

# The International Sports Law Journal



2009/1-2



**MOTOE Case**

**Character Sports Merchandising**

**6+5 and Home-Grown Players Rule**

**FIFA Transfer Rules**

**Players' Agents**

**FIBA Arbitral Tribunal**

**Sports Betting**

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In particular, this issue of ISLJ contains a pre-publication of several contributions on the United States of America, Canada and Japan from the book "Sports Betting: Law and Policy" which will appear in the Asser International Sports Law Series. To the Series two new volumes will be added this summer. The first volume will be on "The Law of the Olympic Games" by Alexandre Miguel Mestre, senior advocate and international sports lawyer. Mr Mestre was, amongst other things, Assistant to the Minister of Sport of Portugal (2003-2005). The other volume is the enlarged edition of Ian Blackshaw's book on sport, mediation and arbitration which was first published in 2002. The Forewords to the books are delivered by Professor Wang Xiaoping, Research Center for Sports Law, China University of Political Science and Law (CUPSL), Beijing, and Prof. Jim Nafziger respectively.

On 19 February this year, the 8th Asser/Clingendael International Sports Lecture took place in The Hague. The theme was "Current Topics of Good Governance in Sport in a European Legal Perspective: ECA and MOTOE". One presentation was given by Dr Michael Gerlinger, Director of Legal Affairs of FC Bayern Munich, Germany, on the background, composition, purposes, competences and activities of the newly established European Club Association. Another presentation was by Samuli Miettinen, University of Salford Law School, United Kingdom, on the recent European Court of Justice's verdict in MOTOE concerning the relationship between competition law, state intervention and sporting activity. Both presentations were preceded by special contributions on the "National Sports Act of Russia" by Denis Rogachev, Lecturer of the Moscow State Law University and Adviser to the Minister of Sport of Russia, and

Mikhail Prokopets, of YuST Law Firm, Moscow and former Senior Legal Counsel of the Football Union of Russia. Their papers are published in this issue of ISLJ.

Currently, the ASSER International Sports Law Centre is implementing two EU-(co)financed research studies: a Study on the Role of Member States in the Organizing and Functioning of Professional Sports Activities, and a Study into the identification of themes and issues which can be dealt with in a Social Dialogue in the Professional Cycling Sector. Within the framework of this project, a special riders' meeting was organized in cooperation with the international trade union CPA in Barcelona in December 2008. Regional workshops to which representatives of the international employers' organizations, commercial teams, UCI and national associations were invited took place in Madrid, Berlin, Brussels, Rome and Paris.

On 15 June this year, the Asser/Edge Hill team delivered lectures at a workshop on "Sports Law - Prospects of Development through Cooperation" that took place in Minsk within the framework of the European Commission's TAIEX instrument and was organized by the local National Olympic Committee and the National Center of Legislation and Legal Research of the Republic of Belarus. The team previously took part in similar workshops in Kiev (Ukraine) in November 2007 and Tirana (Albania) in April 2008.

*The Editors*

# Article 82 EC and Sporting 'Conflict of Interest': the Judgment in *MOTOE*

by Stephen Weatherill\*

## 1. Introduction

The decision of the Grand Chamber of the European Court of Justice in *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* (hereafter: *MOTOE*)<sup>1</sup> is striking for its refusal to allow a sporting body that mixes regulatory functions with economic activities to claim immunity from the application of EC law. Article 82 EC prevents the abuse of a dominant position held by a sporting body and this may affect decisions about whether or not to sanction the staging of new events, which was the issue in the litigation in *MOTOE*. The subjection of such decisions to the requirements of the EC Treaty is not in itself surprising or new. Case law which stretches back some 35 years, from *Walrave and Koch* through *Bosman* to *Meca Medina*<sup>2</sup>, demonstrates the Court's consistent view that sport, in so far as it constitutes an economic activity, falls within the scope of application of the EC Treaty, albeit that it is open to sport to explain and justify its practices in so far as they are necessary for its proper organisation. In short, EC law accepts that sport is 'special' - it has features, such as the need for balanced competition and uncertainty as to outcome, which are not found in typical industries - but it is not *so* 'special' that it can be granted a blanket exemption from the rules of the EC Treaty. *MOTOE*, which concerns the sport of motorcycling in Greece, follows this well-established approach. However, the ruling in *MOTOE* is of interest for three reasons in particular. First, it concerns the Treaty competition rules, specifically Article 82, whereas most (though not all) previous sports cases before the Court have involved the free movement provisions in the EC Treaty. Second, the clarity of expression in the judgment is unusually vigorous, in particular in its concern to assert legal control over the consequences of a conflict of interest between a sporting body's regulatory and commercial motivations. Third, *MOTOE*, as a decision of the Grand Chamber, carries particular weight, and it confirms that the Third Chamber's readiness in *Meca Medina* to subject detailed aspects of sports governance to the scrutiny of EC (competition) law was not simply an oddity created by the five judges who comprised the Third Chamber in *Meca Medina*.

