. Such disruption was thus absolutely contrary to the spirit of fair play and the Olympic spirit embodied in the *Olympic Charter*. With regard to amending the penalty from 'suspension' to a 'warning', in terms of the *Olympic Charter* the IOC argued that a warning is not a sanction stipulated in the *Charter*.

After the hearing and discussion, the Panel summed up its conclusions as follows:

First, the Panel needed to clarify the grounds on which the appellants were appealing. The appellants wanted the decision of the IOC made on 16 August 2008 to be revised in accordance with the appellants' request, modifying 'suspension' into 'warning', based on *the principle of proportionality*. This requirement challenged the extent of the penalty, for the premise of improper reaction.

Secondly, the appellants had asked for consideration and balancing the cause and effect of Abrahamian's reaction during the medals ceremony, while the respondent's contention rested only on the moment at which he acted in the ceremony, regardless of his emotions. Pursuant to the *Olympic Charter*, with regard to the individual responsibility of the IOC or IF, the Panel was inclined to believe that the competence of the IOC was to focus on the ceremony, and it thus had the authority to decide the penalty.

Thirdly, it was a matter of dispute as to whether it had authority to go through technical arrangements or not when the IOC makes a decision. The Panel firmly believed that the IOC has the authority to discipline an athlete in the ceremony without any consideration of technical arrangements. In other words, the IOC lacks the technical background, so it has no ability to judge and examine the technical issues.

Fourthly, whether an athlete may obviously flare up emotionally in the ceremony as a consequence of his or her dissatisfaction or discontent is in question. It is a fundamental principle of the Olympic movement in the *Olympic Charter* that: *Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic movement.* The Panel held that the medals ceremony embodies the Olympic spirit, with a

highly symbolic ritual. Any improper expression of emotion in the ceremony is inconsistent with the exalted aura of the event.

Overall the Panel reached its final judgment: the Abrahamian decision reached concerning the IOC on 16 August 2008 complied with the *Olympic Charter* and the relevant rules, reflecting the spirit of fair play in the Olympic movement. Thus, the Panel rejected the applications, and the IOC's decision was ruled to be valid.

Comment

The case surrounding Abrahamian's medal rejection ended on 12 February 2009. In its final award, the Panel did not accept Abrahamian's applications; the athlete paid a bitter price for his behaviour during the ceremony. But the authors have some reservations about the second arbitration award in terms of the fundamental legal sports disciplinary principles.

The principle that 'technical issues cannot be reviewed'

The basic significance of 'technical issues cannot be reviewed' is that any disputes on technical issues such as rules of games or a referee's judgment in the field cannot be reviewed when the CAS hears a case, except where disputes are related to sport principles, money or something damaging to the practice and development of sport.¹⁰ For a theoretical point of view, this is founded in the doctrine that 'sports cannot be interrupted by the appeal of an appellant'; while for arbitration in sports, disputes are acknowledged to be decided carefully by the internal disputes settlement organ within the sports federations. Thus only decisions of 'torts of rights of persons or property rights' can be appealed.

Nevertheless, some recent practices provide fresh elaboration on this principle, namely: in high-level games, the results of applying game rules are relevant to an athlete's personal or property rights, which should be reviewed during the arbitration. Specifically, the CAS has the authority to hear any disputes involving an arbitrary decision, bribery or malice on the part of an arbitrator.¹¹ For example, an application was filed with the AHD in the Atlanta Olympic Games, where French boxer 'M' protested the referee's disqualification ruling because M had hit his opponent below the belt. But M claimed had hit his opponent's liver, which is allowed in the rules, so he should not be disqualified.¹² This decision was dismissed by the International Amateur Boxing Association ('AIBA') and AIBA supported the referee's judgment, after which the appellant filed a claim with the AHD. The Panel insists that the dispute about the AIBA decision is a typical one of applying competition rules. This was not previously reviewed by the Panel before on the grounds that 'sports cannot be interrupted by an appellant's appeal.' Whether the dispute can be reviewed by the Panel relies on whether the decision was made arbitrarily or not. In this case, the Panel dismissed the application because the appellant was unable to prove the malice of AIBA or any fault in applying rules.

From the development of this principle in sports arbitration, we can see that whether construed in broader or narrower terms, the essence of the principle that 'technical issues cannot be reviewed' is a bone of contention between the autonomy of technique in sports, and the intervention of legal arbitration. Certainly there is an ambiguous distinction between whether we appeal or not, and in how it should be confronted. We should judge each case on its own merits; initially we would analyse the basic facts of each case, then investigate whether the decision was made arbitrarily and conclude by taking into account the individual sport and its rules. At the same time, we can apply a teleological interpretation in the science of constructing law, making clear our distinction between the autonomy of technique in sports, and the intervention of legal arbitration, which thus grants arbitrators enormous discretion. Arbitrators should reach reasonable decisions to protect the order of sports autonomy or the rights of an athlete for the purpose of solving disputes.

What should be given greater attention is just who can apply this principle. While the CAS does not have the authority to review field decisions made by referees, IFs definitely do. In the 2005 World Cup football qualifiers for the Asian area during the Uzbekistan v. Bahrain match, Jeparov kicked the penalty and won a point for the Uzbekistan team in the 39th minute. But the chief referee immediately ruled that

8 *Olympic Charter* is cited according to the edition of 1 July 2007.

9 CAS 2008/A/1647 *NOC of Sweden and Ara Abrahamian v IOC*, <http://www.tas-cas.org/recent-decision>, cited on 10 Jan 2010

10 Huang Shixi, *Disputes and Arbitration in the Olympic Movement*, Law Press, 2005, p42.

11 Huang Shixi, *Disputes and Arbitration in the Olympic Movement*, Law Press, 2005, p51.

12 *M.v.AIBA, arbitration CAS ad hoc Division (O.G. Atlanta) 96/006*, Matthien Reed (ed.), *Digest of Awards 1986-1998*, Switzerland: Editions Stamfli SA, 1998, pp. 414-415.

the goal was disallowed because a teammate had entered the penalty area early. The chief referee then ruled a penalty: that Bahrain be granted an indirect free kick - a ruling which surprised everyone because it was thought that it would be a spot kick again. After the match, the game supervisor explained to the Uzbekistan team that this penalty had been given under the new rule of the Federation of International Football Associations ('FIFA'). The Uzbekistan Football Association appealed to FIFA and claimed that they had won with a score of 3:0. *FIFA Laws of the Game Law 14* stipulates: 'The players other than the kicker must be located..... at least 9.15m (10yds) from the penalty mark.....if the player taking the penalty kick infringes the laws of the game: the referee allows the kick to be taken; if the ball enters the goal, the kick is retaken; if the ball does not enter the goal, the referee stops play and the match is restarted with an indirect free kick to the defending team from the place where the infringement occurred.'¹³ Obviously the chief referee had confused the rules; FIFA therefore ultimately decided that the result was declared null and void because of the referee's serious mistake, and the game had to be restarted. For this case, FIFA did indeed review the technical issues in the game. It is the appropriate body for doing so, and a specific IF (not an arbitration body) can review the referees' decisions. What's more, the internal appeal jury in an IF is the vital channel for coming to an athlete's assistance. Thus, FIFA's change of its referee's decision is reasonable, and it does not violate the principle the technical issues cannot be reviewed.

With regard to the medal rejection case, there is an issue that one can always reject an athlete's application on the grounds that 'technical issues cannot be reviewed'. The authors believe that the precondition for this principle is that the internal appeal jury must have provided the right opportunity to athletes if they are under suspicion, so that it is unnecessary for the CAS to carry out a further review. If some IFs do not have an internal appeal system, how can the rights of an athlete be protected? Where what is involved is a distinct violation of procedure in a case such as FILA not having an internal appeal system, the authors firmly believe that the lack of an internal appeal system within the IF actually infringes on the rights of athletes, and the CAS cannot automatically apply the broad principle of avoiding all technical issues. This does not constitute justice, and the athlete should be assisted to make up for the IF.

The principle of proportionality

In the case dealing with the medal rejection, the appellant put forward the question of the proportionality of the penalty, but was overruled by the Panel. The proportionality of the penalty is an important doctrine, entailing that the severity of the penalty should be commensurate with the degree of the violation of the rules. A similar principle in criminal law is the principle of proportional justice: the idea that an offender's punishment should fit the crime; punishment for any given crime should be in proportion to the severity of the crime itself. A balance should be struck between the weakness of the defendant and the abuse of judicial power, so any award which breaches the principle is invalid. Although sport disciplinary sanctions differ sharply from those of criminal punishment, some similarities do exist. In the sports realm, the body which can impose a sanction on an athlete or others is powerful, so that it is easy to infringe on an athlete's rights. This is why the principle of proportionality is also emerging in sports disciplinary procedures.

The principle of proportionality has two sides: on the one hand, 'Although the imposition of a particular sanction is a matter, within the range provided by the rules, for the discretion of the relevant authority, the principle of proportionality means that a sanction must be proportionate to the offence and the sanction must be necessary to achieve the result sought by the body imposing it.'¹⁴ On the other hand, only the proportionate sanction is the most appropriate one; any sanction beyond proportionality is unfair and fails to realise the aim of the punitive measure. In short, sanctions that comply with the principle of pro-

portionality have two elements: the sanction should be in conformity with the offence, and the aim of the punitive measure is the definite one which the body pursues ('goal congruence'). Compared with the principle of matching the punishment to the crime in criminal law, 'goal congruence' arises from the distinction between 'crimes' in criminal law and 'offences' in sports discipline. Meanwhile sanctioning within sports is less harsh than punishments under criminal law, and sports sanctions are intended more to educate than really to punish. The authors insist that 'goal congruence' is more important when we apply the principle of proportionality. Firstly, 'goal congruence' is the clear standard of whether the penalty is in keeping with the principle of proportionality. Proportionality is a very vague or subjective criterion for arbitrators, who mostly rely only on their experiences, while the goal of each penalty is objective and positive. 'Goal congruence' can thus give arbitrators a practical or feasible guide. Secondly, 'goal congruence', the higher demand, can also restrict the power of the authority imposing the penalties. Because there is an imbalance between those who impose the penalty (IOC, IFs etc.) and those who are penalised (athletes, coaches etc.), 'goal congruence' works to protect the rights of the weak and to prevent the abuse of power by the powerful.

In the medal rejection case, the IOC reached the following decision: the athlete was disqualified from the men's Greco-Roman wrestling 84kg event; he was excluded from the XXIX Olympic Games in Beijing in 2008; he had his Olympic identification and accreditation card cancelled and immediately withdrawn.¹⁵ Above all, this sanction ultimately denied the athlete everything for which he had tried and trained, something exceptionally severe for a professional sportsman. Should he have to bear such an oppressive penalty? According to the principle of proportionality, it would be reasonable to punish an athlete who causes disorder at the ceremony, but should the penalty he deserves not be commensurate with his 'dishonourable' behaviour? The authors argue that defending the Olympic spirit would not only result in a penalty for the athlete's activity, but would also affect achieving the protection of social rights for athletes. It would thus be better for the IOC to have reached a decision with reference to concerns about 'goal congruence'.

The principle of *nullum crimen sine lege*

The *nullum crimen sine lege* principle in sports law draws on the concept from the principle of criminal law, entailing that government organisations or authorities should decide punishment in accordance with the criminal behaviour and should not punish beyond the written criminal law. Just like the principle of proportional justice, it also entails the restriction of abuse of power for authorities. Although there is no deprivation of life or freedom in sports discipline, a penalty as severe as a lifetime ban and professional disqualification, is in essence no less severe in this context than the deprivation of life or freedom. There is also a huge imbalance of power between authorities and athletes who are being penalised. Thus the principle of *nullum crimen sine lege* is obviously important, and entails that the weak be protected in a practical way as efficiently and effectively as possible. Where compared with the principle of proportionality, the principle of *nullum crimen sine lege* is limited by other facts. For example, the arbitrator only decides whether the sanction matches the misbehaviour or not in the principle of proportionality, but under the principle of *nullum crimen sine lege*, the rules should be fully formed and operable.

In the medal rejection case, the IOC imposed the disciplinary sanctions according to the *Olympic Charter, By-Rule 22 Sanction and Punishment* which states: 'In the context of the Olympic Games, in the case of any violation of the Olympic Charter, of the World Anti-Doping Code, or of any other decision or applicable regulation issued by the IOC or any IF or NOC, including but not limited to the IOC Code of Ethics, or of any applicable public law or regulation, or in case of any form of misbehaviour: with regard to individual competitors and teams: 1) temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation...' From this, it is too ambiguous for the above rules, and there is no description of misbehaviour against the Olympic spirit or any more details of sanctions; there is no specific regulation, just general declarations that regulation should be by penalty. Thus the IOC reached a decision depending on whether it or the CAS

¹³ *FIFA Changed the Match Result Historically: the First Change Because of the Wrong Referee Decision*, <http://zhidao.baidu.com/question/4619953.html>, cited on 21 Dec 2009.

¹⁴ Micheal Beloff, Tim Kerr, Marie

Demetriou, *Sports Law*, Hart Publishing, 1999, p.12.

¹⁵ CAS arbitration NO CAS OG 08/007 <http://www.tas-cas.org/recent-decision> cited on 10 Jan 2010.

supported the award, which totally violated the principle of *nullum crimen sine lege*. This is in contrast to the *World Anti-Doping Code*, where the *Code* has full and all-encompassing regulation on the types and nature of doping, which type of acts can be defined as doping, the first penalty and the second and so on. Although the penalties are severe, their regulation is expressed explicitly so that there should be no challenges or questions. This principle was involved in a case which occurred in Nagano, Japan. On 8 February 1998, Canadian athlete Ross Rebagliati won the gold medal for snowboarding, but on 11 February the IOC decided to withdraw the medal because of the existence of marijuana traces in his blood following a drug test. The athlete then filed a case with the CAS, which found that the IOC had imposed its penalty based only on the *IOC Medical Guidelines*,¹⁶ where marijuana was not on the drugs list. Ultimately, the CAS supported the appellant's application and annulled the IOC's decision. This case fully illustrates that the principle of *nullum crimen sine lege* is enforced in the area of anti-doping through the detailed *World Anti-Doping Code*.

The authors argue that it is necessary to set more detailed and concrete regulations on sanction and punishment in the *Olympic Charter*, which is the only authority used by the IOC in its decision-making. The IOC would thus more easily be able to determine the penalty; it would enhance its authority and also conform entirely to the principle of *nullum crimen sine lege*.

'Due process' and the principle of protecting athletes' rights

'Due process' is a vitally important principle in sports practice penalties. It includes the following two requests concerning the content of that principle: first, the neutrality of the authority; second, the legitimacy of the process of imposing a penalty. 'Due process' does not equal 'substantive justice', but the former is the objective criterion and effective guarantee of the latter. With regard to the vital importance of penalties on athletes' careers and lives, the sports authority should put 'due process' into practice and follow the principle of protecting athletes' rights.

In the medal rejection case, when the athlete objected to the IOC decision, we should consider whether the penalty conformed with 'due process' or not. It is not difficult to conclude that the IOC decision violated the 'due process' priority, the neutrality of the authority. In its award, the IOC was attempting to emphasise that the athlete's misbehaviour was a serious contravention of the Olympic spirit, and that therefore the IOC was the body tasked with defending that Olympic spirit. It would thus be reasonable to assume that the athlete challenged the authority of the IOC which had imposed the penalty. No one may judge their own case; it would therefore be impossible for the IOC to reach a neutral and judicial judgment within its dual role: the one who is challenged and the one who imposes the penalty. This is an apparent violation of 'due process'.

Indeed, in Olympic movements, the phenomenon whereby the IOC plays two different roles is not uncommon. According to the *Olympic Charter*, the IOC is in charge of almost every area except technical issues in the competition field. This means, of course, that most violations are regarded as a desecration of the Olympic spirit or a challenge to the IOC. A persuasive case can be made that the IOC might impose a penalty to protect itself and that it would also be hard to follow 'due process'. In consideration of this, the authors argue that it is the CAS or AHD which should impose any penalty because the IOC is actively involved in such cases; in this case, the IOC could only provide suggestions but could not impose the final decision. The CAS and the AHD are just arbitral bodies, so perhaps it would be better to establish a non-arbitral special body under the CAS, handing down decisions exclusively in such cases. If the athlete is not in agreement with a penalty from such a special body, he or she could appeal to the CAS or AHD. This special penalty mechanism would not only avoid the dilemma of the IOC being the judge in its own cases, but it would also guarantee the neutrality and legitimacy of the penalty, while protecting the athlete's rights.

The principle of *stare decisis* (the principle of precedent to be adopted)

The principle of *stare decisis* derives from a basic rule of common law. As its name implies, 'precedent' means that the case at hand should refer to the award of similar previous cases. The existence of the principle of *stare decisis* not only enhances a court's efficiency but also ensures consistency as well as judicial authority. The application of this principle in sports law matters greatly; where it arbitrates over disputes, the arbitral court should take previous similar cases into account where they exist.

In the 1996 Atlanta Olympic Games, the Cape Verde National Olympic Committee ('CVNOC') arbitrarily disqualified an athlete named as Andrade from the Cape Verde team for his behaviour in serving as a flag-bearer without permission. He disagreed with the decision and filed an application with the CAS AHD. The Panel deemed that only the IOC Executive Committee could reach such a decision and that the CVNOC was not an appropriate body to do so. Andrade was actually an athletic delegation member, so his behaviour did not challenge the *Olympic Charter*, and the CAS supported his application. After receiving the award, the CVNOC received authorisation from the IOC and imposed another similar penalty on Andrade. Again the athlete filed an application and the CAS annulled the decision because it was illegal for the CVNOC to impose a penalty without a hearing, thus violating the athlete's right to be heard.¹⁷

This case shares some similarities with the medal rejection one, in the following aspects: the main characteristics are the athletes' opposition to the IOC penalties; the cause of both cases is a violation of ceremonial aspects in the Olympics, the appellants' behaviour being regarded as betraying the Olympic spirit, athletes filed applications with the CAS, etc. The two outcomes differ markedly from each other, suggesting that the CAS acts against the principle of *stare decisis* in cases where the IOC's authority has been flouted. The authors believe that when the CAS made the two decisions, it attached importance to the protection of athletes' rights and the maintenance of IOC authority differently, in two cases which are the same in some aspects yet contrary in their final awards. This fact is definitely detrimental for enforcing the principle of *stare decisis*. As the major body for resolving sports disputes, the CAS should make its awards following the principle of similar cases having similar judgments, thus ensuring the body's fairness and authority.

Conclusion

Swedish athlete Abrahamian decided to retire after the CAS dismissed his second application.¹⁸ His conduct at the awards ceremony during the Beijing Olympic Games has engendered considerable contemplation in us all. In this case of medal rejection, FILA, ICAS and the CAS did not follow the fundamental principles of sports law. First, the absence of an internal jury in FILA left the athlete no avenue for redress. Second, the IOC penalty was too harsh and violated the principle of proportionality. Third, the IOC imposed the penalty without consideration of FILA's functional absence, and the CAS did not remedy the athlete's loss arising from the lack of an internal appeal mechanism in FILA, which is detrimental to the protection of athletes' rights. Ultimately, we support the belief that the final CAS award deserves further consideration.

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¹⁶ From 1 June 2000, the *IOC Medical Guidelines* were incorporated into the *Olympic Movement Anti-Doping Code*, and marijuana has recently entered the WADA list.

¹⁷ *Andrade v. Cape Verde NOC*, CAS Ad Hoc Division 1996 Atlanta Olympic Games, No.002 and 005, also see Huangying, The protection of eligibility

of CAS, *People's Court Daily*, 23 March 2006

¹⁸ In the 2004 Athens Olympics, Abrahamian missed the gold medal for another allegedly unjust referee decision and ultimately got the silver medal. http://en.wikipedia.org/wiki/Ara_Abrahamian cited on 10 Jan 2010.

Prosecuting Sports Violence: The Indonesian Football Case*

by **Topo Santoso****

I. Introduction

For a long time, there have been various problems in Indonesian football, such as fighting and violence on and off the field, as well as vandalism. Many incidents have also taken place, such as violence committed player to player, player to match referee, player to supporter, official to referee, and official to player. Fighting has also occurred between supporters and between supporters and the public (who were not involved in the football game). Meanwhile, vandalism has often occurred in the form of destroying football stadiums, public utilities, and private belongings.

The abovementioned problem is becoming more and more serious and needs to be analysed to find solutions to deal with it. The problem is found not only in Indonesia, but throughout the world.¹ Discussing all problems involving violence in sports would be very difficult and would require extensive study, because it covers so many considerations, not only juridical or normative aspects, but also sociological or even cultural ones.

Of these many problems, one problem will be discussed in this article, namely the implementation of criminal law provisions (particularly crimes against the person) in sports violence (particularly in "contact sports" such as football). More specifically, if the incident is taken place during the game. For incident not in the playing field, an athlete stands in the same relation to the criminal law as does any other citizen.² Today, there still remains a significant debate as to whether criminal law should be invoked in on-field cases. One side rejects the implementation of criminal law and prefers to use the so called "lex sportiva" or internal sports regulations, while the other side prefers to use the criminal law.

The opponents of criminal law implementation argue that all aspects of sports events have already been controlled by internal regulations. The use of criminal law will jeopardize the aim of sports, where people will be afraid to participate because of the risk of prosecution. For this reason, criminal law should not be implemented because circumstances are different from those outside the sporting arena. If criminal law applies, it will cause thousands of people to be prosecuted, because in sporting activities there are high risks of injuries being caused. If occurring outside sports events, such injuries could be regarded as criminal acts, particularly assault.

Meanwhile, the proponents of criminal law implementation argue that internal sports regulations cannot make something which is illegal into something legal. This side also argues that what is tolerable, even if it is part of a game or is a risk which is accepted by all sides in a match, and that there are certain actions that fall beyond the standard of acceptable conduct. Such conduct can then clearly be considered a crime.

This paper will focus on the problems arising from the implementation of criminal law in sporting activities. It will try to establish the relevant standards on the part of law enforcement agencies, sports organizations, and athletes to be considered when we face the problem of

criminal law as applied to sporting activities. In this article, I will focus only on football games in Indonesia. Football is the most popular sport in Indonesia, and in the last ten years there have been many incidents leading to debate over the role of the criminal law.

II. Nova Zaenal Dan Momadao Case

In February 2009, two football players, Nova Zaenal (Persis)³ and Bernhard Momadao (Gresik United), were involved in a fight during a football match between PERSIS Solo and Gresik United in the Indonesian Football league. After the match, the police arrested and detained the players and investigated the incident, following which they were prosecuted by the Solo District Attorney. In March 2010, the Solo District Court found Nova and Momadao guilty of assault and sentenced them to three months imprisonment, with six months probation (a suspended sentence). The court held that the defendants' conduct had damaged the reputation of Indonesian football. The High Court of Central Java at Semarang agreed with the Surakarta District Court decision, even imposing a more severe punishment, extending the imprisonment to six months with one year of probation/suspended sentence.

Those who approve of the prosecution argue that it shows that no one is above the law and that it will deter participants in sporting events from fighting, and thus will discourage public disorder. Those who disapprove argue that it is sufficient for participants in sports to be governed by the rules of the game. Some people (including high ranking officials of the Indonesian Football Association) claim that: "This is the first and only incident - not only in Indonesia but also in the world - in which athletes were prosecuted in a criminal court."

In the Indonesian context, the abovementioned claim could be correct, but in other countries the implementation of criminal law in court for sports violence dates back more than 100 years, and the first sports-related criminal case is commonly considered to be *R v. Bradshaw* (1878). The claim that the prosecution of athletes for offences committed during a game has only occurred in Indonesia and that it is the first and only case in the world is thus exaggerated. This exaggeration was probably caused by over criticism of the harsh application of the criminal law in this case.

Besides *R v. Bradshaw* (1878), there are other decisions concerning criminal law and sports events, such as *People v. Fitzsimmons* (1895), *Commonwealth v. Sostilio* (1949), *R v. Maki* (1970), *R v. Green* (1971), *State v. Forbes* (1975), *People v. Freer* (1976), *R v. Johnson* (1986), *R v. Birkin* (1988), *State v. Floyd* (1990), *R v. Blissett* (1992), *Jensen v. R* (1994), *State v. Shelley* (1997), *People v. Schacker* (1998), *R v. Brownbill* (2004), and *R v. Evans* (2006).

It is thus clear that the criminal law has been used to prosecute and punish athletes who act with excessive violence or are involved in fighting during the course of a game. This development is problematic because there is a conflict between criminal law and sporting law. Prosecutions have been seen as intervention in sport. However, there are reasons to use criminal law, particularly if the conduct goes beyond acceptable standards. Some factors that can be taken into account by law enforcement agencies dealing with violence or fights during the course of sporting events include intention, the consent of the participants, the legality of violence, moral considerations and the need for flexibility in the application of criminal law in sport activities. The approach of my paper is to focus on the criminal law rather than 'sports law' or 'lex sportiva.'

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1 On 29 May 1985, in the Heysel tragedy, Brussels, 39 football fans lost their lives and more than 600 were injured before the 1985 European Cup final between Liverpool and Juventus.

2 Jeffrey Standen, "The Manly Sports: The Problematic Use of Criminal Law to Regulate Sport Violence." *Journal of Criminal Law Criminology*, Vol. 9, No. 3, Summer 2009, p. 619.

3 Solo Football United, Central Java.

III. The "Battle" of Two Groups in Sports Law

The most common question asked by people work in this issue is about the definition of sports law. To answer such a question we need to discuss of how and why the law has become involved in sports disputes and to examine of whether there are any underlying themes or theories that link the disparate legal interventions under discussion into a coherent subject.

This is the challenge facing the law and sport when they interact with one another. It is important to know how sport has evolved to take account of requirements imposed on it by the law, and how the law has provided sport with the legal tools necessary to govern itself effectively and resolve the many and varied disputes to which it can give rise.

When we discuss sports law, we must ask which sports law we mean. There are four important terms grouped into two concepts, namely: (1) Domestic Sports Law and Global Sports Law; and (2) National Sports Law and International Sports Law. For the second category, particularly in Europe, there is added another term, European Sports Law.

The first category, often called *Lex Sportiva*, comprises Domestic Sports Law and Global Sports Law. Domestic Sports Law is defined as "The body of internally applicable legal norms created and adhered to by national governing bodies of sport." Global Sports Law is defined as "The autonomous transnational legal order through which the body of law and jurisprudence applied by international legal sports federations is created; in particular it includes the jurisprudence of the Court of Arbitration for Sport and its creation and harmonization of sporting-legal norms."⁴

The second category is comprised of National Sports Law and International Sports Law. National Sports Law is defined as "The law created by national parliaments, courts and enforcement agencies that directly affects the regulation or governance of sport or which has been developed to resolve sports disputes." International Sports Law is defined as "The general or universal principles of law which are part of international customary law, or the *jus commune*, that are applied to sports disputes."⁵

The key distinction between the two groups is that the former is underpinned by a series of contractual agreements entered into by, for example, the athlete, his or her club, the club's national governing body and the appropriate international sports federation. It is a private contractual order that claims to be making and applying its own set of rules. The latter is the law imposed by a nation state on its citizens, or which is constituted by the treaties entered into by communities of nation states, for example, the members of the EU being bound by the law enshrined in the Treaty on the Functioning of the European Union.⁶

An example of conflict or competition between *Lex Sportiva* and the National Legal System is the conflict between the International Olympic Committee and the Italian government with respect to what type of sanction should be inflicted in a doping case: 1) should it be a two-year suspension, as provided by the World Anti-Doping Code and as the International Olympic Committee demanded? Or 2) should the criminal sanctions (including up to three years' imprisonment) provided by Italian anti-doping law be applicable? The other issue in this case is what institution is authorized to conduct doping tests: 1) the Italian government wanted the country's anti-doping commission to administer the tests, while 2) the International Olympic Committee insisted on conducting its own tests during the Torino Games.

There is still competition between these two groups. The ongoing battle between the proponents of internal self-regulation and external legal regulation has been at the heart of the discussion on sports injuries and the criminal law, and is a major theme of this paper. As far as Indonesia is concerned, it seems that this kind of conflict has just started, as can be seen from the Nova Zaenal dan Momadao case. In this

case, there is discussion about which "law" should be applicable, Indonesian criminal law (as provided in the Indonesian Penal Code/KUHP), or internal sports regulations in football matches as provided by PSSI or FIFA.

IV. Sports Violence and Criminal Prosecution

Mark James⁷ identified several criminal acts that can be committed in cases of sports violence, the most important of which is common assault. Common assault can be committed in two ways: by assaulting another person or by battering them. Assault and battery have very specific meanings in the criminal law and these will be used for the rest of this section. However the term "assault" is generally used, whichever of the two technical meanings is actually in issue, and in the discussions after this section assault will be used to refer to all crimes committed including those which are technically batteries.

A. Common assault by battery and its implementation in sport

Common assault will usually be used in situations where the defendant has caused minor injuries such as bruising or grazes to the victim. This happened in *R v. Evans* (unreported) Crown Court (Newcastle), 14 June 2006, where the defendant was accused of having stamped on his victim in a rugby union game. The judge directed the jury to acquit on the basis that the "slight bruise" on the victim's forehead was insufficient to constitute an actionable injury arising from the normal playing of rugby.

Assault tends to be defined in popular meaning as "an attack". A more complete definition of assault is: (1) "The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery; (2) An attempt to commit battery, requiring the specific intent to cause physical injury. Also termed (in senses 1 and 2) simple assault; (3) Loosely, a battery; (4) Popularly, any attack."⁸

With regard to Indonesian criminal law, Common Assault could be compared to "Penganiayaan" or in Dutch "Mishandeling" (Chapter XX, Article 351 KUHP to 355).

Article 352 of the Indonesian Criminal Code concerns light assault by battery, ie, battery which does not result in an illness or obstacle in the performance of official or professional activities. This can be illustrated as follows: If someone (A) hits another person (B) three times on his head, B feels pain but does not get sick and can continue doing his daily job, then A can be prosecuted as committing "light assault".

It would make no sense to use this offence in football games, because it could result in every athlete being prosecuted. For this reason, law enforcement authorities tolerate minor assaults in sports events.

B. The Offences Against the Person Act 1861

The vast majority of sports assaults that come before the criminal courts arise from either deliberate foul play or fights and, in the United Kingdom, are often prosecuted under ss. 47, 20 or 18 OAPA (Offences Against the Person Act 1861). There is little need to discuss consent in such cases, because these assaults cannot be said to be an expected part of the playing of the game in question. Although it is technically possible for an aggravated assault such as those under OAPA 1861 to be committed during the ordinary playing of the game, this is extremely unlikely to occur. This is to be compared with the Indonesian Criminal Code Article 351.

C. OAPA 1861 s. 47 and KUHP article 351

The offence under s. 47 is committed where the defendant intentionally or recklessly assaults another person and causes the victim actual bodily harm (ABH). Put simply, it is a common assault that causes the victim ABH.

With regard to Indonesia, the offence in s. 47 OAPA 1861 may be compared to the "penganiayaan" offence provided in Article 351 of the Indonesian Criminal Code. There are no elements detailed in Article 351, and only the name of the offence is provided. What is defined as the elements of "penganiayaan" can be found in case law (court decisions) and in the opinion of legal experts.

4 Mark James, *Sports Law* (Hampshire: Palgrave Macmillan, 2010) at p. 3.

5 The second category includes European Sports Law which is defined as "The law created by the institutions of European Union, in particular the European Court of Justice, that affects the regulation or governance of sport or which has been

developed to resolve sports disputes."

Mark James, *supra* note 4 at p. 3.

6 Mark James, *supra* note 4 at p. 5.

7 Mark James, *supra* note 4, at pp. 109-128.

8 Bryan A. Garner (ed.), *A Handbook of Criminal Law Terms* (St. Paul, Minnesota: West Group, 2000) at hal. 44.

In an old decision of Hoge Raad (Netherlands) dated 25 June 1894, the court held that “battery/mistreatment is intentionally causing sickness or injury.” In another Hoge Raad decision on 21 October 1935, the court held that “the intention should be to cause injury towards body or health.”⁹

In a decision dated 15 January 1934, Hoge Raad stated that “Committing conduct which must be strongly assumed to result in severe injuries is a mistreatment/battery.” It is no matter that the offender has no intent to cause injury but only wishes to escape from police.”¹⁰ According to Article 351 (4) of the Indonesian Criminal Code, “intention to endanger other person’s health” can be categorised as battery.

According to case law, the elements of battery or mistreatment are: intentionally/recklessly, causing or resulting in suffering, causing pain, or causing injury, or intentionally causing illness.¹¹ Illustrations of causing suffering are pushing someone into the river and soaking the victim,¹² ordering someone to stand for hours under the intensity of the heat of the sun, etc. Illustrations of causing pain include biting, kicking, hitting, etc. Causing injury includes cutting and stabbing until the victim is hurt/injured. “Causing illness to another person” includes opening windows at night to make a sleeping person ill or giving someone intoxicating drinks until he/she becomes sick.¹³

All such conduct must be committed intentionally and without proper or good purpose or go beyond the prescribed limit. R. Soesilo, an Indonesian legal expert, gives the illustration of a dentist extracting his patient’s tooth. This conduct is actually intended to cause pain but cannot be categorised as battery because it is in fact good and helpful conduct aimed at curing the patient. A father hitting his children because his children are delinquent would be committing battery because the father intends to cause his children pain, but because the father has the proper aim of teaching his children not act wrongly, the conduct may not be regarded as punishable battery.¹⁴ This is in accordance with the Hoge Raad decision on 10 February 1902, which held that “If causing injury or pain in the body is not the purpose, but only a means to achieve other accepted/legal purpose, then there would be no battery.” For example, within accepted limits a parent or teacher in Indonesia may hit children.¹⁵

However, if the abovementioned conduct goes beyond the accepted limit, for example if a dentist extracts a tooth without using anaesthetic and or does it for a joke, or if a parent hits his children on the head using an iron, then the conduct will be considered as battery and therefore punishable.¹⁶

How should the provision be implemented in sports events? In Indonesia only one case has used Article 351 to prosecute athletes, namely the *Nova Zaenal and Momadao* case. In *Nova Zainal Mutaqin*¹⁷ the Prosecutor charged Nova with battery, as regulated in Article 351 (1) of the Indonesian Criminal Code. The defendant demanded the court acquit (*vrijspreek*) or discharge (*onslag van alle Rechtsvervolging*) him for several reasons: (1) the incident occurred during the game between Nova Zaenal and the defendant Momadao was under the jurisdiction of the PSSI regulation and thus his actions did not constitute a crime; (2) Statuta of FIFA, Basic Guidance of PSSI, General Regulation of PSSI concerning Football Match, Disciplinary Code of PSSI, and other regulations issued by PSSI were legal documents and regulated all football matches in Indonesia, and should be regarded as *Lex Specialis Derogati Legi Generali* (Special Law); (3) the essential facts charged were not proven by the evidence presented.

In *Nova Zaenal*, the Surakarta District Court held that all elements

of Article 351 (as described in case law/yurisprudensi)¹⁸ had been proven (the elements are intentionally causing pain or injury towards another person). The court held that these elements were proven because it was proven that the defendant chased the victim (Momadao) and hit him in his stomach three times, causing bruises. The judges saw no justification for the acts of the defendant. The judges then imposed a sentence of three months’ imprisonment, with six months’ probation/suspended sentence.

According to the Surakarta District Court Decision, a fight or battery, even though occurring in the field, is still unlawful and the perpetrator can be sentenced. The court agreed with expert opinion from the prosecutor, namely that of Prof. Dr. Nyoman Serikat Putra Jaya from Diponegoro University, rather than that of the defendant’s expert witnesses, namely Hinc Panjaitan, a leading proponent of *Lex Sportiva* in Indonesia, and Prof. Dr. R. Jamal Wiwoho.

In *Bernard Momadao*,¹⁹ the defendant in the preliminary proceedings brought up an exception which rejected the authority of the Surakarta District Court. The defendant claimed that the public prosecutor’s charge should be denied or annulled. However, this was rejected by the court. In the main proceeding, the Surakarta District Court held that all elements of Article 351 (1) were proven (the elements being intentionally causing pain or injury towards another person) because the defendant had been proven to hit the victim’s head using his right hand, bruising Nova Zaenal Mutaqin’s temples. The judge saw no justification. The court imposed three months’ imprisonment and six months’ probation.

These two decisions, *Nova Zaenal* (Decision No. 319/Pid.B/2009/PN.SKA) and *Bernard Momadao* (Decision No. 381/Pid.B/2009/PN.Ska), were brought to the appellate court in Central Java High Court in Semarang. The Central Java High Court in both these cases agreed with the ruling of the Surakarta District Court, even imposing a harsher punishment by extending the punishment to a six month imprisonment with one year’s probation/suspended sentence. The High Court held that the conduct of the defendant destroyed Indonesian football’s image, discouraged sportsmanship and hindered the ability of the victim to play the sport.

These two decisions were criticized, particularly by PSSI as the central federation of Indonesian football, which argues that the court is not the proper forum to handle such cases, because the sports federation has already laid down appropriate penalties. It claimed that this was the first and only case in the world where athletes had been prosecuted and sentenced in the criminal court.

The court held that, in the criminal law context, the federation’s imposition of rules was not sufficient to eradicate unlawful conduct. This argument is very similar to that in *Bradshaw*. In 1878, Bradshaw set the scene for the way in which the criminal law would develop in respect of sports assaults. In directing the jury on whether a foul that had led to the death of an opponent was criminal, or simply part of the lawful playing of the game, Bramwell LJ stated at p.85 that:

“No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land... [If] a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer ...that he is not acting in a manner which he knows will be likely to be productive of death or injury. But ...if the [defendant] intended to cause serious hurt to the deceased, or ...was indifferent or reckless as to whether he would produce serious injury or not, then the act would be unlawful.”²⁰

In *Bernard Momadao*, it was held that disciplinary treatment taken by the referee who supervised the match in form of yellow cards and by the Disciplinary Commission in the form of suspension in the next three matches in the league also could not eliminate the unlawful conduct. The court held that: “...this kind of sanction cannot eliminate criminal responsibility and the criminal action committed by someone involved in the conduct...”²¹ However, the disciplinary sanction was taken into account by the judges to consider the form of the sentence. Accordingly, the judges held that the sentence should not be implemented unless the defendant committed another violation within six months (suspended sentence).²²

9 R. Soenarto Soerodibroto, *KUHAP & KUHAP: Dilengkapi Yurisprudensi Mahkamah Agung dan Hoge Raad* (Jakarta: Rajawali Pers, 1991) at pp. 211-212.

10 *Ibid.*

11 R. Soesilo, *Pokok-pokok Hukum Pidana Peraturan Umum dan Delik-delik Khusus* (Bogor: Politeia, 1984) at pp. 144-145.

12 See also PAF Lamintang & Theo Lamintang, *Delik-Delik Khusus, Kesehatan Terhadap Nyawa, Tubuh, & Kesehatannya* (Jakarta: Sinar Grafika, 2010) at pp. 132-133.

13 R. Soesilo, *supra* note 11.

14 R. Soesilo, *supra* note 11.

15 R. Soenarto Soerodibroto, *supra* note 9.

16 R. Soesilo, *supra* note 9.

17 Decision No. 319/Pid.B/2009/PN.SKA, decided on 11 Maret, 2010.

18 Decision of Hoge Raad, 25 Juni, 1894 and 11 Januari, 1892.

19 Decision No. 381/Pid.B/2009/PN.Ska, decided on 23 Februari, 2010.

20 Mark James, *supra* note 4 at p. 109.

21 Decision No. 319/Pid.B/2009/PN.SKA, *supra* note 17.

There are two decisions which can be compared in this context, namely *Bradshaw* (1878) and *Billighurst* (1978). In *Bradshaw*, Bramwell LJ noted that contacts that were within the 'rules and practices' of the sport in question were lawful and could be consented to, regardless of the degree of harm caused to the victim. A hundred years later in *Billighurst* (1978), the court held that injurious conduct that was "of a kind which could reasonably be expected to happen during a game" could be consented to.

In the Indonesian context (where the criminal law mainly refers to Dutch law), the relation between sport and criminal law has also become a subject of debate. One interesting issue in this respect relates to consent. Schonke, van Hattum and van Bemmelen, as quoted by Lamintang, conducted a discussion about a physician who conducted plastic surgery (a treatment which cannot be categorized as part of health treatment). According to Schonke, the physician is not criminally liable because the unlawfulness has been removed by the existence of consent from his patient who demanded him to provide the beauty treatment.²³

In the sports context, the discussion concerning "consent" is also very relevant. According to van Hattum and van Bemmelen, the conduct that actually qualifies as battery loses its unlawfulness if there is consent from the other person (the victim). However, consent has limits. The conduct committed cannot go far beyond the prescribed limit in every individual sport.²⁴

The opinion of van Hattum and van Bemmelen may also give guidance about which conduct is acceptable (conduct which does not go beyond the prescribed limits) and which conduct is unacceptable (those actions which go far beyond the prescribed limits). However, it is not very clear whether such opinion is only relevant for inherently 'violent sports', such as boxing, or also relevant for 'contact sports' such as football. This guidance is also too general, because it has yet to describe what is the standard of "go[ing] far beyond the limits". With regard to law enforcement, we still need clearer standards, such as what kind of consent is needed to make conduct which is initially a battery lose its unlawfulness, where the offender will thus not be guilty due to the victim's consent.

V. Conclusion

In all jurisdictions, there is uncertainty in terms of how law enforcement officials should handle sports violence cases. In no part of the world is it common to use the criminal law in such situations. Indonesia, where there is ambiguity in the standards of the Indonesian criminal justice system, is no exception.

What about the law and regulations? Indonesia has a relevant statute in the form of the National Sport System (Law No. 3 of 2005). However, this law does not deal with the question of how to distinguish between criminal acts which attract the notice of law enforcement authorities and acts which are considered part of the game and under the authority of sport organization bodies. The main sources of criminal law are codified in The Indonesian Penal Code (KUHP), which comprises hundreds of criminal provisions. One of the relevant crimes, also found in other countries, is assault, including Grievous Bodily Injury (Articles 351-355). What is the definition of assault? This is not clear in the Code, and therefore we should refer to *yurisprudensi* (case law) and doctrine (opinion of criminal law experts).

With regard to defences, there is no clear limitation/standard regarding the consent of the participants. Thus far in Indonesia there has been only one incident brought to the criminal court dealing with sports violence in the cases of *Nova Zaenal* and *Momadao*. Meanwhile, the opinion of experts falls into two sides, namely: those who support the use of *Lex Sportiva* and disregard national criminal law, and those who support the implementation of criminal law in specific and limited incidents, ie. conduct which goes far beyond the rules of the game. Unfortunately, the first side seems absolutely to deny that in the field of sport or during the match the state law can interfere, while the other side does not provide clear standards which should be taken into account to determine when the criminal law can be used.

We may have further discussion on important standards mentioned in cases outside Indonesia, such as from *R v. Barnes* (2004). In this particular case, the Appellate Court provided certain important criteria to answer the issue of how to determine what is and is not acceptable conduct as part of the game. There are five considerations in handling sports violence cases: (*R v. Barnes*, 2004), namely: 1) the type of sport being played, 2) the level at which it is being played, 3) the nature of the act, the degree of force used, 4) the extent of the risk of injury and 5) the state of mind of the defendant. All these factors are relevant when determining whether the defendant's conduct is objectively acceptable in the circumstances.²⁵ Thus, while we cannot establish general limits in terms of acceptable conduct, we may be able to decide on a case-by-case basis whether these five criteria have or have not been satisfied.

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²² *Ibid.* at pp. 57-58.

²³ PAF Lamintang dan Theo Lamintang, *supra* note 12 at p.138-139.

²⁴ *Ibid.* at p. 140-141.

²⁵ Mark James, *supra* note 4 at pp. 109-128.

The Application of the European Fundamental Freedoms in Non-Professional Sports

by Henning Wegmann*

I. Introduction

The field of sports law is developing rapidly. The internationalisation of sports not only has national legal implications, it also gives rise to more and more international legal conflicts, especially with regard to European Law. In particular, there has been intense discussion on whether and to what extent general matters of sports fall into the scope of the European Fundamental Freedoms. According to the jurisprudence of the European Court of Justice (ECJ), the playing of sports is only protected by the European Fundamental Freedoms insofar as a genuine link can be drawn to economic life.¹ However, these decisions only apply to professional sports. A different legal approach pertaining to non-professional sport could be suitable due to the first-time mention of 'sports' in the Treaty on the Functioning of the European Union of 1 December 2009², in which 'sport' is now explicitly referred to in Articles 6 and 165 of the treaty. This inclusion emphasises sport's increas-

ing importance in European Law. Furthermore, one must bear in mind that it is somehow the essence of non-professional sport that it is being played not only for financial interests.

This paper deals with a decision of the judicial panel of the German Basketball Federation of 13 April 2010³, in which - as far as one can see - for the first time a German authority of jurisdiction takes a stand on the difficult question addressed above.

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¹ See the decisions of the European Court of Justice of 12 December 1974, Walrave/

Koch, 36/74, Vol. 1974, 1405, 1418; of 18 July 2006, Meca-Medina, C-519/04 P.

² Online at <http://dejure.org/gesetze/AEUV> [19 April 2011].

³ Decision of the judicial panel of the German Basketball Federation of 13 April 2010, cited in German in: SpuRt 2010, 215 et seq.

II. Decision of the judicial panel

1. Facts (abridged)

At the extraordinary association day of the West German Basketball Association (in German: *Westdeutscher Basketballverband*, WBV, appellant) on 25 April 2009, three of the basketball clubs applied for the introduction of a limit of two foreigners per team in the men's 2ND regional league. The appellant supported the application by stating that the men's 2ND regional league was an ideal league for educating, developing and supporting young German players. Recent developments had shown that more and more teams in the men's 2nd regional league mainly trusted foreign professionals. This would prevent young German players having the opportunity to train and play.

After this proposal had first been withdrawn, it was reintroduced in unchanged form at the ordinary association day in June 2009. Eventually, on 28 June 2009, the appellant decided under topic 11 'consultations and adoption of resolutions on introduced applications', to add the following text to section 9 of the play order WBV (WBV-SO):

'5. In the teams in the 2nd regional league, two foreigners may play in every game.

6. The restriction according to paragraph 5 does not apply to young foreigners who are under the age of 18, who are residing in Germany for the first time and who attend a German state school or similar educational institution or are completing an apprenticeship in a qualified accredited job. The evidence must be presented to the game management before the player competes for the first time.'

In a letter dated 17 August 2009, the opponents turned to the appellants' office and provided arguments against the agreed supplement section 9 WBV-SO which they elaborated on in detail. Having received no answer within the time limit set, the opponents applied to the judicial panel of the West German Basketball Association requesting them to check the legal correctness of section 9 WBV-SO.

In a decision dated 9 September 2009, the chairperson of the judicial panel accepted the temporary arrangement and suspended the regulation in section 9 WBV-SO until the final decision. With the decision of 27 October 2009, the judicial panel finally declared the regulation to be illegal. First of all, the regulation violated the repercussion ban. In addition, the regulation violated Article 45 TFEU in connection with Article 7, section 2 of the order No. 1612/68 of the European Council on the freedom of movement of employees within the community. The secondary legal discrimination ban also applies to the relevant regulation if it is assumed that the men's 2nd regional league is a pure amateur league.

The appellant appealed against this to the judicial panel of the German Basketball Federation in a letter dated 11 November 2009.

2. Decision (abridged)

The judicial panel of the German Basketball Federation admitted the appeal, but did not find it justified. In the following, this paper only deals with the reasonable justification. With regard to the legitimacy, the judicial panel explains with regard to compatibility with the European fundamental freedoms:

'The unsound norm of section 9 WBV-SO conflicts with European regulations.

[...]

Furthermore, it is to be assumed from the statements from precedence, which are binding to the judicial panel that the men's 2nd regional league in the league operations of the appellant is to be considered a pure amateur league and the players play basketball as a leisure sport. [...] In this connection, the appellant cannot refer to the circular letter of the Federal Ministry of the Interior, in which the Ministry holds the view that the 2nd national leagues in ball games should not be considered professional leagues, except for the men's 2nd football league. Thus a lower league, such as the men's 2nd regional league basketball, cannot be seriously considered a professional league. Just as a national association cannot unilaterally describe its amateurs as amateurs, the Federal Ministry of the Interior can rule on this in a binding way. Any national definitions of the employee's position in national legal systems have no impact at the level of European Law.

[...]

According to the jurisprudence of the European Court of Justice (ECJ), playing sports can only be protected by European Law as long as it is linked to daily business life in the sense of Article 2 of the Treaty of the European Communities (EC Treaty). However, for the future it must be considered that 'sport' is now explicitly mentioned in European Law for the first time, namely in Articles 6 lit. e and 165 of the Treaty on the Functioning of the European Union (TFEU).

[...]

In the view of the judicial panel, non-professional sports fall under the scope of the TFEU, even if there is no link to economic activity.

[...]

It is not correct for the appellant to conclude from the missing precedence of the ECJ on non-professional sports that restrictions on foreigners do not fall outside the scope of European Fundamental Freedoms of the TFEU. The judicial panel cannot follow this line of argument. The mere fact that the ECJ has not yet decided on a specific topic does not provide any statement on the legal situation.

It is said in parts of the literature that non-professional sports, which are carried out without any financial benefit, do not fall within the scope of European Common Law.

This argumentation cannot be followed due to the fact that since the enforcement of the Amsterdam Treaty (of 1 May 1995), European Common Law contains various Citizens' Rights which are not linked to any economic activity. These include, for example, general freedom of movement (Article 21 TFEU). In this way, the free choice of allocation was designed as a right for all EU citizens without any explicit reference to economic activities. [...] Among the rights which are dedicated to all EU citizens, one can also find the general prohibition of discrimination of Article 18 TFEU. It follows directly from this prohibition that every EU citizen legally residing within the boundaries of the EU is entitled to be treated to the same as citizens of the relevant national state.

Furthermore, it must also be stated in this respect that the ECJ explained that in terms of the fundamental freedoms, access to leisure activities is an exercise of general freedom of movement and thus falls under the regulations of the Community Law.

Consequently, non-professional sport falls under the scope of the European Community Law, with no link to economic activities. With the establishment of the TFEU, no conditions narrower than those of the EC Treaty were laid down with regard to whether sport falls within the scope of Community Law. On the other hand, sport is now explicitly mentioned for the first time (Article 6 lit. e and Article 165 TFEU). This justifies the conclusion that non-professional sport falls under the scope of the TFEU.

[...]

The general prohibition of discrimination of Article 18 TFEU is affected by the said regulation in section 9 WBV-SO.

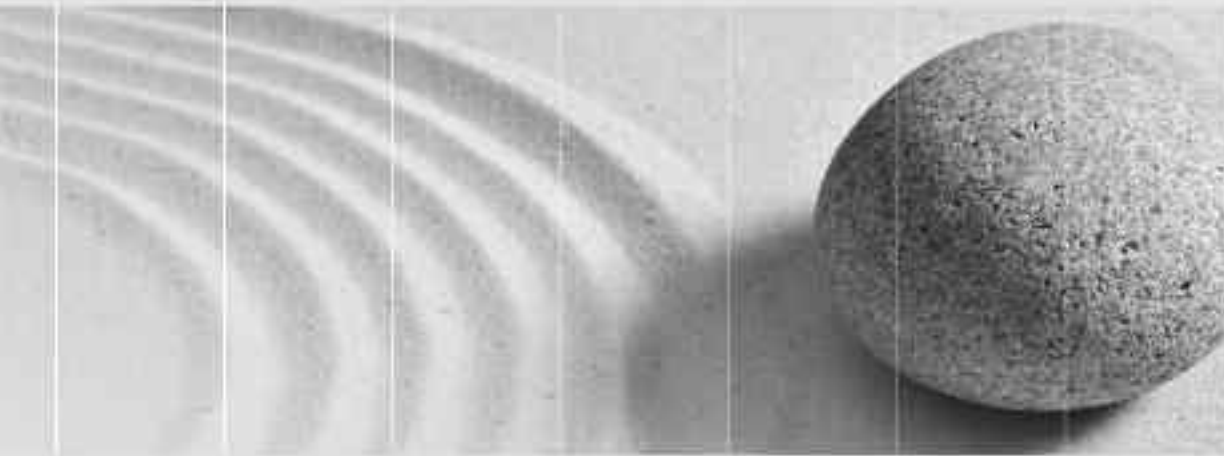
Article 18 TFEU forbids any discrimination for reasons of nationality. It not only prohibits obvious discrimination, but also bans any forms of hidden discrimination on the basis of nationality which lead to the same result because of the application of different means of discrimination. Section 9 WBV-SO may be considered a form of obvious discrimination, as the reason for different treatment is the nationality of the athletes.

Citizens of EU member states may claim the prohibition of discrimination of Article 18 TFEU.

[...]

Although the ECJ has not yet clearly decided on the direct third effect of Article 18 TFEU, it is commonly accepted in the jurisprudence of the ECJ that the prohibition of discrimination against employees is not only directed at state authorities, but under certain circumstances is also binding on private associations and organisations, if it could be expected that they might undermine the prohibition of discrimination due to their legal autonomy. For privately organised sport federations such as the appellant in this case, this is the case if the federation holds a monopolistic position, meaning that it has a norm-setting competence which can be functionally compared to the state's competence.

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[...]

Compelling reasons for a restriction of foreigners cannot be bought forward in the field of club competition, which is considered the core of club sport. In this context, the judicial panel sees no difference between mere club competitions between professional and non-professional athletes.

[...]

To be justified, however, the deliberate measure must also be likely to achieve the pursued aim. This is not the case here.

[...]

Bearing the argumentation of the appellant in mind, a higher level of providing evidence is required; an increase in leisure sport activities at this level should result in higher quality in preparation for a career in the national basketball team.

[...]

Ultimately it must be stated that section 9 WBV-SO violates Article 18 TFEU and must thus be regarded as feeble.⁷

III. Analysis of the Decision

To the best of my knowledge, this decision is the first official decision of a court-like authority in Germany to decide that the European fundamental freedoms also apply in the field of non-professional sport, independent of any connection to business life. Although the decision is not legally binding for any other courts or legal panels of sport federations, it provides an important first hint of how the ECJ might decide when dealing with the topic in the future.

The decision must be appreciated, especially for its clarity. The general prohibition of discrimination in Article 18 TFEU also applies between private persons, via the construction of the direct third-party effect. Within the jurisprudence of the ECJ of recent years, one can already see the tendency to allow the direct third-party effect especially in situations where private organisations show a norm-setting competence which can be compared to that of the state.⁴ As such, the relevant organisation may possibly be able to implement the European fundamental freedoms.⁵ This is the typical situation with sport federations which enact regulations which the athletes must obey if they want to play their sport in the future.⁶

It is also right to state that the European fundamental freedoms of the TFEU apply to the field of non-professional sport even without any connection to economic activities.⁷ In this context, it is important to recognise that despite the missing jurisprudence of the ECJ on this topic, ever since the Treaty of Amsterdam in 1995 there have been regulations which secure the right of EU citizens without linking those rights to any economic activity.⁸

Furthermore, the ECJ has already decided that the fundamental freedoms also protect access to leisure activities which result from the general freedom of movement and that leisure activities are thus generally protected by the fundamental freedoms.⁹ Moreover, the wording of the new TFEU also shows the increasing relevance of 'sport' in relation to the fundamental freedoms, which is emphasised by the fact that in Articles 6 lit. e and 165, the word 'sport' is now referred to directly for the first time in the history of the EC treaties.

Last but not least, the decision of the judicial panel is also emphasised by a current statement of the European Commission of 1 February 2010, in which the Commission states:

'... 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.'¹⁰

What remains unanswered, at least for the moment, is the question of the actual scope of protection. Whereas in the field of professional sport all market freedoms apply, the field of non-professional sport will firstly be protected by the general prohibition of discrimination offered in Article 18 TFEU. However, this result is the only development from the so-called Meca-Medina decision by the ECJ¹¹, in which the court applied the European fundamental freedoms on regulations of national sport federations.¹²

A possible justification of the restriction to Article 18 TFEU was defeated due to the inconsistent argumentation of the appellant. The judicial panel correctly states that the activity level between a mere amateur league and the national basketball team is so different that it is normally impossible to enable amateur players to play for the national team in one step.

IV. Outlook

It remains to be seen to what extent this decision has signalling effect, as the decision has no legally binding power due to the missing court quality of the judicial panel of the German Basketball Federation. In the current legal situation, the judicial panels of sport federations will need to interpret the European fundamental freedoms by themselves. However, it is to be expected that the ECJ itself will have to deal with the topic in the short term due to the increasing importance and ongoing internationalisation of sports law. More founded reasons and the higher level of legal security argue in favour of applying the fundamental freedoms in the field of non-professional sport.

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4 On this see: Michaelis, Unmittelbare Drittwirkung der Grundfreiheiten - Zum Fall Angonese, in: NJW 2001, 1841.

5 See also Seymer, Grundfreiheiten der Unionsbürger im organisierten Freizeitsport, in: Vieweg (ed.), Prisma des Sportrechts, p. 319 (329).

6 Epiney, Ausländerklauseln im Amateursport - ausgewählte rechtliche Fragen unter besonderer Berücksichtigung des Freizügigkeitsabkommens Schweiz-EU, 2008, p. 21.

7 Obviously Holzke holds a different opinion, Die Gleichstellung drittstaatsangehöriger Berufssportler nach der Kolpak-Entscheidung des Europäischen Gerichtshofs, in: SpuRt 2004, 1 (6); Streinz, in: Tettinger (ed.), Sport im Schnittfeld von europäischem Gemeinschaftsrecht und nationalem Recht, 2001, p. 29 et seq.

8 See Hess, Vom Konflikt zur Konkordanz - Das Europäische Gemeinschaftsrecht

und der Sport, dargestellt am Beispiel der Freizügigkeit der Sportler, in: Vieweg (ed.), Prisma des Sportrechts, 2006, Volume 26, p. 1 (28).

9 ECJ, decision of 7 March 1996, C-334/94, 1996 I-1307 'Bosman'.

10 Statement of the European Commission of 1 February 2010, cited in: Engelbrecht, Discrimination against EU nationals in amateur sports, International Sports Law Journal 2010, p. 105.

11 Decision of the ECJ of 18 July 2006, C-519/04 P, - Meca-Medina, online at [lexetius.com/2006/1527](http://www.lexetius.com/2006/1527) [03.05.2011].

12 On this and on the application of the fundamental freedoms in general, see Wegmann, Der Fall Caster Semenya: Rechtliche Implikationen der Geschlechtsbestimmung im Sport, online at http://www.sportgericht.de/premium/2010_Wegmann_Rechtliche_Implikationen_der_Geschlechtsbestimmung_im_Sport.pdf [03.05.2011].

International and European Sports Law Course

School of Law, Erasmus University Rotterdam, The Netherlands

Lecturer: Prof. Dr R.C.R. Siekmann

Structure: ten 2-hour interactive lectures

Assessment: paper (10 pages) and oral exam

Preknowledge: basic knowledge of public international and EU law

Period: 2011/2012

(For more information see page 133)

Protecting International Sports Events: The Importance and Creative Use of Intellectual Property Rights

by Ian Blackshaw*

Introductory Remarks

Sport is big business and has become an industry in its own right worth more than 3% of world trade and 2% of the combined GNP of the twenty-seven Member States of the European Union. So, there is much to play for both on and off the field of play.

Underpinning all this commercialisation of sport are the corresponding Intellectual Property Rights (IPRs), especially trademarks and copyright, since under English Law there is no legally recognised right in a sporting event *per se*. See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor and Others* [1937] 58 CLR 479. In that case, Latham CJ held that:

"A spectacle cannot be 'owned' in any ordinary sense of that word."

Other IPRs, such as Patents, for example, are of limited application and importance in sports law, although they do figure - to a certain extent - for example, in connection with the commercialisation of sports equipment and so-called 'sports movements' such as the '*Fosbury flop*'.

For a broader and more extensive treatment of the subject of IPRs and their importance in sport generally, see Paper on '*The Importance of IP Rights in Sport*' presented by Ian Blackshaw at the 2008 Global IP and Patents Meeting in London.¹

Sports Events: Trademark Protection

Perhaps the most distinctive and recognised sports event mark in the world are the five interconnected rings in blue, yellow, black, green and red symbolising the world-wide reach of the Olympic Movement and the Olympic Games - often referred to as the 'greatest sporting show on Earth!'.²

The Olympic Rings enjoy special legal protection at the international and national levels around the world. At the international level, they are protected by the so-called 'Nairobi Agreement' - the Agreement on the Protection of the Olympic Symbol of 1981.

At the national level in the UK and in connection with the staging of the Summer Olympic Games in London in 2012, the Rings - as a bid pre-condition - are protected under the provisions of the London Olympic Games and Paralympic Games Act of 2006. This Act also protects the use of the Olympic Motto and the use of such expressions as '*the Games*', '*Olympians*', and '*Olympiad*', as well as 'strap lines' in advertisements, such as '*Come to London in 2012*' and '*Watch the games here this Summer*'. All these measures are designed to provide Olympic brand protection and combat various forms of so-called '*Ambush Marketing*' for the benefit of the Official Sponsors of the Games, who pay mega bucks for a package of 'top line' sponsorship rights, against those who, in the advertising and promotion of their products and services, falsely and unfairly claim an association or affiliation with the Games. However, these statutory measures have been described by the UK Advertising Industry as "draconian" and threatening the right of free speech, which includes commercial speech, that is, advertising!

As regards trademark protection, which is probably, in practice, the most important form of legal protection of sports events, sports bodies and organisations and also sports persons (particularly in relation to

their image rights), the UK Trade Marks Act of 1994 defines a trademark in section 1(1) as:

"... any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging."

This is a wide definition³ and so a trade mark may be granted in respect of, for example, distinctive sounds, as in the case of the Australian Football League, which has registered the sound of a football siren for football and associated services.³

Thus, provided the basic legal requirement of distinctiveness is satisfied, it is possible to register the names and associated *logos* of sports events as trademarks. However, the name 'Euro 2000' failed the distinctiveness requirement and could not be registered as a trademark *per se*. But, *prima facie*, combined with a distinctive *logo*, this event name could be registrable as a trademark. Likewise, an attempt in 1998 to register the name 'World Cup' also failed through lack of distinctiveness. Again, combined with a distinctive and original *logo*, such a mark can be protected as a trademark and also enjoys copyright protection as an 'artistic work'.⁴ Under section 4 (1)(a) of the UK Copyright Designs and Patents Act of 1988, "*a graphic work, irrespective of artistic quality*" qualifies for legal protection as an 'artistic work' under the Act.

Sports event 'mascots' may also qualify, in principle, for registration as trademarks, again subject to their being distinctive. And also as registered designs.

Although not an event mark, it would perhaps be remiss not to mention the ADIDAS 'three stripes' trademark case, in which the long-awaited Preliminary Ruling by the Court of First Instance of the European Court of Justice (ECJ) (C-102/07) was rendered on 10 April, 2008. This case, which well illustrates the need for trademark protection in the sporting arena generally, concerned the extent of the legal protection under Trademark Law within the European Union afforded to the three vertical stripes on sports and leisure goods produced and sold by Adidas. The facts of this case were as follows:

The Parent Company of the Adidas Group, Adidas AG, is the proprietor of a figurative trademark composed of three vertical, parallel stripes of equal width that feature on the sides of sports and leisure garments in a colour which contrasts with the basic colour of those garments. Its Subsidiary Company, Adidas Benelux BV, holds an exclusive licence, granted by Adidas AG, to use this mark on garments marketed in the Benelux countries.

Marca Mode, C&A, H&M and Vendex are competitors of Adidas, who also market sports garments featuring two parallel stripes, the colour of which contrasts with the basic colour of those garments.

Adidas took the competitors to Court in The Netherlands claiming the right to prohibit the use by any third party of an identical or similar sign which would cause confusion in the market place. Marca Mode and the other defendants to these proceedings, however, claimed that they are free to place two stripes on their sports and leisure garments for decorative purposes. Their defence was based on the so-called requirement of availability, namely that stripes and simple stripe motifs are signs which must remain available to all and, therefore, they did not need the consent of Adidas to use the two-stripe motif on their garments.

Adidas won at first instance; were overruled on appeal; and the case finally came, on a point of law, before The Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), which sought clarification from the ECJ on the main point at issue, namely, whether the requirement of availability is an assessment criterion for the purposes of defining the scope of the exclusive rights enjoyed by the owner of a particular trademark.

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¹ Reproduced in *The International Sports Law Journal*, ISLJ 2008/3-4, at pp. 146 - 150 (both inclusive).

² Notice that the list of examples is illustrative and not exhaustive.

³ For further information on trademarks generally and, in particular, their territo-

rial nature and, therefore, the need, in the case of Sports Events that are going to be commercially exploited internationally, to register them widely around the world and also in the relevant use classes under the Nice Classification of Goods and Services for Trademarks, see Chapter 10 entitled, '*Intellectual Property Rights and Sport*', by Ian Blackshaw in '*Sports Law*' by Gardiner et al, Third Edition, 2006 Cavendish Publishing, London.

⁴ See later.

The ECJ ruled, first, that the requirement of availability of certain signs is not one of the relevant factors to be taken into account in the assessment of the likelihood of confusion. The answer to the question as to whether there is that likelihood must be based on the public's perception of the goods covered by the mark of the proprietor on the one hand and the goods covered by the sign used by the third party on the other. The national court must determine whether the average consumer may be mistaken as to the origin of sports and leisure garments featuring stripe motifs in the same places and with the same characteristics as the stripes motif of Adidas, except for the fact that the competitors' motif consists of two rather than three stripes.

Secondly, the ECJ turned its attention to the specific protection granted to trademarks with a reputation. It noted that the implementation of that protection does not require the existence of a likelihood of confusion between the sign and the mark. The mere fact that the relevant section of the public establishes a link between the two is sufficient. Since the requirement of availability is extraneous both to the assessment of the degree of similarity between the mark with a reputation and the sign used by the third party and to the link which may be made by the relevant public between that mark and the sign, it cannot constitute a relevant factor for determining whether the use of the sign takes unfair advantage.⁵

Protection of a registered trademark lasts for an initial period of 10 years and, provided the mark is used commercially and the renewal fees are paid, the registration can be renewed for further periods of 10 years *ad infinitum*.

It is advisable, for trademark protection reasons, to use the device R in a circle (®) after the trademark wherever and whenever it is used; or the legend: 'X is registered trademark of ABC'.

Sports Events: Copyright Protection

The difference between trademark protection and copyright protection lies in the fact that in order to obtain the former, it is necessary to register the trademark concerned in a public registry, whereas in the case of copyright in a protected 'work', no such registration is generally required: copyright exists by operation of law once the work is created and published.

As mentioned above, copyright protection exists and can be claimed in respect of a composite event mark, which combines the name of the event incorporated in a distinctive and original logo by the use, for example, of distinctive lettering and colours. Such a logo is regarded for copyright purposes as an 'artistic work' irrespective of artistic merit, pursuant to the provisions of section 4 (1)(a) of the UK Copyright Designs and Patents Act of 1988 (see above). The 'work' need not, for example, be a Picasso!

Copyright in an artistic work lasts for the life of the author plus 70 years (see section 12 of the 1988 Act).

Wherever and whenever the logo appears, it is advisable to claim copyright in it by using the international copyright notice, consisting of a C in a circle (©), the name of the copyright owner and the year of publication. For those countries (and there are not that many of them) in the world that are not members of the Berne Convention for the Protection of Literary and Artistic Works, the words 'all rights reserved' should be added.

Another point to note: generally speaking, there is no copyright in a slogan, as a literary work. See the decision in *Exxon Corporation v. Exxon Insurance Consultants International Ltd.*⁶

Hypothetical New Sports Event Case Study

To illustrate the legal importance and practical application of IPRs in sport as well as the general principles explained above, let us consider the following hypothetical case study.

The International Volleyball Federation wishes to introduce a new event into their calendar of events, entitled: "European Beach Volleyball Grand Prix Series".

As will be seen from the above summary of the legal requirements for obtaining trademark protection, the mark concerned must be distinctive and not generic. Clearly the words 'Beach Volleyball', 'Grand Prix' and 'Series' are descriptive and not inherently distinctive. Likewise, the word 'European' is geographical and also, again, descriptive of the event. Descriptive and geographical marks are expressly excluded from registration as trademarks according to the provisions of section 3(1)(c) of the UK Trade Marks Act 1994. The legal position elsewhere is the same. Trademark protection of the name *per se* is not, therefore, legally possible.

So what can be done? There is, in fact, a way round these legal obstacles and that is by incorporating the event name in a distinctive logo and thereby creating, what is known in the jargon, as a 'composite mark'. The logo may be rendered distinctive by the use of distinctive lettering or script and also colours.

Also, as mentioned, the logo qualifies for copyright protection as an 'artistic work' under the provisions of section 4 (1)(a) of the UK Copyright Designs and Patents Act, 1988 (see above).

Thus, by turning the event name into a distinctive and original logo, trademark and copyright protection has been secured. *Quod erat demonstrandum!*

It should be stressed that, without these specific legal protections, the event name and the event itself cannot be commercialized as, for example, sponsors and merchandisers cannot be granted any IPRs that they can use against infringers and counterfeiters, including so-called 'Ambush Marketing'. Major sports events are very attractive to those companies and business organisations who wish to be associated with them without having to pay the mega sums for the privilege of doing so!

Of course, someone needs to design the event logo and this raises some copyright issues too, depending upon whether the logo is created in-house or by an outside graphic artist. Many International Sports Governing Bodies have their own in-house dedicated marketing departments, which include 'creative staff' who can do this work. In that case, the copyright belongs to the Sports Body concerned.

Under the provisions of section 11(2) of the 1988 Copyright Act, where a literary, dramatic, musical or artistic work, or, indeed, a film, is made by an employee in the course of his/her employment - in other words, it is part of the employee's job description/specification - the employee is the first owner of any copyright in the work. It should be noted that, for this result to apply, it is not sufficient that the work (or the film) is made by an employee; it must be made in the course of that employee's employment. Thus, if, by agreement with the employer, an employee produces the logo in his/her spare time and outside the terms and scope of his/her employment, the first copyright owner of the 'work' is the employee. The legal distinction between an employee and an outside contractor is that, in the former case, the employee is employed under the terms of a contract of service; and, in the latter, the person concerned is acting under a contract for services. This is not a matter of semantics: it is a substantive matter of fact in each case! It is, therefore, incumbent on the employer to make the copyright position crystal clear in writing, to avoid any litigation. See the case of *Ray v. Classic FM* [1998], unreported.

Thus, where the sports event logo is produced outside by an independent contractor - a graphic artist or design studio - section 11(2) (above) does not apply and the first copyright owner is the outside contractor.

Of course, in the latter case where the logo is commissioned, there not only needs to be a Commissioning Agreement, but also a Copyright Assignment from the outside party to the Sports Body concerned.

Copyright Assignment

Let us now take a brief look at the legal requirements that need to be met where the logo is commissioned from and produced by someone outside the Sports Body concerned.

Clearly, in such a case, the copyright needs to be transferred to the Sports Body from the outside body. Under the provisions of section 90(3) of the Copyright Designs and Patents Act, 1988, the Assignment must be made in writing in order to transfer the legal and beneficial title to the copyright in the work concerned. However, the 1988 Act does not

⁵ For the full text of the ECJ Preliminary Ruling in the ADIDAS 'three stripes' trademark case, see: <http://www.curia.europa.eu/jurisp/cgibin/form.pl?lang=EN&Submit=rechercher&numaff=C-102/07>.

⁶ [1982] RPC 69.

prescribe any other formalities or any particular form of words. Thus, the document may be quite simple, but, in order to be legally effective, a clear and express intention to assign/transfer the copyright in the work concerned must be evidenced from the words used in the Assignment.

Thus, a copyright licence or authorisation will not, generally, be implied purely on the basis that, in the particular circumstances of the case, it may be reasonable to do so: there must be a clear intention of the parties. See *Blair v. Osborne & Tomkins*.⁷

In practice, a fairly detailed document needs to be drawn up along the lines of the basic general precedent of a Copyright Assignment which is set out in the Appendix to this article.

As will be seen, it is advisable, *inter alia*, to include in the Assignment some warranties of title on the part of the 'Author' who is assigning the copyright in the sports event logo; to define the rights in the logo that are being assigned (this is where a Definitions Clause comes in very useful); and also to include an Indemnity Clause in relation to any breaches on the part of the 'Author' of any of the provisions of the Assignment Agreement, particularly obligations.

Precision in drafting, as mentioned above, is the name of the game, from a legal point of view.

Concluding Remarks

The importance of IPRs in providing the necessary legal protection to major international sports events cannot be overemphasised. In fact, it is fair to say that, without the creative use and application of IPRs, major sports event organisers have nothing to commercialise or to sell to sponsors, merchandisers, broadcasters and many others who wish to be commercially - and I would add - officially associated with these events.

Getting it right and drawing up the corresponding formal agreements is crucial to the successful exploitation of the sports events concerned. For these purposes, event organisers need to employ the legal experts.

Not to do so, I would submit, is not only false economy but sheer commercial and financial folly!

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⁷ [1971] 2 WLR 503.

APPENDIX

COPYRIGHT ASSIGNMENT

THIS ASSIGNMENT is made the day of 20[]

BETWEEN

- (1) [.....] (.....) whose registered office is situate At ("Author")
 (2) [.....] (.....) whose registered office is situate at ("Company")

RECITALS

- A. The Author is author of and copyright owner in the Work
 B. The Company wishes to take an assignment of the copyright in the Work upon the terms and conditions as hereinafter contained

OPERATIVE PROVISIONS

1. Definitions

- 1.1 The following definitions apply in this Agreement
 "Act" means the Copyright Designs and Patents Act 1988 as amended from time to time
 "Fee" means £[...]
 "Right" means all vested, contingent and future copyrights, all accrued rights of action and all other rights of the Work whether now known or created in the future to which the Author is entitled by virtue of any of the laws in force in any part of the Territory
 "Term" means the full period of copyright in the Work including all renewals, reversions and extensions of copyright in the Work arising under the laws in force in each part of the Territory
 "Territory" means [the world]
 "Work" means the [.....] work (entitled [insert title] a copy of which is annexed as Exhibit 1

2. Assignment

- 2.1 In consideration of the Fee the Author assigns the Rights to the Company with full title guarantee in the Territory for the Term
 2.2 the Company shall pay the Author the Fee on signing this Agreement
 2.3 at any time after the date of this Agreement each of the parties shall at the request and cost of the party execute or procure the execution of any document and do or procure the doing of any act or thing as the party requires so that the party receives the full benefit of all the provisions of this Agreement

3. Warranties

- 3.1 The Author represents and warrants to the Company that
 3.1.1 the Author is the sole author of the Work and was throughout the creation of the Work a "qualifying person" within the meaning of the Act
 3.1.2 the Author is the absolute and unencumbered legal and beneficial owner of the Rights throughout the Territory and has not assigned or licensed the Rights in the Work to any other person
 3.1.3 there is no present or prospective claim in respect of any rights in the Work which may infringe any of the Rights
 3.1.4 the Work is original to the Author and does not infringe any right of copyright moral right or right of privacy or right of publicity or personality or any other third party right
 3.1.5 copyright in the Work is valid and subsisting pursuant to the Laws of the United Kingdom and the United States of America and the provisions of the Berne Convention and Universal Copyright Convention
 3.1.6 the Work contains nothing which is obscene blasphemous libellous or otherwise unlawful and the exploitation of the Work will not infringe the rights of any third party

4. Indemnity

- 4.1 The Author hereby agrees to indemnify and keep indemnified the Company from any loss expenses damages costs or prejudice (including without prejudice to the generality of this provision the Company's legal costs on a solicitor and own client basis) arising directly or indirectly as a result of any breach or non-performance by the Author of any of the Author's obligations or warranties in this Agreement

5. Alterations to the Work

- 5.1 The Author irrevocably and unconditionally waives all moral rights in the Work to which he is entitled under section 80 of the Act and any similar rights to which he is entitled in any part of the Territory
 5.2 The Company reserves the right to alter the Work as in its discretion it may, from time to time, see fit and the Author consents to any and all such alterations

[BOILERPLATE CLAUSES]

[EXECUTION CLAUSES]

[EXHIBIT 1]

The Hybrid Character of WADA and the Human Rights of Athletes in Doping Cases (Proportionality Principle)

by Robert C.R. Siekmann*

1. Introduction

Generally speaking, what may be termed “sports law” consists of two parts, a public and a private one. The private part is formed by the rules and regulations of organized sport. Organised sport is built up of national and international organisations for each sport. The national associations are members of regional (continental) and universal, global and worldwide federations (IFs). From an institutional point of view, his part is hierarchically structured with - in association football - universal federations such as FIFA at the top and with UEFA as the regional organization for Europe. Besides, the Olympic Games which have an “omnisport” character, are organized under the umbrella of the IOC in cooperation IFs regarding the technical sporting aspects. The private part of sports law is the core part of this field of law, whereas the public one is of a non-systematic, fragmented nature. This part mainly consists of national legislation and a number of agreements under public international law (treaties) which relate specifically to sport.

“Anti-Doping law” belongs to “sports law”. In the past, its private part was represented by national and international anti-doping regulations. With the introduction of the WADA Code in 2003 (WADA = World Anti-Doping Agency; officially, the correct naming is WAD Code (WADC), however, the Code is popularly known as and called WADA Code) this part was uniformised in one single international legal instrument. The public part consists of a number of national Anti-Doping Acts as well as two treaties which deal with the subject under consideration, that is the Council of Europe’s Anti-Doping Convention of 1989 (and its Additional Protocol) and the UNESCO International Convention against Doping in Sport of 2005. As far as disciplinary law is concerned, the (private) jurisprudence of the Court of Arbitration for Sport (CAS) plays a very significant role. The special characteristic of “anti-doping law” from an institutional, organizational perspective is the fact that national governments and intergovernmental organisations (IGOs) directly participate in WADA and the close linkage between the UNESCO Convention and the WADA Code. This issue will be discussed in detail in the first part of this article. The hot issue of the legal aspects of the fight against doping in sport is the relationship between “anti-doping law” and the human rights of athletes in doping cases, that is the applicability of general public human rights law to doping in sport. In the second part of the article a case of this type in which in 2009 this author was personally involved as a member of the appeals committee of the *Instituut Sportrechtspraak* [Netherlands Institute for Sport Adjudication] will be presented. The Appeals Board’s decision was finally submitted to the CAS which was and still is the first time in history with regard to a Dutch case.

2. WADA: a public-private body

According to Richard Pound, Member of the IOC and the first Chairman of WADA, in 2002, the seminal event that led to the creation of the World Anti-Doping Agency (WADA) was the Tour de France in 1998. During the event, the French police found doping substances in the possession of certain of the teams and proceeded to arrest not only officials, but also athletes. The sight of athletes being led away by the police, to face possible criminal charges, was most dramatic. It also delivered a “wake-up” message to all other sports; if this could happen to one of the major European sports, in its showcase event, then it could also happen to them. The prospect of sport being governed by criminal law, with the concomitant intervention of the state, was thoroughly unattractive.

The situation was compounded by remarks made by IOC President Juan Antonio Samaranch to a Spanish journalist during the same Tour de France, in which he speculated that the list of substances prohibited was too long and that, so far as he was concerned, anti-doping scrutiny should be limited solely to substances that were harmful to the athletes, regardless of their performance-enhancing capacities. This statement drew considerable media attention, much of which was to the effect that the IOC was going “soft” on drug use and that much of its previous rhetoric concerning anti-doping was nothing more than pious claptrap. This led Samaranch to call a special meeting of the IOC Executive Board in August 1998. During the course of discussions on the issue, a suggestion emerged that what was required, inter alia, was an independent anti-doping agency, that would be completely neutral in its activities and that would have a governance structure designed to ensure that no organisation or groups of organisations could control it. The model suggested at the meeting of the IOC Executive Board was that used in the resolution of sports-related disputes, pursuant to which the Court of Arbitration for Sport (CAS) is governed by the International Council for Arbitration in Sport (ICAS), an organisation made up of representatives of the IOC, the International Federations (IFs), the national Olympic committees (NOCs) and athletes. The effect of such a governance structure has been such that CAS has been recognised as an independent body by the Swiss courts.

The IOC Executive Board also decided to organise a World Conference on Doping in Sport in February 1999 in Lausanne, to which not only members of the Olympic family would be invited, but also representatives of governments and of international organisations. In preparation for the meeting, the working group charged with developing the concept of an international anti-doping agency contemplated a series of the equal blocks of members, consisting of the IOC, the IFs, NOCs, athletes, governments and a sixth group containing representatives of sponsors, sporting good manufacturers, event organisers and, possibly, the pharmaceutical industry. In the interim, the IOC Medical Code was made more generic and turned into the Olympic Movement Anti-Doping Code to become effective on January 1, 2000, so that there would be a uniform set of rules to be applied in doping matters. At a meeting in Lausanne in November 1998, the IFs agreed they would adopt such a code and the stage was set for the World Conference the following February.

Unfortunately, not only on general principles pertaining to the IOC, but also with respect to smooth functioning of the World Conference on Doping in Sport, the Salt Lake City bidding scandal erupted in December 1998 and consumed more virtually all public attention on the failings of the IOC as an organisation to ensure proper governance of its own members. The level of media attention to this issue amounted to a virtual firestorm that drew all attention away from the important substantive content of the proposed World Conference. Despite the risks involved in proceeding with the Conference, and the risk that the anti-doping agenda might be hijacked, the IOC decided, in view of the importance of anti-doping efforts, that the Conference should nevertheless proceed, which it did in early February. A good deal of the Conference was taken up by criticism of the IOC, not only in relation to anti-doping activities, but also in relation to virtually everything it did or had ever done. When the proposed model of the independent anti-doping agency was put forward in this context, the governments present declared themselves completely opposed to the suggested governance structure. They insisted that governments must have at least an equal share of the governing body of any such agency.

Then Pound continues: “Samaranch, who was chairing the Conference, considered this rejection of the governance structure a disaster

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and thought that the Conference was doomed to complete failure. [Readers will, I hope, forgive the use of the first person singular at this juncture, but since the next portion of the saga involved me, it seems unnecessarily convoluted to resort to a third-person narrative.] I persuaded him that this could be turned to the IOC's advantage in several respects: the governments, who had been resolutely critical of the IOC and its anti-doping efforts, would now have to make themselves part of the solution and their participation at this level could mean that the IOC would not have to assume the full costs of such an agency. Although he was pessimistic, Samaranch delegated me to meet with the government representatives, headed by the United Kingdom and Spain, and to see what might be possible. The meeting was shorter than anyone expected. I asked if the governments were insistent on a 50-50 governance mechanism for the independent agency. They were. I said that was fine with the Olympic Movement and that we welcomed such an equal partnership. The government representatives, obviously expecting bitter resistance to their position, were astonished. I said there was one condition. What was that, they inquired? That if they had 50 per cent control of the governance body, they must assume 50 per cent of the costs. The Olympic Movement did not need governments to tell it how to spend its money. Not unpredictably, the prospect of spending money raised certain problems with governments and they said they would need some time to see whether this might be possible. That was agreeable to the IOC, I said, provided that the timetable for reaching a decision was accelerated beyond the normal pace for reaching government decisions. The matter would have to be fast-tracked or the Olympic Movement would proceed on its own, without government involvement, because the matter of doping in sport was too important not to proceed with all possible haste. The governments were now trapped. If they refused to participate, their own rhetoric would be exposed as devoid of both content and commitment to eradicating drugs from sport."¹

The governments agreed to a fast-track operation and during the summer of 1999, the terms of government participation and the structure of the organisation were negotiated. The resulting organisation was named the World Anti-Doping Agency, or WADA, and was established as a private foundation under Swiss law (Articles 80 *et seq.* of the Swiss Civil Code) in November 1999, with an equal number of representatives from the Olympic Movement and of the governments from all five continents. The initial concept was to have a Foundation Board of 32 members. The 16 from the Olympic Movement were to be four members each named by the IOC, the Ifs, the NOCs and the IOC Athletes Commission and the governments were to name 16 from the various continents. This was later increased to add additional representatives on both sides (government and sport) up to 18 each, maintaining the 50-50 balance.² According to the Constitutive Instrument of Foundation (September 2009), the seat of WADA is in Lausanne (Switzerland) and its headquarters are in Montreal (Canada). The Foundation Board takes its decisions by an absolute majority of the votes of the members present; in the event of a tie, the chairman has the casting vote. The first members of the Foundation Board, including the first chairman, was appointed by the founder (IOC). The Foundation Board is self-organized. It elects from its members, or from personalities chosen outside of its members, a chairman and a vice-chairman. The Foundation is an equal partnership between the Olympic Movement and public authorities. To promote and preserve parity among the stakeholders, the Foundation Board will ensure that the position of chairman alternates between the Olympic Movement and public authorities. To further

maintain equal partnership between the Olympic Movement and the public authorities, the vice chairman must be a personality nominated by the public authorities if the chairman is a person nominated by the Olympic Movement, and vice versa.³ The Foundation Board delegates to an Executive Committee of twelve members, the majority chosen from amongst the Foundation Board members, the actual management and running of the Foundation, the performance of all its activities and the actual administration of its assets. The chairman and vice-chairman of the Foundation Board automatically hold the position of chairman and vice-chairman. The Executive Committee takes its decisions by an absolute majority of the votes of the members present; in the event of a tie, the chairman has the casting vote. The Executive Committee is competent to take all decisions which are not reserved by the Law or by the present statutes for the Foundation Board. The Foundation Board may propose amendments to the statutes to the supervisory authority (that is the Swiss Federal Department of the Interior). Any proposed amendment, in particular any change to the object of the Foundation, is reserved and must be approved by a two-third majority of the Foundation Board members present.

One of the most interesting legal aspects of WADA is its legal status. Created by notarial deed, pursuant to Swiss law and subject to oversight by Swiss authorities, it does not conform with the legal format that most governmental organisations prefer and with which they are comfortable. Governments are clearly more comfortable with public entities and intergovernmental organisations; they are not comfortable with private organisations and are not entirely certain how to deal with such entities. Initial expressions of preference by governments were to turn WADA into a public entity, in which governments could be members. This, of course, completely disregarded the other half of the governance structure, namely the Olympic Movement, none of the organs of which are public entities and some of which (such as athlete members) are entirely personal. At least for the time being, governments agreed to see whether it is possible to operate through a hybrid organisation.⁴ The Constitutive Instrument of Foundation of WADA provides that the Agency will be entitled to prepare plans and proposals in light of its conversion, if necessary, into a different structure, possibly based on public international law.

In spite of its formally private nature, WADA carries out functions that aim to further public goals such as promoting and coordinating at the international level the fight against doping in sport in all its forms, including through in- and (unannounced) out-of-competition testing. However, WADA's most important activity (in terms of its "public" function) is its role as a global standard setter. WADA carries out significant normative functions such as updating the prohibited list of substances and the establishment of international technical standards with regard to analyses, and also produces "soft-law" in the form of recommendations and good practices. Beside these tasks, WADA carries out other relevant administrative activities, such as monitoring anti-doping tests during major sports events. The most significant outcome of WADA's activities is the World Anti-Doping Code (WADC), which was adopted in 2003 and entered into force on 1 January 2004.⁵ WADA's Signatories (i.e. those entities signing the Code and agreeing to comply with it) include the IOC, NOCs, NADOs, WADA, and others. Governments instead were not asked to be signatories to the Code, but rather to accept the UNESCO Convention against Doping in Sport, which was unanimously approved by 191 governments at the UNESCO's General Conference. The Convention is currently ratified by 110 States. Article 4 concerns the relationship of the Convention to the Code provides *inter alia* that States Parties commit themselves to the principles of the Code as the basis for the measures to achieve the objectives of the Convention, which may include legislation, regulation, policies and administrative practices. However, the Code itself, reproduced for information purposes as Appendix to the Convention, is not an integral part of the Convention and does not create any binding obligations under international law for States Parties. Casini states that, although the WADA Code formally rests on an instrument of private law (as it itself clarifies: most governments cannot be parties to, or bound by, private non-governmental instruments such as the Code), it displays rather a hybrid nature, due to the role played by public authorities both in

1 Richard W. Pound, Q.C., "The World Anti-Doping Agency: An Experiment in International Law", [2002] *International Sports Law Review*, July 2002 - Issue 3/02, pp. 53-55.

2 The five European members of the WADA Foundation Board are designated half by the Council of Europe and half by the EU.

3 Currently, the WADA President is John Fahey (Australia) and the Vice President is Prof. Arne Ljungqvist (Sweden), IOC

Member and President of the IOC Medical Commission.

4 See again: Richard W. Pound, Q.C., *op.cit supra*, p. 57.

5 A second version of the Code was unanimously adopted by WADA's Foundation Board and endorsed at the Third World Conference on Doping in Sport, in Madrid, on 17 November 2007; the new Code entered into force on 1 January 2009.

WADA's decision-making process and in the procedure for the drafting of the Code. Putting aside any concerns regarding the classification of WADA, this body offers a prime example of an *equal* institutional public-private partnership (PPP) that is unusual both at the global level and in domestic contexts. A second set of issues refers to the binding force of the WADA Code. The Code offers, in fact, a prime instance of a formally private source of norms that show to a high degree a public character, cf., in particular governments taking part both in the decision-making and Code-drafting process as well as the UNESCO Convention expressly referring to WADA and its Code. Casini concludes that the WADA Code provides a very relevant example of norms that cannot be labelled as fully private or fully public, but rather as "*sources de caractère mixte*".⁶ It is remarkable that the WADA Code itself provides that it be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories [cf., Olympic Movement] or governments. This would mean that the WADA Code does not belong to the public or private part of sports law; it is international sports law of a *sui generis* character. The same would apply to WADA as an institution because of its public/private nature.

3. The Dutch billiard social drugs case and the principle of proportionality

3.1. First instance: Instituut Sportrechtspraak: Royal Dutch Billiards Federation (KNBB) (complainant) v N. Zuijkerbuijk (defendant)

On 5 April 2009, during a match in the Dutch Three-Cushion Billiards Premier League, held in Apeldoorn, the defendant was selected for an anti-doping control. The analytical report received by the Doping Authority from the anti-doping laboratory stated that analysis of the A urine sample revealed the presence of benzoylecgonine (a metabolite of cocaine). The analysis of the B urine sample confirmed the presence of this substance. On grounds of the confirmation by the analysis of the B sample of the analysis of the A sample of the defendant, the party concerned was declared to have tested positive. The presence of said substance was thus established. Cocaine appeared on the 2009 Prohibited List accompanying the Doping Regulations of the Institute for Sports Law followed by the Royal Dutch Billiards Association (KNBB) in the category "substances and methods prohibited in competition". The presence alone of a connected substance, in this case a metabolite of a substance that appeared on said list, in a urine sample of an athlete selected for an anti-doping control was deemed sufficient proof that the Doping Regulations had been violated. The party concerned did not have any valid dispensation for the use of said substance. In its decision dated 25 August 2009 the Disciplinary Committee of the Institute for Doping Law also ruled that article 3 paragraph 1 of the Doping Regulations had been violated. Under article 38.1 of the Doping Regulations the Disciplinary Committee excluded the person concerned from competition for a period of two years. Such a sanction could be imposed in the case of a first violation under the provisions laid down in this article unless the conditions set out under a) and b) of this article were met. Cocaine is not a specified substance. The athlete had not discharged the burden of proving that he bears no (significant) level of fault or negligence and neither did he admit violating the anti-doping rule prior to this doping case. The KNBB Board had not established any aggravating circumstances. The Disciplinary Committee found that none of the conditions to reduce/extend the standard sanction period was met.

In the appeal, the defendant did not dispute the violation but he was appealing against the duration of the imposed penalty. In its decision of 26 November 2009, the appeals committee confirmed the verdict of the disciplinary committee dated 25 August 2009 that the violation was proven but reduced the ineligibility period imposed in the decision of the disciplinary committee. In the appeal, the defendant admitted using

cocaine. The violation of article 3 (1) of the Doping Regulations had therefore been established. The substantive grounds for the appeal by the defendant related exclusively to the penalty, which he considered to be excessively long.

Article 38 of the Doping Regulations stipulated a period of ineligibility of two years for a first violation of article 3 unless the conditions in articles 39 (Specific substances), 40 (No fault or negligence) and/or 41 (No plausible level of fault or negligence) for the reduction of the penalty have been met. The appeals committee noted, on the basis of the 2009 Prohibited List, that cocaine was not a specific substance. The reduction of the ineligibility period on the grounds of article 39 of the Doping Regulations was therefore inappropriate. Article 40(1) of the Doping Regulations stipulated as a condition for the non-imposition of the ineligibility period that the defendant did not know or suspect, and could not reasonably have known or suspected, even after exercising the greatest possible care, that he had used the prohibited substance. The defendant stated in his appeal form and at the hearing that he deliberately used the prohibited substance, in this case cocaine. The fact that he did not realise at that time the consequences to which this use could lead did not detract from the fact that the condition stated in article 40(1) had not been fulfilled. There were therefore no factual grounds based on article 40 of the Doping Regulations for the non-imposition of the eligibility period. Article 41(1) of the Doping Regulations stipulated as a condition that there should be no question of a plausible level of fault or negligence. This was the case if the athlete can demonstrate that his fault or negligence was not significant in relation to the violation of the regulations given the circumstances of the case. It had been established that the defendant deliberately used the cocaine. This excluded the possibility of the absence of any significant fault or negligence in the sense of article 41 of the Doping Regulations.

During the hearing, the defendant argued that the penalty imposed upon him was excessive and therefore disproportional. The appeals committee considered this to be an explicit appeal to the principle of proportionality. In this case: the disproportionality of the penalty in relation to the prohibited behaviour being punished. It must therefore examine the penalty in the light of this principle.

The principle of proportionality is a fundamental principle of proper justice (or *due process*). Although it was not, in principle, an explicit statutory component of Dutch criminal or procedural law, it was generally recognised and accepted. Disciplinary law was less formal than criminal law; the principle of proportionality should therefore be applied more widely in disciplinary law than in criminal law.

Disciplinary law was a component of the provisions regulating the membership relationship. This was a relationship in private law that was subject to statutory provisions relating to associations, as set out in book 2 of the Netherlands Civil Code. The statutory standard for the argument of proportionality was found in section 8(2) of the Netherlands Civil Code.

In the opinion of the appeals committee, doping regulations to which athletes who engaged in their sports as members of an association were necessarily subject must, firstly, meet the standards that government regulations in general and their application with respect to criminal law in particular are required to meet. In addition, there were also the standards of a fair trial - in part against the background of European law - and of section 2.8(2) of the Netherlands Civil Code (see *infra*).

The WADA Code and therefore the Doping Regulations had a very strict and rigid and - by comparison with normal criminal law, a very severe - system of penalties. Certainly in cases like the present one, in which the performance-enhancing effects of the prohibited substance found were at best disputed, the implications of the application of this rigid system of penalties must therefore be examined at all times in the light of the standards that prevail in normal criminal law, including the principle of proportionality. As it will emerge below, the appeals committee knew that it was supported in this respect by the CAS and the EC Court of Justice, without it being necessary to make clear whether the CAS or the Court were guided by this principle of criminal law.

The principle of proportionality implied that the application of anti-doping regulations must not go further than is strictly necessary to effectively combat doping. See, for example, Soek, The Strict Liability

6 See: Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, International Organization Law Review 6 (2009) pp. 439, 440, 441. The French expression has

been applied to sports law, that is to the WADA Code by Franck Latty, *La lex sportiva*. Recherche sur le droit transnational, Leiden-Boston, 2007, p. 391.

Principle and the Human Rights of Athletes in Doping Cases, T.M.C. Asser Press, The Hague 2006, p. 381 ff.). In his thesis, Soek summed up the principle as follows (p. 389):

"The proportionality principle is widely recognized and accepted. It prohibits the taking of any measure which in view of its objective must be considered to go beyond what is appropriate and necessary. The application of the principle involves the balancing of the interests of the person or persons affected by the measure and the possibly wider social aim which it is intended to achieve. The CAS has regularly considered whether the doctrine of proportionality could be applied in reduction of a penalty. The application of fixed penalties for doping offences made it difficult to weigh the severity of the offence against the severity of the penalty. Nevertheless, as the CAS at one occasion concluded, when the circumstances of the case so allowed the appellant's sentence could properly be reduced by reference to proportionality considerations."

The CAS had applied the proportionality principle - with the reduction of fixed penalties - in a number of cases, including in particular CAS 2000/A/270, Meca-Medina and Majcen v. FINA, to which Soek referred, and later in: CAS 2006/A/1025, Puerta/v. ITF and CAS 2007/A/1252, FINA v. Mellouli and TSF (cf. David, A Guide to the World Anti-Doping Code - A Fight for the Spirit of Sport, Cambridge University Press, 2008, p. 168 ff.).

In an Advisory Opinion about the implementation of the WADA Code in the FIFA Disciplinary Code (CAS 2005/C/976 and 986, FIFA and WADA; paragraph 139, pp. 52-53) the CAS had the following to say with particular reference to the proportionality principle (section 1.4.3):

"A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonable required in the search of the justifiable aim. Both the Swiss Federal Supreme Court and a significant part of Swiss legal doctrine have upheld the principle of proportionality. [...] The panel is of the view that the principle of proportionality is guaranteed under the WADC; moreover, proportional sanctions facilitate compliance with the principle of fault. Consequently, each body must consider the proportionality of imposed sanctions for doping cases."

It added, in section 1.5 (Conclusion; paragraph 143, pp. 54-55):

"The right to impose a sanction is limited by the mandatory prohibition of excessive penalties, which is embodied in several provisions of Swiss law. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender. However, only if the sanction is evidently and grossly disproportionate in comparison to the proved rule violation and if it is considered as a violation of fundamental justice and fairness, would the panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law."

With respect to the significance of Advisory Opinions McLaren stated (CAS Advisory Opinions, in: Blackshaw/Siekmann/Soek (Eds.), The Court of Arbitration for Sport 1984-2004, T.M.C. Asser Press, The Hague, pp. 180-181):

"Through the Advisory procedure, the CAS is able to give opinions on legal questions concerning any activity related to sport in general. Under Rule 60 of the Code (of Sports-related Arbitration) any questions of law or general interpretation related to sport may be submitted to the CAS for resolution. [...] For the Advisory procedure, the questions do not have to be fact specific; and thus, can raise and deal with general principles of law and how they may apply to sport. For instance, there have been Advisory Opinions on the application of lex mitior, jurisdiction to establish rules, and proportionality in determining sporting sanctions."

Turning to European law, the application of the proportionality principle was also recognised by the Court of Justice. See, for example, the Meca-Medina case and Majcen v. European Commission, C-519/04. Ground 48 was as follows:

"Rules of that kind [in this case, anti-doping rules] could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties say be imposed and those which do not, and second, the severity of those penalties."

Dutch Association Law

As stated above, the issue of proportionality should also be considered on the basis of the standard of reasonableness and fairness relating to the membership relationship stated in section 2:8 of the Netherlands Civil Code. The text of the section was as follows:

"A rule governing the relationship between them by law, custom, statutes, regulations or decision shall not be applicable in so far as it is unacceptable according to standards of reasonableness and fairness in the given circumstances."

The provision is an imperative rule of law and, furthermore, the relevant statutory provision is not excluded in the KNBB regulations. The Committee must therefore apply this rule of law.

The KNBB was an association residing in the Netherlands and it was therefore subject to Dutch association law. The defendant was a Dutch citizen residing in the Netherlands and, when the sample was taken, he was participating in a competition in the Netherlands. The membership relationship and the relevant conduct were entirely within the domain of Dutch law. Dutch law therefore applied exclusively.

The doping regulations were a component of the regulations of the KNBB. These regulations were a component of the membership relationship between the defendant and the KNBB. The application of those regulations implied that the appeals committee must base its considerations on the principle of reasonableness of section 2:8 of the Netherlands Civil Code, which also governed that membership relationship, and all the more because an explicit appeal had been made to that principle (by reference to proportionality).

The provision that required a minimum penalty of an ineligibility period of two years must guide the considerations of the appeals committee unless that rule "is unacceptable according to standards of reasonableness and fairness in the given circumstances". In that case, the rule in question must, by law, not be applied. The appeals committee, in a limited examination, was of the opinion that this unacceptability was a factor in this case, taking all the circumstances of the case into consideration. The reader is referred to the section on "Grounds for Consideration" *infra*.

Grounds for Consideration

After the application of the proportionality principle, the appeals committee came to the conclusion that the ineligibility period of two years imposed by the disciplinary committee was excessive. In so doing, the appeals committee took the following facts and circumstances into consideration:

- a The defendant had not been found positive previously.
- b Cocaine was not a performance-enhancing substance in billiards. The sports doctor and doping expert Harm Kuipers had stated (Dagblad de Stentor, 6 September 2006) that the use of cocaine had no performance-enhancing effect for an athlete whatsoever. *"Certainly not for a billiards player. This is a sport requiring coordination and cocaine is of no use in that respect. Alertness is enhanced, but only for a very short time. Indeed, coordination is rapidly adversely affected, as is the capacity to take decisions quickly. Athletes who use cocaine may have a problem, but it's not a doping problem."*
- c The presence of cocaine in the urine of an athlete in an *out-of-competition control* did not constitute a violation of the Doping Regulations. The appeals committee concluded from this that the WADA also accepted that the use of cocaine did not provide athletes with any advantage other than immediately after use. In this case, there were three days between the use of the cocaine and the competition in which the defendant participated.
- d On the basis of the account of the defendant, which the committee considered to be credible, the appeals committee found in this procedure that it was a fact that the cocaine was taken unthinkingly in

the context of the defendant's nightlife and that there was no question of any link to sports performance.

- e There was no intention to enhance performance and so there was also no intention to acquire an unfair and irregular advantage with respect to competitors.
- f Although it was the case that the defendant did not admit the violation in good time, or at least not in accordance with the Doping Regulations in the correct way prior to the results of the analysis and the charge, the defendant did not make any secret of the recreational use. He has frankly admitted using the substance and did so again during the hearing, seated alongside his father with a contrite expression. The KNBB was also visibly uncomfortable with its own draconic and implacable regulations. Its representative at the hearing was clearly embarrassed about the situation, but he had no choice.

There had been a case recently in another sport of a "spontaneous" admission of cocaine use which was evidently inspired by a sample being taken shortly after cocaine had been used. That strategic honesty - in the light of the prospect of discovery - was found to be grounds for halving the penalty. The defendant had not had routine experience with doping controls targeting cocaine use, by contrast with the reluctant repentant who was clearly motivated by strategic considerations. In all reasonableness, the defendant should not suffer a worse fate than that fellow-user.⁷

- g The defendant had also admitted his cocaine use in public. This could be seen from publications in the press and on various billiards websites. In this respect, the defendant contrasted favourably with numerous other athletes who, when confronted with a positive result, denied using prohibited substances regardless of the facts. With his public admission, and his expressions of regret about what had happened, the defendant had made a contribution to the discussion about this problem for, in particular, younger billiards players. The publicity relating to this case had inflicted considerable damage on the defendant's good name, fame and reputation, and what was even worse in a matter that should have remained private (also from the point of view of the WADA ideology) if use had been established out of competition.
- h The defendant had stated that he did not know that the traces of cocaine would still be apparent in his urine after three days. Particularly when elite sports were involved, it was of course the responsibility of the athlete to be informed about the effect of the substances on the prohibited list. However, this did not absolve the sports associations from their responsibility in this respect. Article 22 of the Doping Regulations was very clear in this respect. Without wishing to suggest that there had been any significant shortcoming in the information provided by the KNBB, the appeals committee did believe it was justifiable to conclude that this information might have left something to be desired, at least in terms of the punishability and traceability of this forbidden substance. In the view of the appeals committee, the defendant was a serious athlete who, if he had been able to oversee the consequences of his cocaine use, would have been in a better position to resist the temptation.
- i The general goal of doping regulations in the field of sports was to combat doping in order to ensure fair competition and it included the need to ensure that all athletes had the same chances and to safeguard their health. The KNBB's aim - following in the footsteps of WADA - of setting punishments for the presence in the body of a series of substances was based on this general objective. Banning cocaine, a substance which did not enhance sporting, or at least billiards, performance was therefore, in the opinion of the appeals committee, difficult to describe as conducive to that aim. At the same time, the detection and prosecution of the presence of this substance led in this case to a serious infringement of the privacy of the defendant which was therefore not justified by the core aim of the fight against doping in sports. The infringement of privacy was all the more

disproportional in consequence and the ineligibility period coming on top of that should be all the shorter in order to attain a reasonable proportionality.

In summary, the appeals committee, in a limited examination, considered the outcome of a rule that required a penalty of an ineligibility period of two years to be imposed for this violation to be disproportional and the result to be unacceptable in the sense of section 2:8 of the Netherlands Civil Code. This was supported by the grounds stated with respect to CAS decisions and European law. In this case, therefore, the rule and its result must not be applied. Instead, the appeals committee, after having taken all the circumstances into consideration and given the fact that the defendant had already received a substantial punishment, considered an ineligibility period of one year after the date of the initial decision to be reasonable.

3.1.1 Comment

1. According to the website of the Netherlands Doping Authority, cocaine belongs to the doping category S6. Stimulantia. Cocaine may be used to improve the athlete's performance, because tiredness is dissipated and alertness temporarily stimulated. However, the use of cocaine may considerably damage a person's health. So, cocaine fulfils two out of three criteria which are applied when the decision is taken to put a substance on the doping list, that is (possibly) improving performance and (possibly) being harmful to health. The third criterion is: "contrary to the spirit of sport"; many people are of the opinion that this is true also for cocaine, a social or party drug. In competition a sportsperson is controlled with regard to all doping categories, but out of competition he or she is not tested with regard to the doping categories S6. Stimulantia, S7. Narcotica, S8. Cannabinoids and S9. Glucocorticosteroids. The main reason to test with regard to these substances only in competition is their short-term effectiveness. If these substances are used well in advance of competition, the sportsperson will not benefit from them in competition.
2. As to the substantial aspects of the case, in my opinion, this is a clear case in which formalities had to be set aside. Generally speaking, it must be possible to impose a less severe penalty in appeal, reconsidering a case and taking all relevant circumstances into account, not only the formal legal ones but also possible aspects of (natural) justice which are not of a formal nature. It is the task of a judge and tribunals to do justice to the facts and circumstances of a case. A judge in a free, democratic society can never be expected to administer justice in a way he cannot reconcile with his conscience as a human being and citizen. Offenders must be treated fair and human. The closed, rigid sanctions system of the WADA Code is forced and even absurd. It is a purely defensive system which is not in conformity with the character of disciplinary law. One of the main purposes of the administration of disciplinary law is to take pedagogically, educationally useful measures which are effective from a societal perspective (society at large argument, on the micro - sporting - and macro levels). In *Meca-Medina*, the European Court of Justice makes the *ratio* of doping law explicit, which is not the case in the WADA Code or in the Doping Regulations of the *Instituut Sportrechtspraak* which follow the WADA Code, since in both a preamble is missing (this underlines the rigid- and closedness of the WADA Code which gives reasonable "society at large" arguments or other prayers for relief no chance).⁸ Re-education of is not feasible, if not all circumstances of his or her case are being considered. A defendant must get the feeling that his arguments and explanation of the facts are really taken into account; otherwise, he or she will not have a cooperative, understanding attitude, once having been sentenced. The re-educational nature of disciplinary law is particularly relevant, when it in fact is about amateur sport like in the present case. The defendant was sponsored, but not dependent on playing billiards for his income. A suspension of two years is not reasonable. It was questionable whether the defendant, a young very talented player ("the new Jaspers", as he was called⁹), would return to competition after this period of time. On the opposite, having been banned from competitive sport he might even become a regular drug user. So, the consequences of a dis-

⁷ The *Instituut Sportrechtspraak* is here referring to the *Yuri van Gelder* case decided by the Disciplinary Commission of the Royal Dutch Gymnastics Union

on 22 October 2009. Yuri van Gelder won the European and world champion's titles (rings) in 2005, 2008 and 2009 and 2005, 2006 and 2007 respectively.

proportionate time penalty would be detrimental to the athlete and his sport. The aim of the sanction - to make clear that the recreational use of drugs may have consequences in doping law, in particular also because it is not "sportsmanlike" - could be achieved as effectively by imposing a penalty for a much shorter period (three or six months) combined with an official, conditional warning that recidivism would automatically lead to a two years suspension. The imposition of sanctions must be tailor-made. A two-year suspension would not communicate an appropriate message of condemnation to the receiver under the mitigating circumstances and really contribute to the prevention of recidivism. Apart from that, the question could be asked whether the use of social drugs (and excessive drinking and smoking/nicotine) would not better be combated under sporting disciplinary law independently from doping.

3. However, in the opinion of the Netherlands NADO, the decision of the *Instituut Sportrechtspraak* was fundamentally incorrect. Having sympathy for the *Instituut's* approach and the human considerations they bring forward, acceptance of these considerations would imply that the harmonisation of doping policy as it is laid down in the WADA Code would become almost an illusion, the Netherlands NADO observed. This became even more relevant now that the verdict was made by the Appeals Committee of the most important tribunal of The Netherlands in disciplinary matters. Therefore, the NADO had decided to submit the case to CAS.
4. It is true that the CAS has applied the proportionality principle in exceptional cases, reducing fixed penalties. The CAS did this before as well as after the adoption of the WADA Code in 2003 (in particular in *Meca-Medina, Puerta*). An Advisory Opinion of the CAS (FIFA and WADA) is of a general purport (R60 CAS; see also MacLaren, *op. cit. supra*) and in *Puerta* reference is made to the fundamental reasoning on proportionality in FIFA and CAS. One of course might argue that it would be foreseeable that in an appeal in the *Zuijkerbuijk* case the CAS would come to a different conclusion than the *Instituut Sportrechtspraak's* Appeals Committee, but this would not be absolutely certain beforehand because - as far as I know - the CAS was never confronted with a similar case before (and apart from the fact that the CAS is not obliged to apply the *stare decisis* principle in its decision-making). The "proportionality cases" of the CAS did concern the absence of (a plausible level of) fault or negligence, but the facts in those cases were indeed quite different. Why should it be expected that in *Zuijkerbuijk* the CAS would automatically use an *a contrario* reasoning, because the previous "proportionality cases" and *Zuijkerbuijk* were not similar (absence of analogy)?

3.2. Appeal: Court of Arbitration for Sport (CAS)

CAS 2009/A/2012 Doping Authority Netherlands (hereafter: "NADO") (appellant) v. Mr Nick Zuijkerbuijk (respondent) (Sole Arbitrator: Mr. Manfred Peter Nan, The Netherlands), Lausanne, 11 June 2010.

On the principle of proportionality the CAS award in *Zuijkerbuijk* reads in full as follows (paragraphs 65-79):

"[T]he determination of the period of ineligibility necessarily requires the Sole Arbitrator to consider the issue of proportionality.

The sanction must be proportionate. The issue is whether the Sole Arbitrator can impose a lesser period of ineligibility than is prescribed by Article 38.1 ISR Doping Regulations, knowing that the requirements for reduction as mentioned in Articles 39-42 ISR Doping Regulations are not met.

NADO argues that DAC "*has not applied the doctrine of proportionality as developed by CAS, or at least has not applied this doctrine correctly in accordance with CAS case law. It has not established circumstances that make this case truly exceptional, and it has not (correctly) applied the criteria established in CAS case law on applying proportionality in doping cases*".

The Athlete argues that a two years period of ineligibility is "*out of proportion*" and "*would apply to structural use of doping, especially when meant to enhance performance*". The Athlete argues that DAC "*acknowledged the draconic and uncompromising nature of the applicable doping regulations, justifiably calling upon the principle of proportionality*". DAC has reduced the ineligibility period imposed to one

year, stating that after application of the proportionality principle an ineligibility period of two years is excessive, disproportional and also unacceptable in the sense of section 2:8 of the Netherlands Civil Code. In this regard, DAC refers in its Decision to facts regarding the Athlete, namely (a) *that he has not been found positive previously*, (d) *the cocaine was taken unthinkingly (...)*, (e) *there is no intention to enhance performance (...)*, (j) *he has frankly admitted using the substance (...)*, (g) *the defendant has also admitted his cocaine use in public (...)*, (h) *he did not know that the traces of cocaine would still be apparent in his urine (...)*. In its Decision DAC also states that (b) *cocaine is not a performance-enhancing substance in billiards (...)*, (e) *the presence of cocaine in the urine of an athlete in an out-of-competition control does not constitute a violation of the Doping Regulations (...)*, (j) *there has been a case recently in another sport of a "spontaneous" admission of cocaine use (...)*. That (...) *was found to be grounds for halving the penalty (...)*. In all reasonableness, the defendant should not suffer a worse fate than that fellow-user (...). Furthermore, DAC finds in its decision that (b) the information provided by the sports association KNBB with reference to the *punishability and traceability* of cocaine has left something to be desired. Finally, DAC holds that (i) *banning cocaine, (...) is difficult to describe as conducive to the aim of combat doping*.

The WADC and the ISR Doping Regulations, considerably restrict the application of the principle of proportionality. Whether an Athlete has never tested positive before in his sporting career is relevant only for determining the applicable range of sanctions as mentioned in Articles 38 and 45 ISR Doping Regulations. The Athlete's age, that he took the prohibited substance unthinkingly and not with the intention to enhance performance, the question of whether taking the cocaine metabolite had a performance-enhancing effect, the (not timely) admission, the admission in public, his unawareness of the traceability of cocaine, the fact that the presence of cocaine in the sample of an Athlete in an out-of-competition control does not constitute a violation of the Doping Regulations or the peculiarities of the particular type of Sport, are not - according to the WADC - matters to be weighed when determining the period of ineligibility. The purpose and intention of the WADC is, inter alia, to make the fight against doping more effective by harmonising the legal framework and to provide uniform sanctions to be applied in all sports. These rules, for instance, do not distinguish between amateur or professional athletes, old or young athletes or individual sport or team sport.

DAC's reference to an anonymous case in another sport and their opinion that banning cocaine is difficult to describe as conducive to the aim of combat doping do not justify a departure of the mandatory rule. DAC also mentioned in its Decision that the information provided by the sports association KNBB with reference to the punishability and traceability of cocaine has left something to be desired. Although Article 22 ISR Doping Regulations provides *that the association board is required to inform members about the content and operation of these regulations (...)*, it is not the duty of the Sports association to warn athletes against the use of cocaine (or its metabolite). While it is certainly desirable that a sports association should make

8 Paragraph 43 of *Meca-Medina* reads in full: "As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport." In the preamble of the UNESCO Anti-Doping Convention (and previously in similar terms, in the preamble of the Council of Europe Anti-Doping Convention) it reads: "Conscious that sport should play an important role in the protection of

health, in moral, cultural and physical education and in promoting international understanding and peace", "Concerned by the use of doping by athletes in sport and the consequences thereof for their health, the principles of fair play, the elimination of cheating and the future of sport", "Mindful that doping puts at risk the ethical principles and educational values embodied in the International Charter of Physical Education and Sport of UNESCO and in the Olympic Charter" and "Mindful also of the influence that elite athletes have on youth".
9 Dick Jaspers is a Dutch professional billiards player, who was world champion (three-cushions) in 2004 and 2004.

every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body.

Article 10.2 WADC and Article 38.1 ISR Doping Regulations provides for a uniform sanction of an ineligibility of two years for first offences. The only possibility for the athlete to reduce this fixed sanction is by evidence of exceptional circumstances (Article 10.5 WADC and Article 40 and 41 ISR Doping Regulations). If the Sole Arbitrator denies the existence of exceptional circumstances, it has, under the WADC and ISR Doping Regulations, no other choice than to apply the sanction of a two year suspension.

The consequences of this abstract and rigid approach of the WADC when fixing the length of the period of ineligibility in an individual case may be detrimental or (in rare cases) advantageous to the athlete (see for instance CAS 2002/A/376 Baxter v/ FIS). Insofar as the WADC prevents specific circumstances to be taken into account for the benefit of the athlete, the admissibility of such provisions is often questioned.

However, CAS case law and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation. In the case CAS 2004/A/690 (Hipperdinger v/ ATP), the Panel found that the athlete had not established either "No Fault or Negligence" or "No Significant Fault or Negligence". In this case, in which the Panel upheld the two years suspension, the Panel cited with approval the decision of the Swiss Federal Court in N, et al. v/ FINA (W. v/ FINA 5P.83/1999). This latter case involved positive doping tests by four Chinese swimmers. The appeal concerned the CAS award upholding the swimmers' suspension. The award was rendered prior to the adoption of the WADC. One of several claims raised by the swimmers on appeal was that the CAS award failed to comply with the principle of proportionality. The amount of banned substance was very low, yet the suspension handed down could possibly end the swimmers' careers. The Swiss Federal Court held that under the applicable FINA Anti-Doping Rules, the appropriate question is not whether a penalty is proportionate to an offence, but rather whether the athlete is able to produce evidence of mitigating circumstances. Furthermore, the issue of proportionality would only be a legitimate issue if a CAS award constituted an infringement of individual rights that was extremely serious and completely disproportionate to the behaviour penalised. The Court found that the two year suspensions in question were only a moderate restriction on the athletes, because the suspensions resulted from a proven doping violation under rules that had been accepted by the athletes. In the result, the Court held that the two year suspensions handed down without examination of proportionality did not constitute a violation of the general principles of Swiss law.

The Sole Arbitrator refers also to CAS 2005/A/847 H. Knaus v/ FIS and CAS 2005/A/830 G. Squizzato v/ FINA. In this latter case the Panel considered: "*The Panel recognizes that a mere uncomfortable feeling 'alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised (...)*".

In continuation, the Sole Arbitrator takes also in account the Advisory Opinion delivered by CAS in relation to the implementation of the WADC into the FIFA Disciplinary Code (CAS 2005/C/976 & 986 FIFA & WADA), in which the Panel held that the principle of proportionality is guaranteed under the WADC.

Furthermore, in the opinion by Prof. G. Kaufmann-Kohler-Antonio Rigozzi and Giorgio Malinvenu (*Legal Opinion on the Conformity of certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated 26 February 2003*), the rigid system of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, but is nevertheless compatible with human rights and general legal principles. These

experts justify this characteristic by citing the legitimate aim of harmonising doping penalties.

Whether the conclusions to be drawn from these experts are correct in such finality can be left unanswered here (see also CAS 2004/A/690 Hipperdinger v/ ATP and CAS 2005/A/847 Knaus v/ FIS); for the case at hand does not require an in-depth discussion of the issue. The mechanism of fixed sanctions according to the WADC is incorporated into the ISR Doping Regulations. At least in the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality. However, in the opinion of the Swiss Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised. In the Sole Arbitrator's opinion, this threshold has not been exceeded in the present case. The Sole Arbitrator holds that a two years period of ineligibility is not out of proportion, excessive or disproportional.

This opinion is not contrary to the standard as set out in section 2.8 of the Netherlands Civil Code. This provision implies that a judging body is not allowed to apply a rule when the result of the application of that rule will be unacceptable. As said above, the application of the mandatory rule of a two years suspension is not unacceptable according to standards of reasonableness and fairness in the given circumstances.

For these reasons, the Sole Arbitrator decides that the Athlete is sanctioned with a period of ineligibility of two years."

3.2.1. Comment

No comment. This is a case of zero tolerance. Or, possibly: what is the usefulness of appeal, if in cases like *Zuikerbuijk* there is not any room for *Einzelfallgerechtigkeit* ("casuistry" in the sense of a case-by-case approach and philosophy)? At first instances, at the national level one gets the feeling as an judge or arbitrator that one fulfils the role and function not of a human being and citizen, but of a stamping machine, acting as a counter clerk. An oral hearing giving a real, non-virtual opportunity to be informed about who is the defendant and why he or she did what he or she did etc. etc., becomes useless and superfluous under the circumstances.

4. Summary and conclusion

1. The WADA - institutionally - and the WADA Code - instrumentally/materially - have a sui generis character. In a pure formal sense, they are private legal instruments, but in fact they are a mixture of public and private (or private and public) elements. Their nature might be called semi-public (from the international governmental perspective) or semi-private (from the perspective of international organized sport). As such, they are separate phenomena in sports law, in a doctrinarian sense. The international community of states directly participates in WADA and its decision-making. Regional inter-governmental organisations such as the Council of Europe and the European Union participate indirectly in WADA (the European members of the Foundation Board are designated half by the Council of Europe and half by the EU). WADA is funded equally by the Olympic Movement on one hand and public governments on the other. Governments have on an equal basis taken part in the unanimous adoption of the initial WADA Code and its amended successor version of 2007. Through the introduction of the UNESCO Anti-Doping Convention states have endorsed the WADA Code in fact twice.

The WADA and WADA Code may be considered a global norm-setting model for other major problem areas in international sport like the fight against fraud and corruption. The introduction of public international agreements (treaties) is a first step to "juridify" such problems on an interstate level (see, for example, in particular the Anti-Football Hooliganism and Anti-Doping Conventions of the Council of Europe). Without the direct, explicit support of the international (or regional) community of states it is impossible to tackle major problems like football hooliganism, doping or fraud and cor-

ruption properly. States have the funding and the means (police enforcement and judicial measures). States in these circumstances must be the “double partners” of sport. The UNESCO Convention does not only have the same function as the Council of Europe Anti-Doping Convention, but then on a global level, it supports WADA and its Code directly. Hybrid organizations of the WADA type might be established - on a permanent, institutionalized basis - for the purpose of combating wrongs and abuses in the sporting world (and also beyond).

2. What is the practical consequence of the close linkage between the international community of states and the WADA Code? The practical consequence is that what might be considered generally recognized principles of disciplinary law and procedure¹⁰ are as such neglected as norms of a hierarchically superior order in relation to what initially were mere sporting rules which in fact are the laws of a sub-culture. In his PhD of 2006 at Erasmus University Rotterdam, Soek has come to the conclusion that the disciplinary law concerning doping violations must be considered as pseudo-criminal law.¹¹ This would bring the general principles of criminal and criminal procedural law into the realm of disciplinary law in sport. The Dutch billiard social drugs case (*Zuikerbuijk*) is a concrete example of the practical consequence of the close linkage between the international community of states and the WADA Code, in particular with regard to the application of the proportionality principle.

In this matter, states obviously have passed the Rubicon. It would be interesting to undertake an international comparative “state practice” research into the question whether and how states (governments) have weighed the general interest of the fight against doping in sport and the fundamental/human rights of the athlete against each other. What governments have stated within the framework of intergovernmental bodies like UNESCO and the Council of Europe? What positions national parliaments have taken? What were the legal and policy considerations to accept, for another example the whereabouts reporting and unannounced out-of-competition control system which seriously affects the privacy of the athlete? What are the arguments for delegating the investigating powers of national police and prosecution to the private sports organizations like WADA and others?¹² There still are a lot of questions to be asked and responded to. Finally, It seems fair to cite here what for example the Netherlands Minister of Sport replied to written parliamentary questions on this issue in 2010:

Question:

What is the legal position of the National Doping Code with regard to current legislation and international conventions, such as the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Convention on the Rights of the Child (UNCRC)? In the event that parts of the code deviate from these conventions, which have been ratified by the Dutch government, is it not

true that the text of the convention would have to take precedence? What implications would this have for the rules on doping controls and how do you perceive your own role in this?

Answer:

The National Doping Code is based almost entirely on the World Anti Doping Code and, first and foremost, must be regarded as a code for and by the sporting world. In this respect, therefore, by taking part in sport an athlete accepts obligations arising from the doping code. Within this context of the law of associations - in this case, sports associations - the international conventions mentioned above have no direct horizontal effect in principle. After all, an athlete can always refrain from taking part in sport. When the Code was established in 2003 and revised in 2007, this basic principle was universally accepted.

Furthermore, a number of professors (Kaufman-Kohler et al) with expertise in the fields of international law and human rights have reviewed the key provisions of the Code in light of the general principles of relevant international law and concluded that there are no inconsistencies.

The international context of anti-doping policy is a crucial factor when planning this policy in the Netherlands. Governments and the sporting world have deliberately agreed, at global level, that the anti-doping rules are the same for all sports and in all countries. As well as being necessary for the success of anti-doping policy, this harmonisation has also been achieved through international agreements. Our country cannot unilaterally withdraw from this, partly because, if it did, it would run the very real risk of sporting isolation.

This does not detract from the fact that the Netherlands is dedicated to achieving a lasting and proper balance between the anti-doping rules and the rights of athletes. Among other achievements, this commitment has led to the current consultation within the Council of Europe regarding specific rules within anti-doping policy for athletes under the age of 18. Lastly, the principle of protecting health - alongside that of fair play - is also particularly relevant to young athletes (a principle that is also established in the Convention on the Rights of the Child).¹³

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¹⁰ Cf., on the international plane, „the general principles of law recognized by civilised nations” as a source of public international law in Article 38(1)(c) of the Statute of the International Court of Justice.

¹¹ Janwillem Soek, *op. cit. supra*, in particular at p.401 (Final statement no. 1). See previously also, Janwillem Soek, *The Legal Nature of Doping Law*, The International Sports Law Journal (ISLJ) 2002/2 pp. 2-3, 5-7. See in general on

principles of Dutch criminal law: H. de Doelder, *Toepassing en beginselen van tuchtrecht* (Scope and Principles of Disciplinary Law), Alphen aan den Rijn 1981.

¹² See, in particular Janwillem Soek, *The Athlete's Right to Respect for his Private Life and his Home*, ISLJ 2008/3-4 pp. 3-13.

¹³ *Aanhangsel Handelingen Tweede Kamer* [Annex to Parliamentary Proceedings] 2009-2010 No. 1999.



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Sports Betting in the Jurisprudence of the European Court of Justice*

by Robert C.R. Siekmann**

A Study into the Application of the *Stare Decisis* Principle, or: the Application of the “Reversal Method” of Content Analysis and the Essence of the ECJ Case Law on Sports Betting

1. Introduction

Kaburakis' article on “ECJ Jurisprudence and Recent Developments in EU Sports Betting”¹ so far is the only substantial one on the matter.² From the article it becomes clear that to determine the evolution of the jurisprudence of the European Court of Justice (ECJ) on “sports betting” is a complex task. In this contribution I am presenting an innovative, although time-consuming method of research the purpose of which is to facilitate that effort considerably. The method starts from the fact that the ECJ jurisprudence is based on the *stare decisis* principle which is expressly applied by the Court when it makes references to the sources used, that is its previous decisions and the relevant paragraphs therein (this of course does not exclude the possibility that phrasing in previous decisions are used literally later on without an express reference to the paragraphs concerned). Kaburakis in fact uses the traditional method of analysis by showing how the jurisprudence evolved from the first “sports betting” case up to and including the at the time of his writing most recent one. According to the alternative method it is preferred to reverse the chronological order of study, starting from the most recent case and going back to the first one. This operational method is similar to the approach taken by the Court when drafting a new decision. The new method is supposed to be a more objective, neutral, non-arbitrary and non-impressionist combination of close reading and feedback; it might be called the “reversal” or “retrospective” method. This method allows us to determine which paragraphs in previous decisions are most important (or relatively important). It is possible that express references to these paragraphs occur more than once in their successors. So, when we closely read the text of later decisions, they may give us feedback about the relative importance of their predecessors. If there is no reference to a “sports betting” case at all, it must logically be concluded that this is a (very) minor case and in any case not a landmark one. Of course, in this perspective the relative importance of the one most recent decision cannot be determined, since there are not any succeeding references made to it yet. It is not only possible to determine what the relative importance of paragraphs in preceding “sports betting” decisions is, but also to determine what the influence of previous non-“sports betting” decisions, of a gambling type or not has been (see below for definitions of the concepts of “gambling” and “sports betting”). Finally, it should be observed that in principle in non-betting/gambling and non-sports betting cases express reference may be made to sports betting/gambling cases. This would illustrate the influence of “sports betting” jurisprudence the other way round.

Of course, in using the “reversal” method of analysis, one should also take into account if and to what extent the factual backgrounds of the cases differ from each other, and whether possibly the applicable law has changed in the meantime (the latter is not the case from a EU perspective, because EU “(sports) betting” law is ECJ case law). Of course, other aspects are a changing membership of the Court as well as Court members changing their views over time, whether or not under the impact of changing views on “sports betting” in the society at large, in particular regarding state monopolies and the position of state-run operators. In this respect, the Advocate-General's Opinions may be of major importance, and it is to be seen whether express reference is made to them in the ECJ's decisions and rulings.

In this contribution, the “reversal” method will be systematically and consistently tested in practice. While using the method it will be refined in applying it, if necessary. “Rules” for the use of the method will be developed in the process of its application. By using this method, it should be possible to determine the essentials of the case-law, its core content. Of course, it cannot be excluded that paragraphs that do not refer to previous ones in fact are of similar or even more importance than those. The latter of course is part of the test. I will present the “reversal” method in the process of its application, step-by-step - in order to verify its applicability with regard to the “sports betting” jurisprudence of the ECJ. So, this contribution has two purposes regarding questions to be answered: will the “reversal” method work and how will it work? What is the essence of the jurisprudence of the ECJ on sports betting, on the basis of the application of this method? An additional question of course would be whether and how the “reversal” method reasonably may be compared with the results of the traditional method in order to know whether the outcome is qualitatively better. If the ECJ has applied the *stare decisis* principle consistently, one would say that the essence of its jurisprudence logically should come to the surface by using the “reversal” method of analysis.

Definition of “sports betting”

Before being in a position to apply the “reversal” method to the case law of the ECJ on “sports betting”, it must be determined which decisions of the ECJ belong to the case-law. For that purpose, we need a definition which circumscribes “sports betting”. In his article, Kaburakis gives no definition of “sports betting”. With reference to previous jurisprudence, he states: “[...] one would anticipate a similar ECJ analysis in a *per se sport betting case* (italics added, RS); indeed it did not take long

* This contribution is an elaborated version of a paper that was presented by this author at the 6th international seminar on Sports Law and Taxation organized by NOLOT, Amsterdam, 4 December 2009. Since that time, the ECJ produced new jurisprudence on sports betting such as the *Ladbrokes*, *Sporting Exchange* (“Betfair”), *Otto Sjöberg* and *Anders Gerdin v. Swedish State*, and *Carmen Media* rulings. The information on the

new case-law was added and incorporated in this contribution.

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1 In: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann, EU Sport, Law

and Policy: Regulation, Re-regulation and Representation, T.M.C. Asser Press The Hague 2009, pp. 555-580. A partly adaptation of this article will appear in print under the title: “European Union Law, Gambling, and Sport Betting. European Court of Justice Jurisprudence, Member States Case Law, and Policy”, in: Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek (Eds), *Sports Betting: Law and Policy*, T.M.C.

Asser Press, The Hague 2011. A general work of reference on EU law and gambling/betting is: Alan Iltis and Cyrille Fijnaut (Eds), *The Regulation of Gambling - European and National Perspectives*, Leiden/Boston 2007.

2 A short overview on “Sports Betting and European Law” is presented by Marios Papaloukas in: *The International Sports Law Journal* (ISLJ) 2010/1-2 pp. 86-88.

after *Läärä* for such a case to come before the court.”³ He continues: “The factual background of *Zenatti* is [...] revisited by the ECJ in the ensuing *Gambelli* and *Placanica* cases, which set the tone for modern legal handling of EU sport betting policies.”⁴

In the Services Directive⁵ it is stated in Article 2(h) that “gambling activities [...] involve wagering a stake with pecuniary value in games of chance [...]”⁶.

In the EL Code of Conduct for Sports Betting⁷ “gambling” is identified as “all types of games, including lotteries and betting transactions, involving wagering a stake with monetary value in games in which participants may win in full or in part, a monetary prize based, totally or partially, on chance or uncertainty of an outcome.” According to the EL Code, “sports betting” includes “all sports betting-based games (i.e. fixed and running odds, totalisator/toto games, live betting, other games and football pools offered by sports betting operators, etc.).” In this context, sports is defined as “all physical human activities with specific rules, shared by a great number of participants, and involving competition amongst the different participants. Olympic sports, sports having as one’s purpose to become Olympic sports and minor sports may be included in sports.” So, the EL Code in fact has no definition of what sports betting is.

In *Zenatti* (paragraph 18) the phrase reading “[...] bets on sporting events, even if they cannot be regarded as games of pure chance [...]” is found. So, generally speaking it may be concluded that “sports betting” are particularly games of, to a certain extent calculated chance, that are connected with a competitive sporting event (“[...] betting on sporting events is not a game of chance, but of informed prediction of the result”; “[...] an [...] in my view usual [...] distinction may be made between lotteries and betting on sporting events on the ground that the latter involves an element of skill absent from the former [...]”, cf., Opinion of Advocate-General Fennelli re *Zenatti*, paras. 14 and 23 respectively; “Sports bets are not dependent on chance in the same way as lotteries. A bettor’s chances of winning may also be affected by his skill and, above all, his knowledge. There is therefore some debate among legal commentators as to whether betting is to be classified as a game of skill or a game of chance. The fact that the events involved are largely dependent on chance, particularly in the case of bets placed on entire blocks of games, would suggest that it is a game of chance.”, cf., Opinion of Advocate-General Alber re *Gambelli*, para. 71). “Sports betting” (or spelled as “sport betting”, see Kaburakis) is not pure gambling. Apart from such “impressionist” considerations, “sports betting” purely is sport-related betting.

This contribution will commence with describing and comparing the factual backgrounds, the “facts” of the sport-related betting decisions and rulings of the ECJ which cover a period of now twenty years. It will be examined whether the societal context changed and the views on sports betting evolved in the course of time. Then, the “law”, the case-law will be analysed by using the “reversal” method and finally presenting the results of this analysis. It is supposed that the outcome will learn us about what is the essence of the ECJ jurisprudence on “sports betting”. Of course, the most recent ECJ ruling itself cannot be scrutinized by the “reversal” method, since by definition references to that ruling are non-existent. So, whether new aspects are to be added to the *stare decisis*, the doctrine of the ECJ, on the basis of that ruling is to be determined in future.

3 Anastasios Kaburakis: “ECJ Jurisprudence and Recent Developments in EU Sports Betting” in: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann, EU Sport, Law and Policy: Regulation, Re-regulation and Representation, T.M.C. Asser Press The Hague 2009, p. 560.

4 Idem.

5 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. 2006 L 76/36.

6 Similarly, Article 1(5)(d) of the E-com-

merce Directive, Directive 2000/31/EC of 8 June 2000, O.J. 2000 L17/1.

7 EL = European Lotteries, which is the non-profit-making association representing the state-licensed lotteries and toto companies in Europe.

8 Cf., Case C-67/98, Judgment of the Court of 21 October 1999, paragraphs 3-7 of the preliminary ruling, ECR (1999) I-07289.

9 Cf., Case C-243/01, Judgment of the Court of 6 November 2003, paragraphs 7-15 of the preliminary ruling, ECT (2003) I-13031.

2. Legal and factual context of the case-law

Zenatti (1999)⁸

In Italy, under Article 88 of Royal Decree No 773 of 18 June 1931 approving the consolidated version of the laws on public order (GURI No 146 of 26 June 1931), “[n]o licence shall be granted for the taking of bets, with the exception of bets on races, regattas, ball games and other similar contests where the taking of bets is essential for the proper conduct of the competitive event”.

Bets could be placed on the outcome of sporting events taking place under the supervision of the Comitato Olimpico Nazionale Italiano (National Olympic Committee, “CONI”) or on the results of horse races organised through the Unione Nazionale Incremento Razze Equine (National Union for the Betterment of Horse Breeds, “UNIRE”). The use of the funds collected in the form of bets and allocated to those two bodies was regulated and must in particular serve to promote sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities, and support equine sports and the breeding of horses. Under various legislative provisions adopted between 1995 and 1997, arrangements for and the taking of bets reserved to CONI and UNIRE might be entrusted, following tendering procedures and on condition of payment of the prescribed fees, to persons or bodies offering appropriate safeguards.

Article 718 of the Italian Penal Code made it a criminal offence to conduct or organise games of chance and Article 4 of Law No 401 of 13 December 1989 (GURI No 401 of 18 December 1989) prohibited the unlawful participation in the organisation of games or betting reserved to the State or to organisations holding a State concession. Moreover, unauthorised gaming and betting were covered by Article 1933 of the Civil Code, according to which no action lies for the recovery of a gaming or betting debt. Nor, except in the event of fraud, could any sum paid voluntarily be reclaimed.

Since 29 March 1997, Mr Zenatti had acted as an intermediary in Italy for the London company SSP Overseas Betting Ltd (“SSP”), a licensed bookmaker. Mr Zenatti runned an information exchange for the Italian customers of SSP in relation to bets on foreign sports events. He sent to London by fax or Internet forms which have been filled in by customers, together with bank transfer forms, and received faxes from SSP for transmission to the same customers.

By decision of 16 April 1997 the Questore di Verona ordered Mr Zenatti to cease his activity on the ground that it was not one that could be licensed under Article 88 of the Royal Decree, since that provision allowed betting to be licensed only where it is essential for the proper conduct of competitive events.

Mr Zenatti initiated proceedings for judicial review of that decision before the Tribunale Amministrativo Regionale (Regional Administrative Court), Veneto and applied for an interim order suspending its enforcement. On 9 July 1997 the Tribunale Amministrativo Regionale granted an interim order to that effect.

The Questore di Verona appealed to the Consiglio di Stato for that order to be set aside.

The Consiglio di Stato considered that the decision to be given called for an interpretation of the Treaty provisions on the freedom to provide services.

Gambelli (2003)⁹

Under Article 88 of the Regio Decreto No 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931), no licence was to be granted for the taking of bets, with the exception of bets on races, regatta, ball games or similar contests where the taking of the bets was essential for the proper conduct of the competitive event.

Under Legge Finanziaria No 388 (Finance Law No 388) of 23 December 2000 (ordinary supplement to the GURI of 29 December 2000), authorisation to organise betting was granted exclusively to licence holders or to those entitled to do so by a ministry or other entity to which the law reserves the right to organise or carry on betting. Bets could relate to the outcome of sporting events taking place under the supervision of the CONI, or its subsidiary organisations, or to the results of horse races organised through the UNIRE.

Articles 4, 4a and 4b of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989 as amended by Law No 388/00, Article 37(5) of which inserted Articles 4a and 4b into Law No 401/89, provided as follows:

“Unlawful participation in the organisation of games or bets

Article 4

1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.
2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.
3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100,000 and ITL 1,000,000.

(...)

Article 4a

The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.

Article 4b

(...) the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.”

The Public Prosecutor and the investigating judge at the Tribunale di Fermo (Italy) established the existence of a widespread and complex organisation of Italian agencies linked by the internet to the English bookmaker Stanley International Betting Ltd (“Stanley”), established in Liverpool (United Kingdom), and to which Gambelli and others, the defendants in the main proceedings, belong. They were accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets which is normally reserved by law to the State, thus infringing Law No 401/89.

Such activity, which is considered to be incompatible with the monopoly on sporting bets enjoyed by the CONI and which constitutes an offence under Article 4 of Law No 401/89, is performed as follows: the bettor notifies the person in charge of the Italian agency of the events on which he wishes to bet and how much he intends to bet; the agency sends the application for acceptance to the bookmaker by internet, indicating the national football games in question and the bet; the bookmaker confirms acceptance of the bet in real time by internet; the confirmation is transmitted by the Italian agency to the bettor and the bettor pays the sum due to the agency, which sum is then

transferred to the bookmaker into a foreign account specially designated for this purpose.

Stanley was an English capital company registered in the United Kingdom which carries on business as a bookmaker under a licence granted pursuant to the Betting, Gaming and Lotteries Act by the City of Liverpool. It was authorised to carry on its activity in the United Kingdom and abroad. It organised and managed bets under a UK licence, identifying the events, setting the stakes and assuming the economic risk. Stanley paid the winnings and the various duties payable in the United Kingdom, as well as taxes on salaries and so on. It was subject to rigorous controls in relation to the legality of its activities, which were carried out by a private audit company and by the Inland Revenue and Customs and Excise.

Stanley offered an extensive range of fixed sports bets on national, European and world sporting events. Individuals could participate from their own home, using various methods such as the internet, fax or telephone, in the betting organised and marketed by it.

Stanley's presence as an undertaking in Italy was consolidated by commercial agreements with Italian operators or intermediaries relating to the creation of data transmission centres. Those centres made electronic means of communication available to users, collect and register the intentions to bet and forward them to Stanley.

Gambelli and others were registered at the Camera di Commercio (Chamber of Commerce) as proprietors of undertakings which run data transfer centres and had received due authorisation from the Ministero delle Poste e delle Comunicazioni (Minister for Post and Communications) to transmit data.

The judge in charge of the preliminary investigations at the Tribunale di Fermo made an order for provisional sequestration and the defendants were also subjected to personal checks and to searches of their agencies, homes and vehicles. Mr Garrisi, who is on the Board of Stanley, was taken into police custody.

Gambelli and others brought an action for review before the Tribunale di Ascoli Piceno against the orders for sequestration relating to the data transmission centres of which they are the proprietors.

The Tribunale di Ascoli Piceno decided to stay proceedings and to refer the question to the European Court of Justice for a preliminary ruling.

*Placanica (2007)*¹⁰

The references for a preliminary ruling had been made in the course of criminal proceedings against Mr Placanica, Mr Palazzese and Mr Sorricchio for failure to comply with the Italian legislation governing the collection of bets. The legal and factual context of these references is similar to the situations that gave rise to the judgments in Case C-67/98 Zenatti [1999] ECR I-7289 and Case C-243/01 Gambelli and Others [2003] ECR I-13031.

Italian legislation essentially provided that participation in the organising of games of chance, including the collection of bets, is subject to possession of a licence and a police authorisation. Any infringement of that legislation carried criminal penalties of up to three years' imprisonment.

Until 2002 the awarding of licences for the organising of bets on sporting events was managed by the CONI and the UNIRE, which had the authority to organise bets relating to sporting events organised or conducted under their supervision. That resulted from Legislative Decree No 496 of 14 April 1948 (GURI No 118 of 14 April 1948), read in conjunction with Article 3(229) of Law No 549 of 28 December 1995 (GURI No 302 of 29 December 1995, Ordinary Supplement) and Article 3(78) of Law No 662 of 23 December 1996 (GURI No 303 of 28 December 1996, Ordinary Supplement).

Specific rules for the award of licences were laid down, in the case of CONI, by Decree No 174 of the Ministry of Economic Affairs and Finance of 2 June 1998 (GURI No 129 of 5 June 1998) and, in the case of UNIRE, by Decree No 169 of the President of the Republic of 8 April 1998 (GURI No 125 of 1 June 1998).

Decree No 174/98 provided that the award of licences by CONI was to be made by means of calls for tender. When awarding the licences, CONI had, in particular, to make sure that the share ownership of the

¹⁰ Cf., Joined cases C-338/04, C-359/04 and C-360/04, Judgment of the Court of 6 March 2007, paragraphs 2-14 and 18-31 of

the preliminary ruling, ECR (2007) I-1891.

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licence holders was transparent and that the outlets for collecting and taking bets were rationally distributed across the national territory.

In order to ensure transparency of share ownership, Article 2(6) of Decree No 174/98 provided that where the licence holder took the form of a company, shares carrying voting rights had to be issued in the name of natural persons, general partnerships or limited partnerships, and could not be transferred by simple endorsement.

Similar provision was made with regard to the award of licences by UNIRE.

In 2002, following a number of legislative initiatives, the competences of CONI and UNIRE with respect to bets on sporting events were transferred to the independent authority for the administration of State monopolies, acting under the supervision of the Ministry of Economic Affairs and Finance.

Pursuant to an amendment introduced at that time by Article 22(11) of Law No 289 of 27 December 2002 (GURI No 305 of 31 December 2002, Ordinary Supplement) all companies - without any limitation as to their form - may now take part in tender procedures for the award of licences.

Police authorisation could be granted only to those who held a licence or authorisation granted by a Ministry or other body to which the law reserved the right to organise or manage betting. Those conditions were laid down in Article 88 of Royal Decree No 773, approving a single text of the laws on public security (Regio Decreto No 773, Testo unico delle leggi di pubblica sicurezza), of 18 June 1931 (GURI No 146 of 26 June 1931), as amended by Article 37(4) of Law No 388 of 23 December 2000 (GURI No 302 of 29 December 2000, Ordinary Supplement).

Furthermore, by virtue of Article 11 of the Royal Decree, read in conjunction with Article 14 thereof, a police authorisation could not be issued to a person who had had certain penalties imposed on him or who had been convicted of certain offences, in particular offences reflecting a lack of probity or good conduct, and infringements of the betting and gaming legislation.

Once authorisation had been granted, the holder must, pursuant to Article 16 of the Royal Decree, permit law enforcement officials access at any time to the premises where the authorised activity was pursued.

Article 4 of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989) as amended by Article 37(5) of Law No 388 provided in respect of criminal penalties for malpractice in the organising of games of chance:

1. Any person who unlawfully participates in the organising of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, or by organisations under the authority of CONI, or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organising of betting on other contests between people or animals, or on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000. [...]
2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein, shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.
3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein, shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.

[...]

- 4a. The penalties laid down in this article shall be applicable to any person who, without the concession, authorisation or licence required by Article 88 of [the Royal Decree], carries out activities in Italy for the purposes of accepting or collecting, or, in any case, of assisting the acceptance or in any way whatsoever the col-

lection, including by telephone or by data transfer, of bets of any kind accepted by any person in Italy or abroad.

[...]

According to the documents before the Court, CONI - acting in accordance with the Italian legislation - launched a call for tenders on 11 December 1998 for the award of 1 000 licences for sports betting operations, that being the number of licences considered on the basis of a specific assessment to be sufficient for the whole of the national territory. At the same time, a call for tenders in respect of 671 new licences for the taking of bets on competitive horse events was organised by the Ministry of Economic Affairs and Finance in agreement with the Ministry of Agricultural and Forestry Policy, and 329 existing licences were automatically renewed.

The application of the provisions concerning the transparency of share ownership that were in force at the time of those calls for tender had primarily the effect of excluding the participation of operators in the form of companies whose shares were quoted on the regulated markets, since in their case the precise identification of individual shareholders was not possible on an ongoing basis. Following those calls for tender, a number of licences - valid for six years and renewable for a further six years - were awarded in 1999.

Stanley International Betting Ltd is a company incorporated under English law and a member of the group Stanley Leisure plc, a company incorporated under English law and quoted on the London (United Kingdom) stock exchange. Both companies have their head office in Liverpool (United Kingdom). Stanley Leisure operates in the betting and gaming sector and is the fourth biggest bookmaker and the largest casino operator in the United Kingdom.

Stanley is one of Stanley Leisure's operational conduits outside the United Kingdom. It is duly authorised to operate as a bookmaker in the United Kingdom by virtue of a licence issued by the City of Liverpool. It is subject to controls by the British authorities in the interests of public order and safety; to internal controls over the lawfulness of its activities; to controls carried out by a private audit company; and to controls carried out by the Inland Revenue and the United Kingdom customs authorities.

In the hope of obtaining licences for at least 100 betting outlets in Italy, Stanley investigated the possibility of taking part in the tendering procedures, but realised that it could not meet the conditions concerning the transparency of share ownership because it formed part of a group quoted on the regulated markets. Accordingly, it did not participate in the tendering procedure and holds no licence for betting operations.

Stanley operated in Italy through more than 200 agencies, commonly called "data transmission centres" (DTCs). The DTCs supply their services in premises open to the public in which a data transmission link is placed at the disposal of bettors so that they can access the server of Stanley's host computer in the United Kingdom. In that way, bettors are able - electronically - to forward sports bets proposals to Stanley (chosen from lists of events, and the odds on them, supplied by Stanley), to receive notice that their proposals have been accepted, to pay their stakes and, where appropriate, to receive their winnings.

The DTCs are run by independent operators who have contractual links to Stanley. Mr Placanica, Mr Palazzese and Mr Sorricchio, the defendants in the main proceedings, are all DTC operators linked to Stanley.

According to the case-file forwarded by the Tribunale (District Court) di Teramo (Italy), Mr Palazzese and Mr Sorricchio applied, before commencing their activities, to Atri Police Headquarters for police authorisation in accordance with Article 88 of the Royal Decree. Those applications met with no response.

Accusing Mr Placanica of the offence set out in Article 4(4a) of Law No 401/89 in that, as a DTC operator for Stanley, Mr Placanica had pursued the organised activity of collecting bets without the required police authorisation, the Public Prosecutor brought criminal proceedings against him before the Tribunale di Larino (Italy).

That court expressed misgivings as to the soundness of the conclusion reached by the Corte suprema di cassazione in Gesualdi, with regard

to the compatibility of Article 4(4a) of Law No 401/89 with Community law. The Tribunale di Larino was uncertain whether the public order objectives invoked by the Corte suprema di cassazione justified the restrictions at issue.

Accordingly, the Tribunale di Larino decided to stay proceedings and to refer the question to the European Court of Justice for a preliminary ruling.

The Atri police authorities charged Mr Palazzese and Mr Sorricchio with pursuing, without a licence or a police authorisation, an organised activity with a view to facilitating the collection of bets, and placed their premises and equipment under preventive seizure on the basis of Article 4(4a) of Law No 401/89. Upon confirmation of the seizure measures by the Public Prosecutor, Mr Palazzese and Mr Sorricchio each brought an action challenging those measures before the Tribunale di Teramo.