## 2. The litigation

The decision in *MOTOE* is a preliminary ruling delivered in response to a reference made by the Diikitiko Efetio Athinon in Greece, seeking an interpretation of Articles 82 and 86 EC in the particular context of the sport of motorcycling.<sup>3</sup> It arises from proceedings brought before the Greek courts by MOTOE - the Greek Motorcycling Federation, a non-profit-making association governed by private law - against the Greek State seeking compensation for the pecuniary damage which MOTOE claims to have suffered in consequence on the State's refusal to grant it the authorisation required under Greek law to organise motorcycling competitions.

Greek law provides that such authorisation would be granted only after consent had been secured from the official representative in Greece of the Fédération Internationale de Motocyclisme (the International Motorcycling Federation). That official representative was ELPA (Elliniki Leskhi Aftokinitou kai Periigiseon, Automobile and Touring Club of Greece) and it too organises sporting competitions in Greece. ELPA entered into negotiation with MOTOE, providing MOTOE with information about a number of regulations which had to be observed in the planning of competitions and asking for a range of details about MOTOE's planned events. But ELPA did not give its consent and the Greek State accordingly did not authorise MOTOE to proceed.

MOTOE claimed it had been treated unlawfully by the Greek State. It sought GRD 5 000 000 as compensation. Its argument based on EC law was that a violation of Articles 82 EC and 86(t) EC had occurred. The Greek law in question conferred on ELPA a position of monopoly power over the organisation of motorcycle events in Greece which, MOTOE claimed, ELPA had abused by withholding consent to MOTOE's plans. Article 82 EC does not forbid the grant or existence of a dominant position or monopoly, but it does forbid abuse of that position and it therefore provides a basis for reviewing the lawfulness of decisions taken by the sports regulator which is typically placed in that position of monopolist. The thematic approach of EC law persists: an extreme approach, whereby the challenged sports rule would be treated as necessarily unlawful because of its economically damaging effect, is excluded, but so too is an approach at the other extreme, whereby the mere fact that the rule arises in the context of sport would immunise it from legal supervision. Instead EC law operates by putting the rule to the test in so far as it has an economic effect. What is it *for*? Is it necessary for the organisation of sport? In this way, the EC develops a sports law and a sports policy, even in the absence of any concrete depiction of the role of sport in the Treaty itself.<sup>4</sup> This is characteristic of the expansionist dynamic of EC trade law.

## 3. Legal analysis

ELPA's role and functions are clearly important in the legal assessment. Only an 'undertaking' is subject to the Treaty rules on competition. The concept of 'undertaking' goes undefined in the Treaty but it has been consistently interpreted to require engagement in an economic activity, and neither legal form nor the method of financing is of importance. It is, then, a functional test.<sup>5</sup> The most important and awkward case law on this point has tended to deal with bodies equipped with important public functions and fulfilling (more or less well) defined social tasks which nonetheless also perform activities with economic implications. Consider, for example, institutions responsible for social security<sup>6</sup> or those dealing with air traffic con-

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1 Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* judgment of 1 July 2008.

2 Case 36/74 *Walrave and Koch* [1974] ECR 1405, Case C-415/93 *Bosman* [1995] ECR I-4921, Case C-519/04 *P Meca-Medina and Majcen v Commission* [2006] ECR I-6991, all cited at para 22 of the judgment in *MOTOE*.

3 Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* judgment of 1 July 2008.

4 See e.g. R Parrish, *Sports law and policy in the European Union* (2003) Manchester, Manchester University Press; R Parrish and S Miettinen, *The Sporting Exception in European Law* (2007) Den Haag, T M C Asser Press; S Weatherill, *European Sports Law* (2007) Den Haag, T M C Asser Press; L Barani, 'The Role of the European Court of Justice as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling' (2005) 1 *Journal of Contemporary European Research* 42; S Van den Bogaert and A Vermeersch, 'Sport and the European Treaty: a Tale of Uneasy Bedfellows' (2006) 31 *ELRev* 821; D Dimitrakopoulos, 'More than a Market? The Regulation of Sports in the EU' (2006) 41 *Government and Opposition* 561; E Szyssczak, 'Is Sport special?', Ch 1 in Bogusz B, Cygan A, and Szyssczak E (eds), *The Regulation of Sport in the European Union* (2007), Cheltenham, Edward Elgar Publishing.

5 E.g. Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, all cited in para 21 of the judgment in *MOTOE*. Also helpful is Case C-55/96 *Job Centre* [1997] ECR I-7119 and for discussion from the perspective of general EC competition law see W-H Roth, Annotation, (2007) 44 *CMLRev* 1131.

6 Eg Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

trol.<sup>7</sup> They fall outwith the category of 'undertakings' for the purposes of EC competition law where the activity is not pursued in the market in actual or potential competition with other economic operators - where the activity lacks an economic nature of the type required to bring it within the scope of the EC Treaty.

It is admittedly not always easy to determine when a body counts as an 'undertaking'. A 'pure' regulator may escape subjection to the Treaty. The Bar of the Netherlands occupies an influential position of power but it is not an 'undertaking' since it does not carry on an economic activity.<sup>8</sup> So naturally this is the preferred status for sports bodies - to avoid being classified as an 'undertaking', thereby to avoid subjection to control under the Treaty competition rules. But the key is 'economic activity'. And the reference made by the Diikitiko Efetio Athinon stated that ELPA's activities are not limited to purely sporting matters, but that it also engages in activities classified as 'economic', which consist in entering into sponsorship, advertising and insurance contracts. These activities generate income for ELPA. And it organises its own sporting events. This made it rather easy for the Court.

ELPA may be vested with public powers for the purposes of some of its functions but this 'does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities'.<sup>9</sup> ELPA is engaged in 'the organisation and commercial exploitation of motorcycling events'.<sup>10</sup> It is an undertaking for these purposes. And non-profit making though its objectives might be, its activities potentially co-exist with those of other operators which do seek to make a profit. There is therefore the necessary commercial aspect to ELPA's activities which brings it within the scope of the EC Treaty.

The Court is not twisting the law to catch a sports federation. Its approach is perfectly consistent with its orthodox approach in EC competition law. For example, an entity responsible for air traffic control has in a similar way been treated as carrying out *not only* purely administrative activities *but also* the management and operation of airports subject to remuneration by commercial fees. Providing facilities for which airlines pay constitutes an economic activity.<sup>11</sup> So too some, though not all, of ELPA's activities in Greece constitute an economic activity.

So ELPA is an 'undertaking'. But - to proceed with the orthodox analytical structure used in cases arising under Article 82 EC - does it occupy a dominant position within the common market? In the context of an Article 234 preliminary reference the matter ultimately falls for determination by the national court. However, the Court provided relevant interpretative guidance. The relevant market, it appeared to the Court, is the 'functionally complementary'<sup>12</sup> organisation of motorcycling events plus their commercial exploitation by means of sponsorship, advertising and insurance contracts on Greek territory.<sup>13</sup> A 'dominant position' under Article 82 EC concerns 'a position of economic strength held by an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers'<sup>14</sup> and this position of strength may be held as a result of the statutory grant of special or exclusive rights to fix the conditions on which other undertakings may gain access to the relevant market. And although Article 82 applies only on condition that trade between Member States is affected, the Court pointed out that even where the undertaking's conduct relates only to the marketing of products in a single Member State it is perfectly possible that it may 'have the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'.<sup>15</sup> As Advocate General Kokott put it in her Opinion, following the Commission, 'the business of sport is becoming international'. The Greek rules hinder that evolution and, since their actual or potential effect is not felt solely on Greek territory, they consequently fall within the scope of the EC Treaty.