In the view of that court, the restrictions imposed on companies quoted on the regulated markets, which prevented them in 1999 from taking part in the last tender procedure for the award of licences for the operation of betting activities, are incompatible with the principles of Community law because they discriminate against operators who are not Italian. In consequence - like the Tribunale di Larino - the Tribunale di Teramo has doubts as to whether the judgment in *Gesualdi* is sound.

The Tribunale di Teramo decided to stay proceedings and to refer the following question to the Court for a preliminary ruling.

*Commission v Italy (2007)*¹¹

In Italy, horse-race betting and gaming operations were originally run exclusively by the UNIRE, which had the option of operating the services of collecting and taking bets directly or delegating them to third parties. The UNIRE entrusted the operation of those services to bookmakers.

Law No 662 of 23 December 1996 (ordinary supplement to the GURI No 303, of 28 December 1996) subsequently assigned responsibility for the organisation and management of horse-race betting and gaming to the Ministry of Finance and the Ministry of Agriculture, Food and Forestry Resources, which were authorised either to operate the activity directly or through public bodies, companies or bookmakers appointed by them. Paragraph 78 of Article 3 of Law No 662 states that there is to be a reorganisation, by way of regulation, of the organisational, functional, fiscal and penal aspects of horse-race betting and gaming, as well as the sharing out of revenue from such betting.

In implementation of Article 3 of Law No 662, the Italian Government adopted Presidential Decree No 169 of 8 April 1998 (GURI No 125 of 1 June 1998), which provided in Article 2 that the Ministry of Finance, in agreement with the Ministry of Agricultural and Forestry Policy, was to award licences for horse-race betting operations to natural persons or companies fulfilling the relevant conditions by means of calls for tender organised in accordance with Community rules. As a transitional measure, Article 25 of Decree No 169/1998 provided for an extension of the period of validity of the licences granted by UNIRE until 31 December 1998, or, if it proved impossible to organise calls for tender by that date, the end of 1999.

A Ministerial Decree of 7 April 1999 (GURI No 86 of 14 April 1999) subsequently approved the plan to reinforce the network of outlets collecting and taking bets on horse-races with a view to increasing the number of betting shops across the whole of Italy from 329 to 1 000. Whereas 671 new licences were put out to tender, the directive of the Ministry of Finance of 9 December 1999 provided for the renewal of UNIRE's 329 'old licences'. In implementation of that directive, the decision of the Ministry of Finance of 21 December 1999 (GURI No 300 of 23 December 1999) renewed the said licences for a period of six years starting 1 January 2000.

Decree-Law No 452 of 28 December 2001 (GURI No 301 of 29 December 2001), converted after amendment into Law No 16 of 27 February 2002 (GURI No 49 of 27 February 2002), subsequently pro-

vided that the 'old licences' were to be reallocated in accordance with Decree No 169/1998, that is, by way of a Community call for tenders, and that they would remain valid until that reallocation had been finalised.

Finally, Decree-Law No 147 of 24 June 2003 extending time-limits and emergency provisions in budgetary matters (GURI No 145 of 25 June 2003), now Law No 200 of 1 August 2003 (GURI No 178 of 2 August 2003), provides in Article 8(1) that the financial status of each licence holder has to be assessed in order to resolve the problem of 'the guaranteed minimum', a levy which every licence holder had to pay to UNIRE irrespective of the actual amount of revenue generated during the year, which had proven to be excessive and had led to an economic crisis in the horse-race betting sector. In implementation of that law, the special commissioner appointed by UNIRE adopted decision No 107/2003 of 14 October 2003, which extended the period of validity of the licences that had already been granted until the deadline for the last payment, set for 30 October 2011, and, in any event, until the date on which the new licences are allocated by means of a call for tenders, in order to take the necessary steps to calculate the amounts to be paid by the licence holders.

Following a complaint lodged by a private operator in the horse-race betting sector, on 24 July 2001 the Commission sent the Italian authorities a letter of formal notice pursuant to Article 226 EC, drawing their attention to the incompatibility of the Italian system of granting licences for horse-race betting operations, and, in particular, the renewal by the contested decision of the 329 old licences granted by UNIRE without a competitive tendering procedure, with the general principle of transparency and the requirement of publication resulting from Articles 43 and 49 EC. In response, the Italian Government announced, by letters dated 30 November 2001 and 15 January 2002, respectively, the bill for and the adoption of Law No 16 of 27 February 2002.

Since the Commission was not satisfied with the implementation of the provisions of that law, it issued a reasoned opinion on 16 October 2002 in which it asked the Italian Republic to adopt the necessary measures to comply with the reasoned opinion within two months of its receipt. By letter of 10 December 2002, the Italian Government responded that it had to conduct a detailed assessment of the financial status of existing licence holders before issuing calls for tenders.

Since it received no further information concerning the completion of that assessment and the launching of a call for tenders for the purposes of reallocating the licences at issue, the Commission decided to bring the present action.

*Liga Portuguesa de Futebol Profissional (2009) (hereafter: Liga Portuguesa)*¹²

In Portugal games of chance are, in principle, prohibited. However, the State has reserved the right to authorise, in accordance with the system which it deems most appropriate, the operation of one or more games directly, through a State body or a body controlled directly by the State, or to grant the right to operate such games to private entities, whether profit-making or not, by calls for tender conducted in accordance with the Code of Administrative Procedure.

Games of chance in the form of lotteries, lotto games and sports betting are known in Portugal as games of a social nature ('jogos sociais') and the operation of such games is systematically entrusted to Santa Casa.

Each type of game of chance organised by Santa Casa is instituted separately by a decree-law and the entire organisation and operation of the various games offered by it, including the amount of stakes, the system for awarding prizes, the frequency of draws, the specific percentage of each prize, methods of collecting stakes, the method of selecting authorised distributors, and the methods and periods for payment of prizes, are covered by government regulation.

The first type of game in question was the national lottery (Lotaria Nacional), which was established by a royal edict of 18 November 1783, and a concession was awarded to Santa Casa, the concession being renewed regularly thereafter. Today that lottery consists in the monthly drawing of numbers by lot.

Following a number of legislative developments, Santa Casa acquired

¹¹ Cf., Case C-260/04, judgment of the Court of 13 September 2007, paragraphs 2-10 of the preliminary ruling, ECR (2007) I-7083.

¹² Cf., Case C-42/07, Judgment of the Court of 8 September 2009, paragraphs 3-28 of the preliminary ruling, ECR (2009) I-7633.

the right to organise other games of chance based on the drawing of numbers by lot or on sporting events. This led to the introduction of two games involving betting on football matches called 'Totobola' and 'Totogolo', respectively enabling participants to bet on the result (win, draw or loss) and the number of goals scored by the teams. There are also two lotto games, namely Totoloto, in which six numbers are chosen from a total of 49, and EuroMillions, a type of European lotto. Players of Totobola or Totoloto may also take part in a game called 'Joker', which consists in the drawing of a single number by lot. Lastly, there is also the Lotaria Instantânea, an instant game with a scratch card, commonly called 'raspadinha'.

In 2003 the legal framework governing lotteries, lotto games and sports betting was adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet. Those measures feature in Decree-Law No 282/2003 of 8 November 2003 (*Diário da República* I, series A, No 259, 8 November 2003). They seek essentially, first, to license Santa Casa to distribute its products by electronic means and, secondly, to extend Santa Casa's exclusive right of operation to include games offered by electronic means, in particular the internet, thereby prohibiting all other operators from using those means.

Article 2 of Decree-Law No 282/2003 confers on Santa Casa, through its Departamento de Jogos (Gaming Department), exclusive rights for the operation by electronic means of the games in question and for any other game the operation of which may be entrusted to Santa Casa, and states that that system covers all of the national territory, and includes, in particular, the internet.

Under Article 11(1) of Decree-Law No 282/2003 the following are classed as administrative offences:

- a the promotion, organisation or operation by electronic means of games [the operation of which has been entrusted to Santa Casa], in contravention of the exclusive rights granted by Article 2 [of the present Decree-Law], and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not;
- b the promotion, organisation or operation by electronic means of lotteries or other draws similar to those of the Lotaria Nacional or the Lotaria Instantânea, in contravention of the exclusive rights granted by Article 2, and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not; [...].

Article 12(1) of Decree-Law No 282/2003 sets the maximum and minimum fines for the administrative offences laid down in, inter alia, Article 11(1)(a) and (b) of that Decree-Law. For legal persons, the fine is to be not less than EUR 2 000 or more than three times the total amount deemed to have been collected from organising the game in question, provided that the triple figure is greater than EUR 2 000 but does not exceed a maximum of EUR 44 890.

The activities of Santa Casa were, at the material time, regulated by Decree-Law No 322/91 of 26 August 1991 adopting the statutes of Santa Casa da Misericórdia de Lisboa (*Diário da República* I, series A, No 195, 26 August 1991), as amended by Decree-Law No 469/99 of 6 November 1999 (*Diário da República* I, series A, No 259, 6 November 1999) ('Decree-Law No 322/91').

The preamble to Decree-Law No 322/91 emphasises the importance of the various aspects of Santa Casa - historical, social, cultural and economic - and concludes that the Government must pay 'specific and continuous attention in order to prevent negligence and failures [...] while nevertheless granting [Santa Casa] the broadest possible autonomy in the management and operation of games of a social nature'.

Under Article 1(1) of its statutes, Santa Casa is a 'legal person in the public administrative interest'. The administrative organs of Santa Casa consist, by virtue of Article 12(1) of its statutes, of a director and a board of management. Pursuant to Article 13 of those statutes, the director is appointed by decree of the Prime Minister, the other members of Santa Casa's board of management being appointed by decree of the members of the Government under whose supervision Santa Casa falls.

Under Article 20(1) of its statutes, Santa Casa has been given specific

tasks in the areas of protection of the family, mothers and children, help for unprotected minors at risk, assistance for old people, social situations of serious deprivation, and primary and specialised health care.

The earnings generated by the operation of games of chance are allocated between Santa Casa and other public-interest institutions or institutions involved in social projects. Those other public-interest institutions include associations of voluntary fire crews, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, and the cultural development fund.

The operation of games of chance falls within the responsibilities of the Gaming Department of Santa Casa. That department is governed by regulations adopted, as in the case of Santa Casa's statutes, by Decree-Law No 322/91, and it has its own administrative and control organs.

In accordance with Article 5 of the regulations governing the Gaming Department, the administrative organ of that department consists of the director of Santa Casa, who is the ex officio chairman, and two deputy directors appointed by joint decree of the Minister for Employment and Solidarity and the Minister for Health. Pursuant to Articles 8, 12 and 16 of the regulations of the Gaming Department, the majority of the members of the committees in charge of games, draws and complaints are representatives of the public authorities, that is to say, the General Tax Inspectorate and the District Government in Lisbon. Accordingly, the chairman of the complaints committee, who has a casting vote, is a judge appointed by decree of the Minister for Justice. Two of the three members of that committee are appointed by decree of the chief tax inspector and decree of the chief administrative officer (prefect) of the District of Lisbon respectively, while the third member of the committee is appointed by the director of Santa Casa.

The Gaming Department has the powers of an administrative authority to open, institute and prosecute proceedings concerning offences involving the illegal operation of games of chance in relation to which Santa Casa has the exclusive rights, and to investigate such offences. Decree-Law No 282/2003 confers upon the directors of the Gaming Department, inter alia, the necessary administrative powers to impose fines as provided for under Article 12(1) of that Decree-Law.

Bwin is an on-line gambling undertaking which has its registered office in Gibraltar. It offers games of chance on an internet site.

Bwin has no establishment in Portugal. Its servers for the on-line service are in Gibraltar and Austria. All bets are placed directly by the consumer on Bwin's internet site or by some other means of direct communication. Stakes on that site are paid by credit card in particular, but also by other means of electronic payment. The value of any winnings is credited to the gambling account opened for the gambler by Bwin. The gambler may use that money in order to gamble or ask for it to be transferred to his bank account.

Bwin offers a wide range of on-line games of chance covering sports betting, casino games, such as roulette and poker, and games based on drawing numbers by lot which are similar to the Totoloto operated by Santa Casa.

Betting is on the results of football matches and other sporting events. The different games offered include bets on the result (win, draw or loss) of football matches in the Portuguese championship equivalent to the Totobola and Totogolo games operated exclusively by Santa Casa. Bwin also offers on-line betting in real time, in which the odds are variable and change as the sporting event in question unfolds. Information such as the match score, the time elapsed, yellow and red cards given, and so on, are displayed in real time on the Bwin internet site, thus enabling gamblers to place bets interactively as the sporting event unfolds.

The Liga is a private-law legal person with the structure of a non-profit-making association, made up of all the clubs taking part in football competitions at professional level in Portugal. It organises, inter alia, the football competition corresponding to the national First Division and is responsible for the commercial operation of that competition.

A sponsorship agreement, concluded by the Liga and Bwin on 18 August 2005 for four playing seasons starting in 2005/2006, made Bwin the main institutional sponsor of the First Football Division in Portugal. Under the terms of that agreement, the First Division, previously known as the 'Super Liga', changed its name first to the Liga betandwin.com,

and then subsequently to the Bwin Liga. In addition, the Bwin logos were displayed on the sports kit worn by the players and affixed around the stadiums of the First Division clubs. The Liga's internet site also included references and a link allowing access to Bwin's internet site, making it possible for consumers in Portugal and other States to use the gambling services thus offered to them.

Subsequently, in exercising the powers conferred on them by Decree-Law No 282/2003, the directors of the Gaming Department of Santa Casa adopted decisions imposing fines of EUR 75 000 and EUR 74 500 respectively on the Liga and Bwin in respect of the administrative offences referred to in Article 11(1)(a) and (b) of that Decree-Law. Those sums represent the aggregated amounts of two fines imposed on each of the Liga and Bwin for promoting, organising and operating, via the internet, games of a social nature reserved to Santa Casa or such similar games, and also for advertising such gambling.

The Liga and Bwin brought actions before the national court for annulment of those decisions, invoking, inter alia, the relevant Community rules and case-law.

The Tribunal de Pequena Instância Criminal do Porto (Local Criminal Court, Oporto) (Portugal) decided to stay the proceedings and to refer the question to the European Court of justice for a preliminary ruling.

Sporting Exchange Ltd ("Betfair") (2010)¹³

Article 1 of the Law on games of chance (Wet op de kansspelen; 'the Wok') provides:

'Subject to the provisions of Title Va of this Law, the following are prohibited:

- (a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence, unless a licence therefor has been granted pursuant to this Law;
- (b) promoting participation either in an opportunity as referred to under (a), provided without a licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom of the Netherlands in Europe, or to maintain a stock of materials intended to publicise or disseminate knowledge of such opportunities; [...]

Article 16(1) of the Wok is worded as follows:

'The Minister for Justice and the Minister for Welfare, Public Health and Culture may grant to one legal person with full legal capacity a licence, for a period to be determined by them, to organise sports-related prize competitions in the interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.'

Article 23 of the Wok states:

1. A licence to organise a totalisator may be granted only in accordance with the provisions of this Title.
2. "Totalisator" shall mean any opportunity provided to bet on the outcome of trotting or other horse races, on the understanding that the total stake, apart from any deduction permitted by or by virtue of the law, will be distributed among those who have bet on the winner or on one of the prize winners.'

According to Article 24 of the Wok, the Minister for Agriculture and Fisheries and the Minister for Justice may grant to one legal person with full legal capacity a licence to organise a totalisator for a period to be determined by them.

Article 25 of the Wok provides:

1. The Ministers referred to in Article 24 shall impose certain conditions on a licence to organise a totalisator.
2. Those conditions relate, inter alia, to:
 - a. the number of trotting and other horse races;
 - b. the maximum stake per person;
 - c. the percentage retained before distribution among the winners and the particular use of that percentage;
 - d. the supervision of the application of the Law by the authorities;

- e. the obligation to prevent or take measures to prevent, so far as possible, unauthorised betting or the use of intermediaries at venues where trotting or other horse races take place.
3. The conditions may be amended or supplemented.'

Under Article 26 of the Wok:

'A licence granted in accordance with Article 24 may be withdrawn before its expiry by the Ministers referred to in that article in the event of a breach of the conditions imposed pursuant to Article 25.'

Article 27 of the Wok prohibits the offer or provision to the public of an intermediary service in the placing of bets with the operator of a totalisator.

Netherlands legislation in relation to games of chance is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

Furthermore, there is no possibility at all of offering games of chance interactively via the internet in the Netherlands.

The Stichting de Nationale Sporttotalisator ('De Lotto'), which is a non-profit-making foundation governed by private law, has held the licence for the organisation of sports-related prize competitions, the lottery and numbers games since 1961. The licence for the organisation of a totalisator on the outcome of horse races was granted to a limited company, Scientific Games Racing BV ('SGR'), which is a subsidiary of Scientific Games Corporation Inc., a company established in the United States.

According to De Lotto's constitution, its objects are the collection of funds by means of the organisation of games of chance and the distribution of those funds among institutions working in the public interest, particularly in the fields of sport, physical education, general welfare, public health and culture. De Lotto is managed by a five-member commission whose chairman is appointed by the Minister. The other members are designated by the Stichting Aanwending Loterijgelden Nederland (Foundation for the Use of Lottery Funds) and by the Netherlands Olympisch Comité/Nederlandse Sport Federatie (Netherlands Olympic Committee/Netherlands Sports Federation).

Betfair operates within the gaming sector. Its services are provided solely via the internet and by telephone. From the United Kingdom, it provides the recipients of its services with a platform for betting on sporting events and horse races, known as a 'betting exchange', on the basis of British and Maltese licences. Betfair has no office or sales outlet in the Netherlands.

As Betfair wished actively to offer its services on the Netherlands market, it requested the Minister to determine whether it required a licence in order to carry on such activities. It also applied to the Minister for a licence to organise sports-related prize competitions and a totalisator on the outcome of horse races, whether or not via the internet. By decision of 29 April 2004, the Minister refused those requests.

The objection lodged in respect of that decision was dismissed by the Minister on 9 August 2004. In particular, the Minister took the view that the Wok provides for a closed system of licences which does not allow for the possibility of licences being granted to provide opportunities for participating in games of chance via the internet. As Betfair could not obtain a licence for its current internet activities under the Wok, it was prohibited from offering those services to recipients established in the Netherlands.

Betfair also lodged two objections to the Minister's decisions of 10 December 2004 and 21 June 2005 concerning the renewal of licences granted to De Lotto and to SGR, respectively.

Those objections were dismissed by decisions of the Minister dated 17 March and 4 November 2005, respectively.

By judgment of 8 December 2006, the Rechtbank 's-Gravenhage (District Court, The Hague) declared Betfair's appeals against the dis-

¹³ Cf., Case C-203/08, Judgment of the Court of 3 June 2010, paragraphs 3-19.

missal decisions referred to above to be unfounded. Betfair subsequently appealed against that judgment to the Raad van State (Council of State).

*Ladbrokes (2010)*¹⁴

Article 1 of the Law on games of chance (Wet op de kansspelen; 'the Wok') provides:

'Subject to the provisions of Title Va of this Law, the following are prohibited:

- (a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence, unless a licence therefor has been granted pursuant to this Law;
- (b) promoting participation either in an opportunity as referred to under (a), provided without a licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom of the Netherlands in Europe, or to maintain a stock of materials intended to publicise or disseminate knowledge of such opportunities; [...]

Article 16 of the Wok is worded as follows:

1. The Minister for Justice and the Minister for Welfare, Public Health and Culture may grant to one legal person with full legal capacity a licence, for a period to be determined by them, to organise sports-related prize competitions in the interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.
2. The proceeds from prize competitions [...] shall be applied in respect of the interests which the legal person intends to serve by organising and operating sports-related prize competitions.
3. At least 47.5% of total proceeds from games of chance organised pursuant to this Title and to Title IVa, to be calculated on the basis of a calendar year, shall be allocated to the distribution of prizes. [...]

Article 21 of the Wok states:

1. The Ministers referred to in Article 16 shall lay down rules concerning licences for the organisation of sports-related prize competitions.
2. Those rules relate, inter alia, to:
 - a. the number of competitions to be organised;
 - b. the method of determining results and the prize scheme;
 - c. the management and covering of organisational costs;
 - d. the allocation of revenue from competitions organised;
 - e. the constitution and regulations of the legal person;
 - f. monitoring of compliance with the legislation by the authorities;
 - g. delivery and publication of the report to be drawn up annually by the legal person concerning its activities and financial results.'

Netherlands legislation in relation to games of chance is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

Furthermore, there is no possibility at all of offering games of chance interactively via the internet in the Netherlands.

De Lotto is a non-profit-making foundation governed by private law which holds a licence for the organisation of sports-related prize competitions, the lottery and numbers games. Its objects, according to its constitution, are the collection of funds by means of the organisation of games of chance and the distribution of those funds among institutions working in the public interest, particularly in the fields of sport, physical education, general welfare, public health and culture.

The Ladbrokes companies are engaged in the organisation of sports-related prize competitions and are particularly well known for their bookmaking business. They offer a number of mainly sports-related games of chance on their internet site. They also offer the possibility of participating via a freephone number in the betting activities which they organise. The companies do not physically carry on any activity in the Netherlands.

De Lotto alleged that the Ladbrokes companies were, via the internet, offering games of chance to persons residing in the Netherlands for which they did not have the requisite licence under the Wok, and made an application for interim relief to the Rechtbank Arnhem (District Court, Arnhem) for the Ladbrokes companies to be required to put an end to that activity.

By judgment of 27 January 2003, the Rechtbank judge hearing the application for interim relief allowed the application and ordered the Ladbrokes companies to take steps to block access to their internet site for persons residing in the Netherlands and to make it impossible for such persons to participate in telephone betting. Those measures were confirmed by the judgments of the Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) and the Hoge Raad der Nederlanden (Supreme Court) of 2 September 2003 and 18 February 2005, respectively.

On 21 February 2003, De Lotto also issued proceedings against the Ladbrokes companies in a substantive action before the Rechtbank Arnhem. In its application, De Lotto sought confirmation of the coercive measures imposed on those companies by the judge who had heard the application for interim relief. By decision of 31 August 2005, the Rechtbank allowed De Lotto's application and ordered the Ladbrokes companies, on pain of imposition of a periodic penalty, to maintain the measures blocking access to games of chance via the internet or by telephone for persons residing in the Netherlands. That decision was upheld by the judgment of the Gerechtshof te Arnhem of 17 October 2006; the Ladbrokes companies therefore appealed in cassation to the referring court.

The Hoge Raad der Nederlanden took the view that an interpretation of European Union law was required to enable it to determine the dispute before it, and decided to stay the proceedings and to refer the questions to the European Court of justice for a preliminary ruling.

*Otto Sjöberg and Anders Gerdin v. Swedish State (2010) (hereafter: Sjöberg/Gerdin)*¹⁵

The Lotterilag governs all categories of gambling offered to the public in Sweden.

The objectives of Swedish gaming policy were summarised as follows in the *travaux préparatoires* for the Lotterilag:

'The main purpose underlying the gaming policy is [...] to have in future a healthy and safe gaming market in which social protection interests and the demand for gaming are provided for in controlled forms. Profits from gaming should be protected and always reserved for objectives which are in the public interest or socially beneficial, that is, the activities of associations, equestrian sports and the State. As has been the case hitherto, the focus should be on prioritising social protection considerations whilst offering a variety of gaming options and taking heed of the risk of fraud and unlawful gaming.'

The Swedish legislation on gambling seeks to:

- counter criminal activity;
- counter negative social and economic effects;
- safeguard consumer protection interests, and
- apply the profits from lotteries to objectives which are in the public interest or socially beneficial.

Paragraph 9 of the Lotterilag provides that a licence is, as a general rule, required to organise gambling in Sweden.

Under Paragraph 15 of the Lotterilag, a licence may be issued to a Swedish legal person which is a non-profit-making association and which under its statutes has as its main purpose the advancement of socially beneficial objectives in Sweden and carries on activities which serve mainly the advancement of that objective. Under Paragraph 45 of the

¹⁴ Cf., Case C-258/08, Judgment of the Court of 3 June 2010, paragraphs 3-13 of the preliminary ruling.

¹⁵ Cf., Joined Cases C-447/08 and C-448/08, Judgment of the Court of 8 July 2010, paragraphs 3-25 and 27 of the preliminary ruling.

Lotterilag, the Swedish Government may also grant a special licence to organise gambling in cases other than those provided for in that law.

In accordance with a fundamental principle of the Swedish legislation on gambling, which provides that the profits from the operation of gambling should be reserved for socially beneficial objectives or those which are in the public interest, the Swedish gambling market is shared between, on the one hand, non-profit-making associations whose purpose is the advancement of socially beneficial objectives in Sweden which have been granted licences under Paragraph 15 of the Lotterilag, and, on the other, two operators which are either State owned or mainly State controlled, namely, the State owned gaming company Svenska Spel AB and Trav och Galopp AB, which is jointly owned by the State and the equestrian sports organisations, those companies holding special licences under Paragraph 45 of the Lotterilag.

Under Paragraph 48 of the Lotterilag, a public authority, namely the Lotteriinspektion, is the central body responsible for monitoring compliance with the Lotterilag. On the basis of that law, the Lotteriinspektion is authorised to draw up the regulations relating to the monitoring and internal rules necessary for the various games. It exercises supervision over Svenska Spel AB's activity and carries out inspections and regular checks.

Under Article 52 of the Lotterilag, the Lotteriinspektion can issue the directions and prohibitions necessary for compliance with the provisions of that law and decide on the rules and conditions adopted on the basis of it. Such a direction or prohibition may be accompanied by an administrative penal

Under Paragraph 14 of Chapter 16 of the Criminal Code (Brottsbalken, 'the Brottsbalk'), the organisation without a licence of gambling in Sweden constitutes an offence of unlawful gaming. This is punishable with a fine or imprisonment of up to two years. If the infringement is deemed serious, it is punishable, as an offence of unlawful gaming set out in Paragraph 14a of Chapter 16, with imprisonment for between six months and four years.

In addition, under Paragraph 54(1) of the Lotterilag, anyone who, intentionally or through gross recklessness, organises unlawful gambling or unlawfully owns certain types of slot machines is liable to a fine or a prison sentence of up to six months.

The provisions of the Brottsbalk relating to the offence of unlawful gaming cover specifically described criminal offences. Criminal offences which are less serious and which, for this reason, do not fall within Paragraph 14 thereof, fall within the scope of Paragraph 54(1) of the Lotterilag. Under Article 57(1) of the Lotterilag, that latter provision does not apply where the criminal offence is subject to a penalty provided for by the Brottsbalk.

Since the Lotterilag applies only in Sweden, the prohibition on organising a lottery without a licence does not apply to gambling operated abroad. Nor does that prohibition apply to gambling offered on the internet from another State to Swedish consumers and the same law does not prohibit Swedish consumers from participating in gambling organised abroad. Similarly, a licence granted under that law confers on its holder a right to offer gambling services only within the territorial scope of the Lotterilag, that is to say, within Sweden.

Under Paragraph 38(1)(1) of the Lotterilag, it is prohibited, in commercial operations or otherwise to promote, without a special licence and for the purpose of profit, participation in unlicensed gambling, organised within Sweden or abroad.

Under Paragraph 38(2), a derogation from the prohibition referred to in Paragraph 38(1) may be granted as regards gambling which is organised on the basis of international cooperation with Swedish participation by a foreign operator authorised to organise gambling, under the rules applicable in the State where he is established, and to cooperate on an international level.

Paragraph 54(2) of the Lotterilag provides that a fine or a maximum of six months' imprisonment may be imposed on persons who, in commercial operations or otherwise for the purpose of profit, illegally pro-

mote participation in gambling organised abroad, if the promotion specifically relates to consumers resident in Sweden.

Under Paragraph (4)(1) of Chapter 23 of the Brottsbalk, it is not only the perpetrator of certain criminal acts who is liable for them, but also the person who promotes them by aiding or abetting them. Furthermore, under Paragraph (4)(2), even a person who is not regarded as the co-perpetrator of the offence is held responsible if he has encouraged a third party to commit it, if he has provoked it or if he has aided its perpetrator in any other way.

At the material time, Mr Sjöberg was the editor-in-chief and the publisher of the Expressen newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and August 2004, of advertisements for gambling organised abroad by the companies Expekt, Unibet, Ladbrokes and Centrebet.

Mr Gerdin, for his part, was, at the material time, the editor-in-chief and publisher of the Aftonbladet newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and June 2004, of advertisements for gambling organised abroad by those companies.

Expekt, Unibet, Ladbrokes and Centrebet are private operators established in Member States other than the Kingdom of Sweden who offer internet gambling, in particular to persons resident in Sweden. These games include, among others, sports betting and poker.

The Åklagaren (Public Prosecutor's Office) subsequently took proceedings against Mr Sjöberg and Mr Gerdin for infringement of Paragraph 54(2) of the Lotterilag, for having promoted, unlawfully and for profit, the participation of Swedish residents in gambling organised abroad.

On 21 June and 6 September 2005, Mr Sjöberg and Mr Gerdin were each ordered by the Stockholms tingsrätt (District Court, Stockholm) to pay a criminal penalty of SEK 50 000 in respect of infringement of the Lotterilag.

Mr Sjöberg and Mr Gerdin both appealed against the judgment concerning them before the Svea hovrätt (Court of Appeal, Svea). That court however refused to allow the admissibility of the appeal brought against those two judgments.

The parties concerned appealed against those decisions of the Svea hovrätt before the Högsta domstolen (Supreme Court) and that latter court, on 5 February 2008, issued a decision declaring that the appeals before the Svea hovrätt were admissible, thereby referring the two cases back to it.

The Svea Hovrätt decided to stay the proceedings and to refer to the European Court of Justice the questions for a preliminary ruling.

*Carmen Media (2010)*¹⁶

Paragraph 284 of the Criminal Code (Strafgesetzbuch; 'the StGB') provides:

1 Whosoever without the authorisation of a public authority publicly organises or operates a game of chance or makes equipment for it available shall be liable to imprisonment of not more than two years or a fine.

...

3 Whosoever in cases under subparagraph 1 above acts

1. on a commercial basis

...

shall be liable to imprisonment of between three months and five years.

...

Apart from bets concerning official horse races, which fall primarily under the Law on Racing Bets and Lotteries (Rennwett- und Lotteriesgesetz; 'the RWLG'), and the installation and use of gambling machines in establishments other than casinos (gaming arcades, cafes, hotels, restaurants and other accommodation), which fall primarily within the Trade and Industry Code (Gewerbeordnung) and the Regulation on Gambling Machines (Verordnung über Spielgeräte und andere Spiele mit Gewinnmöglichkeit), determination of the conditions under which authorisations within the meaning of Paragraph 284(1) of the StGB may be issued for games of chance has taken place at the level of the various *Länder*.

¹⁶ Cf., Case C-46/08, Judgment of the Court of 8 September 2010, paragraphs 3-25 and 38.

Paragraph 1(1) of the RWLG provides:

'An association wishing to operate a mutual betting undertaking on horse races or other public horse competitions must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*'.

Paragraph 2(1) of the RWLG provides:

'Any person wishing, on a commercial basis, to conclude bets on public horse competitions or serve as intermediary for such bets (Bookmaker) must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*'.

By the State treaty concerning lotteries in Germany (Staatsvertrag zum Lotteriewesen in Deutschland; 'the LottStV'), which entered into force on 1 July 2004, the *Länder* created a uniform framework for the organisation, operation and commercial placing of gambling, apart from casinos.

In a judgment of 28 March 2006, the Bundesverfassungsgericht (Federal Constitutional Court) held, concerning the legislation transposing the LottStV in the *Land* of Bavaria, that the public monopoly on bets on sporting competitions existing in that *Land* infringed Paragraph 12(1) of the Basic Law, guaranteeing freedom of occupation. That court held in particular that, by excluding private operators from the activity of organising bets, without at the same time providing a regulatory framework capable of ensuring, in form and in substance, both in law and in fact, effective pursuit of the aims of reducing the passion for gambling and combating addiction to it, that monopoly had a disproportionately adverse effect on the freedom of occupation thus guaranteed.

The State treaty on games of chance (Glücksspielstaatsvertrag; 'the GlüStV'), concluded between the *Länder* and which entered into force on 1 January 2008, establishes a new uniform framework for the organisation, operation and intermediation of games of chance aiming to satisfy the requirements laid down by the Bundesverfassungsgericht in the said judgment of 28 March 2006.

The explanatory report on the draft of the GlüStV ('the explanatory report') shows that the main aim of the latter is the prevention and combating of addiction to games of chance. According to the explanatory report, a study dating from April 2006, carried out, at the request of the Commission of the European Communities, by the Swiss Institute of Comparative Law and concerning the market for games of chance in the European Union, clearly showed the effectiveness which may result, in that perspective, from legislation and a strict channelling of the activities concerned.

As regards the specific area of bets on sporting competitions, the explanatory report indicated that whilst, for the great majority of persons placing bets, such bets might be only for relaxation and entertainment, it was very possible, on the evidence contained in the available scientific studies and expert reports, that, if the supply of those bets were significantly increased, the potential for dependency likely to be generated by them would be significant. It was thus necessary to adopt measures for preventing such dependency by imposing limits on the organisation, marketing and operation of such games of chance. The channelling and limitation of the market for those games by the GlüStV was to be obtained, in particular, by maintaining the existing monopoly on the organisation of bets on sporting competitions and on lotteries with particular risk potential.

According to Paragraph 1 of the GlüStV, the objectives of the latter are as follows:

1. to prevent dependency on games of chance and on bets, and to create the conditions for effectively combating dependency,
2. to limit the supply of games of chance and to channel the gaming instinct of the population in an organised and supervised manner, preventing in particular a drift towards unauthorised games of chance,
3. to ensure the protection of minors and players,
4. to ensure the smooth operation of games of chance and the protection of players against fraudulent manoeuvres, and to prevent criminality connected with and arising from games of chance.'

Paragraph 2 of the GlüStV states that, with regard to casinos, only Paragraphs 1, 3 to 8, 20 and 23 apply.

Paragraph 4 of the GlüStV states:

- 1 The organisation or intermediation of public games of chance may take place only with the authorisation of the competent authority of the *Land* concerned. All organisation or intermediation of such games is prohibited without such authorisation (unlawful games of chance).
- 2 Such authorisation shall be refused where the organisation or intermediation of the game of chance is contrary to the objectives of Paragraph 1. Authorisation shall not be issued for the intermediation of games of chance unlawful according to the present State treaty. There is no established right to the obtaining of an authorisation.
- ...
- 4 The organisation and intermediation of public games of chance on the internet are prohibited.'

Paragraph 10 of the GlüStV provides:

- 1 In order to attain the objectives set out in Paragraph 1, the *Länder* are under a statutory obligation to ensure a sufficient supply of games of chance. They shall be assisted by a technical committee composed of experts specialised in combating dependency on games of chance.
- 2 In accordance with the law, the *Länder* may undertake that task either by themselves or through the intermediary of legal persons under public law or private law companies in which legal persons under public law hold a direct or indirect controlling shareholding.
- ...
- 5 Persons other than those referred to in subparagraph 2 shall be authorised to organise only lotteries and games in accordance with the provisions of the third section.'

The third section of the GlüStV concerns lotteries with a low risk of danger, which may be authorised under highly restrictive conditions and exclusively for organisers pursuing public interest or charitable aims.

Paragraph 25(6) of the GlüStV states:

'The *Länder* may, for a maximum period of one year after the entry into force of the State treaty, in derogation from Paragraph 4(4), permit the organisation and intermediation of lotteries on the internet where there is no reason to refuse them pursuant to Paragraph 4(2) and where the following conditions are met:

- exclusion of minors or prohibited players guaranteed by identification and authentication measures, in compliance with the directives of the Commission for the protection of minors as a closed group of media users;
- limitation of stakes, as fixed in the authorisation, to EUR 1 000 per month, and guarantee that credit is prohibited;
- prohibition of particular incitements to dependency by rapid draws and of the possibility of participating interactively with publication of results in real time; as regards lotteries, limitation to two winning draws per week;
- localisation by use of the most modern methods, in order to ensure that only persons within the scope of the authorisation may participate;
- establishment and operation of a programme of social measures adapted to the specific conditions of the internet, the effectiveness of which is to be assessed scientifically.'

According to the explanatory report, the transitional provision contained in Paragraph 25(6) of the GlüStV aims to provide equitable relief for two operators of commercial games who operate almost entirely on the internet and respectively employ 140 and 151 persons, by giving them sufficient time to bring their activity into conformity with the distribution channels authorised by the GlüStV.

The GlüStV was transposed by the Land Schleswig-Holstein by the law implementing the State treaty on games of chance in Germany (Gesetz zur Ausführung des Staatsvertrages zum Glücksspielwesen in Deutschland) of 13 December 2007 (GVBl. 2007, p. 524; 'the GlüStV AG').

Paragraph 4 of the GlüStV AG provides:

- 1 In order to achieve the objectives set out in Paragraph 1 of the GlüStV, the Land Schleswig-Holstein shall concern itself with supervision of games of chance, the guarantee of a sufficient provision of games of chance, and scientific research in order to avoid and prevent the dangers of dependency connected with games of chance.
- 2 In accordance with Paragraph 10(1) of the GlüStV, the Land Schleswig-Holstein shall fulfil that function through the intermediary of NordwestLotto Schleswig-Holstein GmbH & Co. KG. (NordwestLotto Schleswig-Holstein), the shares of which are held, directly or indirectly, in whole or in part, by the Land. ...
- 3 NordwestLotto Schleswig-Holstein may organise lottery draws, scratch cards and sporting bets, as well as lotteries and additional games in the matter.
...

Paragraph 5(1) of the GlüStV AG provides:

'Authorisation under Paragraph 4(1) of the GlüStV for games of chance which are not lotteries having a low potential for danger (Paragraph 6) presupposes:

1. the absence of grounds for refusal set out in Paragraph 4(2), first and second sentences, of the GlüStV,
2. compliance with:
 - a the requirements concerning the protection of minors in accordance with Paragraph 4(3) of the GlüStV,
 - b the internet prohibition contained in Paragraph 4(4) of the GlüStV,
 - c the restrictions on advertising contained in Paragraph 5 of the GlüStV,
 - d the requirements concerning the programme of social measures contained in Paragraph 6 of the GlüStV, and
 - e the requirements on explanations concerning the risks of dependency in accordance with Paragraph 7 of the GlüStV,
3. the reliability of the organiser or the intermediary, who must, in particular, ensure that the organisation and intermediation are carried out in a regular manner and easily verifiable by players and the competent authorities,
4. the participation, in accordance with Paragraph 9(5) of the GlüStV, of the technical committee in the introduction of new games of chance, of new distribution channels or in considerable enlargement of existing distribution channels and a guarantee that a report on the social repercussions of the new or enlarged supply of games of chance has been drafted,
5. a guarantee that the organisers, within the meaning of Paragraph 10(2) of the GlüStV, participate in the concerted system for prohibiting certain players in accordance with Paragraphs 8 and 23 of the GlüStV,
6. a guarantee that players prohibited from gambling in accordance with the first sentence of Paragraph 21(3) and the first sentence of paragraph 22(2) of the GlüStV are excluded, and
7. compliance by intermediaries in commercial gambling with Paragraph 19 of the GlüStV.

If the conditions in the first sentence are met, authorisation should be given.'

Paragraph 9 of the GlüStV AG provides:

'By derogation from Paragraph 4(4) of the GlüStV, in the case of lotteries, organisation and intermediation on the internet may be authorised until 31 December 2008 if compliance with the conditions set out in Paragraph 25(6) of the GlüStV is guaranteed. ...'

Carmen Media is established in Gibraltar, where it obtained a licence authorising it to market bets on sporting competitions. For tax reasons, however, that licence is limited to the marketing of bets abroad ('off-shore bookmaking').

In February 2006, wishing to offer such bets via the internet in Germany, Carmen Media applied to the Land Schleswig-Holstein for a declaration that that activity was lawful, having regard to the licence which Carmen Media holds in Gibraltar. In the alternative, it applied

for the issuing of an authorisation for its activity, or, failing that, for tolerance of that activity until the establishment of an authorisation procedure for private offerors of bets which complies with Community law.

Those applications having been rejected on 29 May 2006, Carmen Media brought an action on 30 June 2006 before the Schleswig-Holsteinisches Verwaltungsgericht (Schleswig-Holstein Administrative Court).

Those applications having been rejected on 29 May 2006, Carmen Media brought an action on 30 June 2006 before the Schleswig-Holsteinisches Verwaltungsgericht (Schleswig-Holstein Administrative Court).

The Schleswig-Holsteinisches Verwaltungsgericht decided to stay the proceedings before it and to refer the questions to the European Court of Justice for a preliminary ruling.

Summary of the legal and factual context of the case-law

The factual background of *Zenatti* was revisited by the ECJ in the ensuing *Gambelli* and *Placanica* cases, which set the tone for modern legal handling of EU sports betting policies. *Zenatti* concerned the prohibition imposed on the defendant from acting as an intermediary in Italy for a company established in the United Kingdom specializing in the taking of bets on sporting events.

Gambelli involved a similar background to *Zenatti*. The defendants were accused of having unlawfully organized clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constituted an offence of fraud against the State.

The European Court of Justice was given a third opportunity to assume a definite stance on such matters of restrictive practices and national policies on sports betting in violation of the provisions of the EC Treaty, in *Placanica*. Once again, like in *Gambelli* Stanley and its agents in Italy were involved (in all three "Italian" cases, including *Zenatti* UK-based sports betting enterprises were involved; so, in fact these were "UK/Italian" cases); the latter (in *Placanica*) were three defendants who were prosecuted by the Italian State for running the "data transmission" sites one found in *Zenatti* and *Gambelli*. Until 2002, the method of licensing sport betting operators was reserved by and for the state-affiliated and licensed organizations CONI (Italian National Olympic Committee) and UNIRE (horse-racing) respectively. In 2002, the competences of the CONI and UNIRE with respect to bets on sporting events were transferred to the independent authority for the administration of State monopolies, acting under the supervision of the Ministry of Economic Affairs and Finance. Other than the subjective difficulty in obtaining such a license from Italian authorities, the Italian Penal Code criminalised such sport betting activities, as foreign sport betting operators would not be allowed to run their business without a license. It is expressly stated in *Placanica* that the legal and factual context of this case is similar to the situations that gave rise to the judgements in *Zenatti* and *Gambelli*.

The judgment in *Commission v Italy* (all other sports betting cases mentioned here are preliminary rulings of the ECJ) concerned a complaint lodged by a private operator, Italy had failed to fulfil its obligations under the EC Treaty by renewing 329 licences for horse-race betting operations without inviting any competing bids.

The case of *Liga Portuguesa de Futebol Profissional* concerned fines imposed on the plaintiffs on the ground that they had infringed the Portuguese legislation governing the provision of certain games of chance via the internet. It is a case of modern times, that is a case of so-called "remote gambling" - without intermediaries like in *Zenatti*, *Gambelli* and *Placanica*. Bets are placed directly by the consumer on the internet or by some other means of direct communication. In 2003 the legal framework in Portugal governing *inter alia* sports betting had been adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet.

The conclusion is that the factual context of *Zenatti*, *Gambelli* and *Placanica* is similar, and *Liga Portuguesa de Futebol Profissional* is a case of "remote gambling", whereas *Commission v Italy* is essentially different from these cases.

Since the *Liga Portuguesa* case, four new rulings were delivered by

the European Court of Justice in 2010 only, in chronological order: Ladbrokes and Sporting Exchange (“Betfair”) on the same day (3 June 2010), Sjöberg/Gerdin, and Carmen Media. The first four cases were Italian ones (Zenatti, Gambelli, Placanica and Commission v. Italy), followed by a Portuguese one; after these Southern European cases the focus now has shifted to Northern Europe: Betfair and Ladbrokes are Dutch cases, Sjöberg/Gerdin is a Swedish one, Carmen Media a German one, and Engelsmann an Austrian case.

In the Ladbrokes and Betfair cases UK-based sports betting enterprises were involved. The case concerned the possible unlawful conduct of Ladbrokes on the Netherlands market for games of chance, and the rejection of Betfair’s applications for a licence to organize games of chance in the Netherlands. It is observed that Netherlands legislation in relation to games of chance is based on a system of exclusive licences, and there is no possibility at all of offering games of chance interactively via the internet in the Netherlands. De Lotto holds the licence for the organization of sports-related prize competitions and others.

In Sweden (Sjöberg/Gerdin case), under the Criminal Code the organization without a licence of gambling constitutes an unlawful act. Under the Lotteries Act it is prohibited to promote, without a special licence and for the purpose of profit, participation in unlicensed gambling, organized within Sweden or abroad. Expekt, Unibet, Ladbrokes and Centrebet are private operators established in Member States other than Sweden who offer internet gambling, in particular to persons resident in Sweden. These games include, among others, sports betting. The Swedish newspaper publishers Sjöberg and Gerdin promoted the participation of Swedish residents in gambling organized abroad.

The Carmen Media case concerned the refusal of a request by Carmen Media for acknowledgement of the right to offer bets on sporting competitions via the internet in the Land Schleswig-Holstein. Carmen Media is established in Gibraltar, where it obtained a licence authorizing it to market bets on sporting competitions abroad (“offshore bookmaking”).

The Ladbrokes, Betfair, Sjöberg/Gerdin and Carmen Media cases like Liga Portuguesa are all remote gambling cases.

3. The case-law presented according to the “reversal” method

Carmen Media

40 In that regard, it should be noted that activities which consist in allowing users to participate, for remuneration, in a game of chance constitute ‘services’ for the purposes of Article 49 EC (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 25, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 24).

41 Therefore, as consistent case-law shows, such services fall within the scope of Article 49 EC where the provider is established in a Member State other than the one in which the service is offered (see, to that effect, *Zenatti*, paragraphs 24 and 25). That is particularly so in the case of services which the provider offers via the internet to potential recipients established in other Member States and which he provides without moving from the Member State in which he is established (see, to that effect, *Gambelli and Others*, paragraphs 53 and 54).

44 Such a finding is, moreover, without prejudice to the ability of any Member State whose territory is covered by an offer of bets emanating, via the internet, from such an operator, to require the latter to comply with restrictions laid down by its legislation in that area, provided those restrictions comply with the requirements of European Union law (‘EU law’), particularly that they be non-discriminatory and proportionate (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 48 and 49).

45 In that regard, it should be noted that, with regard to the justifications which may be accepted where internal measures restrict the freedom to provide services, the Court has held several times that the objectives pursued by national legislation in the area of gambling and bets, considered as a whole, usually concern the protection of the recipients of the services in question, and of consumers more generally, and the protection of public order. It has also held that such objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services (see to that effect, in particular, *Schindler*, paragraph 58; *Läärä and Others*,

paragraph 33; *Zenatti*, paragraph 31; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 73; and *Placanica and Others*, paragraph 46).

46 The case-law of the Court of Justice thus shows that it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary wholly or partially to prohibit activities of that nature, or only to restrict them and to lay down more or less strict supervisory rules for that purpose, the necessity and the proportionality of the measures thus adopted having only to be assessed having regard to the objectives pursued and the level of protection sought to be ensured by the national authorities concerned (see to that effect, in particular, *Läärä and Others*, paragraphs 35 and 36; *Zenatti*, paragraphs 33 and 34; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 58).

55 As a preliminary observation, it should be noted that, in paragraph 67 of the judgment in *Gambelli and Others*, after stating that restrictions on gaming activities might be justified by imperative requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling, the Court held that that applied only in so far as such restrictions, based on such grounds and on the need to preserve public order, were suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

60 The Court has also held that, in the matter of games of chance, it is in principle necessary to examine separately for each of the restrictions imposed by the national legislation whether, in particular, it is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives (*Placanica and Others*, paragraph 49).

65 The Court has, similarly, held that it is for the national courts to ensure, having regard in particular to the actual rules for applying the restrictive legislation concerned, that the latter genuinely meets the concern to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner (see to that effect, in particular, *Zenatti*, paragraphs 36 and 37, and *Placanica and Others*, paragraphs 52 and 53).

66 As the Court has already held in those various respects, in *Gambelli and Others*, paragraphs 7, 8 and 69, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance or 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 opportunities for gambling in order to justify restrictive measures, even if, as in that case, the latter relate exclusively to betting activities.

85 However, the margin of discretion which the Member States thus enjoy in restricting gambling does not exonerate them from ensuring that the measures they impose satisfy the conditions laid down in the case-law of the Court, particularly as regards their proportionality (see, in particular, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59 and case-law cited).

86 According to consistent case-law, where a system of authorisation pursuing legitimate objectives recognised by the case-law is established in a Member State, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see, in particular, Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, paragraph 49).

87 Also, if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities’ discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them (see *Sporting Exchange*, paragraph 50 and case-law cited).

101 The Court has already had occasion to emphasise the particularities concerned with the offering of games of chance on the internet (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72).

102 It has thus observed in particular that, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70).

Sjöberg/Gerdin

32 It must be recalled at the outset that Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services covers both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51 and the case-law cited).

36 Article 46(1) EC, applicable in this field by reason of Article 55 EC, allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the general interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46 and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

37 In that context, it must be observed that the legislation on gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 57).

38 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 by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58).

39 The Member States are therefore free to set the objectives of their policy on gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

40 It is thus necessary to examine in particular whether, in the cases in the main action, the restriction on advertising imposed by the Lotterilag in respect of gambling organised in Member States other than the Kingdom of Sweden, by private operators for the purpose of profit, is suitable for achieving the legitimate objective or objectives invoked by that Member State, and whether it does not go beyond what is necessary in order to achieve those objectives. National legislation is moreover appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, those restrictions must be applied without discrimination (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 60 and 61).

49 Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that European Union law sets certain limits to their power, and such leg-

islation may not restrict the fundamental freedoms guaranteed by European Union law (*Placanica and Others*, paragraph 68).

50 It follows moreover from the case-law of the Court that restrictive measures imposed by the Member States on account of the pursuit of objectives in the public interest must be applied without discrimination (*Placanica and Others*, paragraph 49, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 60).

54 In that context, it must be recalled that the cooperation between the national courts and the Court of Justice established by Article 267 TFEU is based on a clear division of responsibilities. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice (see, to that effect, *Placanica and Others*, paragraph 36, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 37).

Ladbroke's

15 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51 and the case-law cited).

16 It is common ground that the legislation of a Member State under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State, constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 52, and Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, paragraph 24).

17 However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 55).

18 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

19 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (*Gambelli and Others*, paragraph 63, and *Placanica and Others*, paragraph 47).

20 The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, *Placanica and Others*, paragraph 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

21 Specifically, restrictions based on the reasons referred to in paragraph 18 of the present judgment must be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a con-

sistent and systematic manner (see, to that effect, *Gambelli and Others*, paragraph 67).

22 According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives (*Gambelli and Others*, paragraph 75, and *Placanica and Others*, paragraph 58).

25 As the Court has already held, it is possible that a policy of controlled expansion in the betting and gaming 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 (*Placanica and Others*, paragraph 55).

26 While it is true that the grounds of the judgment in *Placanica and Others* refer solely to the objective of crime prevention in the betting and gaming sector, whereas, in the present case, the Netherlands legislation is also designed to curb gambling addiction, the fact remains that those two objectives must be considered together, since they relate both to consumer protection and to the preservation of public order (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 58; Case C-124/97 *Läära and Others* [1999] ECR I-6067, paragraph 33; and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 31).

52 That question falls within the same legal framework as the first question referred in the case giving rise to the judgment in *Sporting Exchange* and is identical to it.

54 In that regard, it should be noted that the internet gaming industry has not been the subject of harmonisation within the European Union. A Member State is therefore entitled to take the view that the mere fact that an operator such as the Ladbrokes companies lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, is not a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69).

55 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70).

57 It follows from this that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72).

Sporting Exchange ("Betfair")

23 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51 and the case-law cited).

24 It is common ground that legislation of a Member State such as the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 52, and Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-0000, paragraph 16).

25 However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 55).

26 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

27 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 63, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 47).

28 The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, *Placanica and Others*, paragraph 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

29 According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives (*Gambelli and Others*, paragraph 75, and *Placanica and Others*, paragraph 58).

33 It should be noted in that regard that the internet gaming industry has not been the subject of harmonisation within the European Union. A Member State is therefore entitled to take the view that the mere fact that an operator such as Betfair lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69).

34 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70).

36 It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72).

49 Nevertheless, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to a fundamental freedom such as the freedom to provide services.

50 It has consistently been held that if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily (Case C-389/05 *Commission v France* [2008] ECR I-5397, paragraph 94, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 64). Furthermore, any person affected by a restrictive measure based on such a derogation must have a judicial remedy available to them (see, to that effect, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 38).

59 In any event, the restrictions on the fundamental freedom enshrined in Article 49 EC which arise specifically from the procedures for the grant of a licence to a single operator or for the renewal thereof, such as those at issue in the main proceedings, may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities (see, to that effect, Case C-124/97 *Läärrä and Others* [1999] ECR I-6067, paragraphs 40 and 42, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 66 and 67).

Liga Portuguesa de Futebol Profissional (Hereafter: Liga Portuguesa)

37 In that connection, it should be noted that the cooperative arrangements established by Article 234 EC are based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 36).

51 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16).

52 It is accepted that the legislation of a Member State which prohibits providers such as Bwin, established in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 54).

55 It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.

56 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gam-

bling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, paragraph 46 and case-law cited).

57 In that context, as most of the Member States which submitted observations to the Court have noted, the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (see, inter alia, Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraph 15; Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 32; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraphs 56 and 60, and *Placanica and Others*, paragraph 47).

58 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 by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure (Case C-124/97 *Läärrä and Others* [1999] ECR I-6067, paragraph 36, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 34).

59 The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48).

60 In the present case, it is thus necessary to examine in particular whether the restriction of the provision of games of chance via the internet, imposed by the national legislation at issue in the main proceedings, is suitable for achieving the objective or objectives invoked by the Member State concerned, and whether it does not go beyond what is necessary in order to achieve those objectives. In any event, those restrictions must be applied without discrimination (see, to that effect, *Placanica and Others*, paragraph 49).

61 In that context, it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 55).

64 The Court has also recognised that limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation (see *Läärrä and Others*, paragraph 37, and *Zenatti*, paragraph 35).

66 In that regard, it is apparent from the national legal framework, set out in paragraphs 12 to 19 of the present judgment, that the organisation and functioning of Santa Casa are governed by considerations and requirements relating to the pursuit of objectives in the public interest. The Gaming Department of Santa Casa has been given the powers of an administrative authority to open, institute and prosecute proceedings involving offences of illegal operation of games of chance in relation to which Santa Casa has the exclusive rights.

67 In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

69 In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks

of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.

70 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.

72 It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime.

Commission v Italy

20 As the Commission rightly observed, the Italian Government has not denied, either during the pre-litigation procedure or in the course of these proceedings, that the award of licences for horse-race betting operations in Italy constitutes a public service concession. That classification was accepted by the Court in *Placanica and Others* (C-338/04, C-359/04 and C-360/04 [2007] ECR I-0000), in which it interprets Articles 43 and 49 EC in relation to the same national legislation.

26 In those circumstances, it is necessary to consider whether the renewal may be recognised as an exceptional measure, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see, to that effect, *Case C-243/01 Gambelli and Others* [2003] ECR I-13031, paragraph 60, and *Placanica and Others*, cited above, paragraph 45).

27 On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (*Placanica and Others*, cited above, paragraph 46).

28 Although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, cited above, paragraph 48).

29 It should therefore be examined whether the renewal of the licences without inviting any competing bids is suitable for achieving the objective pursued by the Italian Republic and does not go beyond what is necessary in order to achieve that objective. In any case, the renewal must be applied without discrimination (see, to that effect, *Gambelli and Others*, paragraphs 64 and 65, and *Placanica and Others*, paragraphs 49).

Placanica

2 The references have been made in the course of criminal proceedings against Mr Placanica, Mr Palazzese and Mr Sorricchio for failure to comply with the Italian legislation governing the collection of bets. The legal and factual context of these references is similar to the situations that gave rise to the judgments in *Case C-67/98 Zenatti* [1999] ECR I-7289 and *Case C-243/01 Gambelli and Others* [2003] ECR I-13031.

36 Admittedly, as regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (see, in particular, *Case C-55/94 Gebhard* [1995] ECR I-4165, paragraph 19, and *Wilson*, paragraphs 34 and 35).

42 The Court has already ruled that, in so far as the national legislation

at issue in the main proceedings prohibits - on pain of criminal penalties - the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the State, it constitutes a restriction on the freedom of establishment and the freedom to provide services (see *Gambelli and Others*, paragraph 59 and the operative part).

43 In the first place, the restrictions imposed on intermediaries such as the defendants in the main proceedings constitute obstacles to the freedom of establishment of companies established in another Member State, such as Stanley, which pursue the activity of collecting bets in other Member States through an organisation of agencies such as the DTCs operated by the defendants in the main proceedings (see *Gambelli and Others*, paragraph 46).

44 Secondly, the prohibition imposed on intermediaries such as the defendants in the main proceedings, under which they are forbidden to facilitate the provision of betting services in relation to sporting events organised by a supplier, such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, constitutes a restriction on the right of that supplier freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services (see *Gambelli and Others*, paragraph 58).

45 In those circumstances, it is necessary to consider whether the restrictions at issue in the main proceedings may be recognised as exceptional measures, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see *Gambelli and Others*, paragraph 60).

46 On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (see, to that effect, *Case C-275/92 Schindler* [1994] ECR I-1039, paragraphs 57 to 60; *Case C-124/97 Läära and Others* [1999] ECR I-6067, paragraphs 32 and 33; *Zenatti*, paragraphs 30 and 31; and *Gambelli and Others*, paragraph 67).

47 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (*Gambelli and Others*, paragraph 63).

48 However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality.

49 The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination (see to that effect *Gebhard*, paragraph 37, as well as *Gambelli and Others*, paragraphs 64 and 65, and *Case C-42/02 Lindman* [2003] ECR I-13519, paragraph 25).

52 As regards the objectives capable of justifying those obstacles, a distinction must be drawn in this context between, on the one hand, the objective of reducing gambling opportunities and, on the other hand - in so far as games of chance are permitted - the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled.

53 With regard to the first type of objective, it is clear from the case-law that although restrictions on the number of operators are in principle capable of being justified, those restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities and to limit activities in that sector in a consistent and

systematic manner (see, to that effect, Zenatti, paragraphs 35 and 36, and Gambelli and Others, paragraphs 62 and 67).

55 Indeed it is the second type of objective, namely that of preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controllable systems, that is identified, both by the Corte suprema di cassazione and by the Italian Government in its observations before the Court, as the true goal of the Italian legislation at issue in the main proceedings. Viewed from that perspective, it is possible that a policy of controlled expansion in the betting and gaming 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. As the Belgian and French Governments, in particular, have pointed out, 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.

58 It will be for the referring courts to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation genuinely contributes to the objective invoked by the Italian Government, namely, that of preventing the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it will be for the referring courts to ascertain whether those restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality.

61 The Court has already ruled that, even if the exclusion from tender procedures is applied without distinction to all companies quoted on the regulated markets which could be interested in those licences - regardless of whether they are established in Italy or in another Member State - in so far as the lack of foreign operators among the licensees is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute *prima facie* a restriction on the freedom of establishment (see Gambelli and Others, paragraph 48).

68 Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law (see Case C-348/96 *Calfa* [1999] ECR I-II, paragraph 17).

Gambelli

46 Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.

48 In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute *prima facie* a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.

53 The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member states and provides without moving from the Member State in which he is established (Case C-384/93 *Alpine Investments* [1995] ECR I-II41, paragraph 22).

54 Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley established in a Member State, in this case the United Kingdom, offers via the internet and so without moving to recipients in another Member State, in this case Italy, with the result that

any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.

58 The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.

59 It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.

60 In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.

62 As stated in paragraph 36 of the judgment in Zenatti, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.

63 On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läära and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

64 In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, *inter alia*, Case C-19/92 *Kraus* [1993] ECR I-I663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37).

65 According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

67 First of all, whilst in Schindler, Läära and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

68 In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.

69 In so far as 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 opportunities for betting in order to justify measures such as those at issue in the main proceedings.

75 It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

Zenatti

24 As the Court held in Schindler, the Treaty provisions on the freedom to provide services apply, in the context of running lotteries, to an

- activity which enables people to participate in gambling in return for remuneration. Such an activity therefore falls within the scope of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) if at least one of the providers is established in a Member State other than that in which the service is offered.
- 25 In this case, the services at issue are provided by the organizer of the betting and his agents by enabling those placing bets to participate in a game of chance which holds out prospects of winnings. Those services are normally provided for remuneration consisting in payment of the stake and they are cross-frontier in character.
- 30 According to the information given in the order for reference and the observations of the Italian Government, the legislation at issue in the main proceedings pursues objectives similar to those pursued by the United Kingdom legislation on lotteries, as identified by the Court in Schindler. The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports.
- 31 As the Court acknowledged in paragraph 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 *Ministère Public v Van Wesemael* [1979] ECR 35, paragraph 28, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20, and Case 15/78 *Société Générale Alsacienne de Banque v Koestler* [1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them.
- 33 However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of Schindler, recognized as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.
- 34 In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.
- 35 As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 *Läära and Others* [1999] ECR I-0000 in relation to slot machines, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.
- 36 However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of

Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

- 37 It is for the national court to verify whether, having regard to the specific rules for governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.

Analysis of the case-law

The paragraphs in *Carmen Media* which explicitly refer to previous rulings are:

40, 41, 44, 45, 46, 55, 60, 65, 66, 85, 86, 87, 101, and 102 (14 in total, making 26 references to previous rulings).

Carmen Media being the most recent case of all, not any reference is made to this ruling.

The paragraphs in *Sjöberg/Gerdin* which explicitly refer to previous rulings are:

32, 36, 37, 38, 39, 40, 49, 50, and 54 (9 in total, making 13 references to previous rulings).

There are no paragraphs in *Sjöberg/Gerdin* to which reference is made in a later ruling, that is *Carmen Media*.

The paragraphs in *Ladbroke's* which explicitly refer to previous rulings are:

15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 52, 54, 55, and 57 (14 in total, making 19 references to previous rulings).

There is one paragraph in *Ladbroke's* to which reference is made in another ruling:

16 (in *Sporting Exchange* 24).

The paragraphs in *Sporting Exchange* ("*Betfair*") which explicitly refer to previous rulings are:

23, 24, 25, 26, 27, 28, 29, 33, 34, 36, and 59 (11 in total, making 15 references to previous rulings).

The paragraphs in *Sporting Exchange* to which reference is made in a later ruling are:

24 (in *Ladbroke's* 16), 49 (in *Carmen Media* 86), and 50 (in *Carmen Media* 87).

A general reference (without a specific paragraph or paragraphs mentioned) to *Sporting Exchange* is made in *Ladbroke's* 52 (N.B. *Ladbroke's* and *Sporting Exchange* are of the same date, 3 June 2010, and refer to each other, see also above). The total number of references to *Sporting Exchange* is: 4.

The paragraphs in *Liga Portuguesa* which explicitly refer to previous rulings are:

37, 52, 56, 57, 58, 59, 60, and 64 (8 in total, making 10 references to previous rulings).

The paragraphs in *Liga Portuguesa* to which reference is made in later rulings are:

37 (in *Sjöberg/Gerdin* 54), 51 (in *Sporting Exchange* 23, in *Ladbroke's* 15, in *Sjöberg/Gerdin* 32), 52 (in *Sporting Exchange* 24, in *Ladbroke's* 16), 55 (in *Sporting Exchange* 25, in *Ladbroke's* 17), 56 (in *Sporting Exchange* 26, in *Ladbroke's* 18, in *Sjöberg/Gerdin* 36), 57 (in *Sjöberg/Gerdin* 37), 58 (in *Sjöberg/Gerdin* 38, in *Carmen Media* 46), 59 (in *Sporting Exchange* 28, in *Ladbroke's* 20, in *Sjöberg/Gerdin* 39, in *Carmen Media* 85), 60 (in *Sjöberg/Gerdin* 40, *Sjöberg/Gerdin* 50), 61 (in *Sjöberg/Gerdin* 40), 66 (*Sporting Exchange* 59), 67 (*Sporting Exchange* 59), 69 (in *Sporting Exchange* 33, in *Ladbroke's* 54), 70 (in *Sporting Exchange* 34, in *Ladbroke's* 55, in *Carmen Media* 102), and 72 (in *Sporting Exchange* 36, in *Ladbroke's* 57, in *Carmen Media* 101). The total number of references to *Liga Portuguesa* is: 31.

The paragraphs in *Commission v Italy* which explicitly refer to previous rulings are:

20, 26, 27, 28, and 29 (5 in total, making 8 references to previous rulings).

There are no paragraphs in *Commission v Italy* to which reference is made in any later ruling.

The paragraphs in *Placanica* which explicitly refer to previous rulings are:

2, 42, 43, 44, 45, 46, 47, 49, 53, and 61 (10 in total, making 18 references to previous rulings).

The paragraphs in *Placanica* to which reference is made in later rulings are:

36 (in *Liga Portuguesa* 37, in *Sjöberg/Gerdin* 54), 45 (in *Commission v Italy* 26), 46 (in *Commission v Italy* 27, in *Liga Portuguesa* 56, in *Sjöberg/Gerdin* 36, in *Carmen Media* 45), 47 (in *Liga Portuguesa* 57, in *Sporting Exchange* 27, in *Ladbroke's* 19), 48 (in *Commission v Italy* 28, in *Liga Portuguesa* 59, in *Sporting Exchange* 28, in *Ladbroke's* 20, in *Carmen Media* 44), 49 (in *Commission v Italy* 29, in *Liga Portuguesa* 60, in *Sjöberg/Gerdin* 50, in *Carmen Media* 44, in *Carmen Media* 60), 52 (in *Carmen Media* 65), 53 (in *Carmen Media* 65), 55 (in *Ladbroke's* 25), 58 (in *Sporting Exchange* 29, in *Ladbroke's* 22), and 68 (*Sjöberg/Gerdin* 49).

A general reference to *Placanica* is made in *Commission v Italy* 20 and *Ladbroke's* 26.

The total number of references to *Placanica* is: 28.

There is one paragraph in *Gambelli* which explicitly refers to a previous ruling: 67 (one reference).

The paragraphs in *Gambelli* to which reference is made in later rulings are:

46 (in *Placanica* 43), 48 (in *Placanica* 61), 53 (in *Carmen Media* 41), 54 (in *Liga Portuguesa* 52, in *Carmen Media* 41), 58 (in *Placanica* 44), 59 (in *Placanica* 42), 60 (in *Placanica* 45, *Commission v Italy* 26), 62 (in *Placanica* 53), 63 (in *Placanica* 47, in *Ladbroke's* 19, in *Sporting Exchange* 27), 64 (in *Placanica* 49, in *Commission v Italy* 29), 65 (in *Placanica* 49, in *Commission v Italy* 29), 67 (in *Placanica* 46, in *Placanica* 53, in *Ladbroke's* 21, in *Carmen Media* 55, in *Carmen Media* 66), 68 (in *Carmen Media* 66), 69 (in *Carmen Media* 66), and 75 (in *Ladbroke's* 22, in *Sporting Exchange* 29).

A general reference to *Gambelli* is made in *Placanica* 2.

A reference to "the operative part" of *Gambelli* is found in *Placanica* 42.

A reference to "case-law cited" in *Placanica* 46 (including *Gambelli* 67) is made in *Liga Portuguesa* 56.

The total number of references to *Gambelli* is: 29.

Zenatti being the first ruling of all, there are no paragraphs in *Zenatti* which explicitly refer to previous rulings.

The paragraphs in *Zenatti* to which reference is made in later rulings are:

24 (in *Carmen Media* 40, in *Carmen Media* 41), 25 (in *Carmen Media* 41), 30 (in *Placanica* 46), 31 (in *Placanica* 46, in *Ladbroke's* 26, in *Carmen Media* 45), 33 (in *Carmen Media* 46), 34 (in *Liga Portuguesa* 58, in *Carmen Media* 46), 35 (in *Placanica* 53, in *Liga Portuguesa* 64), 36 (in *Gambelli* 62, in *Placanica* 53, in *Carmen Media* 65), and 37 (in *Carmen Media* 65).

General references to *Zenatti* are made in *Gambelli* 63, *Gambelli* 67, and *Placanica* 2.

A reference to "case-law cited" in *Placanica* 46 (including *Zenatti* 30 and *Zenatti* 31) is made in *Liga Portuguesa* 56.

Total number of references to *Zenatti*: 20.

It is striking that *Commission v Italy* (which is not a preliminary ruling like all others) is in an isolated position in relation to the other cases. Not any reference is made to this "old" case. *Liga Portuguesa* is the ruling most referred to, although it succeeded to four previous rulings, and was followed by only four new ones.

Table: Analysis of the case-law

	Zenatti	Gambelli	Placanica	Comm./lt.	Liga Port.	Sport. Exch.	Ladbroke's	Sjöberg	Carmen M.
	(0)	(3)	(18)	(8)	(11)	(15)	(19)	(13)	(26)
Zenatti (20)	x	3	5	0	3	0	1	0	8
Gambelli (29)		x	13	3	2	2	3	0	6
Placanica (28)			x	5	5	3	5	4	6
Comm./lt. (0)				x	0	0	0	0	0
Liga Port. (31)					x	10	8	9	4
Sport. Exch. (4)						x	2	0	2
Ladbroke's (1)						1	x	0	0
Sjöberg (0)								x	0
Carmen M.									x
	[20]	[32]	[46]	[8]	[42]	[19]	[20]	[13]	[26]

*N.B. The rulings at the horizontal line are the referring ones, the rulings at the vertical line are referred to. The number of times that a reference is made is indicated. The "Indirect" references from *Liga Portuguesa* 56 to "case-law cited" in *Placanica* 46 - that is *Zenatti* 30-31 and *Gambelli* 67 - have been counted twice. The totals are indicated between brackets on the left side after the (abbreviated) names of the rulings. The totals of references made per ruling are indicated between brackets under the (abbreviated) names of the rulings at the horizontal line. The totals of the vertical and horizontal lines per ruling are indicated underneath the Table between square brackets. Each reference has two aspects: a stare decisis creating, generating one ("active reference", see also horizontal total numbers) and a stare decisis receiving one ("passive reference", see vertical total numbers). Stare decisis works both ways: because of the relevance of argument in the previous ruling it is referred back to, but this "recognition" materializes only if an (explicit) back-reference is made.*

However, it looks like a central position is a good position also with regard to contributing to stare decisis (in a "passive" manner). *Zenatti*, *Gambelli* and *Placanica* "score less", although the difference with *Liga Portuguesa* is not so impressive as with the newest four, of the year 2010. On the other hand, the "active" role of *Liga Portuguesa* is restricted. *Placanica* and the new rulings of, in particular, *Ladbroke's* and *Carmen Media* have a much higher score. Apart from "content" (see below), the total ("passive" and "active" references) of *Placanica* provides the number one position: 46 (*Liga Portuguesa* 42) is in second position, *Gambelli* 32) in third, and *Carmen Media* (26 "active" references!) in fourth). What are the average scores? On the one ultimate end, *Zenatti*, being the first ruling, could not refer to any previous case, and on the other ultimate end, *Carmen Media*, being the most recent ruling, could not be referred to. And the opposite is also true. *Zenatti* could be referred to in 8 rulings; so, the average currently is: $20/8 = 2.5$. The other averages as to "passive" references are as follows: *Gambelli*: $29/7 = \text{appr. } 4$; *Placanica*: $28/6 = \text{appr. } 4.5$; *Commission v Italy*: $0/5 = 0$; *Liga Portuguesa*: $31/4 = \text{appr. } 7.7$; *Sporting Exchange*: $4/3 = 1.3$; *Ladbroke's* and *Sjöberg* score less than 1. It is clear that *Liga Portuguesa* is by far most prominent, followed by *Placanica* and *Gambelli*. The averages as to "active" references are: *Gambelli*: $3/1 = 3$, *Placanica*: $18/2 = 9$, *Commission v Italy*: $8/3 = \text{appr. } 3$, *Liga Portuguesa*: $11/4 = \text{appr. } 3$, *Sporting Exchange*: $15/5 = 3$, *Ladbroke's*: $19/6 = \text{appr. } 3$, *Sjöberg*: $13/7 = \text{appr. } 2$, and *Carmen Media*: $26/8 = \text{appr. } 3$. So, *Placanica* is by very far most prominent. The conclusion is that *Placanica* and *Liga Portuguesa* are the most prominent rulings of all in several respects.

Now, the "content" of the paragraphs which have been referred to more than once will be focused on:



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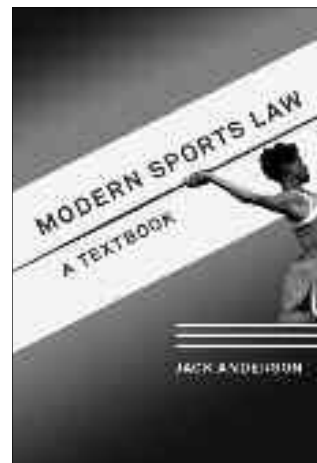


New *from* Hart Publishing

Modern Sports Law

A Textbook

by Jack Anderson



'This is a well-researched and well-written Book on 'Sports Law' and one that I would heartily and unhesitatingly recommend to students and practitioners alike.' Professor Ian Blackshaw, *International Sport Law Journal*

The aim of this book is to provide an account of how the law influences the operation, administration and playing of modern sports. Although the book focuses on legal doctrine it has been written bearing in mind sport's historical, cultural, social and economic context, including the drama and colour of sport's major events and leading personalities. And although it is inevitably very much concerned with elite professional sports it is not dominated by them, and seeks to cover the widest possible range of sports, professional and amateur.

Initially, the book addresses practical issues such as the structures of national and international sport, and examines the evolution of the body of law known as 'sports law'. Thereafter three main themes are identified: regulatory; participatory; and financial aspects of modern sport. The regulatory theme is dealt with in chapters considering the manner in which decisions of sports governing bodies may be challenged in the ordinary courts and the development of alternative dispute resolution mechanisms in sport. The participatory theme includes the legal regulation of doping and violence in sport, as well as the broader topic of tortious liability for sporting injuries. The financial theme, reflecting the enhanced commercialisation of sport at all levels, is developed in chapters concerning issues in applied contract and employment law for players and legal matters surrounding the organisation of major sports events. The conclusion summarises modern sport's experience of EU law, pointing the way to the future direction of sports law more generally.