For all the due deference to the role of the referring national court in disposing of the case, the Court's judgment in *MOTOE* is designed to leave little room to doubt that ELPA's conduct is subject to the

control of Article 82. Its dominant position is however the consequence of State regulation. This, then, invites consideration of Article 86 EC, which in its first paragraph provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary, in particular, to the rules contained in the Treaty with regard to competition. This plainly fits the situation into which ELPA has been placed by Greek law. And though Article 86(2) EC allows Member States to confer exclusive rights which may be damaging to the competitive process in so far as they promote the operation of services of general economic interest, the Court noted that as regards the organisation and commercial exploitation of motorcycling events it had not been claimed that ELPA's functions derived from an act of public authority; whereas, approving the approach of Advocate General Kokott, it added curtly that the Greek State's allocation to ELPA of an exclusive right to give consent to applications to organise events does not count as an 'economic activity'. So the protection afforded by Article 86(2) EC did not fit the case.

Reaching the final stage of orthodox analysis under Articles 82 and 86 EC, and assuming the existence of a dominant position held by ELPA, the question is whether there has been an abuse of the type forbidden by Articles 82 and 86(1).

The referring Greek court pointed out that while ELPA is named under Greek law as the only legal person entitled to give consent to any application for authorisation to organise a motorcycling event, ELPA is also itself directly involved in the organising of events and the determination of prizes as well as the associated economic activities such as sponsorship and advertising. And focus on this conflict of interest provided the cutting-edge of the Court's judgment in *MOTOE*.

A Member State violates the Treaty, specifically Articles 82 and 86(1) EC, where the undertaking exercises the special or exclusive rights conferred upon it and thereby is led to abuse its dominant position. But not only that. A violation occurs where such rights are liable to create a situation in which that undertaking is led to commit such abuses; or where they give rise to a risk of an abuse of a dominant position.<sup>16</sup> This approach seems fatal to the possibility that the Greek arrangements governing the organisation of motorcycle events could be permitted under EC law. For the Court went on to insist that a 'system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators'.<sup>17</sup> ELPA organises and commercially exploits motorcycling events; ELPA also decides whether to give consent to applications to organise competing events, while itself needing no consent from any other body. It therefore has 'an obvious advantage over its competitors'; its right may lead it 'to deny other operators access to the relevant market'.<sup>18</sup> It could 'distort competition by favouring events which it organises or those in whose organisation it participates'.<sup>19</sup>

7 Eg Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297, both cited at para 24 of *MOTOE*.

8 Case C-309/99 *Wouters* [2002] ECR I-1577, paras III-115.

9 Para 25 of the judgment in *MOTOE*.

10 Para 26 of the judgment.

11 Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297, paras 68-83.

12 Para 33 of the judgment.

13 At para 60 of her Opinion AG Kokott raises the (perfectly logical) possibility that the market may extend beyond motorcycling, but the Court does not pursue this. The national court might.

14 Eg Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207, Case 85/76 *Hoffmann-La Roche v Commission* [1979]

ECR 461, Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, all cited at para 37 of *MOTOE*.

15 Para 42 of the judgment.

16 Eg Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, Case C-260/89 *ERT* [1991] ECR I-2925, Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, Case C-380/05 *Centro Europa 7* [2008] ECR I-0000, all cited in paras 49 and 50 of the judgment in *MOTOE*. Also helpful is Case C-320/91 *Corbeau* [1993] ECR I-2533.

17 Para 51 of the judgment.

18 Para 51 of the judgment. The Court cites, as analogies, Case C-202/88 *France v Commission* [1991] ECR I-1223 and Case C-18/88 *GB Inno BM* [1991] ECR I-5941.

This is stark and it is quite brutal! The judgment comes very close to an approach that can be termed 'inevitable abuse'. In principle the identification of a dominant position is distinct from a determination whether that dominant position has been abused, for Article 82 prohibits only the abuse of a dominant position, not its acquisition nor its existence. However, where it has been found that in practice the creation of a dominant position carries with it an inevitable stench of abuse, then the separation in principle between the finding of a dominant position and the finding of abuse is conflated. The one leads to the other. This seems to lie at the heart of the Court's approach in *MOTOE*. It should again be appreciated that this is not a twist in the law designed to catch sporting practices. Admittedly the Court's approach represents a remarkably vigorous reading of the scope of control exercised by Articles 82 and 86 EC, but it is not inconsistent with orthodox practice under EC competition law. Instances of 'conflict of interest' remote from the sports sector dot the Court's decision-making record pursuant to these Treaty provisions.<sup>20</sup> However, sporting bodies may be especially vulnerable to findings of acute conflict of interest. And *MOTOE*'s message holds that an acquisition of exclusive power to determine which events are to be permitted in circumstances where the commercial interests of the holder of that exclusive power are directly affected seems to bring with it an inevitable finding of at least a risk of abuse, which is sufficient to trigger a finding of violation of Article 82 EC (and, in so far as State regulation is also involved, Article 86 EC).

#### 4. Comment

The identification of a conflict of interest from which ELPA suffers lies at the heart of the Court's disapproval. ELPA has a 'dual role', in the phrase employed by Advocate General Kokott, and this leads to legal consequences under Article 82. So does *MOTOE* imply that sporting federations must ruthlessly separate their regulatory functions from any whiff of commercial advantage in order to avoid condemnation under Article 82 - and that the State too must withdraw special rights granted to such sporting bodies in order to escape condemnation under Article 86? It certainly pushes in that direction. There is, moreover, existing practice of the Commission in this vein. In *FLA (Formula One)* part of the Commission's objections related to rules that provided a financial disincentive for contracted broadcasters to show motor sports events that competed with Formula One.<sup>21</sup> This was also a case of sporting 'conflict of interest' to which the Treaty competition rules were applied, albeit that there was no State involvement. The Commission was satisfied with a solution according to which the FIA retreated to a regulatory role, thereby releasing broadcasters to make their own commercial choices about which events to show. And commitments were made that objective and transparent criteria would govern the FIA's decisions on the number of events to be authorised.

Nonetheless there is some room for manoeuvre for sports bodies wishing jealously to cling on to the bundle of regulatory and commercial functions they typically discharge. In fact, *MOTOE*, as a ruling requiring adaptation in but not abandonment of established patterns of sports governance, stands with other judgments concerning sport such as *Bosman*, *Lehtonen*, and *Meca-Medina*. In *Bosman* the whole notion of a transfer system was not ruled incompatible with EC law, only *that* transfer system was condemned.<sup>22</sup> In *Lehtonen* the whole

notion of transfer 'windows' was not ruled incompatible with EC law, only *that* (discriminatory) window was impugned.<sup>23</sup> In *Meca-Medina* the whole notion of doping controls was not ruled incompatible with EC law, only rules that are excessive judged with reference to a finding of doping or with regard to the severity of penalties would infringe the Treaty competition rules.<sup>24</sup>

So in *MOTOE* the whole notion of regulated access to the market for staging sports events was not ruled incompatible with EC law, only *that* system which generated such plain and profound conflict of interest was condemned.

Accordingly *MOTOE* does not imply that EC law expects that organisation of sports events should become a free-for-all. A system involving prior consent is not of itself objectionable: acting as a 'gate-keeper' is an obvious task of a sports federation. The Opinion of Advocate General Kokott in *MOTOE* is helpful on this point. She observed that as a matter of EC law:

'there can be no objection if the national legislature provides in certain cases that the relevant authorities should obtain expert advice before granting authorisation for an activity. Generally, it may therefore be appropriate to involve the sports associations concerned in decisions relating to sport. The particular characteristics of sport and of the sport in question can best be taken into account in this way'.