While the book is aimed primarily at students, and is designed to cover fundamental and topical areas of sports law (sports law in general; sports bodies and the courts; arbitration in sport; corruption; doping; violence; civil liability; discrimination; the commodification of modern sport; and the likely future of sports law), it should also prove of wider interest to practitioners, sports administrators and governing bodies; and though focused primarily on UK law it will also appeal to readers in Australia, Canada, New Zealand and the USA.

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six times: Gambelli 67; five times: Placanica 48 and 49; four times: Zenatti 31, Placanica 46, and Liga Portuguesa 59; three times: Zenatti 36; Gambelli 63,

Placanica 47, and Liga Portuguesa 51, 56, 70, and 72; twice: Zenatti 24, 30, 34, and 35; Gambelli 54, 60, 64, 65, and 75; Placanica: 36 and 58; Liga Portuguesa:

52, 55, 58, 60, and 69; once: Zenatti 25, 30, 33, and 37 (and three general references); Gambelli 46, 48, 53, 58, 59, 62, 68, and 69 (and a general reference, a reference to its operative paragraph and a reference to “case-law cited”), Placanica 45, 52, 53, 55, and 68 (and two general references); Liga Portuguesa: 37, 57, 61, 66, and 67; Sporting Exchange 24, 49, and 50; Ladbrokes 16.

The paragraphs referred to five and four times read in full as follows:

First of all, whilst in Schindler, Läära and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. (*Gambelli* 67)

However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality. (*Placanica* 48)

The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination (see to that effect Gebhard, paragraph 37, as well as Gambelli and Others, paragraphs 64 and 65, and Case C-42/02 Lindman [2003] ECR I-13519, paragraph 25). (*Placanica* 49)

As the Court acknowledged in paragraph 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 *Ministère Public v Van Wesemael* [1979] ECR 35, paragraph 28, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20, and Case 15/78 *Société Générale Alsacienne de Banque v Koestler* [1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them. (*Zenatti* 31)

On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraphs 57 to 60; Case C-124/97 *Läära and Others* [1999] ECR I-6067, paragraphs 32 and 33; *Zenatti*, paragraphs 30 and 31; and *Gambelli and Others*, paragraph 67). (*Placanica* 46).

The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48). (*Liga Portuguesa* 59).

The above cited paragraphs may be generalized and summarized as follows (cross-references to immediately preceding, “scoring” and “non-scoring” paragraphs of course have been taken into account contextually).

Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of

protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality. (N.B. Since *Placanica* 48 and *Liga Portuguesa* 59 are identical (Liga Portuguesa referring to Placanica), the number of references in fact amounts to 9 for this reference.) Restrictions on gaming activities must be justified by imperative requirements (overriding reasons; *Zenatti* 31) in the general interest, such as consumer protection (protection of the recipients of the service, *Zenatti* 31) and the prevention of both fraud and incitement to squander on gaming; restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. (*Gambelli* 67) Those objectives must be considered together. (*Zenatti* 31) The measures must not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination. (*Placanica* 49) Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. (see below).

The paragraphs referred to three times read in full as follows:

However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services. (*Zenatti* 36).

On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läära and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. (*Gambelli* 63).

In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (*Gambelli and Others*, paragraph 63). (*Placanica* 47).

Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16). (*Liga Portuguesa* 51).

Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, paragraph 46 and case-law cited). (*Liga Portuguesa* 56).

In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve differ-

ent and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games. (*Liga Portuguesa* 70).

It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime. (*Liga Portuguesa* 72).

N.B. Since the paragraphs of *Gambelli* 63 and *Placanica* 47 are identical (Planacia referring to *Gambelli*), the number of references in fact amounts to 6 for this reference. So, its essence is (to be) added to the above summary: moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

4. Sports betting and the concept of “sports law”

Is “sports betting” part of sports law, international and European sports law, respectively, or is “sports betting” just an example of “sport and the law”?¹⁷ Of course it is a part of sports law, if we take the broader concept of sports law as the standard of evaluation: everywhere that sport and law meet, we may speak of “sports law”. But does sports betting also belong to the hard core of the concept, where sports rules and regulations, the specific “sporting law”, is tested against regular public, societal law - to find out whether there is a conflict of law or not? It does not seem like that, since rules and regulations of sports governing bodies do not exist, at least not in the context of ECJ jurisprudence. In ECJ jurisprudence “sports betting” in principle is not treated differently from other forms of gambling which may be illustrated by the fact that in sports betting cases explicit reference is made to non-sports betting cases like *Schindler* and *Läärä* by way of *stare decisis*. Whereas in landmark cases of European Sports Law like *Walrave*, *Bosman*, and *Meca-Medina*, sporting measures and practices were tested, the ECJ jurisprudence on sports betting is not of a similar character; it is marginal. What is tested against EU law, is national public legislation on lotteries, including sport lotteries. So, Member States’ law is the “intermediary” between the ECJ and organized sport. Sports betting, like, for example football hooliganism belongs to the world at large around sport, it is away from the playing field, off the pitch, and generally speaking not directly related to what happens on the field of play. In ECJ jurisprudence on sports betting there are only a few observations which show to some extent the specificity of sport in this context, for example it is said that an objective of national legislation may be to allow sports betting only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports (Zenatti, 30) Here sports betting is linked with the promotion of sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities (Zenatti, 4). Sports betting has a role in the broader context of sports funding at the amateur and recreational grass-roots level. Or: “[...] the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.” (*Liga Portuguesa* 71). Here sports betting clearly is connected to the threat of fraud and corruption in sport. In the White

Paper on Sport it is said that, since in some Member States parts of the profits generated by lotteries may be allocated to public interest goals, including sport, questions were raised if “the specificity of sporting needs” may allow for restrictions on the free movement of gambling services in order not to decrease the level of these profits.¹⁸

5. Conclusion

The “reversal or retrospective method” of content analysis introduced in this contribution (see in 1. *Introduction* for the detailed explanation of its meaning and way of application; see also in section 3 *supra* under “Analysis of the case-law” for the “rules” of the method used in practice) in fact is kind of a statistical method of research applied to law. By its application, legal science moves to a certain extent into the direction of becoming exact science.

Sports betting is not defined in the jurisprudence of the European Court of Justice. Generally speaking, it may be defined as sports-related betting.

The essence of the ECJ jurisprudence on sports betting may be summarized as follows on the basis of the application of the “reversal method” of content analysis:

Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality. Restrictions on gaming activities must be justified by imperative requirements or overriding reasons in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming; restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. Those objectives must be considered together. The measures must not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination. Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

The ECJ jurisprudence on sports betting is part of “sports law”, in particular international (EU) sports law, although it does not belong to its hard core from a doctrinal point of view, the specificity of sport not playing any systematic role in relation to this subject of sports law. The ECJ has tested and will continue testing national legislation and policy on sports betting against EU law; in this context it does not test any rules and regulations of sports organisations whether they might be acceptable under EU law (such rules and regulations are non-existent in this context).

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¹⁷ See, for a discussion whether sports law exists, whether there is a sports law, and what it is, what it consists of, the author’s inaugural lecture as professor of International and European Sports Law at the School of Law of Erasmus University Rotterdam, 10 June 2010; see for the English-language version The

International Sports Law Journal (ISLJ) 2011/3-4: “What is Sports Law? A Reappraisal of Content and Terminology”.

¹⁸ Commission Staff Working Document - The EU and Sport: Background and Content, Accompanying document to the White Paper on Sport (2007), p. 109



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Reorganization of the Sports Betting Market in Germany

by Martin Nolte*

Introduction

Ladies and gentlemen,

Sport plays an important role in the lives of people around the world. Its welfare functions are essential to state and society.

Sport socializes, integrates and is used for identification; it therefore exhibits the social functions that are absolutely necessary for cohesion in every national community - in Germany and in China. Furthermore, sport is of massive **economic** significance. The European Commission estimates that it is responsible for 3.6% of global gross domestic product. Politicians take note of these facts. Governments promote sport because of its welfare functions and for external appearances.

The growing significance of sport is, however, leading to legal problems with increasing frequency and these do not stop at national borders, as sport is an international phenomenon. Legal issues within sport assume a corresponding international dimension. The Sino-German Day of Sports Law takes on these challenges and sheds light on highly topical legal sports law issues with international implications.

This also concerns sports financing, because one thing is clear - sport cannot fulfil its important functions without an economic basis. Gambling is especially significant for financing sport because around 50% of the financing for communal sport in Germany is based on government subsidies from its gambling monopoly.

This gambling monopoly exists for major lotteries and sports betting. In the case of major lotteries, players can bet on numbers they have previously filled in being drawn from a limited pool of numbers and win more than one million euros for a financial stake. In the case of sports betting, the player has the opportunity of betting on events during sporting competitions. There are essentially no private providers in either field.

Things are different for minor lotteries and local, very limited sports betting, which lie in the hands of private providers. The same applies to betting on horses, casinos and commercial gambling machines. These games of chance are organized either exclusively or predominantly by private businessmen. The only other field in which there are state-run providers is casinos.

Sports betting is, however, of particular importance to sport. There are three reasons for this:

First, sports betting is based on the sports organizer's individual performances. Sports betting is inconceivable without his planning, organization, and execution of the competition.

Second, sports betting affects the integrity of sporting competitions, in other words the inability to influence them. Betting is on the outcome of sporting events, which entails the risk of manipulation. Sport loses its attractiveness and thus its recognition by state and society when competitions are manipulated.

Third, the German sports betting monopoly prohibits advertising of sports betting, which applies to television, stadium advertising, and players' shirts. This has considerable negative consequences for professional sport. German football clubs, in particular, have financial competitive disadvantages where international competition is concerned. Spanish club Real Madrid can advertise private gambling provider bwin on its players' shirts, but German champion 1. FC Bayern Munich is banned from doing so.

Difficult, highly topical cross-cutting questions go hand in hand with this because compelled by a state treaty between the German federal

states and recent decisions of the European Court of Justice the German gambling monopoly on lotteries and sports betting must be evaluated by the end of 2010.

On September 8, 2010, the European Court of Justice shared German courts' legal concerns about the German gambling monopoly. In its opinion, this is unsystematically, if not to say incoherently, geared to the aim of combating addiction. On the one hand, the government justifies its monopoly in the areas of lottery and sports betting with this aim. On the other, it is operating a policy of expansion in the field of betting on horses, casinos and commercial gambling. These are incompatible, given that the liberalized areas exhibit greater potential for addiction than sports betting.

In view of this my paper is divided into three parts:

The first part deals with the framework for sports betting in Germany, for which a decision by the German Federal Constitutional Court of 28 March 2006 is decisive. In the second part, I will describe developments in the sports betting market during the last four years. In the third part, I will address future regulation of the sports betting market, in which I will pay particular attention to constitutional and European law, after which I will sum everything up.

Part 1. Framework conditions for sports betting in Germany

First, I would like to look at the framework conditions for sports betting in Germany.

The state basically has a monopoly on organization. This monopoly was based solely on the lottery laws of the German federal states for a long time. These concluded a treaty on July 1, 2004, which mutually obliged all the federal states to maintain the sports betting monopoly.

This was based on the conviction that ensuring an adequate supply of sports betting is a public duty. According to the German constitution's allocation of rights and duties, fulfilment of this duty is the responsibility of the individual federal states. State lottery companies exist to fulfil this responsibility.

There are two exceptions to this principle: first, the special field of betting on horses, which has traditionally been in private hands since 1922 and for which the Federal government's Race Betting and Lottery Act is authoritative. Second, there are few private betting licenses with limited local validity. They were issued between 1989 and 1990 in the transitional period when the German Democratic Republic was reunifying with the Federal Republic of Germany and have limited local validity for the new federal states.

1.1. German Federal Constitutional Court's sports betting judgement of 28 March 2006

The framework conditions have been heavily influenced by the German Federal Constitutional Court's sports betting judgement of March 28, 2006, in which the highest German court declared the sports betting monopoly to be unconstitutional.

In its view the betting monopoly's specific formation violates the freedom of profession guaranteed under constitutional law. The monopoly constitutes a particularly fierce attack on the freedom of profession, which can only be justified with great difficulty. Fiscal motives were not sufficient, only the aim of combating addiction could uphold the sports betting monopoly. At any rate, the monopoly would have to be consistently geared to this aim, and it is not.

Despite being unconstitutional, the legal situation continued on as it was. However, the state was obliged to reorganize the sports betting market, for which it was given until December 31, 2007. There were two forms of reorganization open to the government. On the one hand, it could continue the monopoly, in which case it would have to keep a close eye on the aim of combating addiction. On the other hand, it

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could also decide, without further ado, to open up the sports betting market to private providers under controlled circumstances.

1.2. Direct impact of the sports betting judgement

The sports betting judgement has a direct impact on the provision of betting and to the conclusion of a new state treaty.

1.2.1. Considerable limitations on betting provision

The judgement of March 28, 2006 initially led to considerable restrictions on betting provision.

The state lottery companies have been banned from part-time and live betting. The same applied to betting using SMS (Short Message Service) telecommunications service and within football stadiums. Registration of new betting customers was suspended. "Old customers" were subjected to strict identification measures. Other restrictions were added to these, concerning various forms of advertising. Football club 1. FC Bayern Munich was banned from pitch-side advertising for the state monopolies and also had various addiction prevention measures stopped, which included, for example, warning notices on betting slips referring to the danger of addiction to sports betting.

At the same time pressure on illegal private sports betting providers was increased. The authorities prohibited the acceptance and broking of private bets. They declared their decrees to be immediately enforceable. They threatened substantial fines in the event of non-compliance. The courts held these measures to be lawful. They referred to the Federal Constitutional Court's judgement, according to which organization and broking of sports betting without a German licence is strictly prohibited. This represented a danger to public safety. The reorganization orders were therefore lawful.

1.2.2. New state treaty on gambling as of 1 January 2008

The sports betting judgement also quickly led to conclusion of a new state treaty on gambling, between the Federal Republic of Germany's federal states, which has been in force since January 1, 2008.

This state treaty forcefully emphasized the state sports betting monopoly. The federal states cited the following to justify the monopoly: the monopoly is a suitable method of combating the risks associated with betting. This applies especially to the combating of addiction and crime. The policy of strict regulation had proved its worth; this policy must therefore be adhered to.

That the admission of private companies, on the other hand, should be refused is basically supported by two reasons:

First, the admission of private betting companies would lead to an undesirable expansion of the gambling market, as had been proved by forecasts by stakeholders and the public safety authorities.

Second, the number of addicted gamblers and those at risk of addiction would rise to the same extent, which would in turn have a negative impact on accompanying and acquisitive crime.

Although the reasons for the sports betting monopoly were legitimate at the time, developments between 2006 and 2010 contradict the assumption that the sports betting monopoly has achieved its aims.

Part 2: Trend in sports betting between 2006 and 2010

Between 2006 and 2010 the sports betting trend has essentially been shaped by two factors.

First, state sports betting turnover has really slumped, while the black market has flourished massively in the same period.

Second, there was a flood of lawsuits against the sports betting monopoly, which prompted the most recent decisions by the European Court of Justice, which shared the concerns of German courts regarding the admissibility of the sports betting monopoly.

2.1. Slump in turnover and development of the black market

The decline in state betting turnover between 2006 and 2010 was massive. Cautious estimates assume a decline exceeding 60%. In the first instance this could be used to back up the sports betting monopoly's success, whose goal it is to inhibit the passion for gambling, yet on closer inspection this goal has not been achieved, as the turnover of illegal and foreign providers has flourished in the same period.

This development forces one to the following conclusion: the monopoly is not fulfilling its regulatory objective. On the contrary, it has generated a sizeable black market. The total sports betting market volume in Germany is conservatively held to be around five billion euros per annum, of which less than 200 million euros can be ascribed to legal state providers. The remaining share of sports betting is turned over by illegal or foreign providers.

From a regulatory policy view, the monopoly is not only unsuitable, it is even counterproductive. The same must apply to the remaining regulatory aims of the state gaming treaty.

There is a recent comparative law study on addiction prevention carried out in 2010. It comes to the conclusion that the addiction is best combated using a licensing model. The following should also be considered when countering crime: the latest betting scandal in Germany in 2009 occurred under the current state monopoly, which continues to cause a substantial black market operating outside the prevailing law. There can thus be no talk of countering crime in this area. Effective combating of crime is different.

2.2. Legal objections to the sports betting monopoly

There is a correlation between the negative trends in the sports betting monopoly and the legal objections, which are based on German constitutional law and European law.

At the level of German constitutional law, it is first and foremost a question of the monopoly's compatibility with private providers' freedom to exercise a profession. The monopoly serves to inhibit the passion for gambling and to combat addiction and crime; a proclamation of which in the new state treaty is, however, insufficient to justify the state monopoly. The Federal Constitutional Court has repeatedly made clear that the action taken must also actually be suitable to promote the specified objectives. This must be the subject of considerable doubt in view of more recent developments in the sports betting market.

The Federal Constitutional Court has not previously shared this concern. In more recent decisions it has not had an opportunity to rule on the content in this matter. In view of the trends that have been highlighted, it is highly probable that at the next opportunity the court will arrive at the sports betting monopoly's unconstitutionality. It is at any rate certain that more recent developments will be taken into account.

Second, there are far reaching concerns with regard to European law. They concern the sports betting monopoly's compatibility with the private provider's freedom of establishment and freedom to render a service. Although restriction of these freedoms would be permissible for reasons of regulatory policy, especially to curb addiction, the actions in this case would have to be coherent, in other words, consistent.

This is not the case in Germany because ultimately there are licensed gambling sectors such as horse betting, casinos and commercial gambling. In these areas the government is pursuing an expansionist policy, which contradicts the aim of combating addiction which the state is pursuing in the field of sports betting. Finally, the state is still advertising, especially where lotteries are concerned. This fact is also incompatible with the aim of combating addiction.

I therefore permit myself to make an interim summation. The gambling treaty's regulatory targets have been missed. The monopoly is having a counterproductive effect. The state is losing considerable income from the decline in state betting revenues and the simultaneous exclusion of private products. Finally, the state gambling treaty violates European law and is exposed to significant constitutional law concerns in view of the black market. It is thus a question of time as to when the Federal Constitutional Court will declare the treaty to be inadmissible.

Part 3: Future regulation of the sports betting market

This is the background to future regulation of the sports betting market. In this case two different models are being discussed:

On the one hand, the continuation of the sports betting monopoly for the purpose of combating addiction, and on the other hand, regulated opening up of the sports betting market to private entities, subject to government supervision.

3.1. Continuation of the sports betting monopoly

For regulatory policy, fiscal, economic and legal policy reasons, continuation of the sports betting monopoly for the purposes of combating addiction appears to be wrong, as is shown by the following:

3.1.1. Counterproductive to regulatory policy

In regulatory policy terms the sports betting monopoly is counterproductive, as is shown by the trend in the past four years. During this period neither enthusiasm for gambling, nor addiction, nor crime, were curtailed. On the contrary, the monopoly caused a black market. This ensues from the evaluation committee's latest interim report. Therefore, it cannot be assumed that the regulatory objectives would be achieved through continuation of the monopoly.

They would only be fulfilled if one were allowed to cautiously expand the range of services, to advertise and to access the internet. These options are, however, barred under the monopoly, as increasing attractiveness contradicts the objective of combating addiction. The monopoly's weakness in regulatory terms is therefore inherent.

3.1.2. Detrimental to fiscal policy

The sports betting monopoly is detrimental to fiscal policy because its continuation leads to state betting turnover falling further. The monopoly can only be justified by rigorous combating of addiction. Fiscal motives are prohibited. The necessary objective of combating addiction contradicts any increase in attractiveness.

Another thing: the European Court of Justice allows the sports betting monopoly to continue. In this case, Germany would have to coherently direct its entire gambling policy to the fight against addiction. This has a considerable impact on the concessionary areas of horse betting, commercial gambling and casinos. Private licences in these areas would be massively devalued, with significant losses in value added tax. The German horse betting market alone has an annual turnover of approximately 260 million euros. There are 8,000 arcades with more than 100,000 machines and around 40 private casinos. If a strict fight against addiction were to operate where these facilities are concerned, this would give rise to significant compensation payments on the part of the state.

3.1.3. Anachronistic in terms of economic policy

Continuation of the monopoly is anachronistic in terms of economic policy. More and more European Union member states such as France, Italy, and Denmark, are opening up their sports betting markets to private providers. Germany's market remains closed. This is causing private companies to migrate abroad, which has significant consequences for the domestic market, as Germany loses jobs, turnover, and taxes. The problem would be home-made. Continuing the sports betting monopoly is contradictory to the objective of European treaties.

3.1.4. Extremely risky in terms of legal policy

Finally, continuation of the monopoly is extremely risky in terms of legal policy. The sports betting monopoly is supposed to combat addiction, curb enthusiasm for playing, and deflect crime. The last four years have shown that the monopoly has not been able to fulfil its regulatory policy objectives. The Federal Constitutional Court had, however, stated that combating addiction as an aim is theoretically sufficient to operate a monopoly. In view of the increasing black market, there is nevertheless a suggestion that the court could come to the conclusion in future that the German monopoly in fact does not fulfil its supporting regulatory objectives.

Add to this another factor. Supporters of this monopoly perpetuate its maintenance with the aim of safeguarding the lottery monopoly. Their opinion follows presumed logic - if one were to approve sports betting, with a greater potential for addiction, one would first have to approve lotteries, with a lesser potential for addiction, thus losing the lottery monopoly, which must be retained at all costs.

This argument seems illuminating, but it is not. On closer inspection this argument endangers the lottery monopoly more than it safeguards it, as continuation of the sports betting monopoly with the aim of combating addiction is already questionable on factual grounds. If the sports betting monopoly were successfully challenged, the lottery

monopoly would also be overturned. The sports betting monopoly and lottery monopoly would ultimately be fatefully linked through the aim of combating addiction.

3.2. Regulated opening up of the sports betting market

The alternative to the monopoly is therefore regulated opening up of the sports betting market to private providers, under government supervision. The Federal Constitutional Court already referred to this alternative in its decision of March 28, 2006. This model could be based on four cornerstones:

3.2.1. Preventative regulation through qualified concessions

First, preventative regulation through qualified concessions. The sports betting market would not be opened up through wild liberalization. Instead a licensing model would be sought which contributes to preventative regulation of the sports betting market. Organization of sports betting would only be permitted with a prior licence. This qualified concession would have a preventative regulatory effect, as grant of the licence could be linked to regulatory requirements such as the provider's reliability and liquidity.

3.2.2. Protecting the integrity of sporting competition through collateral provisions

Second, protection of the integrity of sporting competition must be ensured through provisions collateral to the licence. To do this, the administration must be authorized to issue collateral provisions, which could specify precise requirements on the permissible forms of gambling. Forms of gambling that are especially addictive or highly manipulative, such as betting on the next yellow card, or the next foul, would have to be precluded. This would not only achieve general regulatory objectives, it would also better protect the integrity of sporting competition. For this purpose one would have to have recourse to the sport's special expertise. Its involvement in concrete considerations on prohibiting specific products could be achieved by giving it a seat and a voice when drawing up collateral provisions.

3.2.3. Regulatory control using the licensing model

Third, the licensing model would achieve regulatory control. Opening up the market reduces the weight of justification that the state has for forming a monopoly. Under the monopoly the regulatory aims of combating addiction and deflecting crime have a claim to absoluteness. This largely precludes increased attractiveness of the gambling offering. The situation changes fundamentally if the sports betting market is opened up. The state's weight of justification decreases. The regulatory objectives lose their absolute weight. They can be appropriately balanced with economic and fiscal policy motives. This is associated with significant manoeuvring room on the part of the state. It can open up the internet for sports betting, allow advertising, and moderately increase the range of products. This increases the attractiveness of legal sports betting in Germany. And as a result, a large part of the illegal market would transfer to the legal market, and people who are especially prone to addiction could consequently be better reached. Therefore, the licensing model is preferable in terms of regulatory policy.

3.2.4. Regulatory sports betting tax

Fourth, a regulatory sports betting tax could be levied. It would support and strengthen market supervision and the aims pursued by admission to the market. In particular, the significance of the sports betting tax should lie in making the range of sports betting more expensive and limiting it to reduce the risk of game manipulation. This regulatory objective is permissible without hesitation. The sports betting tax would accordingly be a form of special tax exclusively geared to a regulatory purpose. The rate of the tax would have to be governed by this objective, which is why a percentage should be chosen which, as in France and Italy, moves in the band between being perceptible and competitive.

The tax revenue would ultimately have to be used for the same function, in other words for regulatory purposes, which particularly include the integrity of sporting competition, whose protection could be achieved

by part of the revenues going to organisers of sporting competitions. Promoting the integrity of sporting competition by means of a financing guarantee would be nothing other than surrender of regulatory objectives to justify the sports betting tax.

Summary

Allow me to sum up as follows.

Sports betting in Germany leads to numerous cross-cutting questions at the interface between regulatory, economic, and sports policy, and in which law plays a central role. The various interests must be ranked and balanced against each other so that they can all come to fruition in the best possible way.

This applies also to the interests of sport. Sports betting entails the risk of manipulation and thus prejudices the integrity of sporting competition, which is why intelligent safeguards and controls are required. Sports betting also opens up significant economic and fiscal opportunities, which should not be placed in the hands of illegal providers.

In view of the current black market and the mandatory stipulations of constitutional and European law, sports betting in Germany requires

reorganization. Continuation of the sports betting monopoly for the purposes of combating addiction is extremely risky and obviously disadvantageous. It will continue the dramatic slump experienced by state-run providers and lend impetus to development of the black market. Finally, the aim of combating addiction would also place the lottery monopoly at risk. Anyone supporting continuation of the sports betting monopoly with the old justification should be clear about these circumstances.

The real alternative can only be controlled opening up of the sports betting market to private entities under government supervision. The licensing model offers significant channelling potential. It achieves the regulatory objectives, in conjunction with considerable additional revenue for the state. Sport would benefit too, as it is concerned with the integrity of its events, with solid basic financing from gambling revenues and additional advertising opportunities.

There is therefore no alternative to controlled opening up of the sports betting market.

Thank you very much for your attention.

The International Sports Law Journal



LEX LUDICA IN ANCIENT CHINESE FOOTBALL

THE DIRECT, INDIRECT AND FREEE GAMES OF CUJU

Cuju has a long history of about 2300 years in China. The earliest written record can be found in the third century BC. There are three kinds of *Cuju* in history: the direct game, the indirect game and the free game. The *direct game* was widely accepted in the Han dynasty (206 BC-220 AD). There were 12 players in each team, and there were two goals in the field. They played the game like a battle. The team which scored most was the winner. This kind of play was used for military practice, for example for the training of soldiers. The *indirect game* was popular in the Tan (618-907 AD) and the Song dynasties (960-1279 AD). There was only one goal in the field. The players kicked a leather ball through a hole in a piece of silk cloth which was strung between two 30 feet long poles. A remarkable feature is that while they played, the ball should not drop on the ground. The team who scored most was the winner. This kind of play was usually for diplomatic performances and the entertainment of the royalty. The *free game* was the most popular one and had the longest history. There was no goal in the field, the players kicked the ball freely, and the game's most important aspect was the skill of the players, the most attractive one was the winner. [Editors' comment: the "direct game" is similar to the basics of the modern association football game; the "indirect game" is somewhat like the modern training form of "foot volley" (tennis football) - keeping the ball in the air. The "free game" in fact is a free-style and jury type of football, purely showing your technical skills.]



Cuju is ancient Chinese football

The FIFA "6+5" Quota System: Legal Admissibility under the Terms of the Treaty of Lisbon

by Andreas Lange

I. Introduction

European football undoubtedly is a very popular sport. Therefore, it is not surprising that the market values of the largest football clubs in Europe varied between EUR 55 mio and EUR 116 mio in the Season 2006/2007 with the most expensive teams¹ reaching levels far beyond EUR 300 mio each.² In the past 15 years there has been a significant increase of the proportion of foreign professional player in European football leagues.³

For this reason there have been and there are strong efforts to introduce player quotas. These quotas were and are meant to support honourable aims, but indeed could not persist under European Community Law in the past. According to the ruling of the European Court of Justice (ECJ) in the cases "Dona"⁴, "Bosman"⁵ and "Simutenkov"⁶ player quotas even reach beyond sports law.

The so-called "6+5" Rule and the "home-grown players" Rule⁷ have to be designated as recent examples to the aforementioned. As a matter of fact in the year of the so called "Bosman" ruling professional clubs in the Community already employed a considerable number of players from other Member States and non-member countries⁸ and the number even increased until nowadays.

The International Federation of Association Football (FIFA) fears the competitive balance of sports at the level of national and international competition could be weakened without a quota system and the sporting and financial concentration could even increase affecting the promotion of junior players and the quality and substance of the national teams.⁹

FIFA's latest attempt to address these issues is the "6+5" Rule mentioned above.¹⁰ According to this rule, a football club is obliged to begin a game with at least six players entitled to play for the national team of the country where the club is located.¹¹ The teams are entitled to substitute three additional players against foreign ones during the match, so that the balance might be "3+8" in the end. Furthermore there are no restrictions for a club in concluding contracts with foreign players.

FIFA originally intended to introduce the "6+5" Rule until the 2012/2013 season beginning with a "4+7" Rule in the 2010/2011 season, in order to grant a reasonable amount of time to the clubs to adapt their squads.¹²

In the meantime the European Parliament¹³ voted for a rejection of

the "6+5" Rule and the European Commission¹⁴ recognized a breach of Art. 45 TFEU¹⁵.

At present the aforementioned rule has not been effected and according to a study from September 2010 the 60th FIFA Congress meeting in Johannesburg in June 2010 decided to withdraw the "6+5" Rule.¹⁶

Nevertheless FIFA's President Mr. Blatter is continuing to defend "his Rule"¹⁷ by seeking further political support for this project.

II. Legal admissibility of the Rule

In the following the legal admissibility of the "6+5" Rule will be considered in detail. Therefore an analysis of its compatibility with Art. 45 TFEU and with Art. 101, 102 TFEU is required.

1. Breach of freedom of movement for Personae

Economic integration of the Member States is a primary aim of the Union (Art. 3 TEU¹⁸) and therefore the Treaty provides the abolishment of all obstacles to the basic freedoms within the Community (Art. 3 para.1 b), Art. 4 para.2 b), Art. 26 TFEU).

In addition the fundamental freedoms are no longer considered as the sole prohibitions of discrimination but were developed by the ECJ as liberty rights.¹⁹ Thus the scope of Art. 18 TFEU is subsidiary. This understanding of fundamental freedoms as liberty rights is necessary to achieve a more extensive access to national markets and required by the „effet utile“. ²⁰ The ECJ stated to abolish all disadvantages for cross-border economic activity.²¹

a) Scope of protection

Furthermore it has to be considered, if regulations of Sports Associations are included within the scope of Art. 45 TFEU.

(1) Subject matter of protection

With reference to the Rule there is no exhaustive secondary law, which leads to the relevance of Art. 45 TFEU. Regarding the applicability of this provision a cross border element is required.²² The existence of such element shall be assumed hereinafter.

For determination of the subject matter as well as of the personal scope of protection of Art. 45 TFEU the concept of worker has to be considered as of central significance.²³ Economic activities in terms of

* Paper within the Master of Laws Program, Open University, Hagen, Germany, Winter term 2010/2011.

1 FC Chelsea London, Real Madrid, FC Barcelona.

2 Frick, SJPE 2007, page 422.

3 Battis in INEA 2008, page 27 et seq.

4 Case C-265/03, Donà, Judgment of the Court, ECR [1976] Page 1333.

5 Case C-415/93, Bosman, Judgment of the Court, ECR [1995] Page I-4921.

6 Case C-265/03, Simutenkov, Judgment of the Court, ECR [2005] Page I-2579.

7 See Articles 17 para. 8 to 12 of Union of European Football Associations (UEFA) Regulations for the Champions League and the UEFA Cup.

8 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 57.

9 INEA 2008, page 185.

10 Lynam, FIFA's "6+5 Rule", page 1: The Rule appeared first four years ago in the Memorandum of Understanding between FIFA and FIFPro dated 2 November

2006. Later on 30 May 2008 FIFA's Congress passed a overwhelmingly accepted resolution to fully support the objectives of the "6+5" Rule.

11 Battis in INEA 2008, page 18; Apps, SJ 2008, page 18.

12 Kusch, ISLJ 2010, page 114.

13 European Parliament, Legislative Observatory, INI/2007/2261, 08/05/2008 - EP: non-legislative resolution.

14 Press release, European Commission, UEFA rule on „home-grown players“: compatibility with the principle of free movement of persons, RAPID, 28 May 2008, IP/08/807.

15 Official Journal of the European Union, 30 March 2010, 2010/C 83/01.

16 Parrish/Garcia/Miettinen/Siekmann, The Lisbon Treaty and EU Sports, page 32.

17 See: <http://www.fifa.com/aboutfifa/cultural/news/newsid=1316570.html>: FIFA in Paris for Africa (FIFA.com) 12 October 2010: "6+5", protecting minors and the Transfer Matching System; www.fifa.com/aboutfifa/federation/

<http://president/news/newsid=1281244.html>: Blatter congratulates new Hungarian President (FIFA.com) 4 August 2010: Schmitt accepted the role of "6+5 ambassador" to the European Parliament in order to promote and defend the rule; <http://www.fifa.com/worldcup/news/newsid=1233802/>: Blatter: My mission is not over (FIFA.com) 10 June 2010: we also spoke about 6+5; <http://www.fifa.com/newscentre/news/newsid=1187396.html>: Rama Yade: France will be up to the task (FIFA.com) 30 March 2010: Rama Yade assured President Blatter of her support for the 6+5 rule; <http://www.fifa.com/aboutfifa/federation/releases/newsid=1161813.html>: Spanish President meets FIFA President in Madrid (FIFA.com) 25 January 2010: In connection with the Spanish presidency of the European Union in the first half of 2010, Rodríguez Zapatero and Blatter discussed the best way of implementing the proposals made by the FIFA Congress with a view to protecting national teams, safe-

guarding the education and training of young players and training clubs, preserving the values of commitment and motivation in football and maintaining the national identity of clubs (6+5).

18 Official Journal of the European Union, 30 March 2010, 2010/C 83/01.

19 Ehlers in Ehlers, EuGR, para. 7 / ref. 28 et seq.; Brechmann in Callies/Ruffert, EUV/EGV, Art. 39 EGV / ref. 52.

20 Streinz, Europarecht, para. 12 / ref. 672; Haratsch/Koenig/Pechstein, Europarecht, Chapter IV / ref. 878 cons., ref. 785 et seq. diff. view: only indiscriminate measures demand the understanding of fundamental freedoms as liberty rights.

21 Case C-415/93, Bosman, Judgment of the Court, ECR [1995] Page I-4921 ref 94.

22 Scheuer/Weerth in Lenz, EU-Verträge, Art. 45 AEUV / ref. 4.

23 Becker in Ehlers, EuGR, para. 9 / ref. 4 et seq.

24 Randelzhofer/Forsthoef in Grabitz/Hilf, Das Recht der EU, Art. 39 EGV / ref. 22 et seq.

25 Randelzhofer/Forsthoef in Grabitz/Hilf,

Art. 3 TEU solely are within the scope of Art. 45 TFEU.²⁴ Professional football players undoubtedly are part of economic life.²⁵ The scope of freedom of movement may even be applicable to players without citizenship of any Member State but them being citizens of any third country bounded under a association agreement with the European Community.²⁶ So the question, if the rule is concerning economic or purely sporting activities, has to be answered.

(2) Exception to the scope - purely sporting activities

The ECJ formerly appeared as generous and explained that the provisions of the Treaty do not affect rules concerning questions which are of purely sporting interest and, as such, have nothing to do with economic activity.²⁷ Thus it developed an exception to the scope of Art. 45 TFEU. Whenever matches are purely of sporting rather than of economic nature, such as competitions between national teams, the basic freedoms are not affected.²⁸

According to some opinions participating at the start of a game shall not be considered as the central issue of the occupational activities protected by the right to freedom of movement and, hence, is not subject to Art. 45 TFEU. The occupational activities of the individual player is not affected in his capacity as employee of the club.²⁹

It should be noted that this opinion does not conform to the recent "Meca-Medina"³⁰ ruling. The ECJ took another important decision with regards to the relation between sport and Community law: even if a rule concerns questions purely of a sporting nature and, as such, has nothing to do with an economic activity per se, this does not mean that the activity governed by that rule or the body which lays it down are not governed by the Treaty.³¹

The ECJ voted for a broad approach. If a sporting activity falls within the scope of the Treaty, there should no exceptions per se be applicable. Thus the "6+5" Rule can be subject to all obligations resulting from Treaty provisions and should be analysed from the perspective of a restriction to fundamental freedoms.³²

Therefore FIFA is entitled to introduce discriminatory rules³³ based upon the autonomy granted to sport associations by Art. 11 European Convention on Human Rights.³⁴ Since the "Meca-Medina" ruling even purely sporting rules must be proportional.³⁵ Assuming the rule is according to basic rights it nevertheless has to be examined with reference to any justification.

Furthermore the Lisbon Treaty Art. 165 TFEU was extended to cover the European dimension in sports.³⁶

In its "Bernard"³⁷ ruling the ECJ displays considerable willingness to consider the social and cultural value of sport and the particular circumstances under which sport operates, albeit without extending sport an exception in the strict sense. For the first time the Court refers to the new Art. 165 TFEU and made a point of the fact that the Member States have recognized the special character of sports in the Treaties.³⁸

The responsibility of the European Union under Art. 165 TFEU paying attention to the distinctiveness of sport, however, should not be overstated. Quite the contrary, Art. 165 TFEU may not serve as a basis for a sweeping and comprehensive exception to the scope of Art. 45

TFEU demanding sports.³⁹ Factual activities according to Art. 165 TFEU will be by far of political nature.⁴⁰

The aforementioned leads to the conclusion that the "6+5" Rule is within the scope of Art. 45 TFEU.

b) Interference with the fundamental freedoms

As mentioned above the "6+5" Rule will be introduced by Sports Associations. Therefore it has to be considered, if Art. 45 TFEU solely addresses to Member States or is effecting third-parties.

(i) Sports Associations: an entity bound by Art. 45 TFEU

The ECJ has extended applicability of the scope of Art. 45 TFEU at least partially to horizontal constellations, e.g. in case of involvement of private parties in any claims.⁴¹ Moreover the ECJ has clarified that rules established by sporting associations and federations, both on national and on international level, are subject to Community law.⁴² Such rulings clarified that sport clubs, associations or federations have to consider the non-discrimination principle when approving their internal codes and regulations.⁴³

In this coherence should be noted, that the ECJ extended the third-party effect in its "Angonese"⁴⁴ ruling even too far. The autonomy of private persons requires more attention and the approach of the Court must be considered as too restrictive.⁴⁵ A private banking corporation is not equipped with an equal position of power compared to a sporting association or federation of earlier rulings.⁴⁶

(2) Existence of „discrimination“

Art. 45 TFEU obviously prohibits direct discrimination⁴⁷ on grounds of nationality.⁴⁸ The ECJ confirmed that Art. 45 TFEU does not only apply to discriminatory rules but also to rules which, although they are expressed to apply without distinction (Indirect or covert discrimination)⁴⁹, impede the exercise of the free movement rights.⁵⁰ Furthermore such rules constituting an obstacle prohibited under Art. 45 TFEU, the provisions must affect the access of workers to the labour market.⁵¹

Nevertheless the ECJ decided that player quotas impair the freedom of movement due to the participation in games being a main goal of professional players.⁵² In a press release from May 28th 2008, the Commission has disclosed its legal conception, holding directly discriminatory rules such as the "6+5" Rule as incompatible with European law.⁵³

Against a direct discrimination can be argued that clubs would still be enabled to recruit players not eligible for the national team of the according club's country. Therefore the "6+5" Rule can only be regarded as indirect restriction with regard to the player's work since being only applicable to the starting line-up.⁵⁴

Advocate General Lenz countered this argument appropriate in his "Bosman" opinion by noting that the Commission correctly referred to Article 4 para. 1 of Regulation (EEC) No 1612/68⁵⁵ on freedom of movement for workers within the Community. The Regulation provides that provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment

Das Recht der EU, Art. 39 EGV / ref. 28; diff. view: *Haratsch/Koenig/Pechstein*, *Europarecht*, Chapter IV / ref. 856.

26 *Streinz*, *SpuRt* 2008, page 226;

Conzelmann, *ISLJ* 2008, page 28.

27 Case 36-74, *Walrave and Koch*, Judgment of the Court, ECR [1974] Page 1405 ref. 8; Case 13/76, *Donà*, Judgment of the Court, ECR [1976] Page 1333 ref. 14.

28 *Majani*, *ISLJ* 2009, page 22.

29 *Fleiner* in *INEA* 2008, page 119.

30 Case C-519/04 P, *Meca-Medina*, Judgment of the Court, ECR [2006] Page I-6991.

31 Case C-519/04 P, *Meca-Medina*, Judgment of the Court, ECR [2006] Page I-6991 ref. 25 et seq.; *White Paper on Sport*, COM(2007) 391 final, page 115.

32 *White Paper on Sport*, COM(2007) 391 final, page 102.

33 *Conzelmann*, *ISLJ* 2008, page 28.

34 likewise Art. 12 Charter of Fundamental Rights of the European Union which according to Art. 6 para.1.1 TEU is now recognized by the Treaty of Lisbon; e.g.: *Streinz* in *Streinz*, *Der Vertrag von Lissabon*, page 118 et seq..

35 *Heermann*, *causa sport* 3/2006, page 357.

36 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, e.g. *Brost*, *SpuRt* 2010, page 180 et seq..

37 Case C-325/08, *Bernard*, Judgment of the Court, ECR [2010] Page 0.

38 *Lindholm*, *CMLRev*, page 1195.

39 *Muresan*, *causa sport* 2010, page 102.

40 *Muresan*, *causa sport* 2010, page 104.

41 *Haratsch/Koenig/Pechstein*, *Europarecht*, Chapter IV / ref. 781, 870.

42 *Apps*, *SJ* 2008, page 20; *White Paper on Sport*, COM(2007) 391 final, page 115.

43 *Kahn* in *Geiger/Kahn/Kotzur*, *EUV/AEUV*, Art. 45 AEUV / ref. 18.

44 Case C-281/98, *Angonese*, Judgment of the Court, ECR [2000] Page I-4139.

45 *Streinz*, *Europarecht*, para. 12 / ref. 707; diff. view: *Brechmann* in *Calliess/Ruffert*, *EUV/EGV*, Art. 39 EGV / ref. 55 et seq..

46 *Franck* in *Tietje*, *Beiträge zum Völker- und Europarecht*, Heft 1, 2009, page 12.

47 See e.g.: *Kahn* in *Geiger/Kahn/Kotzur*, *EUV/AEUV*, Art. 18 AEUV / ref. 8; Direct or overt discrimination occurs when the national and the non-national are treated differently in law.

48 *Brechmann* in *Calliess/Ruffert*, *EUV/EGV*, Art. 39 EGV / ref. 50.

49 See e.g.: *Kahn* in *Geiger/Kahn/Kotzur*, *EUV/AEUV*, Art. 18 AEUV / ref. 9;

Indirect or covert discrimination occurs when an apparently neutral rule affects non-nationals more heavily than nationals.

50 *Kahn* in *Geiger/Kahn/Kotzur*, *EUV/AEUV*, Art. 45 AEUV / ref. 17.

51 *Scheuer/Weerth* in *Lenz*, *EU-Verträge*, Art. 45 AEUV / ref. 4.

52 Case C-415/93, *Bosman*, Judgment of the Court, ECR [1995] Page I-4921 ref 120.

53 See n. 14.

54 *Fleiner* in *INEA* 2008, page 103.

55 See *Haratsch/Koenig/Pechstein*, *Europarecht*, Chapter IV / ref. 874.

of foreign workers are not to apply to nationals of other Member States.⁵⁶ The “6+5” Rule, under which only the number of foreign players who can play in the starting line-up is limited, but not the number of players a club can engage, is still in breach of Art. 45 TFEU.

Besides for factual and economic reasons clubs would not engage many more foreign players than are allowed in the starting line-up.⁵⁷

c) Justification of the interference

Currently it needs to be clarified, if a direct discrimination can only be justified by one of the cases as listed in Art. 45 para. 3 and 4 TFEU⁵⁸ or whether reasons of common good can be consulted in addition.⁵⁹

According to the first opinion singly Art. 45 para. 3 TFEU seems to be applicable.⁶⁰ The provision provides a derogation to the freedom of movement. On that basis solely limitations on grounds of public policy, public security or public health can be justified. In this respect, as mentioned above, the sporting associations have an organizational autonomy to establish and observe the institution of sports (see also Art. 165 TFEU).⁶¹

The circumstance that football is existing without the “6+5” Rule until today already proves the non-existence of pressing reasons of public interest. A justification based on the “Ordre-Public” Exception therefore is not applicable.

In accordance with the second opinion exist persuasive arguments that direct discriminations can be justified by reasons of common good.⁶² As already considered above in general, purely sporting rules are within the scope of Art. 45 TFEU.

According to the ECJ ruling in the “Bosman” case it seems to be suitable to prove possible reasons of common good within justification.⁶³ Since these reasons have to be proportional, the aims of the “6+5” Rule need to be eligible, necessary and adequate.⁶⁴

(i) Protection of the national identity of football and the national teams
The argument is brought forward that the reduced participation of national football players in national football clubs generally leads to a reduction in the level of national teams.⁶⁵ This point is unpersuasive since recently Mesut Özil and Sami Khedira, two key players in Germany’s national team signed a contract with Real Madrid and this so far shows no evident negative effect on the national team. Only an additional employment abroad can be proven which by the way could have positive effect on the player’s development.⁶⁶

Thus can be ascertained that the “6+5” Rule is not eligible to protect or even improve the quality of national teams.

Furthermore it is argued that the conservation of a national identity and cultural diversity justifies the introduction of quota systems.⁶⁷ Against this can be argued, that the participation in international competitions is limited due to competitive game results, without any identifiable effect caused by the nationalities of signed players.⁶⁸ Nor does the participation of foreign players prevent a team’s supporters from identifying with the team.⁶⁹ Quite on the contrary, those players rather do attract the admiration and affection of football fans.⁷⁰

Besides for a breach to the freedom of movement the argument of national identity would not be adequate since it cannot be based on Art. 45 para. 3 TFEU.⁷¹

(2) Promotion of junior players

It is argued that the promotion of national junior players is necessary, because most junior players come from South America and Africa, and secondly, European clubs favour older, experienced European football players.⁷² Young domestic players do not get a chance to gain practical experience. Regarding economical aspects it is cheaper than training and developing own junior players by taking a financial investment with incalculable outcome.⁷³

In general this aim can be also found in the European Sports Charter⁷⁴. In its Article 1 the Charter declares, that all young people should have the opportunity to receive physical education instruction and the opportunity to acquire sports skills. European bodies as the ECJ, the European Council, Commission and Parliament have explicitly acknowledged the training and development of young players as legitimate goals in sports.⁷⁵

In the year 2005 the UEFA introduced a so called “home-grown players” Rule.⁷⁶ Clubs are obliged to employ locally trained players which must have spent at least 3 years between the ages of 15 and 21 in their club or in another club of the same country. Thus there is no nationality condition.⁷⁷ The idea is to promote training of young players and to encourage clubs to invest in training of young people and not only in transfers of players.⁷⁸

Hence the “6+5” Rule would not be necessary to promote junior players. The argument that the “home-grown players” Rule leads to early recruitment of underage players from abroad is not convincing.⁷⁹

Extraordinary young football talents have been scouted worldwide even before the “home-grown players” Rule was introduced. Accordingly Advocate General Lenz argues that the employment of foreign players does not cause any particular disadvantages.⁸⁰

Furthermore it is argued that the “home-grown players” Rule does not help to promote junior players with the nationality of the country the club is located in.⁸¹ As already mentioned above a connection between game experience and the national level could not be proven.

(3) Improving competition in sport

Finally the “6+5” Rule is regarded as eligible to install competitive balance between the teams.⁸² But as a matter of fact, the richest clubs are always able to afford the best and most expensive players. At the same time, they are able to employ the best native players and therefore quota systems would not change this.⁸³

This leads to the conclusion that the most successful clubs shall remain successful. Their financial potential, their name and historical fame attracts the best talents and gives an advance compared to smaller clubs which lies in the nature of things.⁸⁴

Therefore the “6+5” Rule shall not lead to any improvement of competition.⁸⁵

d) Conclusion

The aforementioned leads to the conclusion that the “6+5” Rule must be regarded as a breach of freedom of movement and the aims of that rule have no sufficient weight to sustain justification.

56 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 135.

57 Conzelmann, ISLJ 2008, page 28.

58 Wölker/Grill in Groeben/Schwarze, Kommentar zum EU-/EG-Vertrag, Art. 39 EGV / ref. 153.

59 Scheuer/Weerth in Lenz, EU-Verträge, Art. 45 AEUV / ref. 41; Conzelmann, ISLJ 2008, page 29 et seq..

60 Randelzhofer/Forsthoef in Grabitz/Hilf, Das Recht der EU, Art. 39 EGV / ref. 211.

61 Bros, SpuRt 2010, page 180.

62 Jarass, EuR 2000, page 719; Haratsch/Koenig/Pechstein, Europarecht,

Chapter IV / ref. 890, 895.

63 Weiß, EuZW 1999, page. 497; Randelzhofer/Forsthoef in Grabitz/Hilf, Das Recht der EU, Art. 39 EGV / ref. 30.

64 Haratsch/Koenig/Pechstein, Europarecht, Chapter IV / ref. 789.

65 Tsatsos in INEA 2008, page 75.

66 Streinz, SpuRt 2008, page 227.

67 Conzelmann, ISLJ 2008, page 28.

68 Case C-415/93, Bosman, Judgment of the Court, ECR [1995] Page I-4921 ref 132.

69 Streinz, SpuRt 2008, page 227.

70 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 143.

71 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 142.

72 Majani, ISLJ 2009, page 19; Tsatsos in INEA 2008 page 72.

73 Conzelmann, ISLJ 2008, page 26.

74 Battis/Ingold/Kuhnert, EuR 2010, page 7.

75 Kusch, ISLJ 2010, page 115.

76 See n. 7; Streinz in FS Steiner, page 858.

77 Streinz in FS Steiner, page 859.

78 White Paper on Sport, COM(2007) 391 final, page 13.

79 Battis in INEA 2008, page 146;

Battis/Ingold/Kuhnert, EuR 2010, page 17.

80 Case C-415/93, Bosman, Opinion of Mr

Advocate General Lenz, ECR [1995] Page I-4921, ref. 146.

81 Battis in INEA 2008, page 146 et seq..

82 Tsatsos in INEA 2008, page 71;

Battis/Ingold/Kuhnert, EuR 2010, page 15 et seq..

83 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 147.

84 Majani, ISLJ 2009, page 24.

85 Streinz, SpuRt 2008, page 227.

86 Streinz in Streinz, Der Vertrag von Lissabon, page 83.

87 Case C-519/04 P, Meca-Medina, Judgment of the Court, ECR [2006] Page I-6991.

2. Breach of European competition law (Art. 101, 102 TFEU)

In order to examine the legal admissibility of the “6+5” Rule European competition law needs comprehensively to be considered.

The aim of EU competition law is to prevent restrictive trade practices that are likely to interfere with trade between Member States or lead to a distortion of competition in the Union. According to the Treaty of Lisbon this aim is now laid down in the Protocol (Nr. 31) “on the internal market and competition” as said there that the internal market as set out in Article 2 of the Treaty on European Union includes a system ensuring that competition is not distorted.⁸⁶

a) Violation of Art. 101 TFEU

(1) Applicability / exceptions for the segment

As shown above even rules concerning purely sporting activities are ruled by the Treaty. This means that sporting regulations are no longer automatically excluded from the scope of competition law but are tested for compatibility with competition law.⁸⁷

(2) Coordination of behaviour between companies or trade associations In addition, FIFA needs to be regarded as an „undertaking” under the terms of Art. 101 TFEU. The TFEU does not define the concept of an “undertaking” for the purposes of the competition rules. The ECJ stated that the term “undertaking” encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way with it is financed.⁸⁸

Members of FIFA are the national associations⁸⁹ and hereby in the end the football clubs which are entities with economic aims.⁹⁰ The clubs are for example selling media rights, tickets or are active on the transfer market for players.⁹¹ Consequently, the “6+5” Rule must be regarded as an agreement between undertakings.

(3) Restriction to competition

The competition concerned is the competition between the clubs, in particular the one for new players. The relevant market could be the market of professional players.⁹² It is argued that the competition neither regards supply nor demand. The players supply as service providers and the clubs are regarded as customers.⁹³ This idea disregards that clubs often receive transfer money and therefore have own economic interests to offer players to the relevant market. The rule in question not only restricts the clubs in completing their squads, thus in engaging new players, as well as it restricts the possibility to offer players which actually are employed.

(4) Hindering international trade

Considering the hindering effect of the “6+5” Rule on trade between Member States the ECJ requires a agreement “capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States”.⁹⁴ The adverse effect must also be appreciable.⁹⁵

In that regard, the ECJ has consistently stated that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁹⁶

The “6+5” Rule will influence the player transfer between the Member States with high probability. Against it is argued that players are employ-

ees and the trade concept does not cover the employment of workers by clubs across national borders.⁹⁷ In line with the ECJ ruling it can be said against it that the concept of trade has a wide scope.⁹⁸ Professional players are therefore an economic good which is traded.⁹⁹

(5) Appreciability (the “de minimis rule”)

There must be a possibility of an appreciable amount of inter Community trade being affected, as Art. 101 para. 1 TFEU is subject to the “de minimis rule”. If the market share held by each of the parties to the agreement does exceed 15 % the agreement is noticeable.¹⁰⁰ The “6+5” Rule will affect a market share of 100 % because every club will be legally bound. FIFA de facto holds a monopoly.¹⁰¹ The argument, that the “de minimis rule” is not appreciable because the “6+5” Rule does not attend the aim to weaken competitors is not convincing.¹⁰² As shown above the rule does not solely concern sporting matters.

(6) Justification

There is a dispute if only an exemption in accordance with Art. 101 para. 3 TFEU is possible, or if there are additional exemptions constraining the scope of Art. 101 TFEU (the so called “rule of reason approach”).¹⁰³ To the point the Court’s jurisprudence appears as implicit limitation and not as a “rule of reason approach”.¹⁰⁴

So the “6+5” Rule can gain a legal exemption¹⁰⁵ under Art. 101 para. 3 TFEU if it satisfies the conditions given hereby. Generally speaking, the reason for such exemptions is the cognizance that certain agreements may have positive effect on competition that outweigh any possible detrimental effect on trade.¹⁰⁶

As shown above the supposed positive aims for the Rule could not justify a limitation of the basic freedom. In context of unfair competition an additional argument states that professional sport clubs rely on each other’s existence, because sporting events can only be successfully commercially exploited, if certain sportive balance between the clubs remains.¹⁰⁷ On the other hand the “6+5” Rule is not neutral in the manner that it has no effect on the normal functioning of competition at all.¹⁰⁸

And even more important the sporting balance between the clubs will not be improved by the “6+5” Rule.

As intermediate result a violation of Art. 101 TFEU is recognizable.

b) Violation of Art. 102 TFEU

With regard to competition law it must be considered, if FIFA abuses a dominant market position by implementing the “6+5” Rule.

Generally speaking, Art. 102 TFEU seeks to prevent undertakings from becoming involved in anti-competitive behavior.¹⁰⁹

(1) Dominant Position

The relevant market is the player market, as shown above. FIFA itself is only involved by installing the rules. Therefore a dominant position within Art. 102 TFEU can only be held by the clubs bounded as a collective entity.¹¹⁰

For such a position three cumulative conditions must be fulfilled: The clubs must have mutual knowledge of behavior, the rule must have constancy and there has to be an absence of foreseeable adverse effects.¹¹¹ The aforementioned conditions are fulfilled.

The “6+5” Rule affects all football clubs worldwide. Thus every single club on the relevant market will be concerned.

88 *Hoppel/Frohn*, causa sport 2008, page 256; Case C-41/90, Höfner and Elser, Judgment of the Court, ECR [1991] Page I-1979 ref. 21.

89 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 256: There is likewise no doubt that the individual football associations are to be regarded as associations of undertakings within the meaning of Article 85.

90 *Schwarze/Hetzel*, EuR 2005, page 589.

91 *Manville*, ISLJ 2009, page 26.

92 *Battis* in INEA 2008, page 163.

93 *Battis* in INEA 2008, page 165.

94 Case 22/78, Hugin v Commission, Judgment of the Court, ECR [1979] Page 1869 ref. 17.

95 See e.g.: Case 28/77, Tepea v Commission, Judgment of the Court, ECR [1978] Page 1391 ref. 46 and 47.

96 Joined cases C-215/96 and C-216/96, Bagnasco, Judgment of the Court, ECR [1999] Page I-0135 ref. 47.

97 *Battis* in INEA 2008, page 170.

98 Case 172/80, Züchner, Judgment of the Court, ECR [1981] Page 2021 ref. 18.

99 *Manville*, ISLJ 2009, page 28.

100 Official Journal of the European Union, 22 December 2001, 2001/C 368/07.

101 *Conzelmann*, ISLJ 2008, page 29.

102 *Conzelmann*, ISLJ 2008, page 29.

103 *Emmerich* in Immenga/Mestmäcker, Wettbewerbsrecht, Art. 81 para. 1 / ref. 246 et seq..

104 *Weiß* in Calliess/Ruffert, EUV/EGV, Art. 81 EGV / ref. 114; diff. view: *Haratsch/Koenig/Pechstein*, Europarecht, Chapter III / ref. 1054f.

105 Official Journal of the European Communities, 4 January 2003, Council Regulation (EC) No. 1/2003, L 1/1.

106 *Ellger* in Immenga/Mestmäcker, Wettbewerbsrecht, Art. 81 para. 3 EGV / ref. 3 et seq..

107 *Conzelmann*, ISLJ 2008, page 28.

108 *Manville*, ISLJ 2009, page 28.

109 *Haratsch/Koenig/Pechstein*, Europarecht, Chapter III / ref. 1092.

110 White Paper on Sport, COM(2007) 391 final, page 68; *Manville*, ISLJ 2009, page 33; *Haratsch/Koenig/Pechstein*, Europarecht, Chapter III / ref. 1101.

111 Case T-193/02, Piau v Commission, Judgment of the Court, ECR [2005] Page II-0209 ref. 111.

(2) Abuse

According to General Attorney Lenz there is no abuse given since the rule only restricts competition between the clubs and not between the clubs and the players.¹¹²

This argument must be regarded as unpersuasive as the players themselves are suppliers to the relevant market. The “6+5” Rule brings a barrier to market access¹¹³ for the players. Secondly the rule also will bring a quantitative restriction on the competition between the clubs.¹¹⁴

In accordance with the “Meca-Medina”¹¹⁵ ruling the “6+5” Rule would be no abuse if the legitimate objectives are proportionate.

As shown above no legitimate aims for the rule are existing.

c) Conclusion

The aforementioned leads to the conclusion that also a violation of Art. 102 TFEU is recognizable.

3. Possible legal proceedings against the “6+5” Rule

Finally the question occurs, how an implementation of the rule could be handled on a legal basis respectively what legal procedures can be undertaken.

In the past rules on foreign players already have been in force without leading to court proceedings against them.¹¹⁶ The involved sporting clubs will often abide a rule voluntarily.

Also as the “Bosman” case shows players can file a lawsuit. In addition the EU Competition Commission can take measures under Art. 105 TFEU and FIFA will be required to desist the exercise of the “6+5” Rule and a substantial fine can be imposed.

III. Summary and Results

A consolidated view of the aforementioned indicates that the “6+5” Rule violates Community Law. Nevertheless, it has to be admitted that the “6+5” Rule was meant to support eligible aims.

Since the “home-grown player” Rule is with good reasons deemed insufficient to achieve a promotion of national junior players, the development of alternative instruments is required.

One possible concept suggested is to introduce a “promotion tax”¹¹⁷ for young players. According to this concept, football clubs are obliged to field a minimum number of domestic young players or will have to pay a so called “promotion tax” for every missing player to a young player promotion fund.

An alternative model votes for the possibility to introduce a kind of “bonus-system”. Every time a club fields domestic young players, this will be rewarded by a certain “bonus-payment”.¹¹⁸

Nevertheless both concepts anyway could lead to an indirect discrimination of foreign players. Although under certain conditions such discrimination can be justified, the aim should be to avoid any unnecessary discrimination. Therefore, to support FIFA’s “6+5” aims an admissible option can be a moderate “promotion tax” combined with “bonuses” by equal extend.

In accordance with the “Meca-Medina”¹¹⁹ ruling a such a moderate “promotion tax and bonus” system could be considered as proportional. Hence it would cause no breach to European law especially the freedom of movement and European competition law.

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115 Case C-519/04 P, *Meca-Medina*, Judgment of the Court, ECR [2006] Page I-6991.

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Germany (spring 1995) 1. FC Nürnberg, threatened with relegation, were at home to SV Meppen in a German second division match. A few minutes

before the end Nürnberg, who were leading 2-0, by mistake brought on as substitute a fourth foreigner, who had Austrian nationality. Because of that infringement, the DFB awarded the match, which had ended 2-0 to Nürnberg, to SV Meppen by two goals to nil and two points to nil. Nürnberg accepted the deduction of the points.

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The Autonomy Case in Brazil*

by **Maurício Ferrão Pereira Borges****

Introduction

Brazil has one of the most complex legal systems in the world, especially in regard to sports law. For that reason, sports law in Brazil has been a theorized area of study for a few years. The extension of this growing interest in sports law has undoubtedly served to strengthen it in terms of theoretical approach. The maturation of sports law as an academic subject is not only reflected in the growing volume of academic texts on the matter, but also in the sports law cases being brought to the court. The most recent of the high court cases is the so-called 'Autonomy Case', which involves the internal organization of one of the most important clubs in South America: the *São Paulo Futebol Clube*.

The Brazilian legal system is facing nowadays a conflict of norms in relation to the autonomy of sports entities as to their internal organization and operation. We will describe below the main aspects involving this notorious case, which can have a major impact on the Brazilian football world and be regarded as one of the most important cases in recent Brazilian sports law history.

I. Autonomy under the Federal Constitution

Although it may have divergent applications in different countries, protecting autonomy is today one of the central values of all legal systems. The concept of autonomy has an universal appeal and therefore shapes the whole structure of relationships between individuals, entities and the state. In its simplest and most natural sense, autonomy means self-rule. In other words, it signifies the right of individuals, or of associations, or of states to make their own laws for themselves.

Understood in this way, autonomy could be defined as a synonym for license, which is to say, the ability to do what you want within your private sphere (individual), scope (entity) or territory (state). However, autonomy implies certain measures of self-restraint. It is a limited license, a kind of power with restraints.

In this context, the meaning of autonomy is connected with liberty, which is one of the most important purposes and justifications for the existence of the law. As a general rule, the law protects liberty and autonomy drawing the lines that determine the range of their self-rule. It is not different in the Brazilian constitutional law. Article 217 paragraph I of the Brazilian Federal Constitution, promulgated in 1988, provides that Brazilian legislation shall guarantee autonomy for all sports entities in relation to their internal organization and operation, including (i) sports directing entities such as the Olympic or Paralympic Committees, confederations and federations and (ii) sports associations in general.

Ipsis litteris, article 217 paragraph I of the Brazilian Federal Constitution stipulates that: "It is the duty of the State to foster the practice of formal and informal sports, as a right of each individual, with due regard for: I - the autonomy of the directing sports entities and associations, as to their organization and operation".

In short, sports autonomy always deserves a special chapter in all kinds of sports law books, because it is undoubtedly "the keystone of the whole Brazilian sports legal system".¹

II. Autonomy under the International Sports Law

Pursuant to the Brazilian *lex magna*, as we can see, the importance of the autonomy of the sports entities is also intimately connected with the concepts of self-organization and internal operation. Both concepts guard sports associations against unwarranted intrusion. The main idea of the above-mentioned legal framework is in accordance with the philosophy of FIFA, IOC and, consequently, the international sports law.²

The international sports law is ruled by organizations such as FIFA and IOC.³ They are world governing bodies placed at the apex of the so-called sports pyramids. A sport pyramid is an expression of the necessary organizational structure of sport. In football, for example, FIFA is placed at the apex. Beneath FIFA lie the continental associations - in South America, CONMEBOL. On the next level further down are the national associations, along with other participants, including regional associations and eventually leagues. And then come the sports clubs and the players at the pyramid's bottom.⁴

On the one hand, an association that wants to be admitted into FIFA is obliged to "ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies".⁵ On the other hand, as provides the Olympic Charter, each international federation "maintains its independence and autonomy in the administration of its sport"⁶ and the National Olympic Committees "must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter".⁷ According to article 217 of the Brazilian Federal Constitution, FIFA, IOC, the International Federations and the National Olympic Committees are 'directing sports entities' and the clubs 'sports entities' or 'sports associations'.⁸ Of course the goal of the two most important sports organizations of the world regarding autonomy is not exactly the same as that of the Brazilian constitutional law. FIFA and IOC do not accept any government interference with its members and, aiming to avoid such interference, established rules to safeguard the autonomy of all directing sports entities and associations.

That was the subject of a very interesting decision of the FIFA Emergency Committee, which suspended the Nigeria Football Federation (NFF) with immediate effect on account of government interference.⁹ Last June, Nigerian President Goodluck Jonathan suspended the Nigerian national football team from any international competitions for the next two years after a disappointing run in the World Cup. The reason behind the President's attitude was the widespread corruption that existed in the NFF. Supposedly, the NFF spent their \$6 million World Cup funds carelessly. Therefore, President Jonathan ordered that a financial audit of the World Cup project be carried out in order to investigate any misuse of funds and any wrongdoing related to the project. The results of those investigations include spending \$250,000 to charter a faulty airplane to fly the national team from London to South Africa and paying \$800,000 in allowances to 220 delegates to the World Cup when only 47 were federation officials. The rest were friends, associates, girlfriends etc.

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1 See Álvaro Melo Filho, the author of the chapter about sports in the Brazilian Federal Constitution, O Desporto na

Ordem Jurídico-Constitucional Brasileira (1995), Malheiros Editores, p. 63: "The question of autonomy is not an issue of form but of substance".

2 See my book *Verbandsgerichtsbarkeit und Schiedsgerichtsbarkeit im internationalen Berufsfußball. Unter Berücksichtigung der verbandsinternen FIFA-Rechtsprechung in Bezug auf die lex sportiva* (2009), Peter Lang, pp. 63-64.

3 It is important to note the difference between international sports law, which is ruled by the sports world bodies, and the *lex sportiva*, which is grounded on the

jurisprudence of the Court of Arbitration for Sport: the supreme court of the global sports law nowadays.

4 See Dirk Monheim, *Sportlerrecht und Sportgerichte im Lichte des rechtsstaatsprinzips - auf dem Weg zu einem Bundessportgericht* (2006), Herbert Utz, pp. 6-8. For a critical view of the matter see Stephen Weatherill, is the pyramid compatible with EC Law?, in *European Sports Law: collected papers* (2007), T.M.C. Asser Press, pp. 265 *et seq.*

5 See article 13 d of the FIFA Statutes.

6 See article 26 par. 2 of the Olympic

Charter.

7 See article 28 par. 6 of the Olympic Charter.

8 About the Olympic system and the law of the Olympic Games see Jean-Loup Chappelet; Brenda Kubler-Mabbott, *The international Olympic Committee and the Olympic System* (2008), Routledge and Alexandre M. Mestre, *The Law of the Olympic Games* (2009), T.M.C. Asser Press.

9 See our newsletter in http://www.felsberg.com.br/Newsletter/Internationalout_10/newsletter.html.

In accordance with FIFA's decision, however, some events linked to the NFF were vital to the suspension of the NFF from all international competitions, such as: (i) the court actions against elected members of the NFF Executive Committee preventing them from exercising their functions and duties; (ii) the stepping down of the acting NFF General Secretary on the instructions of the National Sports Commission; (iii) the decision of the Minister of Sports to have the Nigerian League start without relegation from the previous season; (iv) and the fact that the NFF Executive Committee cannot work properly due to this interference.

The suspension will be maintained until the court actions terminate and the duly elected NFF Executive Committee is able to work without any interference by the Nigerian government. During the period of suspension, the NFF will not be able to be represented in any regional, continental or international competitions, including at club level, or even in friendly matches. In addition, neither the NFF nor any of its members or officials can benefit from any development program, course, or training from FIFA or CAF (Confederation of African Football) while the federation remains suspended.

Even though the cited constitutional provision (article 217 of the Brazilian Federal Constitution) is quite limiting, this subject was also addressed in Law no. 9.615/98, commonly known as 'Pelé Law'.¹⁰ By regulating sports in Brazil since March 24, 1998, Pelé Law establishes the autonomy as a basic principle of all sporting activities:

"Art. 2 Sporting activity, as an individual right, is based on the following principles: (...) II - autonomy, defined by the faculty and freedom of individuals and legal entities of organizing themselves for the purposes of performing sporting activities."

As per the reasons stated above, one could say that the autonomy of the directing sports entities and associations is certainly guaranteed both by constitutional law and special law in Brazil. This statement could be true. Unfortunately, it might be only partially true under Brazilian law.

III. Autonomy under the Civil Code

Whilst the Federal Constitution guarantees the autonomy, the Brazilian Civil Code establishes limits to the autonomy of sports entities, as article 59 provides that only the general assembly has competence to change articles of association, even though the entity's bylaws may establish the opposite. If the constitutional law¹¹ clearly safeguards the autonomy of sports clubs, how could civil law be applicable to them?

Regarding article 59 of the Brazilian Civil Code, which came into force on January 11, 2003:¹² "The General Meeting shall have exclusive powers to: I - remove officers; II - amend the articles of association."

The Sole Paragraph of the same article provides the following: "The resolutions mentioned in items I and II above shall be passed by a general meeting called especially for such purpose, with the respective quorum and criteria for election of officers as established in the articles of association."

Evidently, the provisions outlined in the Brazilian Civil Code go against the autonomy of sports entities, in such a way that they require football clubs, which have been created with the legal status of associations, to change articles of association by means of a general meeting of

the associates,¹³ even though these clubs perform such action through their decision-making bodies.¹⁴

The above-mentioned situation was worse until Law no. 11.127/2005 came into force, which partially modified article 59 removing from it the exclusive powers of the general meeting to (i) elect the officers of the association and (ii) approve its accounts. In this context, the dispute in the Autonomy Case arose out of the conflict of norms ongoing in Brazil. It consists indeed in a big question with no easy answer and, therefore, quite a challenge to Brazilian courts.

With this in mind, the case at hand offers an analysis of the complexity of norms relating to the autonomy of sports associations under the Brazilian legal system. Let us begin with the facts of the case.

IV. The 'Autonomy Case'

The well-known Autonomy Case of sports associations is certainly one of the most important leading cases in Brazilian sports law. The main issue, amongst several subsidiary ones, addressed herein is the conflict between constitutional law and civil law as to whether sports associations may have full or limited autonomy.

The question of how autonomy should be treated when sports clubs intend to amend their own articles of association became a controversial matter in Brazilian law. Even after the new Brazilian Civil Code came into force on January 11, 2003,¹⁵ many sport clubs had continued to change their own articles of association through resolutions of their decision-making bodies instead of by general meeting's decision.

As a result, the Brazilian sports clubs, especially the ones that changed their articles of association grounded on the constitutional provision, have experienced legal instability. This situation has led to several lawsuits on this matter, mostly involving country's leading football clubs such as *Santos FC*, *SE Palmeiras* and *São Paulo FC*.

The Autonomy Case arose in 2004 from proceedings brought before the court of São Paulo by a member of the decision-making body of *São Paulo FC* against the sports association *São Paulo FC*. The claimant wanted to avoid changes in the articles of association of the sports entity. According to a first instance decision in the Autonomy Case, the provision of the Civil Code only concerns non-sporting associations. Further, most of the decisions also by the state courts have ruled that the provision in article 59 of the Civil Code does not apply to sports entities, as they have their autonomy guaranteed by the Federal Constitution and by a specific law (Pelé Law).¹⁶

Despite the clear directions contained in the decision of the court of first instance, the State Court of São Paulo has taken an opposing stance on this issue with the understanding that sports associations must comply with the Civil Code and submit changes to their articles of association to a general meeting.

The dispute has been recently brought to the consideration of the Brazilian highest courts (*Supremo Tribunal Federal/STF* and *Superior Tribunal de Justiça/STJ*) by means of appeals. Due to its complexity, the issue in this case may be stated in various ways. In short, its outcome rests basically on three legal doctrines:

- i Supremacy of the Constitution over the Civil Code;
- ii Specificity of civil law;
- iii Constitution and Civil Code as centers of private law.

After that, in early 2010, members of the decision-making body of *São Paulo FC* filed a lawsuit against the club itself aiming to avoid the reelection of its current chairman Mr. Juvenal Juvêncio. Actually, the claimants wanted to discuss a matter which still has no final decision by the highest courts: the same matter discussed in the Autonomy Case. The claim is focused on the fact that the decision-making body of *São Paulo FC* voted on changing the articles of association is illegal in light of the Brazilian civil law because made through an intern resolution instead of a general meeting's voting. Based on this amendment, which also intended to extend the tenure of the club's chairman, Mr. Juvenal Juvêncio was re-elected president of *São Paulo FC* for the third time.

Before the club's decision-making body changed the articles of association, the chairman used to be elected to a two-year term. After the amendment, the term of office as chairman was extended to three years. *São Paulo FC*'s articles of association, though, just allows one reelection

10 *Édson Arantes do Nascimento*, the former football player "Pelé", held the office of Minister of Sports in Brazil at the time Law no. 9.615/98 came into effect.

11 See article 217 I of the Brazilian Federal Constitution.

12 The Brazilian Civil Code was promulgated on January 10, 2002, and came into force one year later.

13 See Felipe Legrazie Ezabella, *As Associações no Novo Código Civil Brasileiro, a Influência no Direito Desportivo* (Lei no. 10.672/2003) e a Alteração de seus Estatutos Sociais, in *Direito Desportivo - Tributo a Marclio Krieger* (2009), Quartier Latin, pp. 267 *et seq.*

14 With a critical overview of the matter Álvaro Melo Filho, *Autonomia Desportiva: uma questão central do Direito Desportivo* (2006), IOB Thompson, p. 62.

15 About the *vacatio legis* of the Brazilian Civil Code see my book *Solidarität im Recht. Die Wirkungen der Solidarität auf die invitatio ad offerendum im deutschen Recht vor dem Hintergrund der brasilianischen Rechtserfahrung* (2009), GRIN Verlag, p. 113, footnote 273.