And accordingly sport can certainly be regulated. Structures for checking matters such as the safety of planned events, based on prior licensing, are capable of complying with EC law despite their restraining effect on would-be organisers. But beyond safety there is a more general and proper regulatory role to be performed by sports federations. Advocate General Kokott accepted that there is typically a need for overarching control, involving the setting of a timetable for events and the fixing of uniform rules for a sport. There is not necessarily an objection *per se* to the 'pyramid' system of governance which is common in sport<sup>25</sup> (though detailed decisions made under its auspices may be vulnerable to challenge<sup>26</sup>). Advocate General Kokott is rightly anxious to declare the lawful nature of practices that serve an 'objective justification in the interests of sport'.<sup>27</sup> The objection in *MOTOE* is not to regulation of sport but rather to *this* system of which *MOTOE* fell foul.

The Court does not directly address the issue of the admitted special expertise of sports federations with the care helpfully demonstrated by its Advocate General, but nothing in the Court's ruling is inconsistent with her approach. Sports federations *do* have special expertise (in rooting out doping, in planning a calendar of events, in fixing the 'rules of the game', and so on) and EC law does not require that they be dislodged from their position of authority. But the detailed manner in which the sports regulator performs its task must be checked for compliance with EC law. Acceptance of the special role of a sports federation as regulator does not carry with it an uncritical acceptance of all its chosen practices. And it is the mixing of regulatory functions and economic incentives which leads sports regulators into difficulties under EC law.

But it remains the case that prior approval is a potentially proper and lawful feature of a regime governing the staging of sports events. Would-be event organisers should not read the ruling in *MOTOE* and assume the gate has been flung open. Sports federations will continue to arrange the calendar and to decide how many events should be permitted. They will doubtless periodically refuse to give prior approval to new events. That is not of itself abusive, even if plainly frustrating to would-be new organisers. The key issue is the conduct of the prior approval system. A sports regulator can clearly be centrally involved, indeed exclusively responsible, but the procedure must be adapted to reflect its incentives. In *MOTOE* both the referring Greek court and the European Court make some play of the absence of any procedural restraints on the way that ELPA exercises its powers. There are no restrictions, obligations or opportunities for review laid down by Greek law.<sup>28</sup> And indeed the operative part of the judgment concludes with reference to this feature which maximises ELPA's autonomy and power:

'A legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling

19 Para 52 of the judgment.

20 See the decisions mentioned in n 16 above. For examination see R Whish, *Competition Law* (Lexis Nexis Butterworths, 5th ed, 2003), Chapter 6, dealing in particular with cases on 'conflict of interest' at p.228.

21 COMP 35.163, Notice published at OJ 2001 C169/5.

22 Case C-415/93 note 2 above. Cf S Gardiner and R Welch, 'The Contractual Dynamics of Team Stability versus Player Mobility: who rules the 'The Beautiful Game'?', (2007) 5/1

*Entertainment and Sports Law Journal*, available via [www2.warwick.ac.uk/fac/soc/law/elj/eslj](http://www2.warwick.ac.uk/fac/soc/law/elj/eslj).

23 Case C-176/96 *Lehtonen v FRBSB* [2000] ECR I-2681.

24 Case C-519/04 P note 2 above, para 48 of the judgment.

25 Para 96 of AG Kokott's Opinion.

26 See S Weatherill, 'Is the Pyramid Compatible with EC Law?' 2005/3-4 *International Sports Law Journal* 3.

27 Para 96,

28 Paras 18, 19, 48 and 52 of the judgment.

29 See eg Case C-67/96 *Albany*

events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling competitions and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review’.