16 See www.tj.sp.gov.br - Lawsuit no. 011.04.015698-3 - 3rd Court of 1st Instance (Forum Regional de Pinheiros).

and, according to the claimants, if the amendment was illegal, the current chairman could not be reelected for a 'third time'.

Anyway, due to this (legal or illegal) modification, the chairman of *São Paulo FC* was elected by the club's decision-making body (i) for a term of two years (2007-2008), (ii) for a term of three years (2008-2011) and (iii) for another term of three years (2011-2014). As to the Defendant's, the current chairman was re-elected only one time, because the first opportunity for him to be re-elected under the new rule i.e. for a three-year term was in 2011.

Conclusion

The Autonomy Case can certainly be the most important leading case in Brazilian sports law. The matter has not yet come to a final decision. This landmark judgment will be the first ruling at high court level which may or may not apply the Civil Code to sports association.

The Autonomy Case, whatever its outcome, will pave the way for the sports clubs to organize and operate themselves. That is why we will have to wait for the final rule of the Brazilian Supreme Courts to conclude which law will prevail in a conflict of norms related to sports law in Brazil: the constitutional law or the civil law.

The International Sports Law Journal



International and European Sports Law Course

School of Law, Erasmus University Rotterdam, The Netherlands

Lecturer: Prof. Dr R.C.R. Siekmann

Structure: ten 2-hour interactive lectures

Assessment: paper (10 pages) and oral exam

Preknowledge: basic knowledge of public international and EU law

Period: 2011/2012

Content

The world of sport also has its own international rules and procedures. This, coupled with the further professionalization and commercialisation of top-level sport, has led increasingly to tension and friction with general international (and national) legal standards. The application and applicability of such standards in relation to professional top-level sport in particular is the central theme of the current problems in this area. Some examples may illustrate this. In the field of EU law the central question is whether the specificity of sport is such that exceptions to that law (the four freedoms, fair competition) can be tolerated in relation to the legal status of unions, clubs and sportspersons. The applicability of the human rights treaties (ECHR, ICCPR) comes into play in relation to the disciplinary proceedings against the sportsperson suspected of doping. In the area of dispute settlement at international level within this context particular consideration must be given to the position adopted by the International Court of Arbitration for Sport (CAS).

Course aims

The course provides an overview of the major themes in the field of international and European sports law (*capita selecta*).

In particular, within the context of this legal field, the focus is on providing insight into the problems such as outlined above and the possible solutions for these in a

sector ("subculture") attracting growing public interest with specific organisational and other features.

It is intended that the course participants also actively contribute to seeking and evaluating solutions. This is done through interactive lectures in which articles written by the lecturer are explained by the lecturer and discussed. Practice-oriented experts shall, where relevant, be invited to share their views on the subject and to enter into discussions with course participants.

Course participants can write their paper on any subject of international and European sports law, whether or not this subject is part of the *capita selecta*. The oral exam is based on the paper and the subject matter dealt with in the lectures may also be discussed. The best papers are eligible for publication in *The International Sports Law Journal* (ISLJ). Aside from the main lecturer, some of the lectures will be provided by guest lecturers.

Literature

Course material includes in particular the relevant articles written by the lecturer and published or intended for publication in *The International Sports Law Journal* (ISLJ).

For further information: please, contact Prof. Robert Siekmann via sportslaw@asser.nl

The Sale of Liverpool Football Club; Controversial or Commonplace?

by Max Eppel*

"At a football club, there's a holy trinity - the players, the manager and the supporters. Directors don't come into it. They are only there to sign the cheques."

Bill Shankly, 2nd September 1913 - 29th September 1981

Never having met Mr Shankly I cannot say how he would have reacted to the recent sale of his beloved Liverpool Football Club ("LFC") to New England Sports Ventures LLC ("NESV") which was completed under very public circumstances on 15th October 2010. But I suspect that he would have been horrified in light of his above quote. Not necessarily at the new owners who have a proven record of success with the Boston Red Sox - and it would be grossly unfair to judge them before they have had a chance to do anything - but in the manner in which the sale was conducted.

Of course times have moved on significantly since Mr Shankly made his comments. Directors/Owners have now become central figures in a club's dealings and wield considerable influence in almost every area including, it is suspected in some clubs, picking the team. Will this become more commonplace and is it really so controversial? If you had invested hundreds of millions of pounds into a project and you had a proven track record of success wouldn't you want to exert as much of your own proven influence as possible? Or should these people curb their power to the Board Room and leave the Boot Room matters to the true football personnel?

This article is intended as a commentary on the sale from the unpopular Messrs Hicks & Gillett and to explore whether it was indeed controversial. The "commonplace" tag in the title is intended to stimulate debate as to whether the sale was actually so out of the ordinary as to warrant extra attention. Or was it merely a further indication that capitalism has devoured socialism's great game and the deal was simply another piece of faceless litigation between two non-English corporate heavyweights slugfests it out over an asset from which they hope one day to reap a handsome reward? I shall address everything in full below. Let me say for the record that, in my personal opinion, the entire game has gorged itself on greed and is fed by a culture of short-termism that can only have a damaging impact on the future of the sport. I also feel that these repercussions are already beginning to be felt - the words "insolvency", "administrators" and "football creditors" now make bigger headlines than your favourite striker's hat-trick against your local rivals. Or indeed my own personal favourite of "ugly defender scores own goal." However, it is my intention to give as balanced a view as possible on the entire affair and I hope that is borne out in this article.

Abbreviated chronology leading up to the Court proceedings

This is not the forum to enter into an exhaustive discussion of the history which could well take up an entire article in itself. I have opted to provide selected highlights which lead up to the Court proceedings.

- | | |
|------------|---|
| Early 2004 | <ul style="list-style-type: none"> The then LFC board accept that they need to sell the club specifically to enable them to compete with Manchester United FC ("MUFC"), Chelsea FC ("CFC") and Arsenal FC ("AFC") in match-day revenue. The need for the backing of a wealthy owner to assist with the funding was the |
|------------|---|

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- | | |
|------------------|---|
| February 2007 | <ul style="list-style-type: none"> primary motivation behind the decision to sell. 3-year search for a new owner commences. Hicks & Gillett acquire LFC for £5,000 per share which values the club at £174.1m, which, along with the debt at £44.8m, puts the overall figure at £218.9m. "We have purchased the club with no debt on the club," and "The spade has to be in the ground [on the new stadium proposal at Stanley Park] within 60 days," are 2 particular highlights from their original press release. Attempts to distinguish their acquisition from the bitterly fan-opposed Glazer/MUFC one by insisting the club would not be laden with debt via a leveraged buy-out. |
| January 2008 | <ul style="list-style-type: none"> First protests on the Kop against Hicks & Gillett. Advanced negotiations with Dubai International Capital entered into but no sale is agreed. |
| By February 2008 | <ul style="list-style-type: none"> The relationship between Hicks & Gillett breaks down leaving the club paralysed because each of the Americans owns 50% of the club so decisions cannot be taken. |
| October 2008 | <ul style="list-style-type: none"> No work undertaken on the new stadium, 18 months on from "spade... in the ground" comments. |
| January 2009 | <ul style="list-style-type: none"> Discussions with the Al-Kharafi family of Kuwait over buying LFC. No deal agreed. |
| June 2009 | <ul style="list-style-type: none"> LFC's accounts for the year ending July 2009 reveal that the owners did in fact borrow to fund the takeover, having secured a £350m loan facility with Bank of Scotland ("RBS") & Wachovia to Kop Football Limited ("KFL") - the SPV used to acquire the club. Despite a record turnover of £159.1m the parent company, Kop Football Holdings Ltd, made a £42.6m loss. This is mainly due to the interest payments of £36.5m per year. No work has taken place on the stadium. Hicks & Gillett point to the global financial crisis. Auditors KPMG provide a warning that there exists "material uncertainty" casting "significant doubt" on LFC's ability to continue as a going concern. Christian Purslow replaces Rick Parry as Managing Director with his sole task being to secure £100m of fresh investment into the club to reduce the debt. LFC fail to secure Champions League football for next season. |

- April 2010
 - Hicks & Gillett reject an offer of £110m from the Rhone Group for 40% of the club.
 - RBS refinance the loan for 6 months on the condition that the club is put up for sale and Martin Broughton (in conjunction with Barclays Capital) appointed as an Independent Chairman to oversee the sale. The other members comprise Ian Ayre & Christian Purslow (as well as Hicks & Gillett).
- June 2010
 - Hicks claims the club is worth £800m.
 - Hicks & Gillett attempt to refinance their loan but are blocked by the other 3 directors.
- August 2010
 - 2 potential bids are said to be on the table from Kenny Huang and Yahya Kirdi but they fail to materialise.
 - Hicks attempts, unsuccessfully, to secure refinancing from Blackstone hedge fund for the £237m debt. Reports emerge that RBS have set a deadline of 15 October.
- September 2010
 - LFC's supporters instigate a large-scale campaign against the American owners.
- October 2010
 - With the date looming to repay RBS or face a £60m penalty charge, rumours emerge that a proposed deal with NESV was agreed on 5 October.
 - A boardroom struggle ensues, with an official statement from the club detailing Hicks and Gillett's attempts to remove Chairman Martin Broughton, Managing Director Christian Purslow and Commercial Director Ian Ayre from the board and install Mack Hicks and Lori Kay McCutcheon.
 - The following day, a statement is released by Martin Broughton to confirm that a proposed sale to NESV had been agreed subject to the court proceedings instigated by Hicks & Gillett.
 - RBS, the primary creditors, are granted an injunction on 12 October preventing Hicks & Gillett from changing any Board members. The fear is that if they install their own people then the sale will be blocked.
 - On 13 October the High Court (Mr Justice Floyd) rules in favour of RBS which means that the Board can be reconstituted and the sale can proceed.
 - On the same day, Hicks & Gillett commenced legal proceedings in Texas. They alleged that the English Directors and NESV (amongst others) had conspired to sell the Club below the market value. The Texan court then issued a Temporary Restraining Order preventing the sale to NESV and preventing RBS from enforcing its loan.
 - On 14 October a further ruling was sought from Mr Justice Floyd and he again found in favour of RBS.
 - The sale to NESV was completed on Friday 15 October.

The legal proceedings

Again, this is not the correct place to enter into an exhaustive discussion of what actually took place in court but the highlights below should serve as an aide-memoire and lead-in to the commentary below.

Wednesday 13 October 2010

- RBS applied for a Mandatory Injunction to restore the validity of the Board of KFL to the position prior to 5 October 2010. Hicks & Gillett also sought an injunction to restrain the sale to NESV.
- RBS submitted that Hicks & Gillett were in breach of various corporate governance provisions relating to KFL's Board membership.
- Hicks & Gillett contended that there had been repudiatory breaches by both KFL and RBS which therefore entitled them to treat the agreement as having been terminated.
- Mr Justice Floyd ruled in favour of RBS and applied the first test laid down by the House of Lords in *American Cyanamid v Ethicon* (1975) AC 396 which is whether there was a serious issue to be tried. The Judge concluded that there was no seriously arguable defence to RBS's claim and he gave extremely direct dicta to that effect.
- It was ordered that the board of KFL should be reconstituted to its form of 5 October 2010 and that the sale should be dealt with by that Board. The injunction sought by Hicks & Gillett was declined.

Thursday 14 October 2010

- RBS applied for an "anti-suit injunction" which is extremely rare. The effect of these injunctions is to prevent parties from commencing or continuing proceedings in another jurisdiction. In this case, RBS felt that Hicks & Gillett were simply trying to frustrate the English proceedings via the Texas courts. An anti-suit injunction does not require the English court to make any findings about the jurisdiction of the foreign court.
- It was held that the conduct of Hicks & Gillett was "unconscionable" with their only purpose being to deprive RBS of the benefit of their injunction and earlier judgment.
- Mr Justice Floyd also took into consideration the fact that the English Directors could be committed to a Texan prison if it were not made immediately. It was also noted that any further delays would prevent the Club from being able to meet its liabilities to RBS. As such, the court made the anti-suit injunction and the sale was able to proceed the following day.

Commentary

Why did the sale end up going to court and should the sale, and indeed future sales of any football club, be the subject of such public scrutiny? Was it controversial or commonplace or none of the above?

It is my view that this is simply the latest high-profile club whose sale has been the subject of due legal process. It is lamentable that a club which used to be known for conducting their affairs in private - "The Liverpool Way" - with a glorious tradition both on and off the pitch have now become headliners in the most non-athletic of ways. However, I do not deem this to be unusual nor indeed un-commonplace. The list of clubs who have changed owners publicly and with a degree of acrimony is extensive and includes, in recent times, Manchester United, Chelsea (Bates/Harding), Spurs (Venables/Sugar) and of course Liverpool. These clubs are scions of the English game but just as susceptible to hostile takeovers, leveraged buyouts or directors' disputes as any other corporate entity.

Why did LFC's sale go to Court?

My answer to this question is simple - it was because of two deeply entrenched positions adopted by opposing parties who had lost all semblance of effective communication and wished to assert their rights at law. Sadly, this does not sound any different to the basis of any other piece of litigation. Which is the thrust of one of my points of view in this article - that football cannot expect to be treated any differently to other businesses as we move further into the 21st century.

After all, what are the alternatives? Most sports are fiercely self-regulating and I'm sure that Sepp Blatter would prefer these disputes or deals to be dealt with within the "football family" but there is really no power to enforce such a course of action despite the promulgation of Article 64(2) & (3) of the FIFA Statutes which provides as follows:

- "2 Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.
3. The Associations shall insert a clause in their statutes or regulations, stip-

ulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS.

The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law."

I readily concede that the above Article does not appear to specifically envision a dispute between a club and its lending institution. But certainly the wording "it is prohibited to take disputes... affecting... clubs... to the ordinary courts of law" could, on some interpretations, be held to convey the meaning that any dispute whatsoever involving a club and anyone or anything else should be channelled through FIFA.

Such an Article has placed FIFA under enormous pressure at the level of the European Parliament ("EP") which adopted the following motion on 29 March 2007:

1.
2. ...
3. *[The EP] Takes the view that applying to the civil courts, even when not justified in sports terms, cannot be penalised by disciplinary regulations; and condemns the arbitrary decisions by FIFA in this respect;*
4. *Asks UEFA and FIFA to accept in their statutes the right of recourse to ordinary courts, but recognises that the principle self-regulation implies and justifies the structures of the European sports model and the fundamental principles governing the organisation of sporting competitions, including anti-doping regulations and disciplinary sanctions."*

If there is no faith or indeed no adequate remedies within FIFA then clubs have no option but to turn to the High Court (or their local civil courts). It is of note, I believe, that there was no protest from FIFA HQ in Zurich about the recent spate of high-level football clubs seeking redress outside of FIFA or the Court of Arbitration for Sport ("CAS"). This must be taken as a tacit admission that whilst a particular level of dispute can, and should, be dealt with through FIFA (or National Associations) they are inherently ill-equipped to deal with the commercial realities of today's world. Hence, the application to the High Court by both RBS and Hicks & Gillett.

Should LFC's sale, and indeed future sales of any football club, be the subject of such public scrutiny?

Hicks & Gillett, now famously, promised during their acquisition of LFC in February 2007 that "The payment of interest on... the [lending] facilities will not depend to any significant extent on the business of Liverpool." It set out the £298m they had borrowed from RBS and Wachovia to facilitate their takeover and investment of LFC. The club itself cost £174m. What actually happened was that Hicks & Gillett did pay the interest on the loan, approximately £35m a year, from LFC's income. This meant that instead of showing record profits from turnover of £185m the club posted a £53m loss in 2009.

Why did this happen? A promise not to do something in the future is not, strictly speaking, enforceable. And it would behove fans of LFC, and indeed other clubs, to heed the statement provided by John W Henry of NESV on 4 November 2010 when asked if he would be "leveraging" the costs of NESV's purchase of the club onto the club:

"It [the promise not to leverage] was not asked for. I don't remember anything being discussed along those lines except that there was a desire for all of the debt to be removed except stadium debt."

And that has been done. RBS has confirmed that that the £150m owed to them has been repaid, as has the £50m owed to Wachovia. RBS are still owed £37m for the development work on the proposed new stadium - such a bone of contention under Hicks & Gillett. Does this mean that NESV are simply the next in a line of foreign speculators hoping to make a fast buck from an English sporting institution (not that Hicks & Gillett did so)? The answer, quite simply, is that they could be. However, examining their success with the Boston Red Sox it can be seen that NESV invested money into them, resolved a tricky stadium issue, lead them to the championship and have not drawn a dividend in their 9 years of ownership. If the same model is adopted at LFC then fans of the Reds will find themselves eternally grateful to the former Board and their legal team.

The reason this case was the subject of such intense scrutiny was because of the high-profile nature of the club and the fast-paced and exciting twists and turns of the court case. But, make no mistake, fans of the so-called smaller clubs will be just as invested in a winding-up petition by HMRC, for example, as a major club being bought and sold for hundreds of millions of pounds.

My conclusion to this section ties in with my submissions in the above section - that there is simply no way of avoiding such public scrutiny when so much is at stake and the lives of so many people are invested in the club. It also ties in with the peculiarly British idiom of being hopelessly entranced with the private lives of football players and, latterly, the private machinations of the clubs. It is only natural as the amount of money increases in the game that our gazes should come to rest above the Boot Room and into the Board Room if that is where the real action is now taking place.

Certainly, our fascination with Abramovich's, Storr's and Ridsdale's would only have served to bemuse Mr Shankly.

Conclusions

I was in the High Court for the recent hearings involving Portsmouth FC and LFC. Granted, both were of very contrasting natures. Portsmouth were fighting off a challenge from HMRC but were placed there, some might say, because of the actions of some of their Directors/Owners. Southend, Cardiff, Plymouth Argyle and Leeds are just a few other clubs who have found themselves fighting off similar claims. This brings me to my final question - just how unusual is it to see clubs in the High Court? My belief is that, whether it is to do with unpaid taxes, the actions of Directors/Owners, or change of ownership and disputes thereto, there is really nothing unusual about it anymore. It is simply a sign of the changed times that, as ever greater tides of money flood the game, so will there be more vicious and hard-fought disputes. Litigation these days is expensive and, while every effort is made to settle cases, we all know that sometimes nothing short of a High Court judgment or order will suffice.

As a fan of football it saddens me to see the disputes overshadowing the dribbles; the litigation grabbing headlines ahead of leading scorers; but as a Sports Lawyer I am certain that High Court actions are preferable to having these matters dealt with by FIFA or even The FA. My reasoning is, I hope, clear - that the boom of Pay TV money must be balanced out with the commercial realities of 21st century life; that where there is money there are, generally speaking, disputes. And where there are disputes there must be the Rule of Law.

To sum up, therefore, I would say that the sale of LFC is both commonplace and controversial but seeing football clubs in court is becoming both more commonplace and less controversial every year.

The International Sports Law Journal

Wayne Rooney Stays at Manchester United - But at a Cost!

Kick Corruption Out of Football!

Tour De France: Latest Doping Investigations

Formula One Removes Ban On 'Team Orders' Rule?

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English Football under Government Spotlight

Half-Time Score in EU TV Sports Rights Case

Landmark ECJ Rulings in FIFA & UEFA 'Crown Jewels' Cases

The Contador Doping Saga Continues: CAS Is Now Involved!

RFU Wins Court Order in Ticket Touting Case

by **Ian Blackshaw**

Wayne Rooney Stays at Manchester United - But at a Cost!

A former UK Prime Minister, Harold Wilson, once said that 'a week is a long time in politics'. In football, 48 hours is no time at all! That is how long - or short! - it took for Wayne Rooney to change his mind about leaving the world's most famous and favourite Football Club, Manchester United.

First, the 25 year old striker and English International is leaving the Club; and, then, surprisingly, he is staying. What a spectacular *volte-face*! But that, I suppose, is the nature of the 'beautiful game'!

First, his manager, Alex Ferguson, is 'dumbfounded' by the news of his departure; and, then, he is 'delighted' that Rooney is staying with the Club after all. They kiss and make up like lovers after a tiff! But, at what cost to football and the Club?

Certainly, despite Rooney's apologies to the Club, the Management, the Owners and - not least - the fans about his disparaging remarks about ManU lacking ambition and his behaviour generally, his own image and that of the Club has been damaged. The 'beautiful game' also, in my view, has been sullied by this episode. Apart from that, there is a financial hit too!

Rooney walks away with a new five-year contract reputedly worth between £150,000 and £200,000 a week, apart from bonuses. This, in my view, is obscene, particularly in the light of the UK Government

spending cuts and job losses announced at the same time that Rooney was negotiating his new deal. In fact, during the term of his new contract, 400,000 workers in the Manchester area alone are expected to lose their jobs! But, again, that, I suppose, is football: not only the world's favourite game, but also the world's most lucrative sport. Furthermore, one English tabloid newspaper, the *Mirror*, characterised the whole Rooney saga as 'greed'.

Rooney will not only now need to perform on the field of play, after a disastrous World Cup, by scoring goals again and soon, but also off the pitch as well, by regaining the confidence and support of his Club, the Management, the Owners and, of course, the ManU fans, the leader of which described the whole affair as being 'completely mad.' Will it all end in tears? Or will Rooney rise to the challenge? We will wait and see with great interest!

The Rooney saga, if it proves anything at all, apart from the fact that Rooney seems to have played his cards well and proved to be a good negotiator, if not a skilled poker player, going for bust and winning hands down, shows, in my view, that there is some truth after all in the *dictum* of Bill Shankly, the legendary manager of Liverpool Football Club (also in the news recently): 'football is not a matter of life and death, it is much more important than that!'

Kick Corruption Out of Football!

The 'beautiful game' is fast becoming the 'ugly game' as more and more corruption scandals come to light!

The latest one concerns the sale of votes for hosting the FIFA World Cup, which is fast overtaking the Olympics as the biggest global sporting event and money spinner.

FIFA, the world governing body of football, is investigating allegations made by a British newspaper on 17 October, 2010 that two officials offered to sell their votes in the bidding contest to host the 2018 World Cup.

Reporters from 'The Sunday Times' newspaper posed as lobbyists for

a consortium of private American companies, who wished to help secure the World Cup for the United States. The reporters stated that, posing as 'fixers', they approached six current and former FIFA officials, who all said that the way to help secure the vote in favour of the American bid was to "pay huge bribes to FIFA executive committee members".

One of the members approached by the reporters was Amos Adamu, the Nigerian President of the West African Football Union, who, it is alleged, at an initial meeting in London, told the reporters that he wanted US\$800,000 to build four artificial football pitches in his home country. It is further alleged that Adamu, when asked whether the money for a "private project" would have an effect on the way he voted, replied: "Obviously, it will have an effect. Of course it will. Because certainly if you are to invest in that, that means you also want the vote."

Another member approached was Reynald Temarii, President of the Oceania Football Confederation, and he is also alleged to have asked for money: in his case, to finance a sports academy.

FIFA have responded quickly to these allegations and have issued the following statement to the media:

"FIFA and the FIFA Ethics Committee have closely monitored the bidding process for the 2018 and 2022 FIFA World Cups and will continue to do so. FIFA has already requested to receive all of the information and documents related to this matter, and is awaiting to receive this material.

In any case, FIFA will immediately analyse the material available and only once this analysis has concluded will FIFA be able to decide on any potential next steps.

In the meantime, FIFA is not in a position to provide any further comments on this matter.

Sepp Blatter, President of FIFA, is very embarrassed by this affair and has admitted that the scandal has had a "very negative impact" on the world governing body.

He has written to the 24 executive committee members promising a full investigation.

The letter says:

"I am sorry to have to inform you of a very unpleasant situation, which has developed in relation to an article published today in The Sunday Times titled "World Cup votes for sale".

The information in the article has created a very negative impact on FIFA and on the bidding process for the 2018 and 2022 FIFA World Cups.

Some current and former members of the executive committee are mentioned in the article.

FIFA will... open an in-depth investigation, which we will start immediately together with the FIFA ethics committee and the FIFA secretary general.

I will keep you duly informed of any further developments."

FIFA has the option of postponing the vote, which is set for 2 December, 2010, but have announced that the vote will go ahead as planned.

The Oceania Football Confederation (OFC) has confirmed that it is investigating the newspaper reports and has issued the following statement:

"OFC is aware of the story that appeared in The Sunday Times in England. As such, OFC is currently looking into the matter."

England, Russia and joint bids from Netherlands/Belgium and Spain/Portugal are in contention to host the 2018 World Cup.

The US - the last remaining non-European bidder - pulled out of the contest on 15 October, 2010; and Australia withdrew from her candidature in June, 2010. Both countries have said that they will refocus their efforts on the 2022 World Cup, along with Japan, South Korea and Qatar who are also bidding to host the event.

Adamu and Temarii have been suspended pending the outcome of the FIFA investigations.

Reactions to the latest corruption scandal to affect football have ranged from surprise to 'what's new?' And some commentators have questioned whether bribes were paid to secure the 1996 World Cup in Germany!

Certainly Blatter needs to act urgently, decisively and transparently in this matter and, if the allegations are found to be true and substantiated, to make an example of the wrongdoers and boot them out 'for the good of the game'. Otherwise, it will just be a 'whitewash' and 'business as usual' and somebody else will be offering votes for cash on a future occasion!

The outcome of the FIFA investigations will be awaited, therefore, with great interest.

Tour De France: Latest Doping Investigations

Shock! Horror! Cycling once again is in the dock for doping!

Cycling, in general, and its flag ship event, the *Tour de France*, in particular, seems to breed a culture for doping. Indeed, one commentator has described the sport's world governing body, the International Cycling Union (UCI), as being an absolute joke and as much to blame as the drug-takers themselves for bringing their sport into disrepute!

This time, it is the 2010 *Tour de France* winner, Alberto Contador, of Spain, who has tested positive for the banned substance *clenbuterol*, a muscle-building and fat-burning drug.

However, Contador, the 27 year-old three-times *Tour de France* cycling champion, insists that the positive test came from contaminated meat and he will fight the doping allegations made against him vigorously. In the meantime, Contador has been provisionally suspended by the UCI, who have now referred the case, as they are required to do under the Rules, to the Spanish Cycling Federation (RFEC) for investigations to be carried out and a decision made.

Against this background, Contador's spokesman, Jacinto Vidarte, has released a statement to the media in which he says:

"The legal team of Alberto Contador, after receiving and carefully studying the report submitted by the International Cycling Union to the Spanish Cycling Federation, maintains their optimism and confidence in bringing a resolution to the case.

The dossier prepared by the UCI and World Anti-Doping Agency [WADA] focuses on the hypothesis of food contamination.

Thus, according to documents submitted by the UCI and WADA,

food contamination remains the only reasonable explanation, from a scientific point of view, to justify the presence of the tiny amount of clenbuterol in the body of the rider during the Tour de France."

A WADA-accredited laboratory in Cologne, Germany, did indeed find a "very small concentration" of the banned substance in Contador's urine sample on 21 July, 2010. Apparently, the amount of the substance was 400 times less than the 50 picogram benchmark measurement that WADA-accredited anti-doping laboratories must be able to detect to establish a doping offence.

Vidarte also disclosed that Contador's legal team will be led by the Swiss Lawyer, Rocco Taminelli, who successfully defended the Italian rider, Franco Pellizotti, when he was acquitted of doping charges in Italy in October.

Under the UCI Rules, the RFEC investigations have to be completed within a month, but the RFEC has told the Spanish media that they will take "at least two months" to carry them out and decide on Contador's fate

If Contador's failed doping test is upheld, he could be stripped of his 2010 Tour de France title and also given a two-year ban, as a first-time offender. In fact, the only previous *Tour de France* winner to be stripped of their title was Floyd Landis in 2006.

If, on the other hand, the Spanish Cycling Federation decides not to punish Contador, the UCI and WADA, under the provisions of the WADA Anti Doping Code, can appeal to the Court of Arbitration for Sport for a final ruling in the case.

It would appear from the above account that Contador may stand a good chance of 'getting off' and avoiding sanctions. But this, as usual, will depend upon the scientific evidence, and one never knows what this will actually reveal and, perhaps more importantly, how it will be interpreted by the sporting and anti doping authorities.

In any case, cycling needs to get its act together so far as eradicating doping from its sport is concerned.

Watch this space!

Formula One Removes Ban On 'Team Orders' Rule?

The World Governing Body of Motor Sport, the FIA (*Federation Internationale de Motor Sport*) has removed the controversial ban on 'team orders' from its rule book.

This rule forbids F1 teams from instructing a driver to cede to his team-mate in order to gain points, and recently came under scrutiny after Ferrari were fined for using team orders in 2010. This happened at the German Grand Prix in July 2010 when the Ferrari driver, Felipe Massa, who had been leading the Hockenheim race, moved aside to allow his team mate, Fernando Alonso, to pass him on Lap 49 and win the race. A few moments before, Massa's race engineer had told the Brazilian: "Fernando is faster than you. Can you confirm you understood that message?"

Although Ferrari insisted that this did not constitute a 'team order', but was merely giving the driver information, and Massa claimed that he and not the team had made the decision to surrender the lead to Alonso, nevertheless, the race stewards decided that Ferrari had, in fact, contravened Article 39.1 of the F1 Sporting Regulations, which provides that "team orders which interfere with a race result are prohibited", and had also breached Article 151 (c) of the International Sporting Code, which prohibits "any fraudulent conduct or any act prejudicial to the interests of any competition or to the interests of motor sport generally". The stewards then handed Ferrari the maximum fine of US\$100,000 that they are empowered to impose on a competitor.

The FIA considered that the rule on banning 'team orders', which was introduced in 2002 after Rubens Barrichello allowed his Ferrari team-mate at the time, Michael Schumacher, to win, was difficult to enforce in practice.

Apart from that practical consideration, I never did understand what all the fuss regarding the 'team orders' rule was about, as F1 is essentially a team sport, although, of course, there is one individual champion in each season, but, again, the winner is a member of a particular team.

However, Article 151 (c) remains in force. This is the so-called rule against 'bringing the sport into disrepute' - a very popular provision in the Disciplinary Rules of many International Sports Governing Bodies. This rule is also, I consider, rather difficult to enforce in practice, as it is essentially 'subjective' in nature.

It is rather like a rule that bans conduct which is against 'public policy', which has been described by one English Judge, namely Mr. Justice Burrough, in the case of *Richardson v Mellish* (1824), 2 Bing. 229, 252, 130 Eng. Rep. 294, at page 303, as: "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

So, perhaps, despite the change, the F1 'team orders' rule remains, but in a much less clear form!

FIFA To Set Up Anti-Corruption Body

The President of football's world governing body, FIFA, Sepp Blatter announced on 2 January, 2011 that he intends to set up "an anti-corruption committee to police world football's governing body."

This development follows close on the heels of the corruption allegations, which overshadowed the bidding and voting process for the awarding of the World Cup in 2018 and 2022, which led, in the event, to bans being imposed on two members of the FIFA Executive Committee, Amos Adamu and Reynald Temarii. It should be added that both of them have strenuously denied the allegations that have been made against them of selling their votes (see my previous ISLJ Opinion of 20 November, 2010, entitled, 'Kick corruption out of football').

According to Sepp Blatter:

"This committee will strengthen our credibility and give us a new image in terms of transparency."

And gave the following personal pledge:

"I will take care of it personally, to ensure there is no corruption at FIFA."

The new committee will consist of between seven and nine members, who will be drawn not only from sport, but also from politics, finance,

business and culture. This is indeed good news. But, of course, the value of any body depends upon its members and it will be interesting to see who is, in fact, appointed - hopefully not 'the usual suspects'! The issue here is summed up in the well-known Latin tag coined by the Roman poet Juvenal: 'Quis custodiet ipsos custodes?'

Furthermore, Blatter also confirmed that he would not be a member of this committee, in order to guarantee its independence. Again, a step in the right direction.

Of course, one thing that is not so clear and that is what will happen to FIFA's ethics committee, which investigated the claims of corruption last year, and, incidentally, exonerated FIFA officials from any involvement.

Certainly, Sepp Blatter is to be congratulated on acting quickly and decisively on announcing the setting up of this new FIFA Anti-Corruption body to kick corruption - in all its insidious forms - out of the 'beautiful game'. Particularly noteworthy is the fact that Blatter will not be a member of this body and also that he has given his personal pledge to make the new arrangements work.

It all sounds too good to be true. So, let us hope that this is not just rhetoric - to serve Blatter's re-election purposes later this year - but that actions really will speak louder than words!

International and European Sports Law Course

School of Law, Erasmus University Rotterdam, The Netherlands

Lecturer: Prof. Dr R.C.R. Siekmann

Structure: ten 2-hour interactive lectures

Assessment: paper (10 pages) and oral exam

Preknowledge: basic knowledge of public international and EU law

Period: 2011/2012 (For more information see page 133)

English Football under Government Spotlight

Despite its popularity, according to the UK Sports Minister, Hugh Robertson, English football is “*the worst governed sport in Britain*” and the UK Parliament Culture, Media and Sport Select Committee is conducting a high-level and wide-ranging inquiry into the way the ‘*beautiful game*’ is organised and run in England.

As followers of football will know, English football has suffered two recent defeats: early elimination from the 2010 World Cup in South Africa in a spectacular 4-1 defeat by Germany and also elimination from the first round of voting in England’s bid to host the 2018 World Cup - apparently, by only two votes!

This inquiry comes at an interesting time when a new English Football Association (FA) Chairman, David Bernstein, takes up his post, replacing the outspoken and indiscreet Lord Triesman, and a lot of changes in the way the English FA is run in the future are expected of him.

Ironically, members of this Select Committee will try to find their answers from Germany and will visit Frankfurt and Munich in the next few weeks as part of a fact-finding mission.

German football has long been considered to be a role model for other countries to follow for a number of reasons. German football officials invest more in youth development; have strict quotas on foreign players in the *Bundesliga*; and also maintain tighter club ownership rules, which prevent any single “outside” investor from holding more than 49% of the shares in a German football club.

But perhaps the most important feature of the successful regulation of football in Germany lies in the fact that the Governing Body, *Deutscher Fussball Bund*, has retained control over the entire game in Germany and, in particular, the *Bundesliga*. By contrast, in England, the FA has ceded quite a bit of turf and influence to the English Premier League, which has become more and more powerful over the last twenty years or so. As a result of this, it is expected that the balance of that power between the FA and the Premier League will form a significant part of the Select Committee’s Inquiry.

Once the Select Committee Inquiry reports, which it is expected to do later in the year, it is questionable whether the UK Government will act on its findings and recommendations, given the fact that, for the first time in decades, the Government is a Coalition, consisting of the Conservatives and the Liberal Democrats.

Equally, it is unclear how far the English FA will go, acting on its own initiative, to put its own house in order, given its past record and dismal performance in this respect; and, in particular, the vexed question of separating the regulation of the sporting side of English football from its marketing side - something which is long overdue.

However, who knows, it may turn out to be a case of ‘*plus ça change, plus c’est la même chose*.’

Half-Time Score in EU TV Sports Rights Case

On 3 February, 2011, the German Advocate General at the European Court of Justice (ECJ), Juliane Kokott, published her Opinion in the long-running football pub broadcasting cases pending before the ECJ. She came down firmly on the side of the Portsmouth publican, Karen Murphy, and the decoder supplier, QC Leisure, involved in the cases. Murphy was fined for using a cheaper Greek service to show English FA Premier League games in her Pub and had argued that the EU single market should allow her to use any European provider.

In Kokott’s view, Broadcasters cannot stop customers using cheaper foreign satellite TV services to watch Premier League football in the UK, because such restrictions infringe

EU Laws, in particular the EU Competition Rules. According to Kokott, exclusivity agreements relating to transmission of football matches on a country-by-country basis are unlawful. Her Opinion has been widely welcomed as being very good for the paying public.

Naturally, Sky and ESPN, who hold the broadcasting rights to Premier League football in the UK, have opposed this contention. At the heart of the case is whether a TV rights holder, such as the English FA Premier League may license its content on a country-by-country basis, thereby dividing up the European market, in order to fully maximise the value of these rights, which are currently worth £1.782 billion over three years!

A spokesman for the English FA Premier League, which is studying the Advocate General’s Opinion in this case, said that, if the Opinion were adopted by the ECJ, this “*would damage the interests of broadcast-*

ers and viewers of Premier League football across the EU”. Really?! Certainly broadcasters; but not viewers, I would argue!

The spokesman added that it would stop rights holders from marketing their properties in a way which meets the territorial and cultural demands of Broadcasters, claiming that

the current EU Law had been “*framed to help promote, celebrate and develop the cultural differences within the EU*”. Again, a smoke-screen for maximising the financial returns of Sports TV Broadcasters at the expense of the viewers, I would further argue!

Furthermore, if the European Commission wanted to create a pan-European licensing model for sports, film and music, then it must go through the proper consultative and legislative processes and not use the courts. But, what are the courts there for in the first place? Surely, to interpret and apply the Law!

The Advocate General’s Opinion is not binding on the ECJ, who will make a ruling on the matter later this year, but the ECJ tends to follow it in 70% of the cases. It will be interesting to see if the ECJ does so in the present case, which, if it does, will significantly alter the entire landscape of Sports TV Rights in Europe and prevent the segmentation of national markets in the future. This, surely, is not compatible with a single EU market and the rules on freedom of competition designed to ensure it. We will see what happens

So, watch this space!

Landmark ECJ Rulings in FIFA & UEFA ‘Crown Jewels’ Cases

On 17 February, 2011, the General Court (formerly the Court of First Instance) (Seventh Chamber) of the European Court of Justice (ECJ) handed down two landmark Judgements in the so-called ‘Crown Jewels’ cases brought by FIFA, the World Governing Body of Football, and UEFA, the European Governing Body of Football.

At the heart of these cases is Article 3a of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as inserted by Directive 97/36/EC of the European Parliament

and of the Council of 30 June 1997 amending [Directive 89/552] (OJ 1997 L 202, p. 60), known, in short form and colloquially, as ‘The Television Without Frontiers’ Directive. Para. 1 of this Article provides as follows:

“1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.”

In the FIFA case, The United Kingdom and the Belgian Governments had decided to list all the FIFA World Cup matches as sporting events which they consider to be of “major importance for society” in the UK and Belgium and should, therefore, be shown on free-to-air television. This meant that these events could not exclusively sold to subscription and ‘pay-per-view’ channels. FIFA, not surprisingly, objected, claiming that this action was not compatible with EU Law.

In the UEFA case, the European Championship was in play in both countries.

FIFA and UEFA argued that the listing of these events, which are money-spinners for them, as ‘free-to-air’ under ‘The Television Without Frontiers Directive’ restricted their bargaining rights with TV companies for football content and were contrary to the EU Competition Rules.

The ECJ held that the World Cup and the European Championship were single sporting events and could not, therefore, be divided up (known, in the jargon, as ‘siphoning off’) at the will of FIFA and UEFA. The Court also held that the Governmental measures, taken after full public consultation, to list these events as ones to be broadcast on ‘free-to-air’ television were proportionate and served the public interest; and, moreover, did not go any further than was necessary to attain that objective. In other words, they were not anti-competitive and, therefore, compatible with EU Law.

On the commercialisation and sale, especially ‘collective selling’, of Sports Broadcasting Rights, see ‘TV Rights and Sport: Legal Aspects’, I. S. Blackshaw, S. Cornelius and R.C.R. Siekmann (eds.), TMC Asser Press, The Hague, The Netherlands 2009.

So, the ECJ has struck an important blow for ordinary football fans, who wish to have unrestricted access to the broadcasting of the World Cup and the European Championship; and the Football Supporters’ Federation were obviously “delighted” with the Court’s Rulings.

On the other hand, FIFA and UEFA, not unnaturally, were “disappointed” with the Rulings, which they say they are carefully considering. They have two months in which to file an appeal to try to overturn them.

It will be interesting to see whether they do, in fact, appeal and, if so, what happens next!

The Contador Doping Saga Continues: CAS Is Now Involved!

Alberto Contador, one of only five cyclists so far to win the three Grand Tours - the Tour de France (three times), Giro d’Italia and Spanish Vuelta - has not yet crossed the finishing line as far as his alleged doping offence is concerned.

The 28-year old Spaniard tested positive for the banned substance *clenbuterol* (a fat-burning and muscle-building drug) just days before his 2010 Tour de France win in July of last year. The World Anti-Doping Agency (WADA) regards *clenbuterol* as a zero-tolerance drug, although under the WADA Anti Doping Code, athletes are able to escape a sanction if they prove “*no fault or negligence*” on their part (see Article 10.5.1 of the WADA Anti Doping Code 2009). It should be noted, however, that this Article only eliminates a sanction, but does not expunge the doping offence itself, which still stands.

But the Spanish Cycling Federation (RFEC) cleared Contador in February of this year accepting his claim that the minute traces of this banned substance found in his urine got into his system through his inadvertently eating contaminated beef. Originally, the RFEC imposed a one-year ban and then changed this to a no ban at all.

For further details and comment on the background to this affair by Professor Blackshaw, the author of this present News Item, see ‘*Tour de France: latest doping investigations*’ posted on the Asser International Sports Law Centre website on 2010-11-22.

However, the International Cycling Union (UCI), Cycling’s World Governing Body, announced on 24 March, 2011 that it will ask sport’s highest court, the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, to ban Contador for doping.

According to the UCI President, Pat McQuaid:

“We’ve studied the case and we feel there’s strict liability whereby the athlete has to prove how the product got into his system. We feel he hasn’t done that in this case and there’s a case to answer.”

Of course it’s damaging for the sport but, by the same token, the sport has to police itself and remain credible. That’s what the UCI does.”

Certainly, cycling does not have a very good doping record! So, it is not surprising that the UCI is taking the case to the CAS for a definitive ruling.

It is hoped that the CAS will hear and decide the Appeal before May or June, so that Contador’s position will be clear before the 2011 Tour de France. However, this may not be possible, as Matthieu Reeb, Secretary General of the CAS, has commented:

“From what I heard, we are heading for a fierce defence. I am pessimistic that we can make a ruling before the end of June.”

If the Appeal by UCI is upheld by the CAS, Contador can be banned for two years and stripped of his 2010 Tour de France title. Of course, until the CAS makes its Award, Contador can continue competing in cycling events - as he currently is doing with his new team Saxo Bank-Sungard. To date, only one cyclist has lost a Tour de France title for doping and that was the American Floyd Landis, who was stripped of his 2006 victory.

The Contador case is a high profile one, and there is a lot of interest in its outcome, not only in Spain, where even the Spanish Prime Minister, Jose Luis Rodriguez Zapatero, declared that “*there was no legal reason to justify sanctioning Contador*”, but also in the world of cycling in general.

So, once again, watch this space!

RFU Wins Court Order in Ticket Touting Case

The unlawful advertising and sale of tickets to major sports events, especially by ticket touts who sell at prices well above their face value, is an increasingly widespread phenomenon, and poses an administrative nightmare for sports event organisers or rights holders, normally the Governing Bodies of the sports concerned. For example, the current fine of £5,000 for touts unlawfully offering to sell tickets for the 2012 London Olympics is being raised to £20,000! To avoid problems, punters should buy their tickets only from official ticketing sources.

The English High Court rendered an important judgement on 30 March, 2011 in a ticket touting case involving the Rugby Football Union [RFU] v. Viagogo Ltd ([2011] EWHC 764 (QB)). In that case, a so-called *Norwich Pharmacal* order was granted by the Court to the RFU.

The facts concerning the parties and their respective activities and the basic legal issues raised in this case, including the nature of a *Norwich Pharmacal* order, are set out and explained in the first part of the Judgement of Mr Justice Tugendhat as follows:

"There are 82,000 seats in the Claimant's ("RFU") Stadium at Twickenham ("the Stadium"). It is the home ground for England international rugby matches, and other matches are played there. There are days when those seats are very much in demand. As the owner of the Stadium, RFU is entitled to decide who can enter it and occupy those seats. Any member of the public who enters without permission is a trespasser. That is so, whether or not they are aware that they are trespassers.

Permission to the public to enter premises is generally given by the owners of the premises in the form of a ticket (or, if entry is free, the permission may be called an invitation). Permission is called a licence by lawyers. It does not have to be in writing, but it often is. If it is in writing, then it is usually printed on a permanent medium, such as paper or card. RFU issues paper tickets with bar codes, and these are scanned at the entrances to the Stadium.

The permission and the physical medium are distinct. The permission may be revoked or expire even if the physical medium cannot be retrieved from the holder by the owner of the premises. And a person who does not hold a physical ticket may be able to prove to the owner of the premises that he has the permission to enter, even if he has lost the physical ticket, for example by credit card data.

RFU is a company incorporated under the Industrial and Provident Societies Act 1965. As the owner of the stadium, RFU could, if it chose, issue tickets at prices designed to maximise profits. But it does not do this. RFU is also the governing body for rugby union in England. As governing body for rugby union, it has responsibilities. Its main object is not to make profits. It does use its right to issue tickets to raise the revenue it needs to operate the Stadium and to cover its expenses. But it also issues them on terms designed to promote and develop the sport. It keeps ticket prices at an affordable level to encourage interest and involvement in the sport by a wide section of the public. And when it does use tickets to raise revenue, in many instances it does so indirectly, by issuing them as part of long term arrangements. These arrangements may be with debenture holders, sponsors and suppliers, and in connection with corporate hospitality packages. So individuals may become ticket holders without having paid cash for the ticket.

Individuals who hold tickets may wish to transfer their tickets to other people for many different reasons. RFU raises no objection to ticket holders doing this under certain limited conditions.

What RFU does object to is when ticket holders advertise tickets for sale, or when they sell, or attempt to sell, their tickets for a price in excess of the value that appears on the face of the ticket. RFU objects to this, because it considers that that tends to defeat the purpose for which it had kept the price affordable or low, and for which it had itself chosen to forego revenue which it might otherwise have received. I am not concerned with whether RFU are right to take this view or not. It is lawful for RFU to take this view, as is not in dispute. So whether that view is right or wise is irrelevant to these proceedings.

When tickets are in demand, there may be many people who are will-

ing to pay more than the face value. Sometimes they are willing to pay many times the face value, especially at times like the present when the England team is doing well. To the extent that RFU has kept the price down to an affordable level, and so to forego revenue, holders will be aware that there is a difference between the face value of the ticket and the price that third parties would be willing to pay on the open market. So holders of tickets may be tempted to sell their ticket at a profit and take the benefit of it in cash, rather than in kind by attending the match.

So, RFU has taken steps to try to prevent the resale of tickets at prices above the face value of the ticket. What it has done is to have its lawyers draw up various legal documents, and to print legal wording on the tickets. The intention of this is that the permission to enter the Stadium which is represented by the paper ticket shall automatically expire, or be revoked, in the event that the paper ticket has been advertised for sale, or transferred at a price above its face value.

If these legal documents and words achieve that purpose, then any persons who hold a ticket sold at more than its face value will (whether they know it or not) be trespassers if they enter the Stadium. And, on RFU's case, there will be other wrongs committed as well.....

The Form of the Order

The information sought as set out in the draft order is as follows:

- a) the names and addresses of the people who have advertised for sale and/or sold RFU tickets ("the tickets") via www.viagogo.co.uk and www.viagogo.com ("the websites") and/or via the respondent directly, to the autumn international 2010 matches held at Twickenham Stadium;
- b) the names and addresses of the people who have advertised and/or sold tickets via the website and/or via the respondent directly to the Six Nations 2011 matches to be held at Twickenham Stadium;
- c) the full details of all the tickets advertised for sale on the Websites and/or otherwise via the Respondent for the Autumn International 2010 and Six Nations 2011 matches including but not limited to in the case of each Ticket the gate, block, row and seat number and the price at which the Ticket was advertised for sale;
- d) [similar detail as to the price at which the Ticket was sold].

Viagogo's business

Viagogo operates a successful online business. It carries on business for profit, and has no other responsibilities. I accept that businesses conducted solely for profit may provide great benefits to the public. But our civic and public life would be much diminished if all businesses were conducted solely for maximising profit. I mention this because the evidence on each side contains passages that are directed to demonstrating that the party concerned is providing a public benefit, and the business, or stance, of the other is to be disapproved in various ways. Since the business models of both parties are in principle lawful, the court is simply not concerned with this debate.

Viagogo provides a secondary market for tickets for many different venues and events. Its main business does not involve itself buying and selling tickets. For the most part it offers a place where prospective sellers may record details of tickets they are offering for sale, and prospective buyers may find the tickets they want and buy them directly from the seller. There are many other companies that do business on this model, including eBay, and a number of them are competitors of Viagogo, both generally, and in respect of tickets issued by RFU.

Viagogo naturally charge for this service. It may well be that, on occasions when the match is not so popular, tickets are sold and bought for less than their face value. But RFU still object to their tickets being advertised for sale. RFU also objects to sellers and buyers agreeing prices through the Viagogo website which are higher than the face value of the ticket.

When sellers advertise RFU tickets for sale, and when buyers do agree to the transfer of RFU's tickets for a price higher than the face value, it is RFU's case that various wrongs are committed (that is wrongs under the civil law), and that the licence or permission represented by the ticket automatically expires or is revoked. But nevertheless, the buyer may

obtain entry to the Stadium by presenting the ticket, and if he does so, then he does so as a trespasser. So it is RFU's case that the holder of a ticket who gains entry as a trespasser is a wrongdoer, and that the sale that makes this possible also has the effect of making a number of other people wrongdoers. The wrongdoers may include the seller, and they may include the person or company to whom the paper ticket was first delivered by RFU, and others as well.

It is no part of RFU's case that Viagogo becomes a wrongdoer in this way. RFU has in the past questioned the legality of what Viagogo does when a sale occurs through its website at a price above the face value of the ticket. But in these proceedings no such allegation is made. In these proceedings I assume that Viagogo are innocent of any wrongdoing when such a sale occurs through its website in this way.

However it is RFU's case that when such a sale occurs Viagogo has facilitated, or become mixed up in, the wrongdoing it alleges has been committed by others, and that RFU is therefore entitled to an order of the court requiring Viagogo to disclose information by which RFU might be able to discover the identity of the wrongdoers. An application for such an order is known as a Norwich Pharmacal application (*Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133).

The principle in *Norwich Pharmacal* is described in the speech of Lord Reid (at page 175):

"If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

This application gives rise to four issues:

- i) Was there arguably wrongdoing? If so,
- ii) Is RFU intending to try to seek redress for the wrong? If so,
- iii) Is disclosure of the information to RFU necessary? If so,
- iv) Should the court exercise its discretion in favour of granting relief?

RFU must satisfy a fifth condition, namely to show that Viagogo is

involved in the arguable wrongdoing, however innocently. But it is accepted by Viagogo that, if there is arguably wrongdoing, then it has innocently become mixed up in it.

The legal test to be applied

The first point is to establish the applicable legal test. This is not in dispute between the parties. There is no dispute that the standard of proof which an applicant must attain before a Norwich Pharmacal order may be granted is that he has at least an arguable case: see *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (No 1) [2009] 1 WLR 2579; [2008] EWHC 2048 (Admin) ("*Binyan Mohammed*") para 67. In *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 Lord Woolf CJ said that a claimant must identify "clearly the wrongdoing on which he relies in general terms". And the parties also agree that the law is as I stated it to be in *United Company Rusal v HSBC Bank Plc & Ors* [2011] EWHC 404 (QB) at para 52:

"... the court [has] to be as satisfied as it can be, having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction, or that the applicant has a much better argument than the defendant. That test is appropriate in Norwich Pharmacal applications." "

The Judgement then goes on to discuss the legal arguments and general principles applicable in the case and the legal basis on which the requested order has been granted.

As will be seen from the above extracts from the Judgement in the RFU case, the *Norwich Pharmacal* order is a very useful weapon for major sports event organisers and rights holders in England to fight unlawful ticket sales, which undermine the integrity of the sport and the event concerned, and, in particular, find out who is behind them in order to take appropriate legal action to stop their unlawful activities.

As mentioned above, the full reasoning of the Court in the RFU case will be found in the rest of the Judgement, which extends to several pages, and the text of the full Judgement may be accessed on line at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/764.html&query=Viagogo&method=boolean>

Also, further information about this important decision can be obtained from Louise Millington-Roberts of the London Sports Law Firm, Max Bitel Greene LLP, who acted as the solicitor on behalf of the RFU in this matter.

Ticket touts, you have been warned!

"Season of Birth Bias" or "The Relative Age Effect": Systemic Discrimination in European Youth Football"

by Steve Lawrence

Dear Professor Siekmann,

Having e-mailed you last week I have since discovered that you are one of the authors of the Study on the Lisbon Treaty and EU Sports Policy.

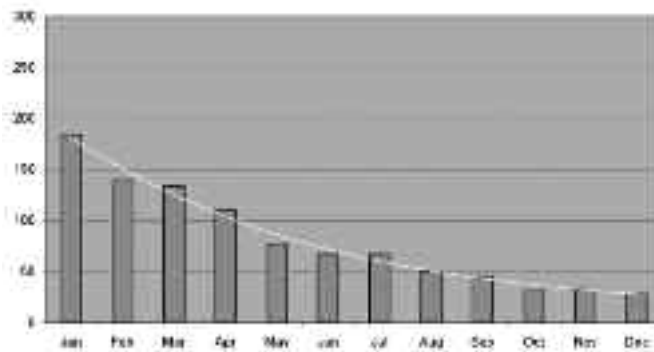
I would like to bring to the attention of the Culture and Education Committee of the European Union an issue of systemic discrimination which has evolved in European football (and in sport generally).

I would be very grateful for your advice on how best to do this. I do believe that the new competence conferred on the European Union by the Lisbon Treaty will enable the Culture and Education Committee to examine the issue and possibly to sponsor or initiate action to reduce the effects of the discrimination. In fact it seems to me that the issue is a perfect example of how the new competence can be exercised to achieve fairness in a situation which is clearly unfair at the moment.

The discrimination has become known as '*season of birth bias*' or '*the relative age effect*'. I have studied the bias for the last eight years since I first became aware of it and I am pleased to say that there are now a number of academic papers on the subject.*

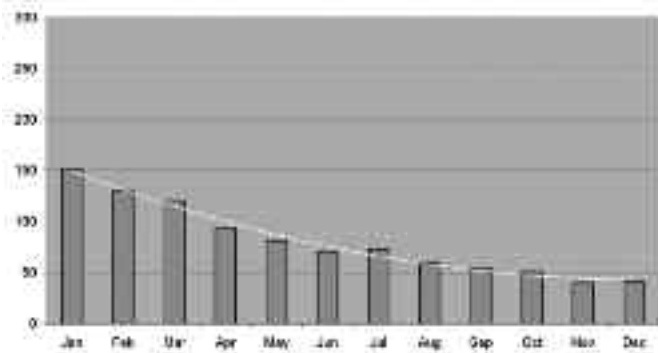
My analysis of the recent UEFA U17, U19 and U21 (see graphs) qualifying tournaments amply illustrates the problem.

UEFA U17 2013/14 Qualifiers - players by month of birth © SL 2010

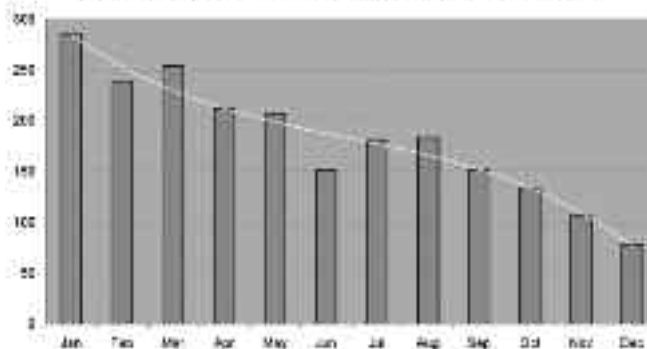


You will see that each of the competitions is heavily over-populated with early born players and correspondingly under-populated with late born players. At U17 the ratio of January born players to December born players is nearly 7 to 1.

UEFA U19 2010/11 Qualifiers – players by month of birth © SL 2010



UEFA U21 2010/11 Qualifiers – players by month of birth © SL 2010



The discrimination is unfair in that it denies opportunity to a (systemically defined) set of young players to compete at an appropriate level.

The discrimination has become structural and systemic because of a single rule adopted by UEFA which is to impose a cut-off date for participation at 1 January at the beginning of the year of the relevant tournament.

The discrimination can be easily removed by one of three methods:

1. By restricting participation by actual age on the day of any given match.
2. By imposing quotas requiring a spectrum of ages in any competing squad.
3. By initiating parallel competitions for the under-represented age groups.

The reason given for not introducing these measures (at least by The FA in England) is that additional and burdensome administration would be required to solve the problem. This does not seem to me to be an adequate reason for allowing the discrimination to continue.

You will see that the discrimination is worst in the U17 cohort, slightly less evident in the U19 cohort and least in the U21 cohort. The bias clearly reduces as players get older but it is still evident and significant at the time when players are entering into their first contracts of employment at about the age of 18. It is fair to say therefore that the discrimi-

nation extends beyond the sporting 'loss of opportunity to compete' and into the realm of the employment prospects of individual players although, I acknowledge, that this requires much deeper study.

The discrimination actually spreads much wider than just football, it extends to any sport which has a cut-off date for participation (there have been academic studies on tennis and ice-hockey) and indeed it extends into education generally with a bias apparent in university entry.

I hope you don't mind me approaching you like this and I would be grateful for any advice on how I can bring this matter to the attention of the Culture and Education Committee. Furthermore I would be very interested in your opinion on whether the issue is appropriate for consideration by the Committee and what courses of action might be open.

Yours sincerely,

Steve Lawrence
Amsterdam
The Netherlands

The International Sports Law Journal

N.B. Dear reader, Please send your comments to sportslaw@asser.nl and those will be forwarded to the author for consideration and reply to you. (RS)

* The academic papers are the following:

1. David Gutierrez Diaz Del Campo, Juan Carlos, Pastor Vicedo, Sixto Gonzales Villora and Oñefre Ricardo Contreras Jordan (2010)
The relative age effect in youth soccer players from Spain
University of Castilla-La Mancha, Faculty of Education, Spain
2. David Butler, Robbie Butler & Meadhbh Sherman, (2010)
Working Paper - The Relative Age Effect in Under 21 Association Football: An Irish and European Perspective
Department of Economics, University of Cork, Republic of Ireland
3. John Ashworth & Bruno Heyndels (2007)
Selection Bias and Peer Effects in Team Sports: the Effect of Age Grouping on Earnings of German Soccer Players.
Department of Economics, University

of Durham, Durham, UK.

Vrije Universiteit Brussel, Belgium.

4. Roel Vaeyens, Renaat M. Philippaerts, & Robert M. Malina (2004)

The relative age effect in soccer: A match-related perspective.

Department of Movement and Sports Sciences, Ghent University, Belgium and Tarleton State University, Stephenville, USA.

5. Werner F. Hiesen, Jan van Winckel, & A. Mark Williams (2004)

The relative age effect in youth soccer across Europe.

Department of Kinesiology, Katholieke Universiteit Leuven, Belgium and Research Institute for Sports and Exercise Sciences, Liverpool John Moores University, Liverpool, UK.

6. Susan Edgar & Peter O'Donoghue (2004)

Season of birth distribution of elite tennis players.

School of Education, University of Ulster, Jordanstown, UK and School of Sport, Physical Education and Recreation, University of Wales Institute, Cardiff, Wales.

7. Craig Simmons & Geoffrey C. Paull (2001)

Season-of-birth bias in Association Football.

The Football Association, Lilleshall National Sports Centre, Shropshire, UK.

8. Musch J. & Grondin S. (2001)

Unequal competition as an impediment to personal development; a review of the relative age effect in sport.

Developmental Review

9. Musch J. & Hay R. (1999)

The relative age effect in soccer, cross cul-

tural evidence for a systematic discrimination against children born late in the competition year.

Sociology of Sport Journal

10. Thompson, A.H., Barnsley, R.H. and Stebelsky, G. (1991)

"Born to Play Ball" The Relative Age Effect and Major League Baseball.

Division of Mental Health, University of Alberta and St. Mary's University Sociology of Sport Journal

11. Barnsley, R.H. and Thompson, A.H. (1988)

Birthdate and success in minor hockey: The key to the NHL.

Faculty of Education, St. Mary's University & Alberta Mental Health Services
Canadian Journal of Behavioural Science

Lisbon Treaty and EU Sports Policy*

Introduction

The principle of conferral stipulates that the EU must act within the limits of the powers conferred upon it by the Treaty. Until the entry into force of the Treaty on the Functioning of the European Union (TFEU) in December 2009, sport was not mentioned in the Treaties.

This meant that the EU was not granted a competence to operate a 'direct' sports policy.

This gave rise to two broad concerns:

First, there is a concern that EU sports policy to date has been guided by the European Court of Justice (ECJ) and that single market laws have not sufficiently recognised the specificity of sport. EU single market competences, particularly those relating to free movement and competition law, exert an indirect influence over sport. Following the judgment of the ECJ in *Bosman*, many sports bodies argued that the lack of a Treaty competence for sport resulted in single market laws, designed to regulate overtly economic activities, being applied to sporting contexts without due consideration for the specific nature of sport.¹ The judgment of the Court in *Meca-Medina* is often cited as another example of the insensitive application of single market laws to sporting contexts.² *Meca-Medina* received particular criticism for promoting a case-by-case approach to assessing the legality of contested rules, rather than allowing for a more holistic assessment of the specific nature of sport.

A second concern is that EU sports policy has lacked status and coherence. Sport has become associated not only with single market competences, but with a large number of other EU policy areas including, public health policy, education, training and youth policy, equal opportunities and disabilities policy, employment policy, environmental policy, media policy and cultural policy. However, the ability of the EU to allocate budgetary appropriations to this activity was limited by its lack of competence to act in the field of sport. Following *UK v Commission*³ the Commission was compelled to suspend some of its sports-related funding programmes and attach these to areas of existing competence in the Treaty such as education policy. The competence question has meant that the EU has struggled to give sport high status and comprehensive treatment, particularly in an era where the EU is being increasingly asked by sports stakeholders to provide a coherent response to contemporary challenges in sport.

A potential solution to the above two issues is for sport to find its place within the EU's constitutional framework. On two occasions, during the Amsterdam and Nice Treaty negotiations, proponents of a Treaty article for sport failed to persuade the Member States of the value of such a move. The convening of the Convention on the Future of Europe set in motion a process resulting in the ratification of the Lisbon Treaty and the adoption of an article for sport in the Treaty on the Functioning of the European Union (Articles 6 and 165).⁴

Structured around 6 chapters, this study explores the significance of this article on current and pending issues in EU sports law and policy. Chapter 1 explores the meaning and origins of key phrases contained in Article 165 including 'European sporting issues', the 'specific nature of sport' and the 'European dimension of sport'. Chapter 2 explains the constitutional limits to EU action in the field of sport. Chapter 3 explores how the general meanings discussed in chapter 1 find legal expression

within the context of the application of EU free movement and competition laws. Chapter 4 explains the significance of Article 165 in relation to the EU's ability to carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport. Chapter 5 presents the findings of the study's consultation exercise which was designed to establish interested stakeholders' preferences and priorities for the implementation of Article 165 TFEU. Finally, chapter 6 presents conclusions and recommendations.

[...]

5. Results of Consultation Exercise

A consultation effort was designed to complement this study with the views from sport governing bodies, sport stakeholders, other sport non-governmental organisations, public authorities, private companies, academics and practitioners with a knowledge and experience in the field. The call for contributions was sent to a wide range of experts and interested organisations, which were asked to elaborate on their preferences and priorities for the implementation of Article 165 TFEU. A total of 37 contributions from 52 organisations were received.⁵

Table 1: Distribution of responses by organisations

ORGANISATIONS	CONTRIBUTIONS
Stakeholders' associations	8
National Olympic Committees	6
Academics, practitioners and think tanks	7
National Governments of EU Member States	4
International sport non-governmental organisations	5
International Sport Federations	3
National Sport Federations	2
IOC ('Olympic and sports movement')	2
International Organisations	1
TOTAL	37

In the contributions received there is a clear representation of the Olympic movement, with 8 submissions from Olympic committees at both national and international level and 4 sport federations also at national and international levels. Thus, the governing bodies of sport presented altogether a majority of 12 responses to the consultation. Sport stakeholders (athletes, supporters, clubs and leagues) have submitted a total of 6 contributions, being the second most represented group in the consultation. The contribution of 4 EU Member State governments is also noteworthy. The present section of the study summarises the most relevant points of the responses received, highlighting those where a very general consensus has been found, but the distribution of responses, which clearly overrepresented the positions of the Olympic movement and the governing bodies of sport, needs to be taken into account when considering the results. Whilst a good degree of consensus can be found in some of the priorities, it is also clear that sport organisations can also present contradictory demands in specific key issues that would be difficult to reconcile with the development of EU sport policy under Article 165 TFEU.

Thematically, the contributions received could be categorised into three broad groups. First, there is a set of responses proposing very specific priorities for the implementation of policies and programmes under Article 165 TFEU. These are concrete suggestions with articulated policy objectives and suggested courses of action. Second, there are those submissions focusing on interpretation of concepts that could shape not only the policy on sport, but also other EU competences when dealing with sport matters. These contributions highlight the impact of EU law and policies on sport and they request a more explicit recognition of the autonomy of sport organisations and a better definition of the specifici-

* Study on Lisbon Treaty and EU Sports Policy, commissioned by the European Parliament to the T.M.C. Asser Institute, the Netherlands, Edge Hill and Loughborough Universities, United Kingdom, September 2010.

1 For a useful list of critical comments from sports organisations see Chappelet, J-L., (2010), *Autonomy of Sport in Europe*, Strasbourg: Council of Europe, pp. 89-108.

2 See for example, Infantino, G., *Meca-Medina: a step backwards for the European sports model*, accessed at:

http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480401_DOWNLOAD.pdf.

3 Case C-106/96 *UK v Commission* ECR [1998] I-02729.

4 All article references, unless otherwise stated, are to the TFEU.

5 Some of the contributions received were joint efforts by several organisations, especially the views of the 'Olympic and Sports movement' that were presented as endorsed by 18 Olympic Committees and Sports federations.

ty of sport recognised in Article 165 TFEU in order to provide the sporting movement with greater legal certainty. Finally, there is a third group of submissions that can be considered to address an horizontal level, where stakeholders elaborate on the general characteristics that any EU action in the field of sport should have. Each of the three groups is discussed now in turn.

5.1. Priorities for a direct EU sports policy

Three areas emerge as clear consensus priorities for the development of EU sport policy in the consultation. These are: (1) sport health and education, (2) the recognition and encouragement of volunteering in sport, and (3) the development of sport activities as a tool for social inclusion. EU action addressing these three policy objectives would be welcome by the respondent stakeholders. The three priorities feature prominently in almost every one of the responses and they are also clearly aligned with the priority areas identified by the Commission in the White Paper on Sport,⁶ the 2009 and 2010 preparatory actions⁷ and the public consultation exercise.⁸ Similar areas, albeit with different headings, were discussed in the European Sport Forum 2010 organised in Madrid and were positively received by the representatives of the sport organisations.⁹ It is becoming increasingly apparent that these areas emerge as the translation of the general principles enshrined in the Treaty into policy objectives where Article 165(1) TFEU calls for the Union to contribute to the promotion of sport's 'structures based on voluntary activity and its social and educational function'.

The majority of contributors have a preference for measures with a clear added value at European level. Thus, it is suggested that EU action should focus on research funding, facilitating the exchange of best practices, elaborating guidelines and on adopting incentive frameworks to encourage civil society, national and sub-national authorities to implement similar policies. The latter is especially stressed in the case of volunteering, where sport organisations contributing to this consultation feel that they face too many regulatory barriers to develop effective volunteering programmes. Some of the most concrete contributions in this area propose, for example, a twofold strategy whereby EU policy shall aim at encouraging legal and even fiscal incentives to volunteering, together with measures to remove obstacles to the free movement and exchange of volunteers within EU Member States. One of the most cited examples of the latter is the need to recognise formally the skills developed by volunteers as part of the EU Lifelong Learning Programme.

There is also a second group of policy priorities that have been put forward in a majority of contributions but do not carry the same degree of consensus that those explained above. These relate to the integrity of sport and can be summarised as comprising (1) the fight against doping, (2) the relationship between gambling and sport, and (3) the welfare of under-age sportspersons. These priorities feature especially in the contributions submitted by sport governing bodies and sport organisations engaged in the promotion of grassroots sport and sport for all (e.g. the International Sport and Culture Association). Again, these three main headings are also well aligned with the priorities identified by the European Commission¹⁰ and could also be considered as concrete policy translations of Article 165 (2) TFEU when it refers to 'promoting sporting fairness' and 'protecting the physical and moral integrity of sportsmen and sportswomen'.

In relation to anti-doping, EU action would be welcome in two very concrete fields: research funding due to the World Anti-Doping Organisation's limited resources, and facilitating the development of a

collaborative network of National Anti Doping Organisations within the EU Member States. In this area it is particularly stressed that EU action is only desired as a valued complement to the ongoing policies of Member States, WADA, UNESCO and sport organisations. The contribution of the Ministry of Education and Culture of Finland, for example, calls to concentrate on areas 'that are currently lacking of European-level cooperation'. The relationship between gambling and sport raises two different concerns.

First, the influence of betting practices in sport. Sport governing bodies would welcome any EU actions that could facilitate police cooperation in the fight against illegal betting and corruption in sport. Second, sport organisations express their worries that a possible liberalisation of the betting and gambling market could have negative consequences on the funding of sport, especially at grassroots level, in countries where most sport programmes rely on funding from lotteries. Finally, in relation to the welfare of under-age sportspersons, the collaboration of EU institutions is requested to help in the fight against the trafficking of underage athletes and in the exchange of good practices to ensure the training of minors is correctly designed and monitored.

5.2. Priorities regarding the impact of EU law and policies on sport

The second category of priorities expressed in the consultation refers to the impact of EU legal provisions on sport, rather than to the active development of a future EU sports policy. This clearly originates in the reference within Article 165(1) to the need to take 'account of the specific nature of sport', crystallising the references to the specificity of sport that can be found in the Amsterdam and Nice declarations on sport and many rulings of the ECJ. The contributions in this category do not present however the same degree of consensus and, therefore, it is necessary to point out from the outset that initiatives under these priorities would be more difficult to adopt with the general support of sport stakeholders.

The main action requested in the contributions is the elaboration of a definition for the specificity of sport which is as complete as possible. This is a top priority for the 'Olympic and sports movement' and sport governing bodies, with support of Member States' governments. The governments of Finland, Germany and the Netherlands specifically call for the drafting of guidelines in the application of competition policy and other EU legal provisions to sport. It is argued by sports organisations that guidelines on the application of EU law to sport would increase legal certainty, hence reinforcing their autonomy and efficiency in the governance and regulation of sport. In view of the analysis in this study, it is however difficult to see how the guidelines that are demanded would add greater legal certainty for sports organisations when the case law of the ECJ is fairly consistent.

The notion of the specificity of sport is widely supported by EU Member States, as reflected in the conclusions of the European Council in 1997, 2000 and 2008, but the specific request to draft extensive guidelines is however less concrete. The European Parliament, on the other hand, has already clearly requested the Commission to elaborate guidelines on the application of competition policy to sport.¹¹ As explained elsewhere in this study, the European Commission argued in the White Paper on Sport that the ECJ's case law prevents the adoption of guidelines because the application of competition policy provisions has to be analysed on a case-by-case basis.

The division within EU institutions in this respect mirrors the disagreements among sport organisations. Whilst governing bodies and Olympic committees support the development of the specificity of sport, other stakeholders such as athletes, clubs and leagues clearly warn in their contributions that the definition of sport's specificity ought to respect workers and stakeholders' rights, especially as the TFEU renders legal the Charter of Fundamental Rights. Thus, the elaboration of guidelines does not represent a top priority (if at all) for these actors. Those who support, in principle, the specific nature of sport as a concept worth exploring (e.g. the European Professional Football Leagues or the European Clubs Association) request to be consulted and involved in any exercise whose result might be an interpretation of the application of EU law to sport.

6 180 See White Paper on Sport (2007), p. 3-7.

7 European Commission (2009), 2009 annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events, COM (2009) 1685, 16 March 2009.

8 European Commission (2010), Strategic choices for the implementation of a new EU competence in the field of sport, EU-wide consultation report, available online at <http://ec.europa.eu/sport/library/doc/a/>

100726_online_consultation_report.pdf.

9 See the Forum's report published by the European Commission, available online at http://ec.europa.eu/sport/library/doc/b1/sport_forum_madrid_report_11_05_10.pdf.

10 See notes 6-9 above.

11 European Parliament (2007), Resolution of the European Parliament on the Future of Professional Football in Europe, A6-0036/2007, 29 March. (The Belet Report), paragraph 55.

5.3. Priorities for the horizontal development of EU sport policy

The third group of priorities presented in the contributions refers to the way in which stakeholders would like to see EU actions implemented, rather than to the content of the policies. This is seen as extremely important in a large majority of the contributions and, therefore, it merits attention when considering the course of action in the development of policies under Article 165 TFEU. First, there is a unanimous call for EU institutions to focus on added value and European-level initiatives. This reiterates the provisions contained in Articles 6 and 165 TFEU on the level of competence, but the insistence in this respect suggests there might be an anxiety among the respondents that EU institutions risk usurping the competences of Member States and, especially, the competences of sport organisations. A strict application of the principle of subsidiarity, with due respect for the autonomy of sport, is requested by sport governing bodies and Member State governments alike.

Second, there is also an agreement to support the need for a knowledge-based policy. This has two main implications. On the one hand, there is a common call for the EU to fund research in sport-related areas, with the economic impact of sport and anti-doping being the most commonly cited. On the other hand, sport stakeholders such as athletes and supporters demand to be consulted as a source of expertise in the elaboration of policy initiatives within their remit.

Third, in terms of policy instruments, direct regulation by the EU is not a priority of the contributors to the consultation. In the area of sports agents requests were made in the past for the European Commission to study the possibility of regulation,¹² but stakeholders now prefer EU institutions to facilitate debate and information exchange to adopt sound self-regulation. Thus, EU institutions are requested mostly to facilitate the development of networks, the comparison of policies across EU Member States and the cooperation among sport organisations and public authorities. There is, however, one area where an important number of stakeholders request active promotion by the European Commission: social dialogue in the sports sector. Contributions by athletes and by football supporters call on the EU institutions to support and promote social dialogue as a tool for good governance.

Finally, there is a common call for EU institutions to keep sports organisations involved in the development and implementation of EU sport policy. In this respect Article 165(2) TFEU calls for the EU to promote 'cooperation between bodies responsible for sport' and Article 165(3) demands that 'the Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport'.

None of these provisions expressly call to cooperate *with* sport organisations in the development of EU sports policy, but the Amsterdam and Nice Declarations pointed out the Member States' willingness to keep them involved. The Commission and the European Parliament have so far proved able to engage with the sports sector. Stakeholders have expressed their unanimous desire to collaborate with EU institutions, putting their expertise at their disposal. Moreover, there is also a request made especially by Olympic committees and governing bodies that the implementation of any future EU programme in the field of sport prioritises the participation of local sports organisations.

6. Conclusions and Recommendations

Article 165 does not contain a horizontal clause. There are no provisions in the Article that require sporting issues to be taken into account when making policies in other areas, but there are also no provisions in 165 which prohibit the EU from doing so. Regardless of the value attached to Article 165 by the Court and the Commission, its existence is unlikely to alter their existing approach to sport. A review of existing EU sports law cases reveals that Article 165 TFEU will add little further protection for contested sports rules beyond that already provided by the Court and the Commission. In this regard, the review reveals that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Therefore, the often requested

production of guidelines on the application of free movement and competition law to the sports sector may not greatly assist the search for legal certainty. The Commission's White Paper on Sport more than adequately explains the legal framework applicable to sport. Furthermore, as the ECJ decided in *Meca-Medina*, contextual analysis and the requirements of proportionality control in EU law necessitate a case-by-case analysis of disputes involving sport. This renders any informal guidelines subject to challenge.¹³

Rather than passively relying on the reference to the 'specific nature of sport' contained in Article 165 to seek to limit the influence of EU law in sport, the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly reasoned and backed with robust data. The EU has a strong role to play in facilitating this dialogue, sharing best practice and ensuring that sporting autonomy is conditioned on the implementation of good governance in sport. Efforts at encouraging social dialogue in sport should be maintained and moves towards a structured dialogue should not undermine these efforts. Thematic dialogue with the sports movement should be encouraged.

Article 165 resolves any legal uncertainty concerning the competence of the EU to directly fund sports related programmes. It is now clear that the EU has the competence to directly carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport and this competence grants the EU a potentially wide field of action.

However, the choice of priority themes should be directly linked to the themes contained in Article 165 and before supporting priority areas, the EU should demonstrate the European dimension in sport and establish the added value of EU action. A focus on a narrow range of priority areas is to be favoured over a broad approach so that the added value of EU action can be demonstrated. In this connection, the consultation exercise reveals that stakeholders favour action in the areas of health enhancing physical education, volunteering and social inclusion. A majority of respondents also identified the fight against doping, the relationship between gambling and sport and, the welfare of under-age sportspersons. In addition to these areas, there is a need to focus on evidence based policy making and in this connection the EU should fund research and encourage stakeholders to justify their positions with solid data and research.

On the face of it, Article 165(4) also appears to be unequivocal concerning the prohibition on harmonisation of the laws and regulations of the Member States. This statement might encourage claims that the laws and regulations of the Member States cannot be harmonised in so far as this would affect sporting practices. However, an examination of past prohibitions of harmonisation and their treatment by the ECJ suggests that harmonising measures can be taken despite this type of prohibition so long as the harmonising measures are nominally based on another Treaty competence. Despite similarly worded prohibitions of harmonisation in the fields of social policy, education, vocational training, culture, and public health, the EU has in practice achieved convergence in legislation through other legal bases.

[...]

Executive Summary

Background

The principle of conferral stipulates that the European Union (EU) must act within the limits of the powers conferred upon it by the Treaty. Until the entry into force of the Treaty on the Functioning of the European Union (TFEU) in December 2009, sport was not mentioned in the Treaties. This meant that the EU was not granted a competence to operate a 'direct' sports policy. This gave rise to two broad concerns. First, that EU sports policy to date has been guided by the judgments of the European Court of Justice (ECJ) and that single market laws, such as those concerning freedom of movement and competition, have not sufficiently recognised the specificity of sport. A second concern is that EU sports policy has lacked status and coherence. Sport has become

¹² White Paper on Sport, p. 16.

¹³ Case C-519/04 P, David Meca-Medina

and Igor Majcen v Commission [2006] ECR I-6991.

Law and Sports in India

Development Issues and Challenges

This book is the first endeavour in elucidating the anomalies in the passionate and popular sports industry in India. This book is a must have for every sports lover, sportsperson, sports administrator and anyone connected with the sports industry. This work seeks to create legal awareness about the issues that are of vital importance in sports.

Justice M. Mudgal and the assistant authors Vidushpat Singhania and Nitin Mishra have taken into perspective the incidents and decisions worldwide in the sporting sector while applying their expertise in law. The authors have managed to derive a paradigm for sports in India, which should form the legal framework for the sports industry.

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SPORTS LAW CONFERENCE - MARCH 2012

The Centre for Sports Law Research at Edge Hill University, in association with Brabners Chaffe Street Solicitors, is pleased to announce its Sports Law Conference to be held at the Hilton Deansgate Manchester on 29-30 March 2012.

Aimed at legal practice, clubs, athletes, governing bodies, regulators and academics, the conference will feature a series of keynote speakers and high quality, peer reviewed papers. Proposals for papers are invited on any issue concerning sport and the law, and may be written from a practice-oriented, theoretical, or interdisciplinary perspective. The organisers also invite proposals for complete panels of three or more papers.

Proposals will be reviewed by the organisers, assisted by the Conference advisory panel.

Advisory Panel

Jack Anderson, Queens University Belfast

Carol Couse, Brabners Chaffe Street

Deborah Healy, University of New South Wales

Mark James, University of Salford

Ken Foster, University of Westminster

Dave McArdle, University of Stirling

James Nafziger, Willamette University

Rob Siekmann, TMC Asser Institute

Maurice Watkins, Brabners Chaffe Street

Stephen Weatherill, University of Oxford

Conference fees start at £195 and include a two day conference pass, lunch and refreshments on both days and a drinks reception to be held at Cloud23 at 18.00 on March 29th. At an additional cost, delegates are also offered CPD hours and the option of a conference dinner following the drinks reception. Further details and a draft programme are available at www.edgehill.ac.uk/law/research/cslr

associated not only with free movement and competition laws but also with a large number of other EU policy areas including, public health, education, training, youth, equal opportunities, employment, environment, media and culture. However, the ability of the EU to allocate financial resources to this activity and to develop a coherent policy on sport has met with constitutional difficulties given the absence of an express Treaty competence for sport. The competence question has meant that the EU has struggled to give sport high status and comprehensive treatment. This is a concern given that the EU is increasingly being asked by sports stakeholders to provide a coherent response to contemporary challenges in sport.

Aims

The aim of the present study is to provide the European Parliament's Committee on Culture and Education with a panorama of the possibilities of EU sports policy at a time when these are being reviewed after the approval of the Lisbon Treaty. In particular, the study assesses from a legal point of view, the potential of the new TFEU to enable the EU to attain the objectives of greater fairness and openness in sporting competitions and greater protection of the moral and physical integrity of sports practitioners whilst taking account of the specific nature of sport. Structured around 6 chapters, this study explores the significance of Article 165 on current and pending issues in EU sports law and policy.

Chapter 1 explores the meaning and origins of key phrases contained in Article 165 including 'European sporting issues', the 'specific nature of sport' and the 'European dimension of sport'. Chapter 2 explains the constitutional limits to EU action in the field of sport. Chapter 3 explores how the general meanings discussed in chapter 1 find legal expression within the context of the application of EU free movement and competition laws.

Chapter 4 explains the significance of Article 165 in relation to the EU's ability to carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport. Chapter 5 presents the findings of the study's consultation exercise which was designed to establish interested stakeholders' preferences and priorities for the implementation of Article 165 TFEU. Finally, chapter 6 presents conclusions and recommendations.

The New Article 165 Competence

Article 165(1) TFEU provides 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'. Article 165(2) continues that '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'. Article 165(3) states that 'The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe'. Finally, Article 165(4) permits the EU institutions to adopt incentive measures and recommendations, excluding any harmonisation of the laws and regulations of the Member States'. This new competence has raised expectations that the Treaty Article can provide solutions to the two concerns detailed in 'background' above. In this respect, this study draws two main conclusions:

1. Application of eu free movement and competition laws

First, Article 165 will have a limited impact on the EU's legal powers over sport, particularly in relation to the application of internal market laws. This is because Article 165 does not contain a horizontal clause requiring sporting issues, and questions of fairness and openness in sporting competitions, to be taken into account in the exercise of other

powers, such as free movement and competition law. This is to be contrasted with other Treaty competencies, such as the provisions on environmental protection and public health, which do contain horizontal clauses. Therefore, from a strict constitutional perspective Article 165 should not alter the existing sports related jurisprudence of the ECJ and the decision making practice of the Commission. This is not to say that sport cannot, will not, or ought not be considered when taking action in other fields. For example, in the sporting case of *Bernard*, the Court confirmed that the Article 165 TFEU reference to the specific nature of sport strengthened arguments that they should be taken into account when examining the legality of restrictions to freedom of movement.¹⁴ However, Article 165 TFEU seems to stop short of imposing a constitutional requirement to do so in either legislative or administrative action. At least in the *Bernard* judgment, reference to the specific nature of sport merely reinforces judicial possibilities which were already open prior to the passage of the Lisbon Treaty.

The absence of horizontality is, in the opinion of the research team, not detrimental to the interests of sports bodies who may have been hoping that Article 165 offers greater protection from the reach of EU law than previously existed. This is because the opportunities to give sports bodies a wide margin of appreciation are substantial even if Article 165 TFEU stops short of imposing a constitutional requirement to do so. For example, in the *Walrave* judgment, the ECJ made a distinction between 'purely sporting rules' that had nothing to do with economic activity, and those that had impacts on economic activity.¹⁵ The judgment also suggested that nationality discrimination, otherwise clearly prohibited by the Treaties, was not relevant to 'the composition of sports teams, in particular national teams'.¹⁶ Although the extent of the exemptions given to sports in both of these interpretations have since been curtailed by modern case law, three modern methods go beyond the limited exemption in *Walrave* and enable sporting practices to receive sensitive treatment even in the absence of legislative special treatment.

First, rules that are 'inherent' to the proper conduct of sport may in some circumstances not fall within the Treaty. Secondly, rules that do fall within the Treaty because they are restrictions of freedom of movement may be justified, by reference to both grounds found in the Treaty itself and to objective justifications developed before the ECJ. Competition law and free movement both also entail grounds of justification found in the Treaties. The third, and more unconventional method, is for the legal framework to be applied to sport in a sensitive way in those cases where it contains few sport-specific exceptions. A review of the existing case law undertaken by the research team confirms that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Indeed, it is worth re-iterating that the ECJ's treatment of Article 165 TFEU in the *Bernard* case supports the view that whilst the new sports competence may have given further weight to sports-related arguments, it has not opened any new previously undiscovered avenues of appeal. This is because the judicial avenues for recognising the specific nature of sport are already well developed by the Court and the Commission.

2. The status and coherence of eu sports policy

On the second area of concern - that EU sports policy has thus far lacked status and coherence - Article 165 TFEU will make a much more definitive contribution. Article 165 allows for the development of a direct supportive and complementary policy in the field of sport. Previously, in order to escape accusations of acting beyond its powers, the EU linked its sports-related funding programmes to existing competencies in the Treaty, such as education policy. The new sports competence contained in Article 165 allows the EU to finance sport directly without the need to justify this action with reference to other Treaty competencies. Thus, the entry into force of the TFEU opens a range of possibilities to EU institutions including, amongst others, funding programmes on social inclusion, health promotion, education and training, volunteering, anti-doping, the protection of minors, combating violence and corruption in sport, the promotion of good governance in sport and supporting the development of a well researched evidence base on current issues in sport.

In the consultation exercise undertaken to inform this study, the

¹⁴ Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, paragraph 40.

¹⁵ Case 36/74 *Walrave and Koch v*

Association Union Cycliste Internationale ECR [1974] 1405, paragraph 4.

¹⁶ *Walrave* paragraph 8.

respondents identified three priority areas for EU action in the field of sport: (1) sport health and education, (2) the recognition and encouragement of volunteering in sport, and (3) the development of sport activities as a tool for social inclusion. The three priorities feature prominently in almost all of the responses and they are also clearly aligned with the priority areas identified by the Commission in the White Paper on Sport,¹⁷ the 2009 and 2010 preparatory actions¹⁸ and the public consultation exercise.¹⁹ Similar areas, albeit with different headings, were discussed in the European Sport Forum 2010 organised in Madrid and were positively received by the representatives of the sport organisations.²⁰

In the White Paper on Sport the Commission recognised that the commercialisation of sport has attracted new stakeholders and this 'is posing new questions as regards governance, democracy and representation of interest within the sport movement'.²¹ The Commission suggested that it can play a role in helping to develop a common set of principles for good governance in sport such as transparency, democracy, accountability and representation of stakeholders. In the White Paper, the Commission argued that governance issues in sport should fall within a territory of autonomy and that most challenges can be addressed through self-regulation which must however be 'respectful of good governance principles'.²²

In this respect, the reference in Article 165(2) to the promotion of cooperation between bodies responsible for sports adds impetus to the Commission's agenda. In particular, the Commission has long promoted dialogue with the sports movement and has been at the forefront of encouraging social dialogue. Article 165 also adds impetus to efforts to move dialogue between the EU and the sports movement onto a more structured footing.

However, given the diversity of the sports movement, structuring dialogue on a meaningful and inclusive basis is a significant challenge for the EU.

A way forward for the Commission in this respect is to use Article 165(2) to develop thematic dialogue with the sports movement over specific issues such as the regulation of agents and the protection of minors. The structure of this dialogue should not assume that any single stakeholder has a monopoly on representation and therefore bilateral dialogue between the Commission and individual stakeholders should be discouraged. Thematic structured dialogue should not lead to 'agreements' such as the so-called Bangemann agreement on player quotas in 1991. In this instance, the ECJ reminded the Commission that it does not possess the power to authorise practices that are contrary to the Treaty.²³

It is also important that structured dialogue, either conducted through the European Sports Forum, bilaterally or thematically, in no way undermines efforts by social partners to conclude agreements within the context of social dialogue committees in sport.

The other innovation brought by Article 165 concerns the possibilities surrounding member state political cooperation. Until the entry into force of Article 165 TFEU, member state political cooperation took place informally outside the formal Council structure. Individual Presidencies often decided to prioritise sport but discussion was restricted to informal meetings of EU Sport Ministers and EU Sport directors and to *ad hoc* expert meetings on priority themes. Article 165 grants the

Member States a competence to adopt a more formal and coherent approach to sport and in May 2010, ministers discussed EU sport policy for the first time in a formal Council setting.

Conclusions and Recommendations

Article 165 does not contain a horizontal clause. There are no provisions in the Article that require sporting issues to be taken into account when making policies in other areas, but there are also no provisions in 165 which prohibit the EU from doing so. Regardless of the value attached to Article 165 by the Court and the Commission, its existence is unlikely to alter their existing approach to sport. A review of existing EU sports law cases reveals that Article 165 TFEU will add little further protection for contested sports rules beyond that already provided by the Court and the Commission. In this regard, the review reveals that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Therefore, the often requested production of guidelines on the application of free movement and competition law to the sports sector may not greatly assist the search for legal certainty. The Commission's White Paper on Sport more than adequately explains the legal framework applicable to sport. Furthermore, as the ECJ decided in *Meca-Medina*, contextual analysis and the requirements of proportionality control in EU law necessitate a case-by-case analysis of disputes involving sport. This renders any informal guidelines subject to challenge.²⁴

Rather than passively relying on the reference to the 'specific nature of sport' contained in Article 165 to seek to repel the influence of EU law in sport, the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly reasoned and backed with robust data. The EU has a strong role to play in facilitating this dialogue, sharing best practice and ensuring that sporting autonomy is conditioned on the implementation of good governance in sport. Efforts at encouraging social dialogue in sport should be maintained and moves towards a structured dialogue should not undermine these efforts. Thematic dialogue with the sports movement should be encouraged.

Article 165 resolves any legal uncertainty concerning the competence of the EU to directly fund sports related programmes. It is now clear that the EU has the competence to directly carry out actions to support, coordinate or supplement the actions of the member states in the field of sport and this competence grants the EU a potentially wide field of action.

However, the choice of priority themes should be directly linked to the themes contained in Article 165 and before supporting priority areas, the EU should demonstrate the European dimension in sport and establish the added value of EU action. A focus on a narrow range of priority areas is to be favoured over a broad approach so that the added value of EU action can be demonstrated. In this connection, the consultation exercise reveals that stakeholders favour action in the areas of health enhancing physical education, volunteering and social inclusion. In addition to these areas, there is a need to focus on evidence based policy making and in this connection the EU should fund research and encourage stakeholders to justify their positions with solid data and research.

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¹⁷ European Commission (2007), White Paper on Sport, COM(2007), 391 final, p. 3-7.

¹⁸ European Commission (2009), 2009 annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events, COM (2009) 1685, 16 March 2009.

¹⁹ European Commission (2010), Strategic choices for the implementation of a new EU competence in the field of sport, EU-wide consultation report, available online at ec.europa.eu/sport/library/doc/a/100726_online_consultation_report.pdf.

²⁰ See the Forum's report published by the European Commission, available online at http://ec.europa.eu/sport/library/doc/bi/sport_forum_madrid_report_11_05_10.pdf.

²¹ White Paper, section 4.

²² Ibid section 4.

²³ Case C-415/93 Union Royale Belge Sociétés de Football Association and Others v Bosman and Others, [1995] ECR I-4921, paragraph 136.

²⁴ Case C-519/04 P, David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991.

Equal Treatment of Non-Nationals in Individual Sports Competitions*

Chapter I: Introduction

In its 2007 White Paper on Sport, the Commission indicated its intention to launch a study to analyse access to individual competitions for non-nationals. In the 2008 Biarritz Declaration, the European ministers called on the Commission to provide clearer legal guidelines on the application of EU law to sport organisations concerning the highest priority problems they face, thereby paying due attention to the specific characteristics of sport and noting the concerns and difficulties encountered by international, European and national sport organisations in governing their sport. This study will enable the Commission to answer the EU sport ministers' call.

The Court of Justice of the European Union expressly determined in the case of *Ruckdeschel* that the general principle of equality is one of the fundamental principles of EU law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified. With this statement, the Court of Justice has instituted a superior rule of law with general application. The fundamental principle of equal treatment finds specific expression, in particular, in the general prohibition of any discrimination on grounds of nationality, as laid down in Article 18 TFEU and further specified in Articles 45, 49 and 56 TFEU.

The prohibition of discrimination on grounds of nationality has already been applied on several occasions to the sports sector. It is now established case law that sport falls under the scope of application of the Treaty in so far as it constitutes an economic activity. The Court of Justice made this particular statement in *Walrave and Koch*, the first ever Court ruling on a sports issue, a case which turned around nationality discrimination in cycling. The Court displayed sensitivity towards the specificity of sport, which was later officially recognized in the Nice Declaration on Sport, ruling that the prohibition of nationality discrimination does not preclude rules or practices excluding foreign players from participation in certain matches for reasons which are not of an economic nature and are thus of purely sporting interest.

The Court has consistently reaffirmed this restriction on the scope of EU law in subsequent case law (e.g. *Donà*, *Bosman*, *Deliège*), adding that such rules of 'purely sporting interest' must remain limited to their proper objectives. This has for a long time offered matches between national teams shelter from the application of the Treaty free movement and competition rules. In its recent *Meca-Medina* ruling, the Court of Justice refined this approach in a competition law context, in practice dismantling the concept of rules of purely sporting interest but replacing the idea with a new test. The Court held that for the purposes of the application of the competition law rules to a particular case, account must firstly be taken of the overall context in which the decision was taken or produces its effects and, more specifically, of its objectives; subsequently, it has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them. These findings can be transposed to the free movement context. It constitutes a new standard by which the Court of Justice of the European Union will in the future evaluate sports rules and practices.

The Court has also dealt with nationality discrimination at club level in sport. So far, it has always firmly branded these discriminatory measures as incompatible with EU law. In the wake of the judgments in *Donà* and *Bosman* there appears to be limited room for sporting federations to treat domestic players more favourably than foreign players who are

protected by EU law. The decisions in *Kolpak* and *Simutenkov* have made it clear that third-country nationals who are legally residing in a host Member State and can also often rely upon a directly effective equal treatment provisions contained in international agreements concluded between the EU and the third-country from which they originate. In these cases, the Court categorically held that the justificatory arguments relating to the maintenance of a traditional link between a club and its country or the creation of a sufficient pool of players for the national team were not such as to preserve the contested nationality clauses.

However, by the same token, the Court also acknowledged that 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. The Court has thus not completely shut the door to all nationality clauses but has left it to the self-regulatory autonomy of the sporting associations to elaborate rules or practices at club level that are compatible with the requirements of EU law. The European Football Association UEFA has made use of this opportunity to introduce the so-called '4+4' or 'home-grown' rule, which requires clubs to include in their teams a minimum number of domestically trained players. The CJEU has not yet pronounced on this rule, which has already received support from the European Commission and the European Parliament. Conversely, both European institutions appeared reluctant towards the proposal of World Football Association FIFA to gradually introduce the '6+5' rule, requiring football teams to start official matches with minimum 6 players eligible to play for the national team of the club. This was generally regarded as unjustifiable discrimination. Nevertheless, in the 2008 Biarritz Declaration of the sports ministers of the European Union, the ministers clearly expressed their interest in further discussion on the initiatives of international federations to encourage the teams of professional clubs to develop the presence of athletes capable of qualifying for national teams, in order to strengthen the regional and national roots of professional clubs, albeit in compliance with EU law. Despite extensive jurisprudence and countless discussions at political level, the issue of nationality clauses even in team sports has thus not yet been settled.

Until now, the situation with regard to equal treatment of non-nationals in individual sporting disciplines has been the subject of much less debate and legal scrutiny. Traditionally, individual sports have been organised on a national basis with one sports federation organising its respective sport within its territory. This has endowed sport with a distinctly national character. The development of an internal market supported by free movement and citizenship rights has the potential to call into question this traditional feature of the so-called 'European model of sport'. This is generating debate amongst some Member States and sports organizations who are concerned for the purity of national competitions should EU non-discrimination law apply to their constitutional arrangements. For example, for cultural reasons it has been suggested that the conferment of 'national champion' titles should be reserved for nationals of the Member State within which the competition takes place. There is also concern at the prospect of some athletes being able to take part in the national championships of more than one country. Eligibility rules for international competitions and championships that are based on the representation of states (legal nationality), are logically a (co)determining factor for the nationality of sports persons in competitions at the national level that are qualifiers for these international competitions.

Rules designed to maintain the purity of national competitions can lead to the adoption of discriminatory measures. For example, with effect from March 2008 the Belgian Swimming Federation adopted new rules excluding non-nationals from participating in national swimming championships in Belgium. The report provides a comprehensive list

* Study on *The Equal Treatment of Non-Nationals in Individual Sports Competitions*, commissioned by the European Commission to the T.M.C. Asser Institute, Edge Hill and Leiden

Universities, December 2010. The Study was presented by Prof. Van den Bogaert (Leiden University) at the EU Sport Forum in Budapest (Hungary) on 20-22 February 2011.

of such measures and the sports in which these restrictions present themselves. Some sports raise specific issues in this respect. For example, the participation of non-nationals in the national championships of sports with direct elimination, such as tennis or fencing, may exert a more significant impact on the outcome of the competition than in other sports. Furthermore, the report will specify the level at which the discriminatory provisions are adopted. In determining whether the discriminatory measures involve access to sports, the conditions relating to the actual practice of sports, the determination of national records, the award of medals or titles, or any other aspect of the sport, the report will investigate the objectives pursued by these measures and the consequences on each sport of removing the restrictions. In doing so, the report will comprehensively enquire into the ongoing debate within the sports movement concerning the definition of the 'specificity of sport' and its application in EU law to both the economic and non-economic aspects of sport. This will allow for the presentation of a typological analysis of the discriminatory measures identified.

This typology against which the directly or indirectly discriminatory measures identified will be measured will be essentially the same as in the context of discriminatory measures at club level and will primarily consist of the Treaty rules on freedom of movement. Furthermore, the Treaty provisions on Union citizenship, which is destined to be the fundamental status of nationals of the EU Member States (*Grzelczyk*) will duly be regarded in this respect. According to settled case-law, EU citizens lawfully resident in the territory of a host Member State who find themselves in the same situation as home State nationals can rely on Article 18 TFEU to receive the same treatment in law irrespective of their nationality in all situations which fall within the scope *ratione materiae* of EU law. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 21 TFEU. In addition, where and whenever necessary, also instruments of EU secondary legislation such as, in particular, Directive 2004/38 on the rights of citizens and their family members to move and reside in the EU and Regulation 1612/68 will be taken into consideration. Essentially, all discriminatory rules will be grouped in four different categories: firstly rules of purely sporting interest; secondly, rules which are inherent in the organisation of the sport and necessary to pursue the objectives outlined and which therefore do not constitute a restriction of EU law; thirdly, those rules which are discriminatory but capable of justification and proportionate; and finally those rules which are discriminatory and cannot be justified and must therefore be dismissed.

Additionally, the report will undertake an assessment of the likely impact of the Lisbon Treaty which establishes sport as a competence of the EU. Article 165(1) TFEU provides 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'. Article 165(2) adds that Union actions 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'. The likely impact of these provisions on the jurisprudence of the Court will be considered. In particular, the report will consider whether these provisions constitute the legal basis for eliminating the discrimination in question or a means of insulating such measures.

Methodology

In the first phase of the Study, the national experts in the 27 EU Member States were asked to complete the following questionnaire:

A. Discriminatory measures in sports (competition) regulations

1. Please, provide a full evaluation of the situation in your country concerning the provisions in sports (competition) regulations that are discriminatory based on nationality in the sports disciplines selected, and relating to access and all other aspects of individual sports competitions.
2. Please, specify, in particular, the level at which the discriminatory

provisions identified are adopted (national, regional or local sports federations) and indicate whether they are imposed at lower levels of this pyramid-shaped hierarchy.

3. Please, provide information regarding any regulatory provisions that are discriminatory on grounds of nationality established under public administrative decision.

B. Typology analysis of the discriminatory measures identified

- 1) Please, indicate whether the discriminatory measures involve access to sports (participation in competitions), conditions relating to the actual practice of sports, the award of medals and titles, etc.
- 2) Please, list the various criteria that hamper access to competitions either directly or indirectly.
- 3) Please, present a detailed list of the various objectives identified as underlying the establishment of discriminatory measures. Particular attention shall be given to the selection of national champions, determining national records, the award of titles and medals to nationals, avoiding the award of national titles to athletes in different Member States, etc.

For the purposes of this Study the term "non-nationals" was defined as follows:

"citizens, their family members, and workers from other EU Member States, as well as citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of the Member States (third country nationals)."

The term "individual sports competitions" was defined as follows:

"national competitions involving individual sportspersons, regarding sports disciplines practiced in a professional or amateur capacity within the European Union."

The individual ("non-team") sports disciplines that are covered in the Study, are the Olympic sports disciplines concerned (Winter and Summer Olympics). There are 26 Olympic sports which are whether individual disciplines themselves or to which individual disciplines belong: triathlon, modern pentathlon, tennis, table tennis, badminton, rowing, canoe/kayak, athletics, aquatics, archery, boxing, judo, shooting, weightlifting, wrestling, taekwondo, equestrian, gymnastics, skating, luge, biathlon, bobsleigh, cycling, skiing, fencing and sailing (see: www.olympic.org/en/content/Sports/).

Several national experts reported that they had encountered considerable problems in collecting the pertinent information, in particular regarding the *ratio* of the discriminatory measures identified. In a number of cases they could not acquire of the relevant competition regulations in particular sports which turned out to be not available on the Internet (otherwise than association statutes and other basic documents, competition regulations are "secondary law"). This was true especially in the smaller EU countries there is no national governing body which applies mainly to Winter sports. It was reported for example that some sport associations did not respond to the efforts made by the national expert, either by phone or by e-mail. Sometimes the national expert was informed that the respondent person was not available or that the expert would receive an answer per e-mail at a later time, without then receiving any information from such associations. In general, in many cases the national expert was not able to identify the reason for certain discriminatory provisions of the associations. For example, it is reported that, when directly asking for the reason of a specific provision, the usual answers were: "there have to be some kind of criteria", "we do not know", "this is simply the way it is", or "the same provision exists also in other countries". Thus, even if such rules were justifiable, no justification has been put forward. In this context, it should be stated that the collection of information is problematic because competition regulations are not generally accompanied by any official explanatory documents. Sports regulations cannot be compared with national public legislation in this respect. Sports organisations are apart from a very few large ones (major professional sports) in this respect not very professional: they are vol-

untary organisations that lack administrative manpower and any tradition of legislative documentation. Moreover, the average sports official and the average citizen tend to take accepted sports rules at face value.

Content of the Study

Chapter II presents the general framework of EU free movement law, citizenship and non-discrimination and its application to sport. The relevant rules require potentially restrictive measures to be justified and entitle EU citizens and their family members to equal treatment. Although some sports-related case law permits limited instances of nationality discrimination, these rules will often place heavy burdens on sports governing bodies to demonstrate that restrictive measures are both justifiable and proportionate. Where they are not, such rules cannot be applied to individuals who benefit from rights under EU law.

Chapter III provides an overview of the information regarding the 27 EU Member States. This information is presented per country, in an alphabetical order. The national reports are published in full in the Annex to the Report (available in digital format). Each country report is arranged as follows: First, the information is summarized in a diagram (typology per category) in which the information is classified according to several categories. These categories range from “unrestricted access to national championship” which implies no discrimination/full equal treatment of non-nationals to “no access to national championship” which implies full discrimination/non-equal treatment of non-nationals. The other categories are: unrestricted access to national competitions; access subject to club membership; access to national championship, but not able to establish national record; access to national championship, but not able to become national champion; access to national championship, but not able to score points or receive medals; Residence requirements; no access to local and regional championships/competitions for qualification to national championship”. As to the difference between the concepts of “national championship” and “national competitions” it is observed that “national competitions” refers to all remaining competitions which are not explicitly included in the category of “national championship”. With regard to the category “access subject to membership of club” it is observed that this category concerns provisions that the sportsperson is to be licensed or certificated by the national association before he or she can participate in competitions. This may also involve clearance from the home national association of the individual to provide their agreement and additionally in certain situations to have clearance from the relevant international sports federation. For practical purposes, two further categories are added: “Sports without discriminatory provisions”, which means that in the competition regulations not any such provisions were found; and “No information on competition regulations available”.

Then, under the diagram the relevant provisions in the competition regulations of the respective sports are listed per category. The numbers between brackets after the provisions refer to the corresponding lines in the full text of the national reports in the Annex to the Report (in the case of Austria these numbers are not added because of the layout of the national report). Finally, a summary regarding “Participation in national championship” is added to each country report. The Chapter is concluded by an integrated comparative overview of the diagrams per country, and a diagram regarding participation in national championship for the European Union at large.

Chapter IV presents the information in relation to each sport in alphabetical order. Each sports report is arranged as follows: First the information is summarized in a diagram (typology per category). Then, under the diagram the relevant provisions in the competition regulations of the sports governing bodies in the 27 EU Member States are listed per category. The final summary corresponds to the summary in the chap-

ters on country reports *mutatis mutandis*. The Chapter is concluded by an integrated comparative overview of the diagrams per sport. Logically, the diagram regarding participation in national championship for the European Union at large is repeated here.

Chapter V on categories of rationales contains separate information from the various national reports regarding types of objectives identified as underlying the establishment of discriminatory (and non-discriminatory) measures.

Finally, Chapter VI contains the analysis and recommendations of the Study. This draws upon the legal framework and the national reports to identify key issues arising from the current treatment of non-nationals in sporting competitions.

Included with this Study is a CD-ROM containing the Annex with the full text of the national reports.

Chapter II: Freedom of Movement: General Principles and their Application to Sport

1. General EU Law Framework on Infringements of EU Rules on Freedom of Movement, Citizenship and Non-Discrimination

1.1. Introduction and personal scope of application

This chapter examines the general legal framework for assessing potential infringements of EU law by national measures, specifically as discrimination based on nationality is concerned. First it explores the general principle of equal treatment and non-discrimination on the basis of nationality as found in art. 18 TFEU. It then considers the rules of free movement, which form a *lex specialis* to the general principle of non-discrimination also going into the grounds that exist to possibly justify direct or indirect discrimination. Finally, the concept of EU citizenship is analyzed, as this rapidly developing construct also grants rights against discrimination.

By way of preliminary, it must be observed that it is settled case-law that Articles 45 and 56 TFEU extend not only to the actions of public authorities, but also to rules of any other nature aimed at regulating gainful employment in a collective manner.¹ The Court of Justice of the EU has made it clear that since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions laid down by Article 45 TFEU to acts of a public authority would risk creating inequality in its application.²

EU nationals who engage in a professional sporting activity can generally invoke the Treaty provisions on free movement of workers - when they work in an employed capacity³ - or freedom to provide services - when they are active as self-employed⁴ - to enforce their rights. The EU citizenship rights are particularly relevant for amateur sportsmen and -women who want to preserve their rights.

Conversely, third-country nationals cannot invoke the EU Treaty provisions. However, that does not mean that they may never enjoy any protection under EU law. First, they do enjoy derived rights as family members of an EU citizen who has made use of his free movement rights under Regulation 1612/68 and Directive 2004/38. Second, they may autonomously benefit from the rights conferred upon them in international agreements concluded between the EU and their country of origin. For example, in *Simutenkov*, it was held by the Court of Justice of the EU that a Russian football player, legally resident and legally employed in a host Member State, could directly rely upon the non-discrimination clause concerning working conditions laid down in the Partnership Agreement with Russia in relation to host Member State nationals.⁵ The question whether, and if so, which rights can be relied upon by third-country nationals in this respect cannot be answered *in abstracto* and will have to be evaluated on a case-by-case basis.

1.2. Infringement of EU Law

1.2.1. The principle of equal treatment and non-discrimination

The general principle of equality is ‘one of the fundamental principles of Community law,’ as the Court of Justice of the EU expressly determined in the case of *Ruckdeschel*.⁶ This principle requires that similar situations shall not be treated differently, unless differentiation is justified. With this statement, the Court of Justice has instituted a superior

1 Case C-414/93 *Bosman*, [1995] ECR I-4921, para. 82.

2 For a far reaching application of this logic see case C-281/98 *Angonese*, [2000] ECR I-4139 para 36.

3 See Case 325/08 *Bernard* nyr.

4 Cases C-51/96 & C-191/97 *Deliège* [2000] ECR I-2549.

5 See especially Case C-265/03 *Simutenkov* [2005] ECR I-2579.

6 Joined cases 117/76 and 161/77 *Ruckdeschel v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, par. 7.

7 Lenaerts, “Gelijke behandeling in het Gemeenschapsrecht”, in Alen & Lemmens (eds.), *Gelijkheid en Non-*

rule of law with general application.⁷ This fundamental principle of equal treatment finds specific expression, in particular, in the general prohibition of any discrimination on grounds of nationality, as laid down in Article 18 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU). It is further specified in Articles 45, 49 and 56 TFEU.

Article 18, situated in Part Two on Non-Discrimination and Citizenship of the TFEU, generally provides that 'within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited...' Conceptually, the principle of non-discrimination is generally perceived in terms of arbitrarily or unjustifiable unequal treatment between nationals of the host Member State and nationals of the other Member States within the scope of EU law. Prohibited discrimination on grounds of nationality will also occur where a Member State treats nationals of a given Member State more favourably than the nationals of another Member State of the European Union.⁸ On several occasions, the Court has held that the general principle of non-discrimination contained in Article 18 TFEU can only be invoked independently of the other Treaty provisions in situations where no more specific Treaty prohibition of discrimination, such as a free movement right, applies.⁹ It has, however, also consistently stressed that these more specific Treaty prohibitions of nationality discrimination are to be interpreted in the light of the general prohibition of Article 18 TFEU.¹⁰ Furthermore, it also decided that national measures incompatible with the provisions laid down in the Article 45, 49 and 56 TFEU also automatically and inevitably constitute a violation of Article 18 TFEU.¹¹

As will be discussed further below, Article 18 TFEU also links to the concept of citizenship, which prohibits discrimination between all those exercising their EU-citizenship rights. First, however, it is necessary to look at the different freedoms individually.

1.2.1.1. Free movement of workers

Article 45(2) TFEU stipulates that the freedom of movement of workers 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. It is clear from the wording of this provision that the principle of non-discrimination forms the conceptual basis for the application of the free movement of workers. Article 45(3) further provides that '(I)t shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

- a to accept offers of employment actually made;
- b to move freely within the territory of Member States for this purpose;
- c to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
- d to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.'

Discriminatie. Verslagen voortgebracht op een colloquium te Leuven op 10 oktober 1990 (Kluwer, 1991), 50.

8 Schermers and Waelbroeck, *Judicial Protection in the European Communities* (Kluwer, 1992), 121; Handoll, *Free Movement of Persons in the European Union* (Wiley and Sons, 1995) at 133.

9 See, inter alia, Case C-10/90 *Masgio v Bundesknappschaft* [1991] ECR I-1119, par. 12; Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-505, par. 6; Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783.

10 Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195.

11 Case 305/87 *Commission v Greece* [1989] ECR 1461, par. 12.

12 Case 175/78 *R v Saunders* [1979] ECR 1129.

13 Article 61 TFEU provides that "As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56". In this respect, it must be acknowledged though that the Court of Justice seems to have never invoked this provision to interpret Article 49 EC: see Martin, "Discriminations", 'entraves' et 'raisons impérieuses' dans le Traité CE: trois concepts en quête d'identité", *o.c.*, at 562. See also Warner AG in Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, and the Court's subsequent rejection of his opinion in par. 16 of its judgment.

The Court has made it clear in *Saunders*¹² that the principle of non-discrimination laid down in Article 45(2) also covers the rights and freedoms guaranteed by Article 45(3).

1.2.1.2. Freedom to provide services

Article 56 TFEU provides that 'Within the framework of the provisions set out below, *restrictions* on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.' Subsequently, Article 57 TFEU stipulates then that 'Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*' (emphasis added). Initially, the wording of the respective Articles 56 and 57 TFEU may thus have given rise to some doubts or ambivalence as to the specific role or importance attributed to the principle of non-discrimination within the specific context of the freedom to provide services. However, the text of Article 61 TFEU¹³ and the definition of restrictions in the General Programme for the abolition of restrictions of freedom to provide services¹⁴ leave no doubt that the prohibition of discrimination on grounds of nationality in effect lies at the basis of the provisions concerning this fundamental freedom. This conclusion is further strengthened by the case law of the Court of Justice on the matter.¹⁵

1.2.1.3. Freedom of establishment

Article 49 TFEU provides: 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished. [...] Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter on capital.' As was the case with Articles 56-57 TFEU in the field of services, it cannot clearly be deduced from the wording of Article 49 TFEU which is the specific function of the principle of non-discrimination within the domain of establishment. In the first paragraph of Article 49, mention is made of the broader term 'restrictions', whereas in the second part of the Article the Treaty simply refers to 'the conditions laid down for its own nationals'. Be that as it may, in view of the parallel structure of the Articles and the identical concepts used in the two sets of provisions, the observations that were made in the field of services generally also hold true for Article 49 TFEU. The prohibition of discrimination on grounds of nationality therefore also forms the conceptual basis of the fundamental freedom of establishment. This conclusion is further corroborated by the provisions of the General Programme for the abolition of restrictions on freedom of establishment¹⁶ and has again also been confirmed in the case law of the Court of Justice.¹⁷

14 General Programme for the abolition of restrictions of freedom to provide services of 18 December 1961, *Official Journal of 15 January 1962, Special Editions, Second Series*, IX, p. 32: Restrictions are defined as "any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as a result of the application of such a provision, or of administrative practices, prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned." Furthermore, are also to be regarded as restrictions, "any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, where, although applica-

ble irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by foreign nationals" (Title III) (emphasis added).

15 Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, par. 25. It must be observed, however, that in paragraph 10 of the same decision, the Court already laid the foundations for a potentially broader approach in the future. Be that as it may, this observation does not detract anything from the fact that the Court views the freedom to provide services as a specific expression of the general principle of equal treatment or non-discrimination. See also Case 39/75 *Coenen v Sociaal-Economische Raad* [1975] ECR 1547.

1.2.2. Types of discrimination

Under EU law, there are two forms of discrimination on grounds of nationality: direct and indirect discrimination. Both are in principle prohibited. Direct discrimination involves different treatment of persons who are in a comparable situation explicitly on grounds of nationality. Nationality is the ground for the differentiation. A directly discriminatory measure leads to different treatment in law and in fact.¹⁸

Indirect discrimination entails different treatment of persons who are in a comparable situation based on an apparently neutral ground. There must actually or potentially be a particular disadvantage for foreigners. An indirectly discriminatory measure is equally applicable in law, but leads to different treatment in *fact*. Language or residence requirements are frequently used examples of indirectly discriminatory conduct.¹⁹ In the case of *O'Flynn*,²⁰ the Court of Justice defined the concept of indirect discrimination, holding that 'conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers,²¹ or the great majority of those affected are migrant workers,²² where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers,²³ or where there is a risk that they may operate to the particular detriment of migrant workers.'²⁴ Discrimination, whether direct or indirect, will furthermore not only be found where two groups which are comparable in relevant ways are treated differently, but also where groups which are not comparable are treated in the same way.²⁵

1.2.3. The concept of restriction

Having developed the distinction between direct and indirect discrimination, the Court of Justice subsequently broadened the scope of application of the free movement provisions so as to include also genuinely non-discriminatory measures. In cases such as *Süger*, *Kraus* and *Bosman*, the Court stipulated that 'any measure which is liable to hamper, or make less attractive, the exercise of the right to free movement' may amount to a restriction to the freedom of movement guaranteed in the Treaty. As a result, even non-discriminatory measures may conflict with the Treaty right to free movement, requiring a justification under EU law.

In summary, there are three types of infringements of the free movement rights in the Treaty: 1) directly discriminatory measures, 2) indirectly discriminatory measures and 3) restrictions.

1.3. The issue of justification

Once it has been established that a given measure constitutes a restriction of the right to freedom of movement, it must be assessed whether that restriction can be justified, or whether it forms a violation of EU law. Concretely, this means that it must be examined 1) whether the disputed measure pursues a legitimate goal; and 2) whether it satisfies the requirements of the proportionality test.

Generally speaking, there are two different types of justification. The first category includes the derogations which are expressly provided in Treaty. The second consists of the objective justifications which have been recognised by the Court of Justice of the EU in its case law, under the so-called 'rule of reason' doctrine.

The precise scope of these exceptions to the fundamental freedoms has been further outlined in Directive 2004/38 and/or in the case law of the Court of Justice of the EU.²⁶ Generally, these concepts must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without being subject to control by the EU institutions.²⁷ The competent national authorities do, however, retain an area of discretion within the limits imposed by the Treaty in this matter.²⁸

1.3.1. Express treaty derogations

Article 45(3) TFEU stipulates that the free movement rights are 'subject to limitations justified on grounds of public policy, public security or public health.' Articles 46(1) and 55 EC contain equal provisions.²⁹ These grounds of justification 'shall not be invoked to service economic ends' and 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.'³⁰ The Court added as a rule that 'recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.'³¹

According to Article 45(4) TFEU, the provisions on freedom of movement of workers 'shall not apply to employment in the public service.' In line with its approach of the derogations contained in Article 45(3) TFEU, the Court has stressed that also this exception 'cannot have a scope going beyond the aim in view of which this derogation was included.'³² The Court has ruled that the interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting admission of foreign nationals to certain activities in the public service. In *Commission v Belgium*,³³ the Court stipulated that Article 45(4) EC 'removes from the ambit of Article 45(1) to (3) a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities', explaining that 'such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.'³⁴ These two requirements seem to be cumulative rather than alternative.³⁵ In 1988, the Commission endeavoured to provide some practical guidance on the sorts of State functions which it considered would or would not benefit from the exception of Article 39(4):³⁶ the armed forces, police, judiciary, tax authorities, and certain public bodies engaged in prepar-

16 General Programme for the abolition of restrictions on freedom of establishment, *OJ Special Edition*, Second Series, IX, 7.

17 Case 2/74 *Reyners v Belgian State* [1974] ECR 631.

18 See further Davies, G., *Nationality Discrimination in the European Internal Market* (Kluwer, 2003) 22-31.

19 Clearly the many residence requirements found in national regulation of sports therefore also require scrutiny.

20 Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR 2631.

21 See *inter alia* Case 41/84 *Pinna v Caisse d'Allocations Familiales de la Savoie* [1986] ECR I, par. 24; Case 33/88 *Allué and Another v Università degli Studi di Venezia* [1989] ECR 1591, par. 12; *Le Manoir*, par. 11.

22 See Case C-279/89 *Commission v United Kingdom* [1992] ECR I-5785, par. 42; Case C-272/92 *Spotti v Freistaat Bayern* [1993] ECR I-5185, par. 18.

23 See Case *Commission v Luxembourg*, par.

10; Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, par. 23.

24 See Case C-175/88 *Biehl v Administration des Contributions* [1990] ECR I-1779, par. 14; Case C-204/90 *Bachmann v Belgian State* [1992] ECR I-249, par. 9.

25 Case C-356/98 *Kaba v Home Secretary* [2000] ECR I-2623.

26 See, for more details, Hall, "The ECHR and Public Policy Exceptions to the Free Movement of Workers in the EEC Treaty", 16 *EL Rev.* (1991) 466.

27 See Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, par. 18.

28 *Van Duyn*, par. 18. In subsequent case law, it subtly qualified this statement, ruling that Member States "must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States." See e.g. Cases 115 and

116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, par. 7.

29 Within the domain of goods, more grounds of justification are available. Article 30 EC provides that "the provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of individual property." See, *inter alia*, Case 34/79 *R v Henn and Darby* [1979] ECR 3795; Case 231/83 *Cullet v Centre Leclerc* [1985] ECR 305; Case 72/83 *Campus Oil Ltd. v Ministry for Industry and Energy* [1984] ECR 272; Case 251/78 *Denkavit Futtermittel v Minister für Ernährung, Landwirtschaft und Forsten des Landes* [1979] ECR 3369; Case 78/70 *Deutsche*

Grammophon v Metro [1971] ECR 487.

30 Article 27 Directive 2004/38. See also Case 30/77 *R v Bouchereau* [1977] ECR 1999, paras. 28-29.

31 Article 27 Directive 2004/38. In Case 131/79 *R v Secretary of State for Home Affairs, ex parte Mario Santillo* [1980] ECR 1585, par. 18, the Court considered it essential that "the social danger resulting from a foreigner's presence should be assessed at the very time when the decision ordering expulsion is made against him as the factors to be taken into account, particularly those concerning his conduct, are likely to change in the course of time." See also Case C-348/96 *Criminal proceedings against Calfa* [1999] ECR I-II.

32 Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, par. 4.

33 Case 149/79 *Commission v Belgium* [1980] ECR 3881.

34 *Commission v Belgium*, par. 10. In the

ing or monitoring legal acts were mentioned as examples of the former, whereas those which probably would not included nursing, teaching and non-military research in public establishments. In many situations however, it remains unclear what does and what does not constitute a post reserved for Member State nationals.³⁷

The 'official authority' exception³⁸ of Article 62 TFEU can be legitimately considered as the functional equivalent of the 'public service' exception in the domain of the free movement of workers. This official authority exception can also not be given a scope which would exceed the objective for which this exemption clause was inserted.³⁹ The Court has limited the right of Member States to exclude non-nationals from taking up functions involving the exercise of official authority to 'those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority.'⁴⁰ It further specified that an extension of this exception to a whole profession would be possible 'only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.'⁴¹

1.3.2. Objective justification and the 'rule of reason' doctrine

Apart from this limitative category of express treaty derogations, the Court of Justice has also elaborated in its case law an additional, open category of grounds for justification based on imperative requirements in the general interest. This way, national measures which cannot be justified by one of the express Treaty derogations but nevertheless serve objectively legitimate purposes can be *safeguarded*. In legal literature, this idea is often referred to as the 'rule of reason'.⁴² Just as with the express treaty derogations, the objective justifications must be interpreted restrictively. Specifically with regard to sports, the Court has e.g. already accepted the following objectives as legitimate: i) the need to encourage the training and development of young players, ii) the maintenance of a certain sporting and financial balance between clubs, or iii) the need to ensure the regularity of a competition and the uncertainty of results.

1.3.3. Which derogations for which type of discrimination?

An important issue is of course which kind of derogations can be invoked so as to cover which type of discriminatory measures. According to an orthodox view, both directly and indirectly discriminatory measures can both be justified by the express Treaty exceptions, whereas indirectly discriminatory measures can only be justified by the judicially created overriding requirements in the general interest. The proverbial exceptional case that confirms the rule and perhaps a number of implicit examples notwithstanding⁴³, the Court of Justice of the EU has always

held on to this orthodoxy.⁴⁴ There is, however, an increasing school of thought in legal doctrine that argues that that also directly discriminatory measures should be open to justification by overriding requirements.⁴⁵ This school argues that even if extra-Treaty grounds were to be allowed to justify directly discriminatory measures, this would not significantly change current practice since it will be difficult to demonstrate that a directly discriminatory measure is proportionate.

If the orthodox view were to be followed in this study, this would mean that most, if not all, accepted justification grounds in previous sports related cases cannot be invoked to justify the directly discriminatory measures imposed by sporting federations. This would only be different if one were to adhere to the more progressive school of thought, and would endorse a theoretical framework that less emphatically restricts objective justification to indirectly discriminatory measures.

1.3.4. The principle of proportionality

Finally, in order to be justifiable, a contested national measure must also comply with the principle of proportionality.⁴⁶ This principle, which is one of the general principles of EU law, requires that the national measures under investigation must be 'suitable for securing the attainment of the objectives which they pursue and must not go beyond what is necessary in order to attain it.'⁴⁷ Concretely, this implies that the Court will firstly verify the appropriateness of the means chosen to achieve the end, and will secondly review whether it is not possible to conceive an alternative measure which is less restrictive of the freedom of movement under the given circumstances and nevertheless capable of producing the same result.⁴⁸ It is sometimes suggested that the test of proportionality contains a third element, i.e. even if there are no less restrictive alternatives, it must still be established that the contested measure does not have an excessive or disproportionate effect,⁴⁹ or that the disadvantage caused by the measure is proportionate to the benefit of the aims pursued,⁵⁰ but in practice the Court does not really seem to maintain a strict dividing line between the second and the third element.⁵¹

Essentially, the test of proportionality thus consists of a *balancing exercise* between the aims pursued by the national measure and its restrictive effects on the exercise of the right to freedom of movement. Consequently, it is not uncommon for the Court to begin a judgment by observing that a measure under challenge which is liable to hinder the right to freedom of movement pursues a legitimate aim and therefore in principle deserves to be justified, only to conclude that the measure does not comply with the principle of proportionality.⁵² In some instances, the Court itself applies the principle of proportionality to the factual circumstances of the particular case. In other situations, the Court wisely leaves the issue to be decided by the national courts. In this respect, Advocate General Jacobs stipulated that 'it may be difficult always to draw the dividing line in the right place', expressing neverthe-

words of Mancini AG in Case 307/84 *Commission v France* [1986] ECR 1725, at 1727-1733: "In short, in order to be made inaccessible to nationals of another State, it is not sufficient for the duties inherent in the post at issue to be directed specifically towards public objectives which influence the conduct and action of private individuals. Those who occupy the post must don full battle dress: in non-metaphorical terms, the duties must involve acts of will which affect private individuals by requiring their obedience or, in the event of disobedience, by compelling them to comply."

³⁵ See for example, O'Keeffe, "Judicial Interpretation of the Public Service Exception to the Free Movement of Workers", in Curtin and O'Keeffe (eds.), *Constitutional Adjudication in the European Community and National Law* (Butterworths, 1992) 89, at 96; or Léger AG in Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, par. 18. ³⁶ (1988) OJ C 72/2.

³⁷ It is argued that Member States could

'abuse' unequivocal, straightforward legislation with the purpose of deviating from or undermining the Court's case law. Furthermore, it is observed that "such legislation could ossify the process of creating a 'citizen's Europe". See Mancini, "The Free Movement of Workers in the Case-Law of the European Court of Justice" in Curtin & O'Keeffe (eds.), *o.c.*, 67; Craig & de Burca, *EU Law. Text, Cases & Materials*, at 724-727.

³⁸ In his opinion in the case of *Reyners*, Advocate General Mayras defined official authority as "that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens." See Mayras AG in Case 2/74 *Reyners v Belgium* [1974] ECR 631, at 664.

³⁹ Case 2/74 *Reyners v Belgium* [1974] ECR 631, par. 43. For other examples, see Case C-306/89 *Commission v Greece* [1991] ECR I-5863 on the activities of traffic-accident experts; Case C-272/91

Commission v Italy [1994] ECR I-1409 on operating a computerisation system for a national lottery; Case C-42/92 *Thijssen v Controledienst voor de Verzekeringen* [1993] ECR I-4047 on commissioners of insurance companies.

⁴⁰ *Reyners*, par. 45.

⁴¹ *Reyners*, par. 46. Conversely, it declared that the extension is not possible "when, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole." (par. 47)

⁴² For more elaboration on this issue of objective justification, consult Scott, "Mandatory or Imperative Requirements in the EU and the WTO, in Barnard and Scott (eds.), *The Legal Foundations of the Single market: Unpacking the Premises* (Hart, 2002) 269.

⁴³ Case C-2/90 *Walloon Waste*, [1992] ECR I-4431, and Case C-414/93 *Bosman*, [1995] ECR I-4921.

⁴⁴ Case C-64/08 *Engelmann* [2010] nyr.

⁴⁵ See e.g. C. Barnard, *The Substantive Law*

of the EU: The Four Freedoms 3rd ed. (OUP, Oxford, 2010).

⁴⁶ In general, see Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart 1999)

⁴⁷ See *inter alia*, Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, paras. 29-30; *Gebhard*, par. 37.

⁴⁸ Tridimas, "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny", in Ellis, *o.c.*, 65, at 68. See for a practical example Case 361/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.

⁴⁹ de Burca, "The Principle of Proportionality and its Application in EC Law", 13 *YBEL* (1993) 105.

⁵⁰ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

⁵¹ Van Gerven, "The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe", in Ellis, *o.c.*, 37.

⁵² Case C-193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chrysanthakopoulos* [1996] ECR I-929.

less the opinion that it may be preferable for the Court to make the final assessment itself when it has the necessary technical expertise and has sufficient knowledge of the facts.⁵³

Due to the open texture and balancing element of proportionality, it is of central importance to also appreciate the significant freedom that the Court of Justice has in *how* to apply proportionality. Very much does therefore depend on the *level of scrutiny* the Court chooses to apply, and the margin it leaves to Member States to strike a balance between restrictions and justifications. Significant differences can be seen between sectors here, with the Court generally leaving a significant margin where sports are concerned.⁵⁴

1.4. EU Citizenship- A nascent fifth freedom

The classical free movement rights form the central and best developed body of rules specifically implementing the principle of equal treatment and non-discrimination. These freedoms, together with the gradually refined framework for potentially justifying any restrictions to them, therefore form the bulk of the rules against which national sports regulation must be tested.

EU-citizenship, however, forms an increasingly important addition to these classical free movement rights. Since its inception in the Treaty of Maastricht⁵⁵ the Court of Justice has rather aggressively developed the concept of Union Citizenship, especially by linking it with the principle of equal treatment.⁵⁶ As a result, individuals exercising their citizenship rights are entitled to equal treatment even where they do not exercise the economic freedoms of movement. In addition, these citizenships rights have been further developed in secondary legislation, first and foremost in the "Citizenship directive."⁵⁷ As a result, citizenship now forms an essential element of the equal treatment framework.⁵⁸

After Lisbon citizenship of the Union is granted under art. 9 TEU.⁵⁹ As before Lisbon, every national of a Member State automatically also is a citizen of the Union, enjoying the rights and benefits that come with that status.⁶⁰ This status itself is further established and developed by Articles 20 and 21 TFEU.⁶¹ Most importantly for this framework, Article 21 TFEU grants each EU-citizen "the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

The Court has firmly embraced this concept of citizenship, gradually developing it into something akin to a fifth freedom in its case law. A development defended by the now classic line that "Union Citizenship is destined to be the fundamental status of nationals of the Member States."⁶²

Two effects of citizenship are of central importance here. First, by exercising their citizenship rights, individuals fall under the ambit of EU law. Secondly, as a result, they not only have the rights directly flowing from citizenship itself, but also the right to equal treatment flowing from art. 18 TFEU. Both these effects will be discussed in more detail below.

1.4.1. Expanding the scope *ratione materiae* of EU law

An individual can only rely on EU rights, such as the right to equal treatment under Article 18 TFEU, when falling under the scope of the Treaty. By way of illustration, a French grocer selling a bottle of French wine to a French customer in France is not covered by EU law.⁶³ A German soccer player accepting a job in the English premier league, on the other hand, is using his free movement right as a worker, and therefore falls under the scope of EU law.

As discussed above, however, to fall under the scope of the free movement rights for workers or service providers one needs to be engaged in an *economic activity*. As a result, all those that are not economically active, such as most amateur athletes, fall *outside* the scope of classical free movement provisions, and thereby outside the scope of EU law in general.

Citizenship changes this picture by removing the requirement of economic activity, significantly expanding the scope of EU law. This is so because every EU-citizen has certain rights simply by being a citizen, without any economic activity being required. As elaborated below, every EU-citizen for instance has the right to move and reside in other Member States. By using these rights, that is simply by moving or residing in another Member State, an EU-citizen therefore also enters the scope of EU law, in the same way a worker does who accepts a job in another Member State. As a result that citizen receives all the protection and rights provided by EU law. Most importantly, of course, this includes the right not to be discriminated based on nationality as found in article 18 TFEU.

1.4.2. The right to equal treatment when exercising citizenship rights

Each EU citizen moving or residing in another Member State may not be discriminated, either directly or indirectly, based on his nationality.⁶⁴ As discussed above, this prohibition of discrimination also forms the core of classical free movement, albeit that with the notion of a 'restriction' free movement goes an important step beyond mere equal treatment. As a result, active EU-citizens receive a significant level of protection, making citizenship a sort of quasi-freedom.

The citizens' right to equal treatment comprises *all* measures that might affect the free exercise of the right to move and reside. No matter how "national", or unrelated to EU competences, if a national measure is capable of effects on the rights of an EU-citizen it cannot discriminate.⁶⁵ Considering this very broad interpretation followed by the Court of Justice, discrimination in the area of sports may clearly also be problematic from the perspective of citizenship. This is especially so as the concept of citizenship is still in development, meaning that more rights and protection might accrue to this status in the future.

1.4.3. Justifying restrictions on citizenship rights

As described in the general framework on free movement above, restrictions on free movement may be justified. To this end the Treaty contains specific exception clauses, and the Court of Justice has developed the 'rule of reason' doctrine. With EU-citizenship now almost forming a fifth freedom, the question arises whether restrictions on these citizen rights may be justified as well, or whether they are always prohibited.

53 Jacobs, "Recent Developments in the Principle of Proportionality in European Community Law", in Ellis, *o.c.*, 1, at 19-20.

54 See further below the specific framework on EU sports law.

55 The articles on citizenship were introduced after a Spanish proposal, and although believed by many to be hollow rhetoric have since developed into a force to be reckoned with. See for instance S.O'Leary, "The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship" (The Hague Kluwer, 1996) p. 18 a.o.

56 See for instance case C-413/99 *Baumgart* [2002] ECR I-7091 as a further example also see case C-200/02 *Chen* [2004] ECR I-9925.

57 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77. Also Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, to the extent that it is not repealed by art. 38 of 2004/38.

58 The Lisbon Treaty in fact even covers both in the same part two of the TFEU, adequately titled: "Non-discrimination and Citizenship of the Union".

59 Art. 9 TEU thereby already refers explicitly to equal treatment: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

60 In case of dual citizenship, of which only one is EU, other Member States have to accept Union Citizenship, with the associated rights, even where the non-EU nationality is dominant. See case C-369/90 *Micheletti* [1992] ECR I-4239, paragraph 14 a.o.

61 The former art. 17 and 18 EC.

62 First used in the classic case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31.

63 See for instance joined cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, and further on this notion of an internal situation A. Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe", 35 *IEL*, p. 43 a.o. (2008).

Nevertheless, the Court of Justice limits these effects by easily finding a transnational element, see for instance case C-370/90 *Singh* [1992] ECR I-4265, and, perhaps taking it too far, case C-60/00 *Carpenter* [2002] ECR I-6279. See however also the recent opinion of Sharpston AG of 30 September 2010 in Case C-34/09 *Gerardo Ruiz Zambrano* where she attacks this notion of a fully internal situation.

64 Case C-258/04 *Ioannidis* [2005] ECR I-8275, para. 26.

65 Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-148/02 *Garcia Avella* [2003] ECR I-11613; Case C-524/06 *Huber* [2008] ECR I-9705.

66 See however also the last sentence of art. 21 TFEU: "These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the

As the Treaty contains no specific exceptions,⁶⁶ any such exceptions had to be developed by the Court of Justice. Although there certainly is some uncertainty left on this point, the Court has, quite logically, chosen to apply, *mutatis mutandis*, its rule of reason approach, requiring for each restriction a legitimate aim which is pursued in a proportionate fashion.⁶⁷

The recent *Gottwald* judgment provides a clear illustration of this approach.⁶⁸ Mr. Gottwald, a German citizen, is severely disabled. Driving to his holiday destination in Austria he was fined for not having paid toll. As disabled persons ordinarily resident in Austria are exempt from this toll, Gottwald claimed that he, as an EU-citizen, should be exempt as well, and that not exempting him was a form of discrimination.

The Court of Justice acknowledged that such a residency requirement was a form of, in principle prohibited, indirect discrimination. It then continued, however, to state that: "Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions."⁶⁹ The Austrian measures were then found to have the combined legitimate objectives of promoting the mobility and integration of disabled persons and to ensure that there was a *connection* between the society of the Member State concerned and the recipient of a benefit.⁷⁰ The measures were, furthermore, also found to be proportionate to these objectives, especially since even individuals who regularly travel in Austria were in practice exempted.⁷¹ As a result, this clear limitation on citizenship and equal treatment was allowed.

1.4.4. Secondary legislation: the Citizens' Rights Directive

Directive 2004/38 further demarcates the rights of citizens and their family. Three types of residence rights thereby need to be distinguished, being the right to travel and short term residence (three months maximum), residence for more than three months, and permanent residence.

Free movement and short term residence up to three months are always allowed, as long as the citizen has a valid ID, and either does not become an unreasonable burden, *or* is employed, self-employed, or has a reasonable chance of finding a job.⁷²

Long term residence is regulated more strictly, and is granted to three groups of citizens.⁷³ First, the employed and self-employed.⁷⁴ Second, citizens who have "sufficient resources for themselves and their family members not to become a burden" and also have comprehensive sickness insurance.⁷⁵ Third, students with comprehensive sickness insurance and sufficient means not to become a burden for the duration of their studies also have a longer residence right.

The right to permanent residence is acquired after legal residence for five years.⁷⁶ Once acquired, no resource requirement applies anymore.⁷⁷

Now of primary importance for this framework is that for all three types of resident citizens, no discrimination is allowed. Firstly because, as discussed above, by exercising their citizenship rights, individuals fall under the protection of art. 18 TFEU. The Citizenship Directive, however, also contains its own specific prohibition of discrimination based on nationality in art. 24(1):

"1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family mem-

bers who are not nationals of a Member State and who have the right of residence or permanent residence."⁷⁸

1.4.4. The rights of family members of active citizens

Of further potential relevance for this framework is that the family members of EU citizens also derive rights from their relation to the citizen. Clearly these rights become relevant where a not so sportive EU citizen brings along more sports-oriented or gifted family members, or any other family member, for that reasons, that wishes to participate in sports. Centrally these family members also enjoy the right to take up employment⁷⁹ and the right to equal treatment and may therefore not be discriminated against on the basis of nationality.⁸⁰ The "family" in this regard primarily consists of the spouse or registered partner, direct descendants under 21, or dependent direct relatives in the ascending line.⁸¹ These family members, furthermore, may come from outside the EU.⁸² The Court has also declared that the right for workers to all social advantages of domestic citizens includes the right to be accompanied by unmarried family members.⁸³ As a result, Member States must not only respect the right to equal treatment of citizens, but also of their family members. Even though third country nationals do not directly enjoy freedom of movement rights, they may be protected as family members of a citizen or 'social advantages' of an EU worker.

1.4.5. Conclusions on Citizenship

EU Citizenship has become an important new bastion of rights, granting far reaching rights to equal treatment, even to those not directly economically active. As such it forms a further limitation on the freedom for Member States to directly or indirectly discriminate on the basis of nationality. Furthermore, this limitation can be especially relevant to amateurs. As amateurs' participation in sport will often not constitute an economic activity, they would not otherwise have any rights under the economically oriented free movement rights. As citizenship rights do not depend on economic activity, these amateurs do derive equal treatment rights from their citizenship, meaning that even national regulation of amateur sportsmen must to a certain extent ensure equal treatment. Since the family members of EU citizens may come from third countries, national regulation of amateur sportsmen may in that regard also need to ensure equal treatment of third country nationals as well as EU citizens.

Chapter 2. Nationality Discrimination and Sport in the Case Law of the Court of Justice of the European Union

A limited number of cases decided by the Court of Justice of the European Union concern nationality discrimination in the context of sport. Although there are some indications that certain instances of nationality discrimination could be justifiable or exempt, these seem relatively restricted. In most cases, the general rules prohibiting discrimination on the grounds of nationality seem to apply. See on this point, however, especially the specific session on analysis and recommendations.

In *Walrave*,⁸⁴ the ECJ was asked to consider a rule in international cycling which required pacemakers to be of the same nationality as stayers. Whilst it accepted that sporting activity could be economic activity, and thus fall within the scope of the TFEU,⁸⁵ it declared that the prohibition on discrimination on the basis of nationality 'does not affect the composition of sports teams, in particular national teams, the for-

measures adopted hereunder."

67 See for instance case C-224/98 *D'Hoop* [2002] ECR I-6191, para 36: "The condition at issue could be justified only if it were based on objective considerations independent of the nationality of the persons concerned, and were proportionate to the legitimate aim of the national provisions." See for instance also case C-11/06 *Morgan* [2007] ECR I-9161.

68 Case C-103/08 *Gottwald* [2009] ECR I-9117.

69 *Gottwald*, paragraph 30.

70 *Gottwald* paragraph 32.

71 *Gottwald* paragraphs 39 and 40.

72 2004/38 articles 4-6 and 14. Since there is no right so social assistance in the first three months, there is by the way little risk of a person becoming such a burden, see art. 24(2) of the Directive.

73 Article 7 Directive 2004/38.

74 The concepts of employment and work used for this determination are the same as the ones discussed above under the free movement for workers.

75 See on these requirements also case C-413/99 *Baumbast* [2002] ECR I-7091, case C-184/99 *Grzelczyk* [2001] ECR I-6193,

and case C-398/06 *Commission v. Netherlands* [2008] ECR I-56.

76 Article 16 Directive 2004/38.

77 Article 16(1) Directive 2004/38.

78 Note that this article extends the right to equal treatment to non-EU family members, thereby going beyond art. 18 TFEU.

79 2004/38 article 23.

80 2004/38 article 24(1). For their other rights, including residence rights

81 2004/38 article 2(2). In addition a "second tier" of family relations is also recognized in art. 3(2) who, once accepted, also have a right of equal treatment.

82 See especially case C-127/08 *Metock* [2008] ECR I-6241, and D.Chalmers et al. *European Union Law* (CUP 2010, Cambridge, 2nd edition) p. 470 a.o.

83 See Regulation 1612/68 Article 7(2) and Case 208/78 *Even* [1979] ECR 2019 para 22. Thus an unmarried companion was a 'social advantage' in Case 59/85 *Netherlands v Reed* [1986] ECR 1283 para 28.

84 Case 36/74 *Walrave and Koch* [1974] ECR 1405.

85 At the time, the EEC Treaty.

86 *Walrave* paragraph 8.

87 *Walrave* paragraph 9.

mation of which is a question of purely sporting interest and as such has nothing to do with economic activity'.⁸⁶ The Court emphasised that the exception to the prohibition on nationality discrimination must 'remain limited to its proper objective'.⁸⁷ However, it did not venture to explain what those proper objectives might be. Advocate General Warner was more direct in his opinion in the case. According to AG Warner, the exception related to 'rules of organisations concerned with sport that are designed to secure that a national team shall consist only of nationals of the country that that team is intended to represent'.⁸⁸ In other words, AG Warner had invited the Court to exempt only those nationality rules that required national teams to be composed only of nationals.

In the *Donà* case, the Court was asked whether nationality discrimination could be permitted in the context of professional football. AG Trabucchi invited the Court to expand the sporting exception beyond the composition of national teams, and suggested that nationality discrimination could be permitted where its purpose was to ensure that teams competing in a national championship were representative of the state.⁸⁹ In response, the Court reiterated that nationality discrimination was in principle prohibited where sport was practiced as an economic activity. The Court accepted the possibility of excluding 'foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only such as, for example, matches between national teams from different countries'.⁹⁰ However, it stressed that such rules must be limited to their proper objectives.⁹¹

In *Bosman*, nationality discrimination in professional sport was again in question, this time in the guise of a rule approved by the European Commission which allowed national federations to limit the number of non-nationals who could be fielded in a professional football match. Dismissing a claim that sporting activity in itself was exempt from the Treaty, the court reiterated that whilst 'rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches' could be exempt, when limited to its 'proper objective', it could not 'be relied upon to exclude the whole of a sporting activity from the scope of the Treaty'.⁹² Since the nationality clauses did not 'concern specific matches between teams representing their countries but apply to all official matches between clubs and thus to the essence of the activity of professional players',⁹³ they were not 'limited to their proper objective' within the meaning of the *Walrave* sporting exception. After finding that they were therefore within the scope of the Treaty, the Court turned to the question of whether the restrictions could be justified.

In this context, the Court's judgment raised a question which to some extent remains unanswered today. In dismissing the arguments in favour of nationality discrimination, it nevertheless seemed to entertain the possibility that reasons other than the three express derogations found in Article 45(3) TFEU could be used to justify nationality discrimination against workers from other Member States. It seemed prepared in principle to consider the 'inherent' nature of a club's links with the

Member State in which it played or its sub-national region. It rejected this not because such a link could not, in principle, justify nationality discrimination, but because such a link did not in fact exist.⁹⁴ This invites speculation as to whether those links, where they exist, may be preserved even for reasons which fall outside the Article 45(3) grounds of public policy, public health and public security. In a similar fashion, the Court seemed to accept that the need to protect competitive balance could in theory require nationality discrimination, but that on the facts, the rule was disproportionate since it was not suitable for the aim of maintaining competitive balance.⁹⁵

In *Kolpak*, the Court was asked to consider rules which discriminated against non-EU nationals. These non-nationals were protected by association agreement clauses analogous to the fundamental freedoms from which EU citizens benefit. The Court examined justifications put forward to justify such discrimination and found that they were not within the meaning of the *Walrave* purely sporting rules since the 'clauses do not concern specific matches between teams representing their countries but apply to all official matches between clubs and thus to the essence of the activity of professional players'.⁹⁶ This reasoning was reiterated in the similar *Simutenkov* and *Kahveci* cases.⁹⁷

The Court's case law on nationality discrimination in sport focuses mostly on sport which is economic in nature. According to this case law, professional sportsmen are clearly protected by the Treaty economic freedoms. Whilst this case law on nationality discrimination tends to concern professional team sports, the case has not been made for treating individual sports differently.

Amateur sports could be subject to equally strong rights of non-discrimination, based both on the rights of the economically active as well as economically inactive citizens and their family members. In *Commission v France*, the Court observed that non-discriminatory access to leisure activities is a corollary of freedom of movement.⁹⁸ Workers are entitled to equal treatment not only in the context of their employment, but any 'social advantages' which may include access to amateur sport.⁹⁹ In *Grzelczyk*, the Court considered any situation involving movement between Member States to constitute a situation 'within the scope of' the equal treatment rule in Article 18 TFEU.¹⁰⁰ The right to equal treatment 'within the scope of the Treaties' in Article 24(1) of the Citizens' Rights Directive extends to both Union citizens residing in the territory of another Member State as well as their family members. Thus, it could be argued that not only discrimination against EU citizens but rules which restrict a third country national family member's access to sport are contrary to the Citizens' Rights Directive, or alternatively Article 21(1) TFEU read together with Article 18 TFEU.

At the time of writing, several alternative schools of thought exist as to the justifiability, in principle, of direct nationality discrimination. Much of the orthodox case law of the Court states explicitly that direct nationality discrimination which is within the scope of the Treaty¹⁰¹ can only be justified with reference to express derogations such as the public health, public policy and public security grounds found in Article 45(3) TFEU.¹⁰² According to this line of reasoning, sport-specific justifications that do not fall within these categories cannot be considered when nationality discrimination is direct, such as a quota on foreign players. The only exception to this would then be the *Walrave* rule, which can with some justification be considered limited to nationality rules governing national team sports.

If the distinction between direct and indirect discrimination is material, it must furthermore be noted that there is also some confusion as to what constitutes direct nationality discrimination. A rule that prevents a player from playing simply because she is not a national is clearly directly discriminatory. However, it is often relatively easy to rephrase those rules in such a way as to achieve similar results, but without direct reference to nationality. At one logical extreme, a rule phrased in terms of a criterion other than nationality discrimination could in principle have effects identical to a directly discriminatory rule. The question is then whether that *prima facie* indirectly discriminatory, and thus justifiable, rule is in fact direct discrimination justifiable only with reference to an express Treaty derogation. A recent example of this can be found in the *Bressol* case, which suggests that such rules are indirectly, rather than directly discriminatory.¹⁰³ In *Bressol*, the Court was asked to con-

88 *Walrave* Opinion of AG Warner p. 1526 1st col.

89 Case 13/76 *Donà v Mantero* [1976] ECR 1333, Opinion of AG Trabucchi p. 1344 1st col.

90 *Donà* paragraph 14.

91 *Donà* paragraph 15.

92 Case C-415/93 *Bosman* [1995] ECR I-4921 paragraph 76.

93 *Bosman* paragraph 128.

94 *Bosman* paragraphs 130-133.

95 *Bosman* paragraph 135.

96 Case C-438/00 *Kolpak* [2003] ECR I-4135 paragraph 54.

97 Case C-265/03 *Simutenkov* [2006] ECR I-2579 paragraphs 38-39, Case C-152/08 *Kahveci* [2008] ECR I-6291 paragraphs 31-32.

98 Case C-334/94 *Commission v France* [1996] ECR I-1307 paragraph 21.

99 Article 7(2). Regulation 1612/68

100 Case C-184/99 *Grzelczyk* [2001] ECR I-6193

101 Employment in the public service is exempt under Article 45(4) TFEU as is the exercise of official authority in the context of services and establishment.