So it is possible and, in my view, correct to interpret the judgment as envisaging that a sporting federation may be given exclusive rights to decide which competitions may take place, even where it has a direct commercial interest in the matter itself, provided that its procedures and criteria for selection are transparent, objectively justified and non-discriminatory and provided also that they are followed faithfully and openly. There should moreover be a right to a hearing afforded to the applicant promoter and there should be a duty to give reasons for decisions taken, which should be subject to the possibility of review by an independent body. As a matter of EC law one would argue that such safeguards eliminate the risk of abuse and therefore shelter the arrangements from condemnation pursuant to Article 82. This approach is visible elsewhere in the case law dealing with Articles 82 and 86<sup>29</sup> and, in fact, it is consistent with the Court’s approach to the law of free movement, where systems requiring prior approval before a product or service may be marketed can be justified only if the restriction on trade is proportionate to the objective pursued and provided applicable criteria are objective, non-discriminatory and known in advance.<sup>30</sup> The concern is to define as tightly as possible the basis of the decision-making process in order to prevent arbitrary or self-motivated choices. Clearly, however, the safeguards attached to the authorisation procedure must be genuine and effective. They must be sufficiently robust to provide a convincing counter-balance to the risk that the sports federation’s commercial interests will influence its attitude to the authorisation of competing events. As mentioned above, the core of the Court’s concern in *MOTOE* is to require ‘equality of opportunity’ between the various economic operators.<sup>31</sup> Any preference for the authorising federation’s own commercial interests in choosing whether or not to grant consent irredeemably taints the system. That may well suggest a need for structural change within federations so that the regulatory arm is kept organisationally scrupulously separate from the commercial arm. A sports regulator which went so far as completely to surrender its commercial activities would be in the safest position - it might not even constitute an ‘undertaking’ within the meaning of EC law<sup>32</sup> and, even if it does, the risk of abuse would be minimised. But EC law does not go so far as to *demand* that surrender of commercial activities by a sports regulator. It is the conflict of interest under which sports regulators may labour - and of which ELPA was egregiously guilty - which raises concerns, and they may be met by structural separation of regulatory and commercial activities within a sports regulator combined with effective procedural safeguards to ensure fairness in the decision-making process.

## 5. Conclusion

*Meca-Medina* was a landmark judgment.<sup>33</sup> It was one of the first rulings of the Court applying the Treaty’s competition rules to sport.<sup>34</sup> But more broadly it provided a clear and (in my view) intellectually satisfying framework for understanding how and why EC trade law applies to sport. It insists that the legally central questions surround the identification of which sporting rules are truly necessary for the organisation of a particular sport. Such rules are not incompatible with EC law even though they may have economic implications that are detrimental to individuals.<sup>35</sup> Naturally the ruling in *Meca Medina* did not offer answers to the many *detailed* questions raised about the scope of intervention of EC law into sporting practices. Instead it assumes that those questions need to be resolved on a case-by-case basis. As Advocate General Kokott put it in *MOTOE*, citing *Meca Medina*, ‘each individual activity that exhibits a connection with sport must on each occasion be examined to ascertain whether it is economic in nature or not’. And if it *is*, its compatibility with EC law needs to be checked.<sup>36</sup> For this reason the judgment in *Meca Medina* has attracted criticism from those engaged in sports governance for its perceived contribution to uncertainty.<sup>37</sup> But the alternative - finding bright lines that limit the reach of EC law, beyond which sporting autonomy reigns supreme - is inconsistent with the very nature of EC trade law, a broad functionally-driven system, and in any event lacks any demonstrated intellectually robust justification for the exclusion of legal supervision from an economically significant sector.<sup>38</sup> *Meca-Medina* in short accepts that sport may be special - but invites sporting bodies to show how and why this is so, and thereby to show that practices that have economic effects are nevertheless necessary elements in sporting competition and therefore compatible with EC law.

*MOTOE* is a decision of the Grand Chamber. It mentions *Meca Medina*, a ruling of the Third Chamber, but does not explicitly follow its reasoning. But it has in common with it the ready acceptance that regulatory decisions taken by sports bodies frequently have significant economic consequences and that accordingly legal supervision pursuant to the EC Treaty is required. Most of all, the Grand Chamber in *MOTOE* has shown no interest in resuscitating the extraordinarily profound deference shown to the autonomy of sport by the Court of First Instance in *Meca-Medina*.<sup>39</sup> Nor has it been tempted by the partisan case in favour of maximising the autonomy of sports governing bodies made in the ‘Arnaut Report’ - the so-called Independent European Sport Review published in October 2006 which is deeply flawed in its legal analysis as a result of its reliance on the CFI ruling in *Meca Medina* to the almost complete exclusion of the ECJ’s.<sup>40</sup> Few rules are *purely* sporting in nature: and, following this key insight, the Court’s ruling in *MOTOE* adheres to that in *Meca Medina* by excluding the very broad claims to autonomy strategically made by sports bodies. Instead the European Court, in *Meca Medina* and now in *MOTOE*, has treated sport realistically: as a sector with economic weight which is therefore within the scope of the EC Treaty, albeit that EC law must be sensitive to the special characteristics of sport.<sup>41</sup> That too is the message of the European Commission’s White Paper

*International BV* [1999] ECR I-5751 paras 88-122, esp para 120 on respect for the expertise of the decision-making body and para 121 on safeguards attached to its decision-making process. In *Albany* the Court expressly finds differences from the situation at stake in Case C-18/88 n 18 above.