102 See for example Case C-546/07 *Commission v Germany* paragraph 48 judgment of January 21, 2010 not yet reported; Case C-490/04 *Commission v Germany* [2007] ECR I-6095, paragraph 86. *Contra* Barnard, C., *The Substantive Law of the EU* 3rd ed. (Oxford University Press 2010) 239, citing joined cases C-338/04, 359/04 and 360/04 *Placanica* [2007] ECR I-1891.

103 Case C-73/08 *Bressol* judgment of 13 April 2010 not yet reported.

sider rules that required students to both principally reside in Belgium and demonstrate fulfilment of one of eight additional criteria. As one of these eight secondary criteria was whether the resident also had the right to permanent residence, the rules in practice always admitted resident nationals who by law always had the right to permanent residence. However, the rules required resident non-nationals to demonstrate eligibility. Without formulating the rules in terms of nationality, resident nationals were always eligible whereas resident non-nationals were subject to additional tests. The Court considered this to constitute indirect discrimination despite the view of AG Sharpston that, as direct discrimination, it could not be justified.¹⁰⁴

The Lisbon Treaty has neither developed nor clarified any possible special status for sport. The new sport competence calls for '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'.¹⁰⁵ This sport competence is limited to 'incentive measures'. It does not appear to constitute a horizontal obligation applicable to other areas such as the economic freedoms. Whilst the EU seeks to achieve these aims, it does not appear constitutionally obliged to take them into account when legislating in other fields.¹⁰⁶ The thus far only reference to this provision by the CJEU in the *Bernard* case has not seen any novel reinterpretation of past precedents based on the introduction of Article 165 TFEU.¹⁰⁷ Furthermore, even if Article 165 TFEU should be accorded greater prominence in future, it contains ideals which may contradict each other, thus lessening the likelihood that invoking Article 165 TFEU should in itself lead to a radical reinterpretation of EU law. For example, Article 165 TFEU advocates both fairness and openness, but does not specify how these should be weighed when they conflict. Thus, the conclusion remains that direct nationality discrimination remains difficult to justify even in the context of the Court's sport-related case law, where apart from very limited adjustments, nationality discrimination is as problematic as in other sectors of economic and non-economic activity.

[...]

Chapter VI: Analysis and Recommendations

1. Specific EU law framework for analysis

It follows from the EU Treaty provisions, secondary EU legislation and the case law from the Court of Justice of the European Union on EU citizenship and freedom of movement that sports rules and practices can be grouped in four different categories:

1. Measures which do not fall under the EU free movement rules;
2. Measures which do not constitute a restriction to freedom of movement;
3. Measures which amount to a restriction of the right to free movement but are nevertheless capable of justification and proportionate;
4. Measures which cannot be justified and/or are disproportionate, therefore violate EU law, and may consequently no longer be applied in a Member State.

First, certain rules do not come under the material scope of application of the EU Treaty.

A fortiori, they do not fall under the EU Treaty free movement rules

either. The so-called *rules of purely sporting interest* fall under this category.¹⁰⁸ Traditionally, the rules concerning matches between national teams were considered to be a paradigm example of this. So far, the Court of Justice of the EU has consistently refused to interfere with instances of nationality discrimination concerning matches between national teams.¹⁰⁹ According to an established line of case law, the free movement provisions 'do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only'.¹¹⁰

This permissive approach of the Court in relation to national teams has not met with substantial criticism. In his opinion on *Bosman*, Advocate General Lenz stated that it appears 'obvious and convincing'.¹¹¹ However that may be, it must be acknowledged that in contemporary society, the Court's explanation for this 'restriction on the scope of EU law' no longer reflects reality. In general, matches between national teams have economic implications and are therefore no longer of 'purely sporting interest'. There must be a better legal explanation for the Court's receptiveness towards nationality discrimination in sporting contests between national teams.¹¹² At the same time, it must be acknowledged that the Court of Justice has also consistently stressed that 'such a restriction on the scope of the Treaty provisions must remain limited to its proper objective', and 'cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty'.¹¹³

In its *Meca-Medina* judgment, in the context of EU competition law, the Court issued a number of highly relevant statements with regard to the concept of 'rules of purely sporting interest'.¹¹⁴ The Court specified that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down. If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition'.¹¹⁵ This refinement by the Court has the effect of practically dismantling the concept of rules of purely sporting interest.¹¹⁶ Only rules with no or a merely marginal or in any event clearly subordinate or secondary economic impact or effect are now likely to continue to fall under this category. It is submitted that the so-called *rules of the game* are a good illustration of what can still be regarded as a rule of purely sporting interest in this respect.

Secondly, certain measures do fall under the EU free movement rules, but do not amount to a restriction on freedom of movement.

Under the free movement rules, nationals of EU Member States have in particular the right, which they derive directly from the EU Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity.¹¹⁷ Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom. However, in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market.¹¹⁸

¹⁰⁴ Paragraph 47 *Bressol*. See *contra* the opinion of the Advocate General, points 64 to 76 and points 128-9.

¹⁰⁵ Article 165(2) TFEU.

¹⁰⁶ See R. Parrish, B. Garcia,, S. Miettinen, and R. Siekmann, 'The Lisbon Treaty and EU Sports Policy' (European Parliament 2010), esp. Chapter 2..

¹⁰⁷ Case C-325/08 *Bernard*, judgment of 16 March 2010, *nyr*.

¹⁰⁸ See for an introduction to this concept S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International,

European Monographs, n° 48, The Hague, 2005), p. 16, and J.-P. Dubey, 'La libre circulation des sportifs en Europe' (Bruylant, Brussels 2000). Also see S. Weatherill, 'Fair Play Please', Recent Developments in the Application of EC Law to Sport.' (2003) 40 CMLRev. 89, and A. Husting, 'Quelle reconnaissance pour l'exception' ou pour la spécificité sportive dans la nouvelle constitution européenne?' (2004) 481 *Revue du Marché commun en de L'Union européenne* 515.

¹⁰⁹ S. Van den Bogaert and A. Vermeersch, 'Sport & the European Treaty: A Tale of

Uneasy Bedfellows?' (2006) 31 *European Law Review*, 821-840.

¹¹⁰ Case 36/74 *Walrave*, [1974] ECR 1405, par. 8; Case 13/76 *Donà*, [1976] ECR 1333, par. 14. *Bosman*, [1995] ECR I-4921, paras 76 and 127; Cases C-51/96 & C-191/97 *Delège* [2000] ECR I-2549, para. 43.

¹¹¹ Lenz AG in *Bosman*, para. 139.

¹¹² S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International, European Monographs, n° 48, The Hague, 2005), p. 455.

¹¹³ Cf. *inter alia* *Bosman*, para. 76.

¹¹⁴ Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

¹¹⁵ *Meca-Medina*, para. 28.

¹¹⁶ See also S. Weatherill, 'Anti-doping revisited - the demise of the rule of "purely sporting interest"?' (2006) 27(12) *European Competition Law Review*, 645.

¹¹⁷ *Bosman*, para. 95; Case C-18/95 *Terhoeve v Inspecteur van de Belastingdienst Particulieren / Ondernemingen Buitenland* [1999] ECR I-345, para. 38.

¹¹⁸ Case C-190/98 [2000] *Graf* ECR I-493, para. 23.

In the case of *Graf*, the Court provided an important clarification of this stance.¹¹⁹ This case concerned a worker's entitlement to compensation on termination of employment if he terminates his contract of employment himself in order to take up employment in another Member State, when the provisions of the contested legislation grant him entitlement to such compensation only if the contract ends without the termination being at his own initiative or attributable to him. The Court held that entitlement to compensation on termination of employment is not dependent on the worker's choosing whether or not to stay with his current employer, but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him.¹²⁰ The Court was therefore of the opinion that such an event is *too uncertain and indirect* a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers.¹²¹

In the cases of *Deliège* and *Meca-Medina*, the Court added another significant refinement. In *Deliège*, the contested selection rules inevitably had the effect of limiting the number of participants in a judo tournament, but such a limitation was regarded as being 'inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted.'¹²² Such rules could thus not in themselves be regarded as constituting a restriction on the principle of freedom of movement. The Court also held that the adoption of one system for selecting participants rather than another must be based 'on a large number of considerations unconnected with the personal situation of any athlete, such as the nature, the organization and the financing of the sport concerned.'¹²³ The free movement rules would only come into play if the selection rules were disproportionate.¹²⁴

In *Meca-Medina*, the Court stipulated in more principled terms that the compatibility of rules with the Treaty provisions cannot be assessed in the abstract: for the purposes of application of a Treaty provision to a particular case, account must first of all be taken of the overall context in which the rule was taken or produces its effects and, more specifically, of its objectives; then, it has to be considered whether the consequential restrictive effects it produces are *inherent* in the pursuit of those objectives and are *proportionate* to them.¹²⁵ The *Meca-Medina* case was set in the context of EU competition law, but it is nevertheless suggested that the Court's findings with regard to the application of the Treaty competition provisions to sports may be transposed *mutatis mutandis* to the free movement context.¹²⁶

To illustrate this principle in practice, the Court in *Meca-Medina* ultimately ruled, first, that the general objective of the contested anti-doping rules was to combat doping, in order for competitive sport to be conducted fairly; and that this included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.¹²⁷ Secondly, it held that the effect on athletes' freedom of action of the penalties imposed in the federation's rules to enforce the doping ban, must be considered to be,

in principle, inherent in the organization and proper conduct of competitive sport, whose very purpose is to ensure healthy rivalry between athletes.¹²⁸ Finally, the Court did not find a violation of the proportionality principle. It therefore concluded that the anti-doping rules *did not in law constitute a restriction* of competition incompatible with the common market even if they *in fact* had ancillary effects that did restrict competition.¹²⁹

This legal category could also be an elegant solution to help matches between national teams escape the need for more detailed justification under EU law. It could be stipulated that a rule requiring athletes to have the nationality of the country of which they represent the national team in international sporting events, does not in itself constitute a restriction on the Treaty free movement provisions, as long as it derives from a need inherent in the organisation of such a competition.¹³⁰ On the one hand, it reflects the assumption that in encounters between national teams, matters such as national pride and identity play a decisive role and, in principle, outweigh the economic and financial interests at stake. As a result, these matches might deserve shelter from the application of EU law. On the other hand, applying this rule rather than the 'purely sporting' line of reasoning recognises that matches between national teams have often become huge commercial events. Therefore, when the restrictive effect of these particular nationality clauses goes beyond what is necessary and inherent to organise matches between national teams, the rule would constitute a restriction of free movement. This conclusion fits squarely into the Court's principled statement that the 'restriction on the scope of the provisions in question must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity' from the scope of the Treaty.¹³¹

Thirdly, certain sports rules do amount to an obstacle to an athlete's right to freedom of movement, but are nevertheless justifiable because they pursue a legitimate objective and fulfill the terms of the proportionality test.

In the case of *Lehtonen* for example, the Court of Justice first held that rules of a basketball federation which provide that players can only be transferred to other clubs during limited 'transfer windows', constituted a barrier to the free movement of workers, but subsequently acknowledged that such a measure could be justified by the legitimate objective of ensuring the regularity of sporting competitions.¹³² Ultimately, it left it to the national court to examine the proportionality of the contested measure.

Two crucial issues arise in this respect. The first is which justifications are available. Secondly, and more importantly, it must be considered which types of discriminatory measures can be justified by which types of justifications. As has been outlined in earlier chapters, there are two types of justifications: the exceptions expressly provided in the Treaty, and the judicially created mandatory or overriding requirements in the general interest. The Treaty exceptions are a limited and in relation to the free movement of persons include justifications on grounds of public policy, public security, public health and employment in the public service.¹³³ The overriding requirements, often also referred to as objective justifications, are an open-ended category of justifications accepted by the Court of Justice.¹³⁴ In sports-related case law, the Court has, for example, already accepted the need to ensure the training and development of young players, the need to maintain a certain sporting equilibrium between clubs and the need to preserve the regularity of a sporting competition as legitimate objectives.¹³⁵ However, the exception for matches between national teams notwithstanding, the Court of Justice has until the time of writing never explicitly recognized extra-treaty justifications for direct discrimination on grounds of nationality. Traditionally, the approach of the Court has been to allow only the express Treaty derogations as possible justifications when confronted with directly discriminatory measures, and to restrict the use of mandatory requirements to indirectly discriminatory measures.¹³⁶ Some legal doctrine invites the Court to depart from this strict approach and to adopt a more uniform stance on this issue, or considers that it has already done so.¹³⁷ This would potentially allow mandatory requirements to also justify directly as well as indirectly discriminatory measures. It is possible to point to some cases in the jurisprudence of the Court, includ-

119 *Idem*.

120 *Graf*, para. 24.

121 *Graf*, para. 25.

122 *Deliège*, para. 64. Also note that the criteria in this case were not based on nationality.

123 *Deliège*, para. 65.

124 For more info, see also S. Van den Bogaert, 'The European Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?' (2000) 25 *European Law Review* 554-563.

125 *Meca-Medina*, para. 42, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, para. 97.

126 See also S. Weatherill, 'Anti-doping revisited - the demise of the rule of "purely sporting interest"?' (2006) 27(12) *European Competition Law Review*, 645.

127 *Meca-medina*, para. 43.

128 *Meca-Medina*, para. 45.

129 *Meca-Medina*, para. 55.

130 *Deliège*, para. 69.

131 *Donà*, paras 14 and 15; *Bosman*, paras 76 and 127.

132 Case C-176/96, *Lehtonen v FRBSB* [2000] ECR I-2681.

133 See e.g. Article 45(3) and (4) TFEU.

134 See also Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1996] ECR I-4165.

135 See e.g. *Bosman* and *Lehtonen*.

136 In general see Kapteyn & Verloren van Themaat, 'The Law of the European Union and the European Communities' (4th revised ed. Kluwer 2008), p. 654 a.o., and on this orthodoxy see C.W.A. Timmermans, 'Creative Homogeneity' in: M. Johansson et al. (eds), 'A European for All Seasons: Liber Amicorum Sven Norberg' (Brussels, 2006) p. 471.

137 See e.g. Barnard, C., *The Substantive*

ing those on sport, which would implicitly add further substance to this argument.¹³⁸ However, the Court still continues to refer regularly to the strict orthodox rule, also in recent cases.¹³⁹ It is therefore unclear whether the Court would be prepared to depart from it where sport is concerned.

If directly discriminatory measures were to be considered objectively justifiable, the introduction and recognition of a sports-specific overriding requirement in the general interest which would allow some form of nationality discrimination in sports under certain strictly regulated and safeguarded circumstances might be contemplated.¹⁴⁰ Such an exception could be based on *respect for the representation of culture and national identity through sports*. This way, the EU could recognize the positive role of nationality in the organization of sporting competitions, and thereby contribute to the further eradication of all negative forms of discrimination. The new Treaty basis for sport in Article 165 TFEU might be invoked to play a role in this regard, bearing mind 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.'

In addition to the legitimate objective required to justify a restriction, the ultimate verdict of the Court on a claimed justification also hinges upon the level of scrutiny the Court is willing to exert when assessing whether the principle of proportionality is being respected. Taking into consideration the Court's awareness about the EU's supporting, coordinating and supplementing competence in sporting affairs and the corresponding conditional regulatory autonomy of the sporting federations, and also the societal relevance of sport, it is possible that the Court's review of the tests of suitability and necessity in a sporting context will be merely marginal.¹⁴¹

Fourthly, any given sports measure that restricts freedom of movement and cannot be properly justified and/or is not proportionate violates EU law and may no longer be applied.

The *Bosman* case constitutes the best-known example in this respect. In *Bosman*, the Court of Justice dismissed the long-standing transfer rules and the so-called '3+2' nationality clauses in professional football for unjustifiably violating the principle of free movement for workers. The Court did admit that the need to ensure the training and development of young players and to preserve a certain sporting equilibrium amount to legitimate objectives,¹⁴² but nevertheless concluded that these goals could be achieved in a less restrictive way.¹⁴³ As a result, EU professional football players whose contract with their club of affiliation has expired are now entitled to move to another club, without any transfer sum being due to the former club, and nationality clauses in sport are no longer applicable to sportsmen with an EU nationality.

As far as proportionality is concerned, much turns on the case-by-case analysis of the Court, and the level of scrutiny the Court chooses to apply. For example, in the *Bernard* case, the Court accepted that the education and training of young players was a goal worthy of protection, but observed that where damages exceeded the costs of training, they would be disproportionate.¹⁴⁴ Thus, a legitimate objective does not in itself suffice to protect a practice. Nevertheless, in some

other cases, such as *Deliège*, it seems that proportionality is less strictly policed.

2. Analysis of the compatibility of the various types of sporting rules with EU law on freedom of movement, non-discrimination and citizenship

In general, the sport rules and practices under scrutiny can be grouped into a number of separate categories. There are rules which:

- prevent or hinder foreign nationals' access to national sporting competitions;
- prevent foreign nationals' access to national championships;
- deny foreigners the possibility to win the national title in any given sporting discipline;
- deny foreigners the opportunity to set national records or win medals at national championships.

Each of these sets of rules will be examined as to its conformity with EU law, more specifically the EU Treaty provisions on freedom of movement, non-discrimination on grounds of nationality and EU citizenship.

2.1. Exclusion from participation in national competitions

A first type of rule which is under scrutiny concerns the access of sportsmen and sportswomen to national competitions. Sporting events, tournaments and competitions organised at national level are understood as distinct from national championships or international tournaments.

It is submitted at the outset that a barrier to or even a downright ban on access to this type of 'ordinary' competition on grounds of nationality in individual sports will be most difficult to justify, just as is the case with nationality discrimination in team sports. For this reason, it is suggested that the general starting point as regards national competitions in individual sports should be one of *open access to all EU citizens, and by extension also to their family members*¹⁴⁵ and any third country nationals that can derive equal treatment rights from EU law.¹⁴⁶ In view of the great variety between individual sports, the factual diversity between different sporting competitions, the way they are set up, and the role they play in the larger organisation of a sport,¹⁴⁷ it may, however, prove to be necessary to make a number of adjustments or exceptions to this general principle, based on the particular circumstances of a given case. This may, for instance, be the case when the national competition is directly linked to the national championship. Whilst the question of unrestricted access to national competitions may perhaps not be the most sensitive issue involved in this study, the empirical research shows that it nevertheless is in this area that, quantitatively speaking, most problems probably exist. Many different sports in different Member States require, for instance, overly long residency requirements, or have other unjustified barriers in place.

2.1.1. Not a rule of purely sporting interest

First of all, rules which restrict foreigners' access to national competitions in a given sporting discipline cannot be qualified as being of purely

Law of the EU: The Four Freedoms 3rd ed. (Oxford University Press 2010) 239 and 511.

¹³⁸ See e.g. *Bosman*, discussed in this context in Chapter 2 above. In general, see also Case C-2/90 *Commission v Belgium* (Walloon Waste) [1992] ECR I-4431 or Case C-379/98 *PreussenElektra AG v Schlesweg AG* [2001] I-2099, and especially the Opinion of AG Jacobs in that case. Similarly the judgments in Case C-204/90, *Hanns-Martin Bachman v. Belgium* [1992] ECR I-249 and Cases C-34-36/95, *De Agostini* [1997] ECR I-3843 point to allowing *de facto* discriminatory measures under the rule of reason.

¹³⁹ See for example Case C-546/07 *Commission v Germany* paragraph 48 judgment of January 21, 2010 not yet reported.

¹⁴⁰ Some counter arguments must be recognised in this respect. First, whilst the Court has accepted cultural policy as a mandatory requirement (Case C-288/89 *Gouda* [1991] ECR I-4007 paras 22-23.), when invited to consider that cultural policy, a supporting competence under Article 167 TFEU that is similar in structure to Article 165 TFEU, required the recognition of a non-Treaty 'derogation' to support directly discriminatory restrictions, the Court responded in *Spanish Cinema Dubbing* that cultural policy was not one of the derogations set out in the Treaty (Case C-17/92 *Spanish Cinema Dubbing* ECR I-2239 para 20.). When cultural arguments have been invoked in past sports-related case law, e.g. in *Bosman*, the Court has tended not to find these decisive. Any extension of the mandatory requirements,

particularly in relation to directly discriminatory rules, would therefore seem to require either an express Treaty derogation or a judicial re-examination and re-evaluation of the past case law on direct nationality discrimination. As the outcome of *Bosman* demonstrates, even the support of the European Commission if offered is on its own insufficient to achieve this effect (*Bosman*, para. 136).

¹⁴¹ See e.g. *Meca-Medina*, paras. 49-54.

¹⁴² *Bosman*, para. 106.

¹⁴³ *Bosman*, para. 110.

¹⁴⁴ Case 352/08 *Bernard and Newcastle United v Olympique Lyonnais*, judgment of 16 March 2010, not yet reported, paragraphs 46-48.

¹⁴⁵ Article 7(2) Regulation 1612/68.

¹⁴⁶ See e.g. Case C-265/03 *Simutenkov* [2005] ECR I-2579. Also see S. van den

Bogaert, "Free Movement for Workers and the Nationality Requirement", in: Schneider (ed.) *"Migration, Integration and Citizenship: A Challenge for Europe's Future"*, Vol. 1 (Forum, Maastricht 2005), p. 55-72.

¹⁴⁷ Cfr. the Court's principled statement in *Meca Medina* that 'the compatibility of rules with the Treaty provisions cannot be assessed in the abstract: for the purposes of application of a Treaty provision to a particular case, account must first of all be taken of the overall context in which the rule was taken or produces its effects and, more specifically, of its objectives; then, it has to be considered whether the consequential restrictive effects it produces are inherent in the pursuit of those objectives and are proportionate to them.'

ly sporting interest. First, it can hardly be defended that these competitions are only about sport; most also involve (clear) economic interests. Furthermore, a complete refusal of access to national competitions would almost inevitably lead to 'excluding the whole of a sporting activity from the scope of the Treaty', which is precisely one of the explicit limits set to this 'sporting restriction' by the Court of Justice.¹⁴⁸ Consequently, it is highly unlikely that the Court would allow the exclusion of foreigners from national competitions as a rule of purely sporting interest.

Even restrictions in amateur sports would be difficult to excuse under the traditional 'purely sporting interest' formula. Since the Court's recognition in *Meca-Medina* of the difficulty of severing economic and uneconomic aspects of sport, it may be difficult to consider that amateur sport has 'nothing to do with economic activity'. This is further underlined by the Court's observations in *Deliege* regarding the economic impacts of sponsorship agreements and other economic implications in situations where the athletes are not directly remunerated: Sports persons may be providing a service 'even if some of those services are not paid for by those for whom they are performed'.¹⁴⁹

2.1.2. Under the scope of the EU Treaty but no restriction?

In the same vein, it would be unexpected if the Court were to allow these rules under the category of rules which *in law* do not constitute restrictions under the general framework outlined above. First, the *Graf* situation does not seem to apply as access to the sporting competition forms the core of an athlete's activity. Restricting access to that core activity therefore does not qualify as too uncertain and indirect. Secondly, preventing access of non-nationals to ordinary sporting events cannot generally be qualified as 'inherent and proportionate' to the objectives pursued by the organisation of such competitions.¹⁵⁰ It is difficult to see which inherent need is served by excluding, even temporarily, foreign nationals, let alone how a full exclusion should be proportionate to such an aim. For instance, banning foreigners from participating in a national competition is not inherently required to keep a fair and balanced competition or to enable sufficient training of youth, let alone that such restrictions would be proportionate for those aims. As a result, the second category also fails to offer good prospects for allowing the rules which restrict access to a national competition.

2.1.3. Restriction to freedom of movement, but acceptable justification?

A sporting rule applicable to an individual sporting discipline which bans foreign athletes from taking part in national competitions, appears liable to render the exercise of EU citizens' free movement rights less attractive. Hence, it constitutes a restriction to freedom of movement. Therefore, such a rule is prohibited, and must be disapplied, unless it can be justified.

As the four freedoms are of a fundamental nature, they are to be interpreted extensively; hence, the corresponding derogations are to be interpreted and applied restrictively.¹⁵¹ A rule preventing foreigners from taking part in a national sporting competition must be classified as a directly discriminatory measure. Arguably, the express Treaty derogations which might in principle be available - public policy, public security and public health or employment in the public service - cannot serve as grounds for justification in this respect. According to the orthodox view, mandatory requirements cannot be invoked so as to justify directly discriminatory measures. And even if it were assumed that the Court would accept that objective justifications in the general interest can also be invoked to justify a directly discriminatory measure, such a measure

must still also pass the test of proportionality. It will be very difficult to demonstrate that there is no less restrictive alternative to a directly discriminatory measure. Only the need to train young players seems somewhat plausible as a justification to banning foreign athletes from national competition. Even so, the measure is very unlikely to pass the proportionality hurdle: it appears too far-reaching. As outlined above in the previous section of this chapter, one could envisage a newly designed judicially created overriding requirement in the general interest narrowly focusing on the positive features of nationality in sports which might be capable of justifying direct nationality discrimination under strict circumstances, but it is submitted that this does not seem appropriate in this context either: in national sporting events, the focus is not on identity, honour and representation, which so far has proven to be most potent justificatory aims.¹⁵² Consequently, a rule excluding foreigners from ordinary national competitions probably cannot be justified.

A rule containing a residence requirement entailing that athletes are only entitled to take part in a sporting competition when they have already been resident for a certain duration in the country where the competition takes place is likely to be qualified as indirectly discriminatory. Indirectly discriminatory measures can be justified by the express Treaty derogations as well as by the overriding requirements in the general interest. In addition, these measures must also pass the test of proportionality. Even if the Court were already to accept a legitimate aim in this particular context, which does not seem straightforward, the measure must still be regarded as proportionate. It is not easy to imagine a rule containing a residence requirement being considered as suitable and necessary, particularly where the purpose of that rule has not been explained as was the conclusion of many country experts commissioned by this study.

2.1.4. Conclusions and recommendations

With regard to these rules restricting access to national competitions, the general conclusions are the following:

- the blanket exclusion of foreigners from participation in national competitions is a directly discriminatory measure which amounts to an unjustifiable infringement of EU athletes' free movement rights. These overly restrictive rules will have to be dismissed so as to allow foreign EU athletes access to these competitions.
- Rules containing residence requirements tend to favour nationals over non-nationals. They are thus indirectly discriminatory and must in all likelihood also be dismissed as contrary to EU law unless they can be justified, which appears unlikely.
- Athletes from countries outside the EU cannot directly benefit from free movement rights. However, they may enjoy some form of legal protection as family members of an EU national or under an international agreement concluded between the EU and their country. When third country nationals are family members of EU citizens or acquire the protection of non-discrimination provisions in e.g. Association Agreements, these third country nationals can no longer be excluded from participation in national competitions.

Current practice in many sports and in several EU Member States does not seem to comply with the required general level of openness. Most commonly, overly long residency requirements seem to be imposed (see for instance the situation in Austria, where weightlifting requires two years of residence, aquatics, archery, badminton and canoeing 3 years, and shooting even up to 5 years of residence). Moreover, restrictions of freedom of movement may also be caused by the vagueness or complete absence of rules in a given context, or by the explicit discretion given to decision makers (see, for instance, aquatics in Finland, where permission is given on a "case-specific manner"). Even where periods are short, the diversity of periods within particular sports suggests that many rules will struggle to satisfy the 'least restrictive measure' proportionality requirement.

The following recommendations can therefore be made:

- It is recommended to grant EU athletes and their families, as well as non-EU nationals who can rely upon EU rights in this context, equal access to national competitions as that of home state nationals, subject to the exceptions outlined below.

¹⁴⁸ *Meca-Medina* para 26.

¹⁴⁹ *Deliege* paragraph 56. See also e.g. the recipients of free-to-air broadcast services as persons protected by the Court's freedom of movement for services case law.

¹⁵⁰ See below for potential specific exceptions to this finding, in particular where the sport is organized into tiered competitions where athletes are eliminated.

¹⁵¹ See e.g. Case C-441/02 *Commission v*

Germany [2006] ECR I-3449 paras 32-35. C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, at p. 480.

¹⁵² See also *Deliege*, where the Court even refuses to extend this representation aspect to A-level, international tournaments which directly led to qualification for national representation. For this reason the proposed new sporting exception also cannot be relied upon here.

- As there appear to be quite a few instances where this level of openness is not achieved, and as many national federations or clubs might not possess the legal capacity and know-how to establish EU-compliant rules, this might be an area where the European Commission may be of assistance. For instance the Commission might assist with coordination, dialogue, the drafting and circulation of best practices or model rules, or by supporting training and education events aimed at sports administrators. This would also help to reduce the ambiguity and uncertainty of some rules.
- Nevertheless, it must be outlined that it is possible to envisage some factual situations which might warrant specific, and limited, restrictions on access to national competitions:

- *Restrictions inspired by the specific organizational needs of a sporting event and/or the objective of safeguarding space for the training and development of national sportsmen*

First of all, in some disciplines, the *structure and the format* of the competition in question may legitimately warrant the imposition of limits on the number of participants that can compete for sporting glory at a certain level. For instance, in Grand Slam tennis tournaments, a maximum of 128 participants can participate in the main draw. Moreover, to ensure the training and the development of young players, it may be acceptable that a certain number of places in a sporting event is preserved for them. As such a measure must also be proportionate, and may not *de facto* close of an entire sport from the application of EU law, complete exclusion of all foreigners under this aim would not be acceptable. Rather, only a limited amount of places may be reserved. The exact amount of reserved places will have to be scrutinized on a case-by-case basis. These rules, inherent in the organization of a sporting event, would come under the scope of EU law, but would not amount to a restriction of freedom of movement, provided they are also proportionate. Whilst the non-discriminatory limitation of numbers could be classified as an 'inherent' rule under the present case law, the court has not yet expressly accepted that directly discriminatory measures can be justified in this way.¹⁵³

- *Restriction when the national competition forms part of the national championship?*

A second, and more complex, situation arises where the national competition, at least at the highest and economically most relevant level of a given sporting discipline, forms part of the national championship and helps in the determination of who wins the national title. This is for instance the case where points earned during regular, separate competitions together determine the outcome national championship. It could be contemplated - also in the light of what will be said later on the access to national championships and titles - to bar foreigners from competing in these circumstances if their inclusion exerted an unwarranted decisive influence on the national championship. One must also check then whether this exclusion is not disproportionate. In other circumstances, where the results of non-national athletes can simply be disregarded, it will be hard under EU law to bar foreigners from competing in national competitions or even in national championships.

- *Acceptable restrictions inspired by the desire to ensure the regularity of the competition?*

In order to safeguard the regularity of the sporting competition, the uncertainty of outcome and the comparability of results, the Court has in *Lehtonen* accepted in principle the practice of limited transfer windows. This means that restrictions on changes *during* the competition can be acceptable, as the balance should not be altered during the competition. Similarly, the requirement of *membership* of a national club and federation also seems a proportionate requirement to monitor and safeguard the fairness and structure of the competition. Consequently,

rules requiring membership, and barring sportsmen access after the start of the season seem justifiable restrictions.

Crucially, however, these rules should apply generally to *all participants* in a competition, as the specific aims involved do not necessitate any form of direct or indirect discrimination. Where membership of a national club and federation is required, these should equally be offered on a non-discriminatory basis. Thus, where long residence requirements (*any* residence requirements) might indirectly favour nationals, these must be justified and proportionate. As in *Lehtonen* the restrictions on access should not be stricter for EU citizens than they are for nationals, or they risk being qualified as unjustifiably discriminatory. There is no basis to require, for example, that an EU citizen has already been resident in a given country for more than two years, or has been registered with a national club for at least a year before he can compete in a sporting competition. To put it sharply, as time limits to access are based on safeguarding the fairness and structure of the competition, there is no ground to refuse access to the Swedish Canoeing competition to a Polish citizen who moves to Sweden on August 31, if registration for the competition is open until the 1st of September.

The immediate practical effects of this conclusion are difficult to assess, as it is not possible to deduce from the empirical study precisely how many of these restrictions on access to the national competition are actually in place. In addition to the many unknowns, and the fact that there frequently are no specific findings under the title 'access to national competition', it often cannot be determined whether residence or membership requirements also apply as regards access to national competitions. Nevertheless, as the best practices allowing open access to national championships and titles illustrate, national competitions should be able to accommodate this openness, especially if the specific exceptions such as knock-out tournaments discussed above are taken into account.

- *A non-justified restriction: qualification for international and external events*

It must also be pointed out that the fact that it is possible to qualify for international representative tournaments at the national sporting competitions, does not entail that nationality discrimination is allowed. The Court of Justice has explicitly rejected this link in *Deliège*, holding that the mere fact that such national selection takes place on such tournaments does not exclude such measures from the scope of the Treaty in the same way that representative games are excluded.

- *Factual limitation: the international calendar*

A coordinated calendar of sporting events at the level of international federations may *de facto* limit foreign participation in a competition. Such a rule could very clearly be regarded as 'inherent' in the organization and proper functioning of sport. As such, disproportionate restrictions might be challenged.

2.2. Exclusion of foreigners from participating in national championships

2.2.1. Introduction

The question of who can take part in a national championship raises a number of complex issues. From one perspective, these championships share in the 'national character' of the national title, and also influence the award of that title. From another point of view, the mere participation of foreign athletes does not necessarily have to diminish the national character of the contest, especially where sufficient places and the title itself are already reserved for nationals. This 'limitation' of the purely national character of the championship, furthermore, has to be weighed against the fundamental free movement rights of foreign athletes, up to and including the substantial rights enjoyed by (permanent) resident foreign EU citizens in a host Member State.¹⁵⁴ In practice, one differentiates in this context between open and closed championships.

In a sense, national championships form a legal border zone between the relatively more clear-cut enclosure of national titles and the openness required in regular competitions. It is suggested that EU athletes and family members of EU migrants should be allowed to compete in national championships, unless there are good grounds for an excep-

¹⁵³ See further S. Miettinen and R. Parrish, 'Nationality Discrimination in Community Law: An Assessment of the UEFA Regulations Governing Player

Eligibility (The Home-Grown Player Rule) 2007 5(2) *Entertainment and Sports Law Journal* points 7-9.

tion. The largest and most important exception in that regard would be the exclusion of foreign athletes from championships in which they exert too direct and substantial an influence on the outcome. This is especially the case in sports which involve direct eliminations, for instance the knock-out system in boxing or judo.

This approach is also supported by current practice, where in some sports which do not involve single duels between competitors, roughly half of the national championships are already opened to participation by foreigners, whereas knock-out sports are more closed. Archery, aquatics, athletics, gymnastics and triathlon, for example, are already relatively open to foreigners.

2.2.2. *A rule of purely sporting interest?*

It is possible, but legally less than probable, that the Court of Justice of the EU would accept the exclusion of foreigners from participation in national championships as being a rule of purely sporting interest. The same reasons that would probably even exclude the award of the national title from the category of purely sporting interest - see below - thereby apply *a fortiori* where mere participation is concerned. Even though the national championship is clearly linked to the national title and national representation at international level, the economic aspects involved can no longer be qualified as only marginal in the post *Meca-Medina* sense. Be that as it may, in case the award of the national title were regarded as being a rule of purely sporting interest, access to the national championship could also still be considered as such, in view of the particular nature and context of such a sporting event.

2.2.3. *Exclusion of foreigners as inherent and necessary?*

If this practice cannot be qualified as a rule of purely sporting interest, it must be examined whether the issue of participation in national championships can be qualified under the second category of the general framework as an 'inherent' rule necessary for the organisation and proper functioning of sport. Again, it is not self-evident that this will indeed be the case. After all, the primary objective of participation in a national championship appears linked to that of the award of the national title, being to crown the best national. In principle, this objective does not inherently and necessarily require the exclusion of non-national athletes.¹⁵⁵ It may still be regarded as inherent in the aim to crown the best national to exclude foreigners from competing, but it does not seem necessary to completely ban foreigners from competing when the results of non-nationals may simply be disregarded in the race for the title. Even with foreigners competing, the best national can simply still be crowned as national champion.

In this respect, a number of additional observations need to be made:

- First, the qualification of this rule will ultimately depend upon the level of scrutiny the Court of Justice is willing to exercise. Given the sensitivity of the issue of participation in national championships, it is expected that the Court will not easily substitute a federation's reasoned assessment for its own.
- Secondly, the various individual sports have different characterizing features which possibly have implications for their legal qualification under EU law. In some sports, the presence and participation of for-

eign athletes impacts only in a secondary and indirect way on the outcome of the championship, whereas in sports with direct eliminations the influence is direct, substantial and immediately measurable. In this latter category, the exclusion of nationals could be seen as inherent and necessary to achieve the objective of crowning the best national. For instance, if current world number one Rafael Nadal were to be able to participate in the Dutch national tennis championship, even if he could not win the title, one could predict with quite a high degree of probability that the winner of the Dutch title would be he who would emerge victorious out of the other half of the draw and would subsequently succumb to the Majorcan in the final.¹⁵⁶ If more than one foreigner would participate, let us assume British Andy Murray, it might even be that no national reaches the final. This may create problems for the award of the title. One would then be forced to devise other means to designate the champion, for example when the last remaining Dutch players in the draw are eliminated in the quarter finals. For this reason, it can thus legitimately be argued that excluding non-nationals from national championships might qualify as a necessary and proportionate consequential restrictive effect of the objective to crown the best national where these non-nationals would seriously undermine the process of this selection. Consequently, in these circumstances the exclusion may not violate EU law.

2.2.4. *Exclusion of foreigners a justified restriction?*

The exclusion of non-nationals from competing in a national championship clearly restricts free movement rights - when a sufficient economic dimension is present -, or in any case EU citizenship rights to equal treatment. It amounts to a directly discriminatory measure. Therefore, this practice is in need of justification, or it will have to be abandoned. Just as with all other directly discriminatory measures, chances of justification are slim.

Under the orthodox view of justifications for direct discrimination, the available express treaty derogations will not be useful in this respect. Mandatory requirements could only be considered if one adopts a more permissive stance. In that case, of the already accepted grounds of justification in sports-related case law, the objective of ensuring the regularity of the competition could perhaps be submitted in this context. It would then have to be convincingly demonstrated that the participation of foreign athletes disrupts the normal course of the event. This may be clear in knock-out events, but much harder to prove in other situations. A case-by-case analysis will be necessary. A new ground for justification on sporting nationality might also be accepted as a legitimate aim in this respect. National championships are to be seen as events where national identity is celebrated and partially constituted by a competition between nationals only. However, even if a non-treaty justification were to be accepted to justify direct nationality discrimination, it would still have to be demonstrated that the total ban on foreigners is proportionate. That may turn out to be difficult. If these grounds for justification are rejected by the Court, the measure must be abandoned.

2.2.5. *Conclusions and recommendations*

In sports where the presence and participation of foreign athletes exerts a direct influence on the course of a sporting event, the exclusion of foreigners from participation in the national championship might be seen as an inherent and necessary measure to crown the best national in a given discipline. However, banning foreigners from taking part in national championships when their influence on the outcome is merely marginal or indirect, seems to be a disproportionate restriction of freedom of movement.

This conclusion also seems supported by current practice. Several general factual conclusions are interesting in this regard. First, at least each of the 26 different individual sports has an open championship in at least one Member State. The feasibility of such open competitions may call into question the proportionality of the measures taken in more closed national systems. Second, some sports have open championships in half the Member States. National championships are open to foreigners in aquatics and gymnastics in 11 Member States, archery in 12 countries, and athletics in 13, for instance. Third, sports with knock-out systems indeed appear to be more closed. Boxing, for instance, is only open

¹⁵⁴ Directive 2004/38 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

¹⁵⁵ To qualify national championships under the second category one would have to argue that along the line that the object of a national competition is not just to crown the best individual, but to have the best nationals compete against each other. This does not seem convincing for two reasons. First, it is more convincing to accept that the real aim is to crown the best national, seeing how the championship is linked to the title, and not really to have them compete. Secondly, even if the aim would be solely

to have the best nationals compete, this aim could often still be achieved without excluding all foreigners, but by less restrictive means, such as not counting the foreigners. As such, a full exclusion, even if inherent, would not be proportionate.

¹⁵⁶ Of course this perhaps "unfair" effect of knock out systems is also present where only nationals are allowed to compete, in the sense that all who have to face the eventual champion in the earlier rounds will not reach the eventual podium, even if they would have defeated the eventual number two or three. This does not interfere, however, with the central objective of crowning the best national, which allowing non-nationals would.

in two or three Member States. Thus, the inference of less restrictive measures is even stronger in these sports.

However, the most prominent conclusion is perhaps that the general perception that national championships are closed for foreigners does not correspond with a more nuanced reality.

A number of recommendations can be made in this respect:

- If the participation of foreign athletes in multiple national championships is perceived to be problematic, one could resolve this issue by adopting a uniform international calendar, so that all national championships take place contemporaneously, e.g. on the same day.
- A less restrictive measure, which would not ban foreigners from participating, but would merely impose limits on them taking part, taking into consideration the constraints of the organization of a sporting competition and the specific nature of the event, would be more easily acceptable under EU law.
- It could also be envisaged that foreign athletes can only take part in the national championships of a given sport in a given country on the condition that they reside in the country during a certain period and/or are a member of a sports club and affiliated to the responsible national sporting federation. Such a rule would have the additional advantage of practically preventing athletes from taking part in national championships in different countries. However, it may turn out to be difficult to justify (long) residency requirements where shorter periods achieve the same aims and compulsory affiliations must not establish discriminatory conditions for non-nationals.

2.3. Exclusion from winning the national title

2.3.1. Introduction

The question whether the title of 'national champion' in a given sporting discipline may be reserved for nationals only, or rather whether EU law demands that the award of this title be opened up to all EU citizens or even third country nationals, practically means the following: does ice skating ace Sven Kramer from Holland have the right under EU law to become national champion of other countries as well, for example, Italy?

Evidently, this is one of the crucial and most sensitive questions raised by this research. On the one hand, to many it seems 'common sense'¹⁵⁷ that the title of national champion of a given country is reserved to nationals of that particular country. Furthermore, the exclusion of foreigners seems to have widespread support: there seems to be no pressing need to undermine this popular and even loved custom. This is especially so in this sensitive post-Lisbon era, in which the social and political climate is characterized by national and anti-European sentiments. Deconstructing this traditional structure of sports might, therefore, not be the best use of EU legislative capacity and legitimacy: people do not seem to be waiting for changes in this respect, nor are they wanting any changes. By the same token, the intrinsic logic of EU law, centered and evolved around the notion of non-discrimination, has a hard time accommodating this straightforward case of direct discrimination on grounds of nationality. Especially with the increased economic dimension of sports, bringing it closer under the economic focus and logic of the EU Treaty, the question therefore arises to what extent the EU legal framework can accommodate a perhaps rare instance of socially acceptable or even desirable discrimination based on nationality. Would it not be possible, for instance, to envisage opening the title race to people resident in the country?

2.3.2. National titles and the rules of purely sporting interest

It is still possible, although legally speaking since *Meca-Medina* perhaps no longer very likely, that the Court of Justice would accept a rule excluding foreigners from the national title as a rule of purely sporting interest. The argument to place rules on acquiring the national title in this first category would be based on extending the logic underlying the

qualification of matches between national teams as events of purely sporting interest. The Court of Justice has after all consistently allowed discrimination based on nationality as far as these matches are concerned. According to an established line of case law, the free movement provisions 'do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.'¹⁵⁸ It could be argued that national titles should be qualified in the same way as matches between national teams, as they ultimately both concern the direct representation of the nation. The national champion in the sporting discipline also represents that country on the international level. If the national title is in this way qualified as of purely sporting interest, it does not fall under the scope of the Treaty, and direct discrimination would therefore be allowed.

However, as discussed in the general framework, the Court in *Meca-Medina* seems to have reduced the scope of the purely sporting exception in a way that appears to prevent qualifying rules concerning the award of the national title as a rule of purely sporting interest. The significant economic interests that are often involved, for instance in terms of sponsorship money, name recognition and invitations to lucrative tournaments and events, mean that the economic dimension cannot really be qualified as merely marginal. This analysis leads to the result that these rules come under the scope of the Treaty.

2.3.3. Exclusion of foreigners from national titles: inherent and necessary?

The second category in the abovementioned framework seems the most plausible legal categorization for a restriction on eligibility for the national title. This would mean that such rules do fall under the Treaty, but do not form a restriction to freedom of movement, and therefore do not violate EU law. As a result, it would remain possible to reserve the award of the national title to nationals of a country. This qualification is firstly based on the objective pursued by awarding a national title, which concerns *selecting and crowning the best national* sportsman in a specific discipline.¹⁵⁹ It is the quintessential goal of a title to find and honor the 'best' within a specific group of contestants, and in the case of a national championship this group of competitors is formed by the nationals. Crucially, the consequential restrictive effect of excluding non-nationals could be seen as *inherent* in the pursuit of the objective to select and crown the best national, as required under the *Meca-Medina* line of reasoning. Also, such an exclusion might be considered *necessary* as there simply is no less restrictive way to crown the best *national* than to exclude non-nationals from the title. Lastly, such an exclusion also remains 'limited to its proper objective' and does not 'exclude the whole of a sporting activity' from the scope of the Treaty, but remains limited to the specific contest or race for the national title.¹⁶⁰

2.3.4. Exclusion of foreigners: a justified restriction?

If conversely, a rule reserving the national title to only nationals were to be qualified as a restriction of free movement and other Treaty rights, it could only be saved from non-application by a standard justification. This would require a legitimate aim that must be achieved in a proportionate manner, and also that the Court should revisit and revise the orthodox view on the justifiability of directly discriminatory practices. The previously accepted legitimate aims of maintaining a fair balance in the competition or training of young athletes do not seem to apply in this regard. It also cannot be seen why excluding non-nationals from the national title would be necessary or even suitable for achieving those aims. Conversely, a new 'sporting exception', recognizing the positive role of nationality in sports, could perhaps be capable of justifying discrimination based on nationality. If this would be accepted as a legitimate aim, the exclusive award of a national title to a national could be a suitable and necessary means of achieving the objective of crowning and honoring the best national athlete in a discipline.¹⁶¹

2.3.5. Exclusion of foreigners: unacceptable discrimination?

If the Court qualifies the rule excluding non-national EU citizens from the national title as a directly discriminatory measure which cannot be justified by any of the express Treaty derogations and also does not want

¹⁵⁷ Or 'obvious and convincing' in the words of Lenz AG in *Bosman*, para. 139.

¹⁵⁸ *Walrave*, par. 8; *Donà*, par. 14; *Bosman*, paras 76 and 127; *Deliège*, para. 43.

¹⁵⁹ In that sense the concept of a national champion is inherently discriminatory.

¹⁶⁰ *Donà*, paras 14 and 15; *Bosman*, paras 76 and 127.

¹⁶¹ Also see the discussion below on the less restrictive access to compete in the national championship, without being eligible for the title.

to accept the proposed sporting exception as a new ground of justification, the rule violates EU law and should therefore be disapplied.

Considering the sensitivity of the issue, the relative remote impact on the economy of restricted national titles, and the far-reaching intrusion into the realm of sport, the Court may think twice before going down this road. In addition to the possible reasons for finding such a limitation justified, there are also significant, albeit not fully legal, reasons for at least *not finding a violation*. This would be especially so where Member States are sensitive and open to citizenship and free movement rights in other areas, such as the allocation of prize money and participation in national competitions. In that regard, it would be wise for Member States and federations not to overreach by trying to exclude too much of a sport from EU law, as such an attempt might provoke or force the Court to require a more far reaching opening of the sporting scene. Ultimately, in order for sporting bodies to have legal certainty regarding the justifiability of direct nationality discrimination, the Court must develop its case law on this issue. In practice this will require a future test case.

2.3.6. Conclusion and recommendations

It seems likely that the exclusive eligibility of nationals for the national title can and perhaps also should be accepted under the second category of the general framework as inherent and necessary in the selection and crowning of the best national and therefore does not constitute an infringement of EU law.

However, it must be observed that some national titles are open to non-nationals in a number of Member States: for example athletics in Germany, biathlon in Cyprus, Estonia and Finland, or gymnastics in France, Greece, and Slovakia.

In addition, rule makers are recommended to have due regard of the status of legal residents. Under EU law, EU citizens and their family members who have acquired the status of residents under Directive 2004/38 are to be treated equally to host Member State nationals. The question could therefore be asked whether sporting federations might not consider allowing them to win the national title in a championship as well. This would then of course involve a change in the ultimate goal of the championship: it would no longer be to crown the best national in a given discipline, but the best national and/or person residing in the country. This may not be required by EU law, but it might do justice to these EU citizens, and the spirit of EU integration.¹⁶²

2.4. Exclusion from winning national medals and setting national records

2.4.1. A rule of purely sporting interest

Under the EU law framework set out above, the exclusion of foreign athletes from winning medals at national championships and setting national records might be qualified under category one as a 'rule of purely sporting interest'. This qualification is inspired by the predominantly symbolic nature of national medals and records: principally the award of a medal or recognition of a record is the official honour and recognition for an outstanding sporting performance.¹⁶³

It is not disputed that medals and records, especially in the more com-

mercialised sports, can have an economic dimension as well. Such sporting honours may, for instance, lead to more sponsorship or offers to compete in lucrative events. In order to attract more attention to a sporting competition, organisers and sponsors generally try to present an attractive list of famous and high-level participants. Despite this potential economic dimension, a strong argument can still be made to qualify medals and records as purely sporting, the economic dimension being truly secondary.¹⁶⁴ Such an argument also partially rests on the normative claim that such sporting honors *should* perhaps remain of purely sporting interest. Furthermore, as will be discussed further below, retaining the purely sporting qualification of medals and records also becomes more tenable once other, more economic aspects, such as prize money, are more accessible to free movers.

As outlined in the general framework, once an aspect has been qualified as a non-economic, purely sporting interest, it does not fall under the scope of the Treaty, and therefore does not have to conform with the rules on non-discrimination, citizenship or free movement. As a consequence, under this qualification medals and national records may be exclusively reserved for nationals in some sporting disciplines. This means that, where medals are to be qualified as of purely sporting interest, the rules for the award of medals and recognition of records may directly discriminate between nationals of a Member States and all foreigners including EU-citizens.

2.4.2. No restriction of free movement

If the exclusion of foreigners from winning national medals and setting national records is not to be accepted as a rule of purely sporting interest, the question then becomes what consequence would this entail under EU law? It could be argued that such a rule would fall under the second category of the abovementioned EU legal framework, and as a result would not constitute a restriction of the free movement rights.¹⁶⁵ It could legitimately be submitted that in the specific context of national championships, which have as their objective to crown the best national in any given discipline, it is inherent and necessary that prizes are awarded exclusively to nationals of that country. This would entail that sporting federations can therefore still exclude foreigners from receiving medals and establishing records under the economic free movement provisions.

2.4.3. Restriction and justification

Thirdly, should the exclusion of foreigners be qualified as a restriction on free movement, such a restriction might be justified. Justifying a directly discriminatory measure would require, as described in the general framework, a legitimate aim that is furthermore proportionately achieved by the measure. The express Treaty derogations cannot be used in this context and mandatory requirements will not be allowed if the Court adheres to the strict orthodoxy. As regards medals and records, none of the generally accepted legitimate objectives such as maintaining a fair and balanced competition, or training the youth, would seem to apply, as these simply do not necessitate such a restriction. Were the exclusive award of medals and records to be qualified as a restriction on free movement, therefore, this restriction would only seem to be justifiable under a possible newly conceived mandatory sporting requirement in the general interest (i.e. positive representation of nationality through sports). Again, the fact that the economic dimension of medals, although present, is and should be secondary to the sporting laurels and symbolism, would provide a central argument to allowing the restriction of medals and records since neither derogations¹⁶⁶ nor objective justifications¹⁶⁷ can generally be used to serve economic purposes.

2.4.4. Infringement of EU law

Lastly, should such a ground for justification be rejected, the exclusion of non-nationals from medals and records would violate the rules on free movement, and must as such be abandoned. This would mean that at least EU citizens should have the right to be awarded medals and set national records.¹⁶⁸

2.4.5. Conclusion and recommendations

It is concluded that a rule restricting the award of medals and the recognition of national records to national athletes could best be classified

¹⁶² One could e.g. consider stipulating that apart from the host State nationals, also permanent legal residents under Directive 2004/38 (i.e. after five years of continuous residence) can win the national title in a given discipline.

¹⁶³ On the basis of a kind of 'Titanium Dioxide' like reasoning, it could be argued that if the sporting interest clearly outweighs the economic aspect, a rule might still be qualified as being of purely sporting interest: Case 300/89 *Commission v Council* [1991] ECR I-2867.

¹⁶⁴ On the difficult exercise of "severing the economic aspects from the sporting aspects" also see *Meca-Medina* paragraph 25 a.o.

¹⁶⁵ *Meca-Medina* paragraph 42 and 45-47.

¹⁶⁶ See e.g. Case 352/85 *Bond van Adverteerders* [1988] ECR 2085 para 34

¹⁶⁷ On the case law and limited acceptance of what Hatzopoulous calls rules serving structural purposes, see Hatzopoulous, V., 'Recent developments of the case law of the ECJ in the field of services (2003) 37 *Common Market Law Review* 43.

¹⁶⁸ And in addition perhaps also the family members of a migrant EU citizen on the basis of Directive 2004/38 and the third country nationals who can rely upon equal treatment rights conferred in international agreements concluded by the EU with certain third countries.

under EU law as a rule of purely sporting interest, falling outside the scope of the EU Treaty, and should thus be allowed to persist.

In this context, the following recommendations are being made:

- Record setting performances of foreign athletes in national championships of any given country may not be required to be officially recognized as national records in that host country.
- If foreign athletes can take part in national championships, but are in principle prevented from winning an official championship medal, one could envisage the introduction of a separate, 'open' podium ceremony, which would premium the best three athletes of a competition, and the national championship podium, which would premium the best three nationals. In France e.g., there is such a separate national podium in aquatics. And in Romania, foreigners who come first in the national championships in aquatics and pentathlon receive a special diploma.

3. Conclusions and Recommendations

3.1. Rules which prevent or hinder foreign athletes' access to national sporting competitions

3.1.1. Conclusions

The blanket exclusion of foreigners from participation in national competitions is a directly discriminatory measure which amounts to an unjustifiable infringement of EU athletes' free movement rights. These overly restrictive rules will have to be dismissed so as to allow foreign EU athletes access to these competitions.

Rules containing residence requirements affect predominantly foreign athletes. They are thus indirectly discriminatory and must in all likelihood also be dismissed as contrary to EU law unless they can be justified, which appears unlikely.

Athletes from countries outside the EU may benefit from free movement rights if they enjoy some form of legal protection as family members of an EU national or under an international agreement concluded between the EU and their country. Those third country nationals who are not protected by EU law can in theory continue to be excluded from participation in these tournaments.

Current practice in many sports and in several EU Member States does not seem to comply with the general level of required openness. Most commonly, overly long residency requirements seem to be imposed (see for instance the situation in Austria, where weightlifting requires two years of residence, aquatics, archery, badminton and canoeing 3 years, and shooting even up to 5 years of residence). Moreover, restrictions of freedom of movement may also be caused by the ambiguity or complete absence of rules in a given context, or by the explicit discretion given to decision makers (see, for instance, aquatics in Finland, where permission is given on a "case-specific manner").

3.1.2. Recommendations

It is recommended to grant EU athletes and their families, as well as other non-EU nationals who can rely upon EU rights access to national competitions in the same way as home state nationals, subject to the exceptions outlined below.

As there appear to be quite a few instances where this level of openness is not achieved, and as many national federations or clubs might not possess the legal capacity and know-how to establish EU-compliant rules, this might be an area where the European Commission may be of assistance. The Commission may assist for instance through coordination, dialogue, the drafting and circulation of best practices or model rules, or support for the education of national sports administrators. This would also help in reducing the ambiguity and uncertainty of some rules.

Nevertheless, it must be outlined that it is possible to envisage some factual situations which might warrant specific, and limited, restrictions on the access of non-nationals to national competitions.:

- Restrictions inspired by the specific organizational needs of a sporting event and/or the objective of safeguarding space for the training and development of national sportsmen
- Restrictions when the national competition forms part of the national championship

- Restrictions inspired by the desire to ensure the regularity of the competition
- Factual limitation: the international calendar

3.2. Rules which prevent or hinder foreign nationals' access to national championships

3.2.1. Conclusions

In sports where the presence and participation of foreign athletes exerts a direct influence on the course of a sporting event, the exclusion of foreigners from participation in the national championship might be seen as an inherent and necessary measure to crown the best national in a given discipline. However, banning foreigners from taking part in national championships when their influence on the outcome is merely marginal or indirect, seems to be a disproportionate restriction of freedom of movement.

This conclusion also seems supported by current practice. Several general factual conclusions are interesting in this regard. First, at least each of the 26 different individual sports has an open championship in at least one Member State. Second, some sports have open championships in half the Member States. National championships are open to foreigners in aquatics and gymnastics in 11 Member States, archery in 12 countries, and athletics in 13, for instance. Third, sports with knockout systems indeed appear to be more closed. Boxing, for instance, is only open in two or three Member States.

However, the most prominent conclusion is perhaps that the general perception that national championships are closed for foreigners, does not correspond with a more nuanced reality.

3.2.2. Recommendations

If the participation of foreign athletes in multiple national championships is perceived to be problematic, one could solve this 'problem' by adopting a uniform international calendar, so that all national championships take place contemporaneously, e.g. on the same day.

A less restrictive measure, which would not ban foreigners from participating, but would merely impose limits on their participation, and which would take into consideration the constraints of the organization of a sporting competition and the specific nature of the event, would be more easily acceptable under EU law.

It could also be envisaged that foreign athletes can only take part in national championships of a given sport in a given country on the condition that they reside in the country during a certain period. However, required periods of residence amount to restrictions that require justification. It may be particularly difficult to demonstrate the proportionality of long required periods of residence. Where membership of a sports club or affiliation to a national sporting federation are required, these must also be offered to non-nationals on a non-discriminatory basis if they are to be objectively justifiable. Such rules, if proportionate, would have the additional advantage of practically excluding athletes from taking part in multiple national championships in different countries.

3.3. Rule which deny foreign athletes the possibility to win the national title in any given sporting discipline

3.3.1. Conclusions

It seems likely that the exclusive eligibility of nationals for the national title can be accepted under the second category of the general framework as inherent and necessary in the selection and crowning of the best national and therefore does not constitute an infringement of EU law.

However, it must be observed that some national titles are open to non-nationals in a number of Member States: for example aquatics in Germany, biathlon in Cyprus, Estonia and Finland, or gymnastics in France, Greece, and Slovakia. This may raise an inference that since particular national federations are able to open their national titles to non-nationals, more restrictive measures in other federations may not be proportionate.

3.3.2. Recommendations

Rule makers should have due regard of the status of legal residents. Under EU law, EU citizens and their family members who have acquired the status of residents under Directive 2004/38 are to be treated equal-

ly to host Member State nationals. The question could therefore be asked whether sporting federations might not consider allowing them to win the national title in a championship as well. This would then of course involve a change in the ultimate goal of the championship: it would no longer be to crown the best national in a given discipline, but the best national and/or person residing in the country. This may not be required by EU law, but it might do justice to these EU citizens, and the spirit of EU integration.

3.4. Rules which deny foreign athletes the possibility to win medals or set national records

3.4.1. Conclusion

A rule restricting the award of medals and the recognition of national records to national athletes should best be qualified under EU law as a rule of purely sporting interest, falling outside the scope of the EU Treaty, and should thus be allowed to persist.

3.4.2. Recommendations

Record setting performances of foreign athletes in national championships of any given country may not be required to be officially recognized as national records in that host country.

If foreign athletes can take part in national championships, but are in principle prevented from winning an official championship medal, one could envisage the introduction of a separate, 'open' podium ceremony, which would premium the best three athletes of a competition, and the national championship podium, which would premium the best three nationals. In France e.g., there is such a separate national podium in aquatics. And in Romania, foreigners who come first in the national championships in aquatics and pentathlon receive a special diploma.

[...]

Executive Summary

Non-discrimination is a general principle of EU law. One of the best known rules derived from this principle is the EU prohibition against nationality discrimination. The rule against discrimination on the basis of nationality is reflected in Treaty articles which prohibit nationality discrimination in all situations which fall within the scope of the EU Treaties. These rights are also granted to non-nationals who are protected by EU law. EU law currently grants freedom of movement rights of equal treatment to EU citizens but also to certain third country nationals such as non-EU family members of EU citizens and third country nationals who derive rights from international agreements between the EU and their non-EU member state. Equal treatment requires the abolition of both direct discrimination and rules which, whilst not framed in terms of nationality, in fact lead to unequal treatment.

Thus, nationality should not, as a matter of EU law, be a valid way to distinguish between domestic citizens and non-nationals. Yet sports within Europe generally remain organised on the basis of nationality. Under the 'European model of sport', national sports governing bodies are responsible for the organisation of sport within the national territory. As a consequence, sport is often inherently based on nationality. This creates tensions between the requirement to treat all EU citizens without regard to their nationality, and the pre-existing structures based on nationality and national territories by which many European sports are organised.

Even where rules are not expressly based on nationality, they may be prohibited under EU law. Restrictions to freedom of movement are considered discriminatory where nationals and non-nationals are governed by identical rules but where these indirectly favour nationals over non-nationals. For example, since residency requirements are more likely to be satisfied by nationals than by non-nationals, the Court has held that these are indirectly discriminatory, and therefore unlawful, unless justified and proportionate. Furthermore, EU law requires not only equal treatment of non-nationals but in fact prohibits all unjustified rules which hinder or render less attractive the exercise of free movement rights. Thus, when sports rules restrict the freedom of movement of non-nationals, they must be justified.

The Court of Justice of the European Union has in its case law sought

to strike a balance between protecting EU citizens' rights to free movement and non-discrimination, and the specific characteristics of sport and the autonomy of sports governing bodies to organise sporting competitions. It has accepted that nationality rules in national team sports are matters of 'purely sporting interest' which have 'nothing to do with economic activity' and are therefore outside the scope of EU law. It has in later cases considered that some rules are 'inherent to the organisation and proper functioning of sport' and therefore do not in law constitute restrictions of EU free movement rights even where the situation is otherwise within the scope of the EU treaty. Where the Court has found that a sporting practice has restricted freedom of movement rights, it has carefully considered the justifications put forward to examine whether such rules are both justified and proportionate. In so doing the Court of Justice has accepted a number of sports-specific justifications such as the need to educate and train young players and the need to ensure the regularity of competitions. It may even be argued that the Court might accept justifications for nationality rules in sport which would not be acceptable in the context of other activities, thereby recognising that the specific characteristics of sport require specific treatment within EU law.

Despite such guidance from the Court of Justice, it has maintained that neither sporting activities nor nationality discrimination in sport can be categorically excluded from the scope of EU law. Although the Lisbon Treaty has conferred a supporting, coordinating and supplementing competence to the EU in the field of sport, its references to "openness and fairness" as guiding principles suggest that no significant exemption will be forthcoming solely on the basis of Article 165 of the Treaty on the Functioning of the European Union. In its recent case law, the Court has confirmed that issues regarding the compatibility of sporting practices with EU law must be resolved on a case by case basis. Although sports governing may wish that the EU institutions should provide legally certain guidance as to whether various such practices are considered acceptable, it is difficult to extrapolate firm guidance applicable to all sporting practices from the body of cases which has thus far been decided. When guidance issued in the past has been contrary to EU law, the mere fact that it has been issued by an EU institution has not protected sporting practices from being declared unlawful by the Court of Justice of the European Union.

Although the full legal framework applicable to sport has not yet been definitively settled, a presumption now exists that the general EU law rules apply to sport just as to any other activity within the scope of EU law unless a limited exemption can be identified. Within the general framework, it is clear that non-nationals are entitled to equal treatment and that restrictions to their freedom of movement between Member States must be justified and proportionate. According to settled case law, free movement rights include rights to equal treatment and unrestricted access to leisure activities such as sport even where the sport is not organised on a professional basis. Since citizens and their family members enjoy equal treatment in Member States other than their state of origin, they also enjoy as a matter of EU law equal access to both amateur and professional sport regardless of whether the citizen is also enjoying rights as a worker or a provider of services. Thus, non-nationals protected by EU law have a legal right to access sport in Member States other than their state of nationality. Even if the Court's exemption for nationality rules in national team sports were to be extended to individual sports by analogy, such rules would need to be carefully reasoned and limited to their proper function in order to escape censure. Other methods of analysis also require a proportionate justification in order to ensure that restrictions to non-nationals' free movement rights escape censure under EU law.

This study examines restrictions to the access of non-nationals to individual sporting competitions in the EU Member States. Its national experts have compiled data on the rules in all Member States as regards twenty-six Olympic sports in which competitors are individuals rather than teams. These include the triathlon, modern pentathlon, tennis, table tennis, badminton, rowing, canoe/kayak, athletics, aquatics, archery, boxing, judo, shooting, weightlifting, wrestling, taekwondo, equestrian sports, gymnastics, skating, luge, biathlon, bobsleigh, cycling, skiing, fencing and sailing. The data includes both rules that distinguish on the basis of nationality and rules which, whilst based on criteria other

than nationality, hinder or make less attractive the freedom of movement of non-nationals.

Any rules which hinder or make less attractive the exercise of non-nationals' freedom of movement rights must be justified under EU law. This study therefore also seeks to comprehensively list the justifications put forward by sports governing bodies for those rules. However, although national experts have requested information on both the rules themselves and any justifications for those rules, relatively few justifications were put forward to explain restrictive sports rules. This raises the inference that the many substantially unjustified restrictions to the access of non-nationals to sporting competitions are unlawful under EU law. There are also instances of justifications which are difficult to accept in the context of the established legal framework and which therefore as a matter of law seem unlikely to survive a legal challenge. For example, it is not settled law that access to domestic competitions can be restricted on the basis of nationality solely because the competition is organised by the national governing body.

An examination of the rules of specific sports organisations by country also demonstrates that a single sport can be subject to very different rules across the EU Member States. This suggests that some national rules are more restrictive than necessary. In some cases, the difference arises because even some Olympic sports have no national governing bodies in certain Member States. Although this study was limited to the twenty-six identified individual Olympic sports, a further investigation beyond Olympic sports may reveal a significant additional number of these situations. In cases where sports did have domestic governing bodies in all EU Member States, the national rules governing access to sports were also not always uniform. Even where such sports had European-level governing bodies, their rules often left domestic governing bodies with significant margins of discretion regarding the access of non-nationals to domestic competitions. The diversity of rules regarding access may suggest that some of those rules are more restrictive than is necessary. For example, if one governing body does not require a long period of prior residence, it may be more difficult for another governing body within the same sport to demonstrate that its longer residence requirement is proportionate and thus acceptable under EU law.

After identifying the rules governing access of non-nationals to individual competitions in the selected sports, the study then maps rules and those justifications which have been offered against the general framework of EU free movement rules in an effort to determine whether the rules could, if challenged, be declared lawful by the Court of Justice of the European Union. Four categories of sporting rules emerge from this analysis. The first category of rules which do not fall within the scope of the Treaties and are thus not subject to EU law includes 'purely sporting' rules. The second category involves rules that do not in law constitute restrictions to free movement such as those rules which are 'inherent to the organisation and proper functioning of sport'. The third category involves rules which, whilst constituting restrictions, may be justified and proportionate. Finally, the study observes that some rules cannot be considered justified or proportionate and would therefore be unlikely to survive a legal challenge in their current form.

'Purely sporting' rules are outside the scope of EU law. EU law does 'not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only'. However, such rules must be 'limited to their proper objective'. It may be difficult to demonstrate that the exclusion of all non-nationals from all sporting competitions constitutes a 'purely sporting' rule. Furthermore, since the Court has clarified that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down', the exclusion of a specific restriction does not imply the exclusion of all restrictions within that sport. The most likely candidates as 'purely sporting' rules may include rules regarding the distribution of national representative honours and nationality rules in national team sports. It may even be argued that the distribution of medals has so marginal an economic dimension that it could fall within this category of rules.

Some sporting rules do not in law constitute restrictions to freedom of movement. Since they are not restrictions, they may not always need detailed justification. Some rules have been considered inherent in the organisation and proper functioning of sport by the Court of Justice. These could include rules limiting the number of participants in a judo tournament. Other hindrances to free movement may be so 'uncertain and indirect' that they are not in law considered restrictions and therefore do not require justification. In some cases, the Court has distinguished between non-discriminatory rules which hinder access and must be justified, and non-discriminatory rules which affect issues other than access and which therefore do not require justification. Any rule which as a matter of EU law does not require justification is likely to offer a wide margin of appreciation to sports governing bodies.

However, rules which constitute restrictions to freedom of movement must be justified and proportionate. These include all rules restricting access to sporting competitions as well as any rules involving the unequal treatment of non-nationals. Several sport-specific justifications, such as the need to ensure the regularity of competitions and the need to educate and train young players, have in principle been accepted by the Court of Justice. However, it remains doubtful whether directly discriminatory rules can be justified other than by reference to Treaty grounds of public policy, public security and public health. In such cases, it may be difficult to find a justification which the Court will be prepared to accept. Furthermore, all restrictions must be proportionate: they must be suitable for achieving the lawful aims but also the least restrictive measures which will achieve those aims. Thus, rules established by national bodies which are more restrictive than the rules of other national bodies within the same sport may be difficult to justify since the existence of less restrictive measures in other domestic systems implies that less restrictive measures can achieve those aims.

The final category of rules identified by the study includes those restrictions which are not justified and proportionate and therefore breach EU law. Prominent past examples of these include the 3+2 rule, which restricted the access of non-nationals to professional football and was declared unlawful in the *Bosman* case. Even if the Court could be argued to offer a wide margin of appreciation to sporting rules in some cases, there is also a body of modern case law that demonstrates careful examination of the proportionality of such rules. The onus will be on governing bodies to demonstrate the justifications and proportionality of restrictions. In the absence such evidence, which in the context of this study was often not forthcoming despite direct requests addressed to sports governing bodies, restrictions on the access of non-nationals will be contrary to EU law.

It is clear that the principles of fairness and openness which are reinforced by Article 165 of the Lisbon Treaty have not yet been uniformly implemented by sports governing bodies within the European Union. There are many sports where the access of non-nationals is restricted by reference to nationality even in cases where no element of national representation can be identified. In some sports, access even at an amateur level is restricted by rules such as residence requirements that restrict the equal access of non-nationals. Organising bodies have not always clearly articulated the reasons for restricting the access of non-nationals, and where reasons have been articulated, they are not always in compliance with EU law. The diversity of practices also suggests that some practices within the same sport are more restrictive than others, and that the more restrictive practices may not be proportionate and are therefore not justified under EU law.

There are several ways to ensure the greater compliance of sporting rules with EU law. It may be that many sports bodies lack the expertise and specialist knowledge required in order to ensure that their practices comply with EU law and in particular that non-nationals are able to access sport where appropriate. In such cases, sports bodies, Member State administrations and non-nationals themselves would mutually benefit from the exchange of good practices and from training specifically targeted at ensuring awareness of and compliance with EU law. However, where national associations fail to make adjustments required by EU law and where Member States fail to protect the rights of non-nationals to access sports, it may be necessary for the Commission to consider more direct approaches such as infringement proceedings.

Infringement proceedings and domestic legal challenges which result in preliminary references to the Court of Justice of the European Union would also offer opportunities to clarify the legal framework in those areas where sports governing bodies are legitimately concerned about a lack of legal certainty. Whilst the Court of Justice remains committed to a case-by-case analysis, a greater body of case law would provide a greater degree of certainty. In particular, where the Commission has already investigated practices and raised doubts about their restrictive effects, it may be necessary for the Court of Justice be given an opportunity to directly consider such issues. The resulting legal certainty will assist sports governing bodies to develop practices that both protect the specific features of sport whilst complying with the rights of non-nationals under EU law.

Recommendations

On the basis of the EU Treaty provisions on citizenship, non-discrimination on grounds of nationality and freedom of movement, the relevant secondary legislation and the case law of the Court of Justice of the EU in this respect, the following suggestions are made:

1. As far as access of foreign athletes to national competitions is concerned, it is recommended as a rule under EU law to encourage and allow the participation of foreign athletes (EU citizens and also third-country nationals to the extent that they may benefit from EU rights) as much as possible, while taking into account the constraints imposed by the organization of a specific sporting event and respecting the need to ensure the training of young players and the regularity of the competition.

2. As far as participation of foreign athletes in national championships is concerned, it is in general recommended under EU law that these athletes be allowed to compete in the national championship of a given sporting discipline, provided that they do not exert a direct and substantial influence on the outcome of the competition. In sports which involve direct eliminations, it is accepted in principle that foreigners may be excluded from participation in the national championship, as they exert too direct and substantial an influence on the outcome of the tournament.
3. As far as the award of national titles is concerned, under EU law winning the national title may remain the exclusive prerogative of nationals of a given country. This can be classified as a rule which comes under the scope of the EU Treaty, but does not form a restriction to freedom of movement as it is inherent to the organisation and proper functioning of national titles and proportionate and therefore does not violate EU law.
4. As far as the award of medals in championships and the setting of national records is concerned, this is likely to be a matter of purely sporting interest which does not come under the scope of application of the EU Treaty.
5. The European Commission is invited to enter into a constructive dialogue with national federations who still apply unacceptable discriminatory measures on grounds of nationality, so as to have these measures removed. If necessary, the Commission may have to undertake enforcement action so as to preserve the equal treatment rights of athletes.

[...]

The International Sports Law Journal



International and European Sports Law Course

School of Law, Erasmus University Rotterdam, The Netherlands

Lecturer: Prof. Dr R.C.R. Siekmann

Structure: ten 2-hour interactive lectures

Assessment: paper (10 pages) and oral exam

Preknowledge: basic knowledge of public international and EU law

Period: 2011/2012

(For more information see page 133)

Implementation of the WADA Code in the European Union*

Introduction

The fight against doping has become an increasingly important theme on the European agenda.

On this subject, the White Paper on Sport published by the European Commission on 11 July 2007 stated the following:

The EU would benefit from a more coordinated approach in the fight against doping, in particular by defining common positions in relation to the Council of Europe, WADA and UNESCO, and through the exchange of information and good practices between Governments, national anti-doping organisations and laboratories. Proper implementation of the UNESCO Convention against Doping in Sport by the Member States is particularly important in this context.

The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States.

In the past few years, activities in this field have essentially concentrated on the Code of the World Anti-Doping Agency (WADA) which is the subject of the Copenhagen Declaration and the UNESCO Convention against Doping in Sport. Naturally, the work of the informal European working party, the 'EU Working Group on Anti-Doping', actively contributes to this.

Despite the increased interest in this subject, in practice the central objective of the Code, i.e. to ensure harmonised, coordinated and effective anti-doping programmes at both an international and national level with regard to the detection, deterrence and prevention of doping, is still far from being realised for a variety of reasons. The necessity for a European framework for cooperation in the fight against doping, on the basis of the Code, therefore requires further study.

An initial requirement for the achievement of strict agreements on a European level is that reliable information is available about the state of affairs in each Member State.

With a view to the Belgian Presidency of the European Union in the second half of 2010, the Flemish Minister for Sport, Philippe Muyters, has asked the T.M.C. Asser Institute of International Law in The Hague to carry out a thorough study of the application of the Code within the European Union and to catalogue its findings.

In this report, the T.M.C. Asser Instituut presents the results of its study. Its inventory was undertaken on the basis of the attached questionnaire which was distributed amongst the relevant government departments and/or agencies with primary authority in the area of sport in each Member State and amongst the National Anti-Doping Organisations (NADOs) in the European Union. Included with this study is a CD-ROM containing the text of the Code, the International Standards, the UNESCO Convention against Doping in Sport, as well as national legislation and sports rules and regulations governing anti-doping which were received and collected as supplements to the answers.

As far as Belgium is concerned, a distinction should be made between the four different authorities authorised to fight doping, namely: the Flemish Community, the French Community, the German-speaking Community and the Joint Community Commission.**

The study was concluded on 6 August 2010.

Conclusions

A. Relationship between the national rules and regulations and the WADA Code

A.1 In what way has the UNESCO Anti Doping Convention been implemented in your country?

One EU country is not yet a State Party to the UNESCO Convention against Doping in Sport.

Implementation of the WADA Code

- in a Doping Act: 10 EU countries
- in a Sports Act: 5 EU countries
- in other Acts: 9 EU countries
- Doping rules in regulations of sports authorities: 3 EU countries
- No implementation: 1 EU country

A.2 On which points do the anti-doping rules and regulations in your country differ from the WADA Code?

- In 20 EU countries no differences exist between the WADA Code and the anti-doping rules;
- In 5 EU countries the anti-doping rules differ from the WADA Code on some points;
- 3 EU countries are in the process of bringing the law into conformity with the principles of the new version of the WADA Code;
- In 1 EU country the process of implementation has been abandoned.

A.3 On which points does your country's practice differ from the prevention of doping envisaged in the Code?

- In 15 EU countries practice does not differ from the prevention of doping envisaged in the Code;
- In the remaining EU countries practice differs on some points, namely:
 - contracts on doping controls concluded with sport organizations;
 - the cost of transfer and analysis of doping samples;
 - dissemination of personal information;
 - frequency of in- and out-of-competition doping controls;
 - the modality of doping sanctions;
 - the publication of doping sanctions;
 - quality of doping control officers;
 - the right to appeal;
 - the use of ADAMS;
 - the whereabouts issue.

A.4 Have your rules and regulations been declared WADA compatible with the present WADA Code, 2009 version?

- WADA has declared the rules and regulations of 15 EU countries to be compatible with the present WADA Code;
- The rules and regulations of 13 EU countries have not yet been declared compatible with the present WADA Code;
- The rules and regulations of 1 EU country have been declared incompatible with the present WADA Code.

A.5 Does your country make use of the Anti-Doping Administration and Management System (the ADAMS database), which the WADA makes available to all stakeholders?

- 11 EU countries make unrestricted use of ADAMS.
- This means that ADAMS is used for whereabouts, Therapeutic Use Exemptions, mission orders and results management.
- 7 EU countries make restricted use of ADAMS.

* Report on *The Implementation of the WADA Code in the European Union*, commissioned by the Flemish Minister responsible for Sport in view of the Belgian Presidency of the European Union in the second half of 2010 to The T.M.C. Asser Institute, the Hague, The Netherlands..

** For practical reasons, in the Conclusions of the study the Communities of Belgium were counted as separate countries, whenever differences were found in the replies of those Communities.

- 6 EU countries are currently in the process of implementing ADAMS.
- 5 EU countries do not make use of ADAMS.

A.6 *Has a TUEC or Therapeutic Use Exemption Committee been established in your country?*
Only in 3 EU countries a Therapeutic Use Exemption Committee has not been established.

A.7 *Are all five International Standards of the WADA and the 2009 Code fully applicable in your country?*

- All five International Standards of the WADA and the 2009 Code are fully applicable in 13 EU countries.
- The Standard for Laboratories is not applicable in 5 EU countries.
- Work on the implementation of the International Standard for Protection of Privacy is ongoing in 5 EU countries.
- In 2 EU countries the International Standard for the Protection of Privacy is only applicable to the extent that it does not infringe Directive 95/46/EC or national legislation for privacy protection.
- In 2 EU countries the International Standard for Protection of Privacy is not applicable.
- In 1 EU country two International Standards are applicable (laboratories and the list of banned substances).
- In 2 EU countries none of the Standards are applicable.

B. Specific points of attention

B.1 *With which anti-doping organisations (ADOs) - both national and international - are you currently exchanging information?*

- Apart from communicating with other NADOs and WADA, which NADOs are obliged to do in case of a positive finding, all NADOs have their own specific circles in which information is exchanged.
- Only 1 EU country reports that it does not exchange information.

B.2 *Are the doping sanctions imposed by other ADOs recognized and fulfilled in your country?*

- 18 EU countries recognize and carry out doping sanctions imposed by foreign ADOs.
- 7 EU countries conditionally recognize and carry out doping sanctions imposed by foreign ADOs.
- 4 EU countries do not execute foreign doping sanctions.

B.3 *What is your opinion concerning a mechanism for reciprocity (mutual recognition) of doping sanctions between the 27 EU Member States?*

- All EU countries are in principle in favour of the idea of mutual recognition of doping sanctions between the 27 EU Member States.
- Some EU countries are only in favour provided that, inter alia:
 - the sanctioning bodies operate according to the WADA Code;
 - the rights of the defence are respected.
- Other EU countries are in favour of the idea of mutual recognition only if all EU countries would have harmonized rules and identical sanctions.

B.4 *Do you ever carry out doping controls at the request of another Member State or NADO?*

- The NADOs of 26 EU countries carry out doping controls at the request of another Member State or NADO.
- 1 EU country is not in a position to carry out tests for another NADO.

B.5 *Which rules and regulations apply in your country concerning trade and distribution of doping products?*

- The trade and distribution of doping products is a criminal offence prohibited and sanctioned by:
 - the Criminal Code in 8 EU countries
 - drugs laws in 10 EU countries
 - the Sports Act in 4 EU countries
- 5 EU countries have no existing laws and regulations relating to trade and distribution of doping products.

B.6 *What are your NADO's statutes?*
NADOs in EU countries can be bodies that are subordinate to a Ministry or acting independently. Besides public bodies, they can be foundations under private law or have corporate status.

B.7 *How has your national registered testing pool for doping tests been defined and what does it consist of, and what is the number of sportsmen assembled in the registered pool on 1 February 2010?*
Because NADOs are free to decide which athletes will be included in its national registered testing pool the composition of these pools differs widely from country to country.
The number of sportsmen included in the registered pool on 1 February 2010 differs widely from country to country.

B.8 *What is the relationship between the sport federations, the public authorities and the NADO in your country?*

- In nearly all EU countries the relationship between the NADOs, the sport federations and the public authorities has been defined in some way.
- Cooperation between the sports federations and the NADOs is determined by either:
 - a legally subordinate position of the sport federations (5 EU countries);
 - the allocation of state funding (14 EU countries); or
 - agreements (5 EU countries).
- The situation in 3 EU countries is not clear.

B.9 *Does your NADO already apply the WADA's Athlete Biological Passport programme in the fight against doping?*

- The NADOs in 5 EU countries apply the WADA's Athlete Biological Passport programmes.
- 3 EU countries will introduce the programmes in 2010.
- The NADOs in 2 EU countries use programmes which are similar to WADA's Athlete Biological Passport programmes.
- In 2 EU countries the programmes are the object of study.
- The NADOs in 14 EU countries have not yet implemented the Athlete Biological Passport programmes.



Modern Sports Law

by Jack Anderson

2010 Hart Publishing Oxford UK & Portland Oregon USA

ISBN 978-1-84113-685-1 Pages 373 + XLIX Paperback Price £25

According to the Author, Dr Jack Anderson, who is Senior Lecturer in Law at Queen's University, Belfast, Northern Ireland, the aim of this Book is to "*provide an account of how the law influences the operation, administration and playing of modern sports.*" Including, presumably, 'Wiff-waff' according to Boris Johnson, Mayor of London, looking forward to 'Ping-Pong' coming home to the London Olympics in 2012!

In its Eight Chapters, the Book covers the historical development of Sports Law; national and international issues on the operation and administration of sport; matters relating to the playing of and participation in sport; and the commercial aspects of the evolving professional sports industry, which is big business globally and nationally.

Within these general themes, the Book deals with such vexed legal questions as challenges to the decisions of sports governing bodies; civil and criminal liability in sport (I note particularly that there is good coverage of boxing, a subject on which Anderson is something of an expert!); doping in sport; sports-related contracts of employment; and, a subject particularly close to your reviewer's heart, the settlement of sports disputes by ADR, including a useful review of the activities of the Court of Arbitration for Sport, based in Lausanne, Switzerland, whose influence on the 'extra-judicial' settlement of sports-related disputes at the international level continues to increase year on year. The actual choice of the topics covered in the Book is, in the words of its Author, "*some-what eclectic.... [reflecting] ... the assorted nature of the subject matter.*"

The Book opens with a manful and laudable attempt - as it should bearing in mind its title! - to define what 'Sports Law' is; or whether we

should - perhaps more strictly - refer to 'Sport and the Law' - an academic 'hoary old chestnut', if ever there was one! The Author, I think quite rightly, settles for the term 'Sports Law'!

The Book also covers the application of European Union Law (EU) to sport - an important and, again, evolving topic, which no self-respecting Book on Sports Law can possibly omit. Needless to say, there is a fairly comprehensive analysis of the landmark decision of the European Court of Justice (ECJ) in *Bosman* and its ongoing repercussions and implications for the further development of 'Sports Law' at the EU level.

However, there is one glaring omission from the Book, especially as it is aimed primarily at students, and that is the absence of any Bibliography - not even a 'Select' one. The Book, however, is complimented by a workmanlike Index, as well as useful and comprehensive Tables of Cases, including Commonwealth and other Jurisdictions and ECJ Decisions, Statutes, International Treaties and - the nowadays obligatory - Court of Arbitration for Sport (CAS) Awards - to the extent, of course, that they have been placed in the public domain, one of the weaknesses, from a precedents point of view, and one of the strengths, from an ADR point of view, of the CAS.

The Law is stated as at 30 April, 2010.

All in all, this is a well-researched and well-written Book on 'Sports Law' and one that I would heartily and unhesitatingly recommend to students and practitioners alike!

Ian Blackshaw

Sport and the Law: A Concise Guide

by Laura Donnellan

2010 Blackhall Publishing Blackrock Co. Dublin Republic of Ireland

ISBN 978-1-84218-210-9 Pages 254 + XXIV Paperback Price €30

The aim of this Book is to provide "*an overview of the law relating to sport in Ireland and other common law jurisdictions, namely, England, the United States, Canada and Australia.*"

From the title of this Book, it is clear that the author, Laura Donnellan, who is a Lecturer in the School of Law of the University of Limerick in the Republic of Ireland, seems to be a disciple of the late Edward Grayson. Although in her Introduction, she broaches and gets close to the subject of 'Sports Law' in the following terms:

"In recent years we have seen an increase in the involvement of the law in sport. The professionalisation and commercialisation of sport has brought with it a plethora of legal issues. In recent years, sportspersons have seen an increase in earning potential. If an athlete suffers a career-ending injury or is involved in a contract or sponsorship dispute, or a doping allegation, he or she will be more likely to seek redress in the courts. In short, sportspersons are demanding higher standards of justice. As a result of these sporting cases, a cohesive body of law pertaining to sport has developed."

Leaving aside this issue of whether there is such a thing as 'Sports Law', on which opinion is widely divided, the Book covers a wide range of legal issues. These include: participator violence and civil liability in sport; doping and gender testing in sport, including a brief reference to the infamous Caster Semenya case; commercial issues in sport, including the application of the Common Law Doctrine of 'Restraint of Trade' and, in particular, the Dwain Chambers' eligibility issue, which, quite frankly, is a scandal; European Law and sport (I would quibble with the use of this term instead of European Union Law, as 'European Law' also includes a range of sporting issues arising under the European Convention on Human Rights of 1950, which is not mentioned at all

in this Chapter and only briefly referred to elsewhere in the Book, despite its increasing importance!); and, of course, ADR and sport, and, in particular, the importance and ever-developing role of the Court of Arbitration for Sport (CAS) in the settlement of sports-related disputes '*within the family of sport*'.

The Book also deals with the fascinating and controversial topics of the legality of boxing and other fighting sports, namely so-called 'mixed martial arts'; and animals in sport, including the controversial UK Hunting Act of 2004, which banned fox hunting with dogs, and the Hansen case, decided by the CAS on appeal from the FEI, which involved the doping of his horse competing as part of the Norwegian team in the jumping event at the Beijing Olympics in 2008.

A feature of the Book, that your reviewer particularly liked, is that every Chapter ends with either a Conclusion or a Summary, which is very helpful to the reader.

The Book also includes a useful Bibliography, complemented by copious footnotes, referring to other helpful materials and resources, and List of Acronyms, of which Sport has spawned so many over the years, as well as the usual Tables of Cases and Statutes. There is also a short but adequate Subject Index.

The Book lives up to its sub-title in providing the reader with a clear and concise guide to the subject of the interface between sport and the law in all its contemporary and wide-

ranging manifestations, for which the Author is to be warmly congratulated!

I would recommend this Book to all those who are involved - in some way or another - in the administration, practice and business of sport!

Ian Blackshaw

International “Lex Sportiva” Conference*

Universitas Pelita Harapan

Djakarta, Indonesia

22 September 2010



Opening address by Dr Andi Alfian Mallarangeng, Minister of Youth and Sport of the Republic of Indonesia



Key-note address by Dr (HC) Rita Subowo, Chairman of the Indonesian Olympic Committee



From left to right: Hinca IP Pandjaitan, SH MH ACCS, Director of the Lex Sportiva Instituta Indonesia, Djakarta, Alexandre Miguel Mestre, PLMJ LaW Firm, Lisbon, Portugal, and Prof. James A.R. Nafziger, Thomas B. Stoel Professor of Law, Willamette University College of Law, Salem, Oregon, United States of America, and co-founder of the Hague International Sports Law Academy, at the signing ceremony of the Djakarta Declaration on Lex Sportiva.



Indonesia, and the ASSER International Sports Law Centre / opening conference of the Hague International Sports Law Academy (HISLA)

* In cooperation with the Lex Sportiva Instituta Indonesia and supported by the Minister of Youth and Sports of the Republic of Indonesia, the Indonesian National Sports Committee and the Indonesian National Olympic Committee, The Football Liga



From left to right: the Indonesian Minister of Sport, the Chairman of the Indonesian NOC, and Dr Janez Kocijancic, President of the National Olympic Committee of Slovenia and co-founder of HISLA.



Key-note address by Prof.Dr Bintan R Saragih SH, Dean of the Faculty of Law, Universitas Pelita Harapan, Djakarta, Indonesia.



Key-note address by Dr (HC) Jonathan Parapak, Rector of Universitas Pelita Harapan (UPH).



Prof.Dr Klaus Vieweg, Faculty of Law, Friedrich-Alexander University, Erlangen-Nuremberg, Germany, and co-founder of the Hague International Sports law Academy, signing the Djakarta Declaration on Lex Sportiva.



After the solemn adoption of the Djakarta Declaration on Lex Sportiva, 22 September 2010, and also announcing the official start of the HAGUE International Sports Law Academy (HISLA); from left to right: Janez Kocijancic, Alexandre Mestre, Klaus Vieweg, Rob Siekmann, Jim Nafziger, Bintan Saragih, Franck Latty (Professor of Public Law, Law Faculty of Clermont-Ferrand, University of Auvergne, France), and Hincia Pandjaitan (also chairing the Conference's afternoon session)

The text of the Djakarta Declaration on Lex Sportiva is published in The International Sports Law Journal (ISLJ) 2010/3-4 at pp. 18-19; and see for the text of the opening address by Janez Kocijancic on behalf of HISLA, that was delivered at the Lex Sportiva Conference in Djakarta. ISJ 2010/3-4 at p. 10.

Constitution of the Asian Council of Arbitration for Sports and Sports Arbitration Tribunal of Asia

To,
The President, Olympic Council of Asia
The Secretary General, Olympic Council of Asia,
Executive Board Member, Olympic Council of Asia,
President/s, National Olympic Committee/s of Asia
Secretary General, National Olympic Committee/s of Asia

Sir,

I am pleased to inform you that the 16 World Congress of the International Association of Sports Law, had been successfully organised on 25 - 28 November 2010 at Seoul, Korea. This Congress was organised by the Korean Association of Sports and Entertainment Law. The delegates were all from the Sports Lawyers from the whole globe, including more than 53 Asian delegates. The Congress resolved their resolution as, "Seoul Declaration". Copy of the Declaration is attached for your kind perusal in this regard.

One of the resolution was to constitute an "Asian Council of Arbitration for Sports" here in after referred as 'ACAS'. The purpose for constituting the ACAS was to establish and manage the "Sports Arbitration Tribunal of Asia" here in after referred as 'SATA'. The objective behind the resolution to constitute the ACAS and SATA was to establish the decentralize office of the International Council of Arbitration for Sports (ICAS) in Asia as well as decentralize court of the Court of Arbitration for Sports (CAS). Whose principal bench is at Lausanne, Switzerland. Hence it is pecuniary very difficult for the members of the National Olympic Committees of Olympic Council of Asia to approach CAS at Lausanne. Where as the autonomy of the National Olympic Committee/s and National Sports Federation/s are being interfered by the Governmental Agencies or the Judiciary in a large scale. Where as the Olympic Charter advocates that the disputes between the Sports Organisation shall be resolved with their own mechanism.

Therefore, a foundation Committee consisted of more than 53 Sports Lawyers and Sports Law experts have resolved to constitute the Asian Council of Arbitration for Sports and Sports Arbitration Tribunal of Asia. You being the great stake holder of the Olympic Movement of the Asian continents and of your countries know that most of the Arbitrators and Mediators in ICAS and CAS are being empanelled from the

European and American countries. The Sports Lawyers from the Asian countries are hardly given any positions in the ICAS and / or CAS. So it was thought that in order to promote the Sports Lawyers and Sports Law Experts with in from the countries in Asian Continents the constitution of the ACAS and SATA is of a great importance. Because most of the Arbitrators and Mediators involved in the Arbitration or Mediator during the Asian Games and / or any International Sports Tournaments does not know the laws of the Asian Countries and costs heavily on the NOC and NSO of the Asian Continents.

I am attaching the copy of the draft Agreement of the Asian Council of Arbitration for Sports and Sports Arbitration Tribunal of Asia for your kind perusal and comments and suggestions. So that with the help of your good office we can approach the International Olympic Committee and the International Council of Arbitration for Sports to recognize our decentralize office in any Asian Country like Sydney or New York.

Your comments and / or suggestion in this regards is anticipated with in a month from the receipt of this draft Agreement of ACAS and / or SATA, with a recommendation of the Sports Lawyers or Sports Law Experts from your country to become the members of the ACAS.

Thanking you, with kind regards.

Yours Sincerely,

(Prof. Dr. Amaresh Kumar)
Advocate,
Supreme Court of India,
Secretary General, Asian Council of Arbitration for Sport
Hony. Visiting Professor & Research Fellow of ASSER International Sports Law Centre,
The TMC ASSER Institute of International Laws, the Hague,
The Netherlands,
Secretary General, All India Council of Physical Education & Sports Law India
18, Central Lane (Basement),
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Asian Council of Arbitration for Sports

Minutes of The First Meeting of the Founder Members of the Asia Council of Arbitration for Sports, dated : 26-27 November, 2010 Seoul, Korea

The 16th World Congress of the International Association of Sports Law was organised by the Korean Association of Sports and Entertainment Law from 24-28, November, 2010 at the Hanyang University, Seoul, Korea. The Congress was inaugurated by Kim, Chong - Yang, the President of the Hanyang University, Korea, at Hanyang Institute of Technology building, 6th Floor of the Hanyang University. Prof. Panagiotopoulos, Dimitrios, the President of the International Association of Sports Law, Athens, Greece, presented the Congratulatory remark after the inauguration and welcome speech of Kim, Chong - Yang. Prof. Yeun, Kee-young, the President of the Korean Association of Sports and Entertainment Law addressed the opening address.

Followed by the inaugural functions and addresses the Key-Note speeches were presented by Pangiotopoulos, Dimitrios (President of IASL, Greece), Ms. Clement, Annie (University of New Mexico, USA), Hunt, Ian (President, Australia and New Zealand Sports Law Association), Colantuoni, Lucio, (University of Degli Studi Di Milano, Iteli), Shevchnko, Vagan (Head, International Sports Law of the Department for Physical Culture and Sport, Moscow, Russia), Liu, Yan (Vice-President of China Sports Law Association, China), BORGES,

Mauricio Ferrao Pereira (Felsberg e Associados Lawyers, Brazil), Saito Kenji (Vice President of Japan Sports Law Association, Japan), Prof. (Dr.) Kumar, Amaresh (Advocate, Supreme Court of India & Secretary General, Sports Law India and All India Council of Physical Education, India), Mould, Kenneth (University of Free State, South Africa), Shokri, Nadar (President, Legal Commission of Olympic National Committee of Iran, Iran), Foks, Jacek (Deputy Director, Polish Institute of International Affairs, Poland) and Yeun, Kee - Young (President of the Korean Association of Sports and Entertainment Law, Korea). They all presented their paper on the topic, "Sports Law in the World - Present and Perspective" in relation to their Nation on the first day of the conference on 25, November 2010.

On 26 November 2010 the second day of the session, all together, 60 (Sixty only) papers were presented by the delegates of the several countries as per the schedule and list enclosed with this minute. The topic, "CAS and Sports Jurisdictional Order, Need for Constituting, 'Sports Arbitration Court of Asia' the First Appellate Court of CAS" was by presented Prof. Dr. Kumar, Amaresh was very much appreciated by all the delegates presented in the Conference. It was felt my most of the Asian Delegates that since most of the Sports Law Experts are present in this Congress. A resolution shall be passed to formulate and constitute the, "Sports Arbitration Court of Asia".

As on the request of the Asian delegates present in the present

Congress were called by Yeun, Kee - Young, President of the Korean Association of Sports and Entertainment Law, a meeting was convened at the Lexington Hotel, Seoul on 26, November 2010 at 05:00 PM in room No. 1312. The Following members attended the meeting:

S.No.	Name	Country
1.	Liu, Yan	China
2.	Hon-Jun Ma	China
3.	Lin Zhu	China
4.	Jia-Si Luo	China
5.	Prof. Xiao-Shi-Zhang	China
6.	Zhi-Qiang Wang	China
7.	Zhongqiu Tan	China
8.	Xu-Feng Yan	China
9.	Bing Liang	China
10.	Weidong Tang	China
11.	Bao-Qing Li	China
12.	Zhe Jin	China
13.	Rihun WU	China
14.	Ji Jin	China
15.	Xiaoping Wang	China
16.	Yi Li	China
17.	Li Shen	China
18.	Yuan Gao	China
19.	Sung-Bae Kim	China
20.	Fa-Chao Ma	China
21.	Zhang Ruo	China
22.	Fei Gao	China
23.	Hua - Rong Chen	China
24.	Yan Yan	China
25.	Boyuan Zu	China
26.	Shixi Huang	China
27.	Shuli Guo	China
28.	Yang - Jin Yoon	China
29.	Saito, kenji	Japan
30.	Takuya Yamazaki	Japan
31.	Kimihito Kato	Japan
32.	Yuki Mabuchi	Japan
33.	Felio J. B. Martorell	Japan
34.	Taisukue Matsumoto	Japan
35.	Tomoyuki Kataoka	Japan
36.	Andy Hall	Japan
37.	Yeun, Kee - Young	Korea
38.	Doo - Hyun Kim	Korea
39.	Hye - Seon Choi	Korea
40.	Seok - Jung Shon	Korea
41.	Woo - Yeul Baek	Korea
42.	Jae - Kyoung Lee	Korea
43.	Sang - Kyum Kim	Korea
44.	Gu - Min Kang	Korea
45.	Dae - Hee Kim	Korea
46.	Yun -Chul Baek	Korea
47.	Jang, Jae - Ok	Korea
48.	Ki - Tae Kim	Korea
49.	Joo - Jongmi	Korea
50.	Shorki, Nader	Iran
51.	Jady Hassim	Malaysia
52.	Adnan Wali	UAE (Ajman, Iraq)
53.	Kumar Amaresh Prof. (Dr.)	India
54.	Panagiotopoulos, President, IASL Dimitrios (Special Invitee)	

The meeting called in order, by the President, of IASL, Panagiotopoulos, Dimitrios, and the motion was moved by Joo, Jongmi, Secretary General of the Organising Committee of the 16th World Congress of the IASL, stating that during the Paper presentation by Prof. Dr. Amaresh Kumar, a need was felt by all the delegates that a first Appellate Court of Arbitration for Sports was required at the continent level. As the Head of the CAS is at Lausanne, Switzerland. Which become some time very difficult and costly for the National Olympic Committee to approach

due to the far off distance and cost effective to reach at Lausanne, for redressal of their disputes. She stated that if the First Appellate Court of CAS is established at every continents the NOC or the Sports Federation will be in the better way to settled their dispute first at their Continent Level Sports Arbitration Tribunal and in case of any party is not satisfied with the award of the Continental Level Sports Arbitration Tribunal then they can approach the CAS as final Court for Sports Arbitration. This will also minimize the interference of the local court to intervene in the disputes related with the Sports.

She further informed that since, the Congress is also resolving to formulate one Law for Sports related disputes, so that the sports related disputes can be resolved in the light of the common law globally, like "Lex-Sportiva world wide". It is the right time to begin with Asia at present since all most more than 50 Sports Lawyers from Asia are present in this World Congress of the IASL.

The House unanimously resolved the move of Ms. Joo, Jongmi, as one of the ardent need of the time.

In this regard Mr. Shorki, Nader of Iran, informed that under Rule - 59 of the Olympic Charter, it is mandatory for all the NOC or NSF to resolve any dispute arising from its execution or interpretation shall be settled by arbitration in accordance with the provision of CAS. But as rightly stated by Ms. Jongmi that, approaching every time to the CAS at Lausanne proves to be a costly matter, hence we shall constitute the, "Sports Arbitration Tribunal of Asia". He further stated that in the list of the CAS Arbitrators and Mediators very few representation has been provided to the people from the Asian Continental region. As it shall be very important that a body shall be constituted at our own continental region. So that more people from Asia shall be included in the list of the Arbitrators and Mediators. He also proposed to constitute a Council to control and look after the SATA.

On the proposal of Shorki, Nader, the House unanimously resolved to constitute a, "Asian Council of Arbitration for Sports" with in this house and elect some important Board of Governors to process the functions of the, "Asian Council of Arbitrator for Sports", here in after named as, "ACAS" in short. The following members were elected in the Governing Body of the, "Asian Council of Arbitrator for Sports":

Prof. Yuen, Kee-Young of Korea was unanimously elected for the Post of the President of the ACAS on the proposal of Kenji, Saito, of Japan.

Prof. Dr. Kumar Amaresh, of India was unanimously elected for the Post of the Secretary General of the ACAS, whose name was proposed by Takuya, Yamazaki of Japan and Lui, Yan of China.

Prof. Yuen, Kee-Young, proposed the name of Shorki, Nader, of Iran for the Post of Secretary Finance, an his name was proposed by Prof. Yan, Xufeng of China. The house unanimously, approved the name of Shorki, Nader to be elected on the Post of the Secretary General.

After the election of the President, Secretary General and Secretary Finance, the house resolved and wish from these three Board of Governors to go through the draft agreement related to the Constitution of the Asian Council of Arbitration for Sports & Sports Arbitration Tribunal of Asia to present before the house and the meeting was adjourned for tomorrow.

On 27, November 2010 the above listed members attended the meeting in the Lexington Hotel, at Seoul, Korea at 08:00 AM. Prof. Panagiotopoulos, Dimitrios suggested that since now ACAS has been constituted with its Board of Governors and Prof. Yeun, Kee-Young is now the President of your ACAS, it will be in order that Prof. Yuen shall preside the meeting of the ACAS. This proposal of Prof Panagiotopoulos was unanimously welcome by the all the members of the ACAS.

Prof. Yeun, Kee-Young, accepted the request of the house and Presided the meeting on 27, November 2010. He calls the meeting in order after expressing his thanks to all the members for showing their confidence in him and his team. He assured all the members that he will work for the cause of Asian Council of Arbitration for Sports in all the possible way.

Prof. Yeun, Kee-Young, the President asked Prof. Dr. Amaresh Kumar to read the draft agreement of ACAS and SATA.

Prof. Dr. Amaresh Kumar, read the draft Agreement of the ACAS and SATA before the members. The house resolved to approve the draft prepared by the three members of the Board of Governors and the same



From left to right: the President elect of the Asian Council of Arbitration for Sport (ACAS) Prof. Dr. Yuen-Kee, Young, Professor of Law, Dongguk University, Seoul, Korea (left); Ms. Prof. Joo Jogmi, Organising Secretary of the XVI World Congress of IASL, Seoul, Korea, 25-28 November 2010, and Secretary General elect of ACAS, Prof. Dr. Amaresh Kumar, Advocate of the Supreme Court of India and Secretary General of the Sports Law India & All India Council of Physical Education.

was approved. Some of the members of the China and Japan stated that the draft agreement of ACAS and SATA shall be circulated to all the ANOC and Governmental Authorities of the Asian Countries to consider the same for their acceptance like the agreement of the International Council of Arbitration for Sports and Court of Arbitration for Sports. For which the house authorized Prof. Dr. Amaresh Kumar to commu-

nicate as per the requirement so that every ANOC, ANSF and Government shall agree and accept as the Common Law of the Sports Dispute Redressal Mechanism in the Asia.

The Secretary General assured the members that all the effort would be taken to get the agreement signed by the Asian National Olympic Committees, Government Authorities and Sports Federations affiliated by the International Sports of Sports. The members desired that after receiving the response from all the related bodies the meeting to sign this ACAS and SATA might be organised next year in India.

The Secretary General desired that since the Head Quarter of the ACAS and SATA will be at Seoul in Korea. It is desired that a Joint Secretary shall be appointed from Korea who shall be keeping the entire track between the President and all the members, Specifically the Secretary General. The proposal of the Secretary General was approved unanimously and the house authorized the President to choose the Joint Secretary of his confidence. The President suggested the name of Prof. Joo, Jongmi, and the Organising Secretary, of this Congress, whose work was appreciated in the organization of this 16th World Congress of the IASL to a grand success. The house approved the name of Joo, Jongmi as Joint Secretary of the ACAS.

The President of ACAS Prof. Yeun, Kee-Young, assured the Secretary General to provide all the financial help in the functions of the ACAS as its head. He further stated very soon he will procure a permanent office of ACAS in Korea with all office equipments. He desired that all the members shall co-operate in the promotion of the objectives of the ACAS and SATA, in accordance with the Olympic Charter, so that the Sports shall be promoted in the fullest scene, for human development, protection of the human rights of the Athletes, peace and equality.

The meeting was called to an end by a vote of thanks proposed by Prof. Dr. Kumar, Amaresh, Secretary General of the Asian Council of Arbitration for Sports to the Chair, all the members present and specially to Panagiotopoulos, Dimitrios, President of the IASL.

DATED : 27, November, 2010

PLACE : Seoul, Korea

Signature

PRESIDENT

Prof. Dr. Yuen, Kee-Young
Faculty of Law,
Dongguk University
President, Korean Association
of Sports & Entertainment Law,
Pildong 3-Ka 26, Chungku,
100-715, Seoul, Korea
Tel:0082-2-2260-3232
e-mail:kyyeun@dongguk.edu

Signature.....

SECRETARY GENERAL

Prof. Dr. Amaresh Kumar
Advocate,
Supreme Court of India,
18, Central Lane (Basement)
Benglai Market, New Delhi,
Pin - 110 001, India,
Tel: 0091-11-23753638
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dramaresh@sportslawindia.info

Agreement Related to the Constitution of the Asian Council of Arbitration for Sport (ACAS)

between

1. The Olympic Council of Asia
2. The National Associations of Sports Law in Asian Continents
3. The members National Olympic Committees of Olympic Council of Asia represented by their President.
4. The members of National Sports Organisations in Asia recognised by International Sports Organisations recognised by International Olympic Committee by their President.

It will be preliminarily stated that, with the aim of facilitating the settlement of disputes in the field of sport in Asia, an arbitration institution entitled the "Sports Arbitration Tribunal of Asia" (hereinafter the SATA) has been created, and that, with the aim of ensuring the protection of the rights of the parties before the SATA and the absolute independence of this institution, the parties decided unanimously to create a Foundation for Olympic Council of Asia called the "Asian Council of Arbitration for Sports" (hereinafter the ACAS), under the aegis of which the SATA will henceforth be placed.

In View of the above, the Parties Expressly Agree to the Following

Article 1

The parties agree to constitute and set in operation the Asian Council of Arbitration for Sports (ACAS).

Article 2

The founder members of the ACAS are appointed from the Asian continental region in the 16th World Congress of International Association of Sports, on 27th November 2010 at Seoul, Korea, as follows:

S.No.	Post	Name
1.	President	Prof. Yeun, Kee – Young, Professor of Law, Dongguk University in Seoul, & President of Korean Association of Sports and Entertainment Law
2.	Senior Vice-President	To be elected latter in next meeting
3.	Vice-President	To be elected latter in next meeting
4.	Secretary General	Prof. Amaresh Kumar, Advocate, Supreme Court of India & Secretary General Sports Law India and All India Council of Physical Education
5.	Secretary Finance	Shorki, Nader, President, Legal Commission of Olympic National Committee of Iran, Iran.
6.	Executive Members	To be elected latter in next meeting

Article 3

The parties agree mutually and vis-à-vis the ACAS to finance its activities and those of the SATA to the extent determined by the ACAS and according to the following proportions:

1. 50% of the initial funding will be born by the Korean Association of Sport and Entertainment Law.
2. 50% remaining funding will be born out by the membership of the National Sports Law Association of the Asian Continental Regions.
3. The members ANOC of OCA desiring to take the services of the ACAS and SATA will have to pay Euro 500 as membership fee and Euro 100 per annum.

The above-mentioned parties shall be informed of the amounts of the subscription to be paid to the ACAS and this notification shall be accompanied by a copy of the budget duly approved by the ACAS.

Article 4

Any Asian National Olympic Committee of Sport Federation or association of Federations may sign the present Agreement or accede to it under the conditions determined as agreed between the parties.

Article 5

The present Agreement is for an indefinite period; each party has the right to terminate the Agreement at any time for the end of a calendar year, by giving notice two years beforehand by registered letter to the Secretary General of the ACAS and all the other parties. In such case, the present Agreement ends only insofar as it concerns the outgoing party, the other parties agreeing herewith to assume all the obligations and rights of the outgoing party with immediate effect on the day of termination, in proportion to their own rights and obligations, with no further action or formal notice required.

Article 6

The present Agreement is subject to laws of Rule - 59 of the Olympic Charter. Any dispute arising from its execution or interpretation shall be settled by arbitration in accordance with the provisions of the CAS.

Seoul, November 27, 2010

Signed by :

The preamble of the Agreement states that *“with the aim of facilitating the resolution of disputes in the field of sport in Asian Continental Region, an arbitration institution entitled the “Sports Arbitration Tribunal of Asia” (hereinafter the SATA) has been created, and that, with the aim of ensuring the protection of the rights of the parties before the SATA and the absolute independence of this institution, the parties have decided by mutual agreement to create a Foundation for sports-related arbitration in Asian Continental Region, as the it is not pecuniary possible all the National Olympic Committee of the Olympic Council of Asia to approach CAS at Lausanne constituted by the “International Council of Arbitration for Sport” (hereinafter the ICAS),*

Seoul Declaration for Sports Law

16 World Congress International Association of Sports Law

The 16th World Congress of the International Association of Sports Law was held on a topic, “Sports Law in the World - Present and Perspective” from 25to 28November 2010, at the Hanyang University, Seoul, Korea. On the successful deliberation of the Congress following declaration were made the Congress:

1. THAT, Autonomy in the functioning of All the National Olympic Committee and National Sports federations shall be interfered by the Government or Judicial authority of any country. The National Olympic Committee and National Sports Federation shall be permitted to discharge their functions as per their own Constitution, Bye-laws respecting the Olympic Charter and Provisions of their International Federations, for the protection of the Human Rights and dignity of Athletes, Peace, Equality and Promotion of Sports and Physical well being of the humanity in the Globe.

2. THAT, a Globally Common Sports Law, shall be accepted by all the Countries with the aim of ensuring the protection of the rights of the National Olympic Committee and National Sports Federations by maintaining absolute independence of their Institutions of Sports complying the provisions of the Rule - 59 of the Olympic Charter.
3. THAT, with the aim of facilitating the resolution of disputes in the field of Sports in Asian Continental Region, an arbitration Institution entitled the “Sports Arbitration Tribunal of Asia” shall be created. As it is not pecuniary possible for all the National Olympic Committee of the Asian Countries to approach the Court of Arbitration at Lausanne, constituted by the International Council of Arbitration for Sports.

London Seminar 12-13 April 2010: The Legal and Tax Treatment of Sports Image Rights Agreements*

by Lieke van Berkel

Day 1: 12 April 2010

1. Introduction

This two-day seminar has been devoted to the legal and tax treatment of sports image rights agreements. The first day has focused on the tax sheltering aspects in a number of selected European territories: the United Kingdom, Guernsey, Spain, Italy, and Luxembourg. Notably the three greatest football countries have been covered as well as two possible European tax efficient territories. On the second day attention was given to the structuring of the arrangements. Under the steering chairmanship of Prof. Ian Blackshaw interaction with the audience added to the practicality of the presentation of the expert speakers.

The introduction to the seminar was of course presented by Prof. Ian Blackshaw. Sport is a very important component of the world economy. In the EU, the money that is earned in the sports world delivers 2% of the GNP of all countries. It is a lot to play for. Branding has played a significant part in this process. This is called the 'commodification' of sport. Sport and the players are more and more seen as 'commodities' that can be commercialized. Sport is also a big part of the entertainment industry. In this industry, sports persons have become celebrities and marketing icons; their personality rights, more specific their image rights, are increasingly being used and exploited by different companies. Therefore it is very important to define these image rights to know how to protect these rights and their exploitation and how they can be used best and described in legal agreements. The discussion is not only on the basis of what sports image rights are but also, who owns these rights. This is even more important in the case of a sports man, who is a professional player and a member of a team for example and most common in the football world. SportsBusiness International therefore kept up a poll on their website, to investigate this. A majority of the sports industry executives, 55%, polled that sports men themselves should have control over their own image rights and their commercial exploitation. 21,6% of the questioned people were of the opinion that the rights should be jointly held by "all interested parties" and 16,5% said that the club or team, to whom the sports men is a member of, should control the rights. Only 3,7% was of the opinion that the national sports governing body or the league should hold the rights. This article also shows that there is a lack of clarity about the commercial sports marketing contracts and about the ownership of the rights. Therefore there is a need for more clarity about precise provisions or agreements that deal with the exploitation of these vulnerable and, at the same time, very valuable rights. In some countries the market of sports image rights is more developed than in other countries. Each country's image rights are described differently, therefore also protected differently and under different sections of the law. In most European countries the sports image rights market is well developed. But also within Europe, it differs per country. Continental Europe provides a better protection of the image rights in general, than, for example, the United Kingdom does. The UK law does not provide for a specific definition of image rights, while the continental law system does, describing image rights as 'right of personality' and they are mostly protected by the 'right of privacy' and the 'right of publicity'. With this two day seminar, an effort is being made to provide for more clarity, to describe the image rights, to compare the legal and tax treatment of different countries and to see the possible ways to arrange these image rights agreements.

2. The United Kingdom Tax point of view

Mr. Stephen Woodhouse of Deloitte London provided an introduction to the tax treatment of income from sports image rights. In every type

of professional sports, legal and tax considerations are important. Substantial amount are paid with tax on these payments being a high cost.

There is no specific definition of image rights in UK law. However, where structured and administered correctly, income earned from the exploitation of image rights is not treated as income of employment, but as a separate income component. Key is that the payment should be for the exploitation of the image and not be connected with the exercise of the employment. The possibility of identifying the image rights income separately from the employment remuneration is a vital key element. Image rights can be used, but sports clubs and players always need to bear in mind that the attribution of income for the exploitation of the image needs to be made in the correct way.

The main element is that the image of a player represents an individual and independent image. The image should constitute a separate value from their playing ability in order to demonstrate its exploitation.

The value of a player's image right can grow or diminish over time, which raises the question of whether you can identify an accurate value in the early stage. Therefore you should set up a structure in which the value of the image is monitored overtime. For example, procedures should be in place to deal with the impact of negative publicity on the value of an image right.

From the audience of the seminar it became clear that in Italy the situation from a tax perspective is relatively unsophisticated. The taxation of sportsmen is not as clear as in the UK. Sportsmen pay taxes on wages as income from self-employment. This tax treatment is also used for the taxation of income from the exploitation of image rights. In Italy the image right is not an enforceable right for a company and Italian citizens cannot transfer this personality right. In Sweden, players do not apparently have any right over their image rights. One reason for this is that in Sweden only a small number of players are involved with relatively low income levels.

3. Guernsey: General principles of tax treatment of image rights

Mr. Jason Romer of Collas Day explained that Guernsey is centrally positioned for the developed and developing international financial centres. It has great big experience in dealing with the important subject of taxation of income from inter alia image rights. Guernsey is on the G20 White list and has a vary favourable tax regime. Guernsey has an internationally recognized specialized finance centre and has a zero % corporate tax rate. Guernsey also has legal, banking and accounting expertise and corporate cell structures facilitating ownership of image rights. Especially because of the Tax regime of Guernsey, the Island is interesting for image rights agreements, but other EU countries look suspicious to the tax regime of Guernsey because of their zero % rate. There is no tax on transfers or what so ever. Guernsey provides for a very transparent system.

Guernsey current offers protection for intellectual property rights under Intellectual Property legislation. The advantages of the IP legislation of Guernsey are:

- Legal protection;
- Cost savings;
- Efficiencies for speed of registration: in small jurisdictions it is faster, approximately 12 weeks for the registration of a trademark. In Guernsey there is an option for a primary trademark, same as in other countries. But also a possibility for a supported registration, this registration takes 6 weeks to register. It is also possible to get the registration in another country and bring it back to Guernsey;
- Tax efficiencies;
- The different legal frameworks for IP exploitation;

* Further information may be obtained by acquiring the conference proceedings. If

interested, please contact NOLOT Seminars at erica@nolot.nl.

- The time zone;
- The expertise and relevant knowledge.

Guernsey is not an EU member, and therefore also not bound by the EU legislation. The legislation that Guernsey now provides for is modern and flexible. The legislation enclose design rights, copyright, trademarks, database rights and plant breeders rights.

At present in the UK and Guernsey one cannot register (sports) image rights. The closest other right is a trademark, and the distinctiveness of a brand. The image right can be seen under the trademark protection as a *specific distinction of a person or individual* and can therefore be protected under the trademark law. Currently new specific legislation is underway which will enclose; patent, innovation warranty, a real definition on image rights and their protection, which is expected this year.

The forthcoming image right legislation will be a Statutory right in law. A right that needs to be balanced, because otherwise one cannot even publish newspapers anymore without infringing the right of press freedom. The income from image right exploitation will be seen separately from employment income. The closest other right is a trademark, the distinctiveness of a brand. The image right can be seen under the trademark protection as a *specific distinction of a person or individual* and therefore protected under the trademark law. A player could have an employment contact with the club and a separate contract with a company regarding his or her image. In some countries Guernsey is on the black list for income tax purposes, however, it is on the white list of the OECD. Guernsey has internationally accepted and robust IP legislation and the forthcoming legislation is expected to allow for protection at a level that currently does not yet exist.

4. Spain: general tax principles

Angel Juarez of Juarez Asociados Abogados (Barcelona and Madrid) explained that for the understanding of the Spanish tax rules for income from the exploitation of sports image rights, Art. 92 of the IITA is important. Article 92 concerns the personal attribution of image rights payments, and establishes a 15% 'safe harbour'. This 15% rule restricts the payment of income from exploitation of image rights to 15% of the total remuneration paid by the employer to the player. This rule was made before the introduction of the Beckham law (providing for a favourable tax treatment for incoming professionals), but it is still in place.

The Art. 92 IITA rule applies only to employed resident taxpayers. If Art. 92 IITA does not apply, then the safe harbour of 15% is thus not available. If Art. 92 IITA applies, the image rights income is attributed to the player and marginal tax rates apply (up to 43%). The test for the applicability of Art. 92 IITA is the aforementioned 15% threshold. The measurement of this threshold is to be made on the level of the employer. The key elements for the measurement are that the payments are made by the employer in respect of:

- Employment services rendered by the employee; and
- The use of the image of the employee:
 - Whether made by the employee or any other third person
 - Whether in cash or in kind.

The 15% safe harbour was set up during a time in which many sports clubs were facing bankruptcy due to tax reassessments because of the fact that the wages and remuneration paid to players were tax wise not properly arranged. The introduction of the 15% safe harbour was part of a recovery plan for the clubs. Different reactions to avoid the safe harbour were made by various clubs. For example:

- Barcelona created a scheme to get around this 15% rule. The income from exploitation of image rights would not be paid to the player by the club but by the TV company exploiting the broadcasting rights of FC Barcelona. The payments from the TV company to FC Barcelona would then be reduced in the amount of the direct payments by the TV company to the players employed by FC Barcelona. The reasoning from FC Barcelona was that the attribution rule in Art 92 IITA because the payment was done by a company other than the players' employer. This scheme was not accepted. The Supreme Court concluded that the TV company acted just as a paying agent on behalf of the club.

- Real Madrid did not pay players for use of their image rights, but they paid for a sublicense of the image rights registered as a trademark in Hungary. Real Madrid got a sublicense from the Hungarian company, this was intended to be seen as a royalty not as an image right. Also this scheme was not accepted and did not work.

The Spanish safe harbour on tax gets a lot of criticism from companies and clubs:

- Clubs are not making money on their activities, thus the 15% is artificial and inconsistent;
- It creates legal uncertainty: image rights are not transferable because they are personal, but in tax law it is possible to transfer these rights via the safe harbour system.

The only way for Spanish resident taxpayers to use the benefit of the 15% safe harbour is to be hired by a Spanish club. It does not even matter if your image is worth anything. Also, players can still conclude other image right exploitation contracts with companies established in their previous country of residence or elsewhere.

2 possible options for circumventing the 15% limitation would be the following:

- Suppose Nike wants to use the image of Ronaldo. Nike pays 1 million to the club of Ronaldo, 40% of the payment goes to Ronaldo; or
- Suppose the payment goes directly to Ronaldo, Nike pays 1 million to the company of Ronaldo, and his company pays 40% to the club. This option is apparently used the most in practice.

5. Luxembourg tax treatment

Luxembourg was presented by Mr. Lars Gosling of AS Avocats from Luxembourg. Mr. Gosling started by mentioning that if Luxembourg would be on any list, it would be on the white list. But as a matter of fact Luxembourg is not on any list.

The Law of Luxembourg makes clear that; 'everybody is entitled to his private life and is protected for this'. Therefore the image right is not a valued right, not material or commercial, therefore you cannot make an agreement regarding it. But what one can do is to make an agreement on the use of it.

The new advantageous tax regime for income from the use of image rights applies from January 2008. Art 50bis of the Luxembourg tax code provides for the two main characteristics of the regime: 5.72% income tax rate and an exemption from net worth tax over the intellectual property. Individuals (resident and non-resident) who carry on a business in Luxembourg and Luxembourg corporate entities are entitled to the application of this regime. The Luxembourg IP regime applies to the following types of property:- software copyrights (important for IT companies), patents, designs, models, trademarks relevant in the sports industry) and domain names. Other conditions for application of the regime include: the qualified IP must have been created or acquired after December 31st 2007, the Luxco must not have acquired the qualified IP from a direct "Associated Company" and the qualified IP related expenses need to be activated.

The IP regime elements that are specifically relevant for Sports image rights are trademarks and domain names. Commercial use of one's image right may be accomplished by first protecting the name by registering it as a trademark. This can also be used to protect a logo, signature, photo or domain name.

The commercial use of the IP by Luxco can be achieved through: the creation of IP by Luxco, by acquisition of legal title over IP or acquisition of IP licence by Luxco. Exploitation of the IP can take place by production of goods, or by licensing of the IP to third parties. Eventually the IP can be disposed of, and several exit strategies may be used. Exit strategies include disposal of Luxco or by migration of the Luxco to a third country.

6. Tax treatment of Italy

The Italian tax treatment of income from image rights was explained by Mr. Marco Ettore of the firm CBA (Milan). Italy does not have a specific tax treatment on sportsmen like Spain. For income tax purposes

es there is no difference between income from employment and other income. There is a distinction between resident and non-resident taxpayers. An individual is considered to be resident in Italy if he registered as a resident person, if in Italy his domicile (centre of most relevant economic interests) and place of habitual home. Italian nationals who have emigrated to a blacklisted country are deemed to remain resident in Italy unless evidence of the contrary is given.

Resident taxpayers are taxed on their worldwide income. The income from exploitation of image right is then taxed on the normal progressive tax rates. With respect to a non-resident sportsman, the tax treaties that the country of residence has concluded with Italy (if any) is important. If no tax treaty exists, then the tax rate of income from exploitation of image rights is 30%. If a tax treaty applies, both the rules of the countries need to be matched. The income of sports image rights is the income from independent personal services and will be taxed this way.

An Italian resident sportsman may feel the need to find a structure for lowering the tax burden on their income. As a sportsman you may need to try to set up entities to reduce the amount of taxes that needs to be paid. For example Italian resident sportspersons could set up an entity in Luxembourg in order to have it exploit their image rights. However, Italy does not have exhaustive judgments and case law on this type of structure. It should be noted that the Italian tax authorities have the power to attribute to the taxpayer the income that seems related to other subjects in case of an abuse of law (infringement of constitution in Italy) and in case of fictions (e.g. if the real intention would be a direct contract from A to C, first a contract is concluded with B to go around this). The attribution can be made on the basis of simple presumptions (serious, precise and concordant).

The Italian tax shelter structure that is set up for sportsmen who are resident in Italy has to comply with provisions concerning residence of legal entities, CFC legislation and anti fictitious interposition rules. The consequence is that such structure needs to be effective and localized in non tax haven countries. The tax shelter structure set up for sportsmen who are non resident in Italy, on their side, need, in case of distribution of dividends, to comply with provisions concerning the anti abuse rules applicable to conduit companies. In each case an applicable tax treaty, if any, needs to be analysed for determining the concrete tax treatment.

7. The United Kingdom: Tax aspects

The presentation on the United Kingdom was made by Ms. Debbie Masterton of Deloitte LLP. In the United Kingdom the use of payments for image rights can for tax purposes be advantageous for both players and clubs. If structured correctly, there should be no income tax withholding obligation or social security on payments to the image rights company by the club. Dividend payments by companies owning or exploiting image rights are taxed at effective rates from 25% up to 36.1% in 2010/2011. The income that is received by the image rights company is liable to corporation tax, the rate depending on the size of the company's profit. The income that is left in the company is taxed at (currently) 18% (which has now risen to 28% with effect from 23 June 2010 for higher rate taxpayers) when the company is wound up.

The position for non UK domiciled individuals is slightly different. Generally, if a sportsperson is not born in the UK, the person is not subject to the UK tax on any income that is earned overseas and not remitted to the UK, provided a remittance basis claim is made.

For some time now the UK tax authorities (HMRC) have entered into discussions with the football clubs regarding the taxation of payments for image rights of the players. In many cases the HMRC believes that image rights are simply a 'cover' for normal remuneration. As such, these payments should be taxed as normal income from employment. Their assertion (HMRC) is that the value placed on the image rights is not commercial and that there is not enough done to exploit the image, thus the income from the promotional services performed is not commensurate with the payments made under the Image Rights contract.

If HMRC were successful in a challenge the payments under the Image Rights contract would be taxed as normal employment income.

It needs to be clear from the structure of the contract which activities are from image rights and what is normal employment income. One cannot just come up with an amount to be paid under a separate image right agreement without a commercial justification. The parties should undertake a valuation of the image rights, taking into account the expected income the club expects to generate from exploitation of the image plus the value of the ability to control the player's activities in such a way as to both ensure the player devotes his time and energy to sporting activities as well as preventing inappropriate use of the image which the club considers would damage their brand. Furthermore, the club should consider how to exploit the image rights acquired and take steps to do so. If there is no evidence supporting the value and no efforts made to exploit the image rights acquired under the Image Rights contract, the payments will likely be viewed as part of the employment income and also taxed that way. However, if properly structured and exploited, HMRC should not ignore such Image Rights contracts and argue that the agreement is merely a smoke-screen for additional remuneration.

In addition, UK case law demonstrates that genuine payments for image rights should be taxed separately from employment income. For example: Sports club and Ors v HMRC: the case was won by the taxpayer, the income was not taxed as income of the employment because the intention and actual exploitation made clear that the income from the image right was separate and distinct to the payments for playing.

8. Art. 17 of the OECD Model Convention

Mr. Angel Juarez presented his views on the application of Article 17 of the OECD Model Convention to sports image rights. An image right includes the right to privacy, and the right to publicity such as name, image, voice, signature, likeness, fame, personal characteristics and trademarks. Whether the payments are for an activity or not is the important element for the tax payments. There is no specific article in the OECD model on Image rights payments. Only art. 17 makes a reference on image rights by mentioning the sponsorship fees. Art. 7 and Art. 15 are also relevant for this subject. There is also a small role for art. 12 involving royalties. But Image rights do not fall under the definition of royalties in art. 12 because the definition is a closed definition which does not include personality rights such as image rights. Articles 17 and 15 are based on the place where the activity takes place. Art. 17 involves income derived by entertainers from their personal activities as such, but not from other sources not involving any activity at all (e.g. dividend or interest). If there is no activity then Art. 17 is not applicable. Another criteria is that there needs to be a public performance element in the activity, an entertainment criteria.

The Commentary to Article 17 of the OECD model is not always constituent in its wording. The wording can be read as contradictory. E.g. paragraph 9 of the Commentary to Art. 17 requires a direct link between the income and the public exhibition. But further on the same Commentary describes that also an indirect link is possible and also that just appearances instead of public exhibition are possible. This contradiction is probably the result of the required consensus building process between the OECD countries.

9. Concluding remarks

Prof Blackshaw concluded the first day by mentioning that image rights involve more aspects and elements than thought at first sight. It is a fascinating subject. The model convention, the tax law as well as the national laws are important. There is still no clarity on the protection of the image rights under the UK law. If this uncertainty is solved, it will all become clearer. Guernsey is a very special case and after acceptance of the planned new legislation on image rights Guernsey may be able to compete in this field with other territories such as Luxembourg.

1. Introduction

During the second day of the seminar attention was mainly given to the practical aspects of drafting sports image rights agreements and putting the structures into place. The importance of properly writing things down in a contract was firmly underlined by Prof. Blackshaw. The second day was also about explaining the agreements on sports image rights from the common law point of view and the European civil law point of view. In the English common law system, the intention of the parties is essential. It is virtually impossible in the common law system to go outside the contract - only in very exceptional circumstances where the intention of the parties is unclear. The continental law does make this possible, because of the fact that next to the contract, a look can be taken at what both parties talked about. Preliminary contractual agreements are important in the continental law system and you can already be bound by pre-contract conversations and negotiations. Therefore it is even more important under the common law system to write everything down. Only in very exceptional circumstances can you circumvent the contract. With some clauses in the agreement, you can fill this gap, for example by adding a good faith clause in the agreement. Parties are then bound to act toward each other in 'good faith':

Prof. Blackshaw explained that drafting a sports image right agreement is not easy to do and there is no one model that fits for every case. Therefore you have to be careful with model agreements, every case has his own facts! The deal supposed to be laid down in the agreement as specific as possible and it needs to have a business essence. It is important to speak well with the client before drafting an agreement and make sure to write everything down. Be careful not to draft in a vacuum. Meet the client, the preparation and the meeting is the essential part of drafting an agreement. Make sure everything is made clear to the client, explain everything. Especially with licensing of a sports image right and territorial issues you have to be secure, because you also deal with EU competition law and in such cases it is even more important to prepare and explain. By studying the model and the conversation with the client, you see the gaps and on this point there is still the possibility to go back to the client and talk about the elements that are still unclear; after that, you can conclude it.

Typically sports image rights agreements have some complex financial provisions, especially in the case of licensing and royalties that are paid for these licenses. Mathematical formula are used to explain these provisions, these formula explain the essence of the financial provision better than words. Use schedules as appendices next to the explanation in words. Also pay attention to any inconsistency between the body of the agreement and the appendices. Be careful with recitals, recitals do not have to be used. Some essential provisions need to be included in a sports image rights agreement. For a trademark licensing agreement, the following provisions should be supplemented:

- Exclusivity provision
- Quality control provisions
- Performance clause: the licensee should promote the product in the territory of the agreement. Be careful to make these clauses realistic and include the right to terminate.
- Distribution channels clause: these clauses are also important for the quality and the image of the trademark you want to protect.
- Assignments and sublicensing: include a provision that the image right can only be assigned with the prior written consent of the licensor.

In the UK it is not possible to withdraw this consent without a reasonable reason. Other European countries do give this option by paying damages. You include in the assigning clause that the agreement can be assigned to an associated company. If these clauses are not drafted properly it can cause a lot of trouble. It is also possible to include a morality clause in the agreement, but again be careful with these, make sure you maintain complete flexibility, because negative publicity is also publicity and it still needs to be possible to deal with it. At the end of the day you want to protect the intellectual property. Therefore the morality clause should be objective. The good faith clause is the umbrella for this counterbalance.

In many commercial agreements you will find also the following clauses:

- Best endeavours clauses: also be careful with these, be reasonable, if you include this clause the other party has a heavy obligation under this clause. "Not to leave any stone unturned".
- Penalty clauses: pre assessment of the breach. Under the continental law system these clauses are enforceable. The common law system does not allow these clauses to be enforceable, they are only for the pre assessment. But because of the fact that image rights are personality rights and therefore fundamental rights, it is difficult to put a penalty on a infringement of them.
- Entire agreement clause: these clauses contain the phrase that this is the agreement and that only this agreement is used. These clauses can be very problematic, because of the fact that oral understandings can differ from the concluding provisions in the agreement. A common law judge does not look further than this clause, so be careful.

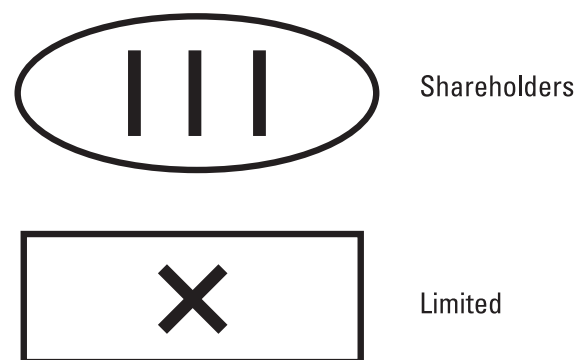
As aforementioned, in continental civil law, the preliminary contractual agreements are important. Parties are already legally bound to these agreements if these agreements are in a certain stage of negotiation. If the parties do not finalise the negotiations, they are liable for damages. In continental law, parties can already go to Court with these preliminary agreements. In the common law system, it is not possible to enforce these agreements which are only preliminary because an 'agreement to agree' is not a legally binding contract.

2. Guernsey

Mr. Jason Romer dealt with the situation on Guernsey. There is no specific definition of sports image rights in the UK. Guernsey also does not have a specific definition yet. However, Guernsey is coming with a new definition this year. In Guernsey the question is if it is possible to register an image right as a trademark. The problem is that an image right is an indisposable right. Via a trademark registration it is made disposable, therefore a conflict occurs. The Guernsey law therefore sees it more as an extra/subsidiary right next to the personality right.

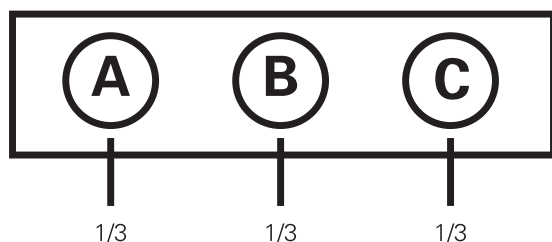
It is difficult to figure out what is the best way to structure an agreement, because there is always a conflict between what the club wants and what the players want. Guernsey comes up with a new way to structure the agreement for a sports image right agreement.

Normal structure



If there occurs a problem, the problem will be shared by all shareholders

New Guernsey structure



Different activities within the company, if there occurs a problem in C, the problem will not be felt by the shareholders of A and B

The new structure of Guernsey is used to go around the CFC legislation. This new structure is used already a lot in the UK and this scheme is also very useful for the arrangement of image rights. It is possible to split the shares within the cell, but from all cells the shares are ordinary shares, thus $\frac{1}{3}$ of the share of the company. With 20 cells, the shareholder only holds 5% of the whole company, but the shareholder is 100% in control of his own cell. This structure is set out in different structures and agreements. Option 1, the PCC model, as set out on the sheets, the company is always represented by the cell, the shares in the cell will be held by the trust. It is possible to offer all sorts of products via the cells. This structure is more in the interest of the club than for the interest of the player.

The second option that was set out on the sheets was the ICC model, the incorporated cell model. Via this structure the club can set up the main ICC and then create separate ICC's and take some percentage of these separate ICC's. The benefit of this structure is that it can be easily transferred to another country or club if the player moves. It gives the club more control over the player, the club owns the shares of the company, and the player gives their image right to this company. The royalties are earned by the players cell and these benefits will then be transferred to the player. The trust is led by the trustee, trustees only have to take action when dividend is made.

It depends on what side you are, the club or the player, when drafting an agreement and choosing between the different options and schemes. Option 1 is more in favour of the club; option 2 has more advantages for the player. Both schemes are especially meant to arrange the overseas image rights companies. The specific Image rights legislation in Guernsey is on his way. But next to this upcoming legislation, Guernsey has already a wide variety of suitable structures.

3. Spain

Angel Juarez of Juarez Asociados Abogados (Barcelona and Madrid) explained that in Spain the image right is seen as a right of personality. Therefore the right is protected under the Constitution. Art. 18 of the Constitution of Spain and Art. 8 of the Human Rights Convention are the basis of protection in Spain. The right is divided in the right of privacy and the right of publicity. Because of this specific classification of the right, the economic aspects of the image rights are not protected by these articles. The rights of personality are not transferable, but you can license them. An individual can revoke the license, but damages must then be paid. For the arrangement of the agreement the value of the license is important and the way the license is granted to the company.

In practice in Spain, countries that are on the black list are avoided for locating the companies. Trusts are not usually used in Spain. As there is no written law regarding trusts in Spain, a case by case approach is therefore possible. Next to the protection articles mentioned above, it is important to always pay attention to art. 17 OECD and art. 92 IITA for the tax aspects of the agreement as mentioned earlier during the seminar.

4. Luxembourg

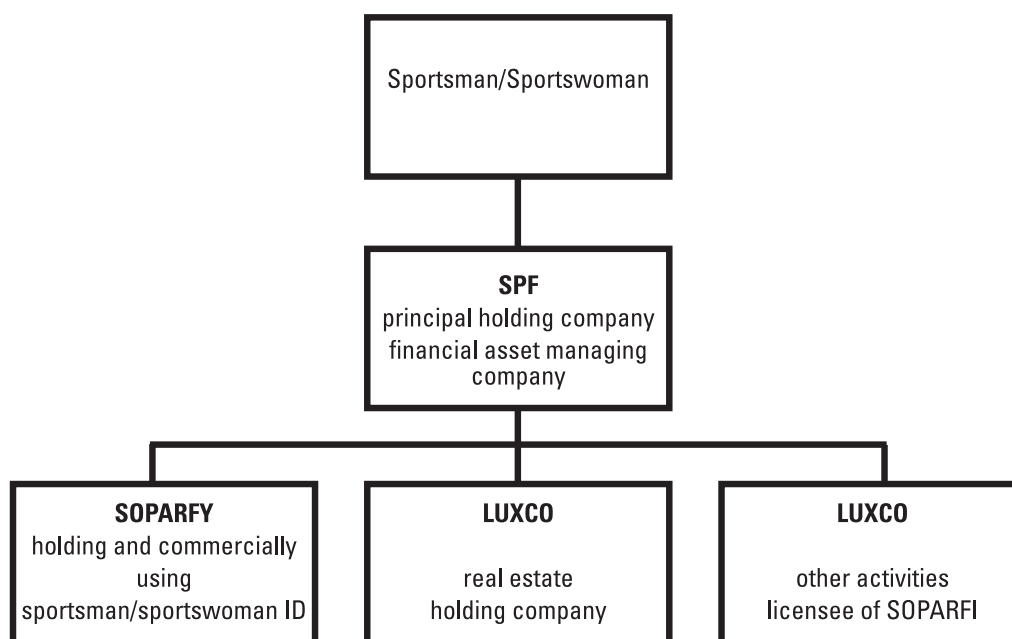
Mr. Lars Gosling of AS Avocats explained that the arrangement of sports image rights in Luxembourg goes via the Intellectual property law. A structure based on IP law is set out for the sports image rights. Benefits of Luxembourg include its membership of the EU, and readily access to the reduced tax rate of 5,72%.

An IP structure may in Luxembourg be arranged through the société de participations financières (SOPARFI). The SOPARFI is the holding company which can carry out commercial and other operations. The SOPARFI exists in two different legal forms: the société à responsabilité Limitée (Sarl): Private limited companies and the Société Anonyme (SA): public limited company. The SA is mostly used.

The IP that can be registered under the IP law in Luxembourg are trademarks and domain names. The SOPARFI can acquire the use of the image right via three different ways: by creating a qualified IP, by purchasing the legal title of the qualified IP or by purchasing the license of a qualified IP.

As parent company of the SOPARFI one can use the so called 'Luxembourg private wealth management company' (SPF). SPF is the holding company of the financial instruments and assets. The shareholders of the companies must be individuals and cannot have a corporate structure, therefore a group of individuals or a foundation etc is possible.

As a summary, the structure of the IP scheme in Luxembourg for arranging a sports image right can be drafted as follows:



5. Italy

Mr. Luca Ferrari presented the issue of the protection of image rights in Italy. Image rights, which include all individual's characteristics taken as a whole are recognised as rights of personality. The Universal Declaration on Human Rights is one the international declarations that deal with this right. The Declaration describes the concept of name, portrait and identity as elements of the right of personality. The image rights are arranged under the Italian Private international law in Italy. Art. 24 of the law states that; *'an individual's personality rights are defined and ruled by her/his national law'*. For Italian citizens, the application of Italian law is imperative- therefore it cannot be derogated by agreement- (at least) with respect to the nature and content of image rights.

The Italian Courts established the precept that; *the image right cannot be the object of the agreement or of the license, because the right is inherent to the person and, as such, non assignable and non negotiable*. Thus, an agreement that has the image right as the sole or principal object, is null and void and of no effect. But separate from the Courts decision, the exploitation of an image right is still possible with consent of the owner of the image right, via a license for using the image right. There is a possibility to set up a company for the exploitation of the image right, but the image right cannot constitute the asset of a company and the image right cannot form the substance matter of a licensing sponsorship endorsement agreement. Therefore, under Italian law image rights cannot be held in a trust, assigned by a contract or conveyed by deed. The possibility the Italian law gives is managing the right of publicity by an agent or consultant. The agent can set up a company to exploit the image right. The commercial risk can be taken by the agent if the agreement has real business intent. However, for this scheme to work, the consent of the image right owner is essential. Without consent nothing can be down. The consent can be withdrawn at any time. However, in addition to contractual liability for breach of contractual obligations, the exercise of the withdrawal right without good faith entails liability in tort and damages must be paid.

Under Italian law, another possibility is given to arrange image rights, via trademark law. Name and image can be registered as a trademark under Article 7 of the Code of Intellectual Property. But the possibility is limited to substituting a trademark for an Image right licensing. For the use of merchandising the trademark is useful, like for perfume, but this is not a very useful option for the image, because of Art. 19 of the Code. This Article states: *'the individual or entity applying for trademark registration must have at least the intention to use it in the manufacturing or trading of products or in the provision of services'*. The real protection for the image right derives from the joint provisions of Art. 10 of the Civil Code and Art. 96 of the law on Copyright. Art. 96 of the Copyright law states that *a person's likeness cannot be displayed, reproduced or sold without the latter's consent*. Again, consent is the fundamental element. There are some exceptions for this consent, mentioned in Art. 97 of the Copyright law. However, the consent is always necessary if the person's image is used for commercial purposes. Under Art. 10, if the image is displayed without the necessary consent or causes prejudice to the dignity and reputation of the image's owner, the latter can apply to the judiciary to request a cease and desist order and to claim damages.

The exploitation of the image right of sportsmen can be subject of a conflict between the interest of the clubs and that of the player. In principle, the image right is the right of publicity of the player himself, who is free to commercially exploit his own image. Upon conclusion of the employment contract, the club acquires the right to use the player's image as part of the team's image. The sports association can limit the advertising activities which are personally undertaken by the athlete, but this limitation is subject to several criteria that should apply before the club can interfere with this right. The Collective Bargaining Agreement, which is now in force between clubs and football players, unfortunately does not regulate the subject of image rights. The image rights are arranged through the right of publicity by the "Convention for the Regulation of agreements concerning promotional and advertising activities which involve football clubs and their players", whereby the latter are entitled, unless waived, to a part of the club's profit deriving from the promotional activities using the players' image. In

practice, however, in most cases the individual contractual forms foresee such a waiver. There is still no case law on this subject; therefore these agreements are still a risk. There is also a possibility to arrange an individual image right contract between the Italian clubs and the player, but this is very rare and not the rule.

6. United Kingdom

Mr. Stephen Woodhouse of Deloitte explained that the use of sports image rights agreements may be advantageous for both the club and the player. The main advantages for the club are: the profit of the image right for the club, no employer social security liability on payments to the image rights company. Certain players insist on image rights arrangements when agreeing to join a club and as a result they can be pivotal in negotiations with top players. Also, with such an agreement the club has control over the image therefore the club can control the time the player devotes to non playing activities and ensure they do not undertake activities which are detrimental to the club.

Where image rights payments operate effectively, there are benefits for the player:

- * Opportunity to increase the earnings based on their image rather than on their playing ability;
- * Free to concentrate on the employment with the club and be fully aware of the commercial obligations under the Image Rights Contracts;
- * The income under the image rights agreement is not subject to employee social security;
- * The income can be extracted from the image rights company under the more favourable (at the time of writing) capital gains tax regime if done on liquidation of the company.

The UK does not have a specific definition of image rights and no specific law that protects these rights. Therefore there are some practical difficulties and considerations that occur during the drafting of a sports image right agreement with the key element being the allocation of remuneration for substantive duties. There are no set guidelines for this but the agreement should reflect the commercial substance and reality.

Also, clubs should make sure that they have specific agreed processes in place to be followed when entering into an agreement. Board discussions should agree the commercial rationale for using image rights agreements. The board discussions, with regards to individual players, should demonstrate the decisions regarding payments based on commercial considerations.

Also, the agreements should be professionally drafted for the particular contract being established rather than generic template documentations.

7. European (EC) Law

Angel Juarez of Juarez Asociados Abogados then explained that image rights agreements are not only subject to national laws of the country in which players and clubs have their bases, but for EU Member States also European law is important for drafting the agreements. European law provides for 4 basic freedoms: free movement of goods, services, capital and persons. Next to these 4 freedoms, the European citizenship is important. When drafting an agreement, the four freedoms need to be respected. The basis of the four freedoms is the protection against discrimination based on nationality. Always make sure that the agreement is not discriminating or in violation with the European law. Not only the four freedoms of the EU law are important, but also the provisions of competition law are important in a case of sports image rights, because markets are being divided while drafting an image right agreement and several clauses are included in the agreement to arrange the supplying of the image right.

8. Conclusion

Sports law in general, and more specific sports marketing involve a lot of aspects on commercial, legal, tax and practical grounds. It is therefore of extreme importance to arrange everything well in a contract. Especially for a licensing agreement, the most used way to arrange a sports image right, it is important to write everything down and arrange

everything in a business, commercial and financial sense. Always watch the applicable rules of the law and of the taxes, both on national and EU level. Always get advice from nationals of the country or the area in which you want to arrange an agreement. Take an overview and professional advice, especially on taxes, because image rights involve a lot of money! There is a lot to play for!

Keep in mind that sometime the deals you did not close, are better than the deals you did do. Do not always have the feeling that you need to conclude the deal. But watch out in which stadium of negotiations you are if you conclude a contract by continental law and on what point you do not agree on, because you can already be liable for damages on certain preliminary contractual agreements.

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We are proud to announce a new publishing and ground-breaking venture providing quarterly reports on the worldwide legal and tax aspects of sport and their practical implications, including EC legal and tax developments, which will be available in print and on line. The launch date for the first issue of *Global Sports Law and Taxation Reports* will be the end of November 2010. Next and subsequent year's issues will be published in March, June, September, and December.

The Editors

The new Journal *Global Sports Law and Taxation Reports* will be edited by Professor Ian Blackshaw and Dr Rijkele Betten, with specialist contributions from the world's leading practitioners and academics in the sports law and taxation fields.

Prof. Ian Blackshaw is a well-known and acknowledged leading international sports lawyer and academic, active in many sports law associations and a Member of the Court of Arbitration of Sport (CAS) in Lausanne, Switzerland. He is also a prolific author of Books and Articles and regular Speaker at International Seminars and Conferences on various aspects of Sports Law, including the business side of Sport, which is now a global industry worth more than 3% of world trade.

Dr Rijkele Betten is likewise involved in the field of international tax. Since 1985, he has been publishing and speaking on international tax law at many international events, and during the past 10 years has specialized in international tax issues impacting on the mega incomes to be derived by sports persons, sports event organisers, sports marketers and broadcasters from sports and associated activities.

Messrs. Blackshaw and Betten have each built up a prodigious personal and professional network of experts and contacts worldwide, and through these networks they are able to offer subscribers to *Global Sports Law and Taxation Reports* very valuable information and practical insights of a topical nature at the highest possible levels.

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Contents



Global Sports Law and Taxation Reports will feature: articles; comparative surveys; commentaries on topical sports legal and tax issues; and documentation.

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