<sup>30</sup> Eg Case C-390/99 *Canal Satellite Digital SL* [2002] ECR I-000 esp para 35; Case C-432/03 *Commission v Portugal* [2005] ECR I-9665, esp para 50; Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers* judgment of 19 June 2008, esp paras 33-37.

<sup>31</sup> Para 51 of the judgment.

<sup>32</sup> Cf n 8 above.

<sup>33</sup> Case C-519/04 P n 2 above.

<sup>34</sup> See also, considering Art 82 in the case of agents, Case T-193/02 *Piau v Commission*

[2005] ECR II-209, upheld in Case C-171/05 P *Piau v Commission* [2006] ECR I-37.

<sup>35</sup> For comment see S Weatherill, ‘Anti-doping revisited - the demise of the rule of ‘purely sporting interest?’ [2006] *European Competition Law Review* 645; E Szyszczak, ‘Competition and sport’ (2007) 32 *ELRev* 95; M Wathelet, ‘L’arrêt Meca-Medina et Majcen: plus qu’un coup dans l’eau’ 2006/41 *Revue de Jurisprudence de Liège, Mon et Bruxelles* 1799; A Rincon, ‘EC Competition and Internal Market Law: on the existence of a Sporting Exemption and its withdrawal’ (2007) 3 *Journal of Contemporary European Research* 224. For exploration of the evolution of the Court’s case law see R Parrish and S Miettinen, *The*

*Sporting Exception in European Law* (2007) Den Haag, T M C Asser Press.

<sup>36</sup> For a good example of how the approach of the Court in *Meca Medina* now provides the starting point for assessing the compatibility of particular sporting rules with EC law see A Klees, ‘Die sogenannte 50+1 Regel im deutschen Profifussball im Lichte des europäischen Wettbewerbsrechts’ 13/2008 *EuZW* 391.

<sup>37</sup> See eg G Infantino G [Director of Legal Affairs at UEFA], *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?* UEFA paper 02/10/06, available at [www.uefa.com/MultimediaFiles/Download/uefa/KeyTopic/480391\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopic/480391_DOWNLOAD.pdf); J Zylberstein, ‘Collision entre idéaux sportifs et contingences économiques dans

l’arrêt Meca-Medina’ 2007/1-2 *Cahiers de Droit Européen* 218.

<sup>38</sup> For a particularly incisive critique of the pretensions of the *lex sportiva* see K Foster, ‘Is there a Global Sports Law?’ (2003) 2 *Entertainment Law* 1, available via [www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf](http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf).

<sup>39</sup> Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291, set aside by the ECJ in Case C-519/04 P *Meca-Medina and Majcen v Commission* n 2 above. For criticism of the CFI judgment see S Weatherill, ‘Anti-doping rules and EC Law’ [2005] *European Competition Law Review* 416.

<sup>40</sup> *Independent European Sport Review*, available at [www.independentfootballreview.com](http://www.independentfootballreview.com).

on Sport issued in July 2007.<sup>42</sup> Its legal analysis is heavily and properly dependent on the ECJ ruling in *Meca-Medina*, and concludes that the judgment reveals an interpretation of Articles 81 and 82 which ‘provides sufficient flexibility to take account of the specificity of sport and does not impede sporting rules that pursue a legitimate objective (such as the organisation and proper conduct of sport), are indispensable (inherent) to achieve the objective and proportionate in light of the objective pursued’.<sup>43</sup> Case-by-case inquiry into sporting practices is required. Quite so. Were the Commission’s White Paper to be re-drafted today, the ruling in *MOTOE* would certainly need to be absorbed into the discussion on matters such as the licensing of clubs and in particular into the legal analysis pertaining to competition law but nothing in *MOTOE* contradicts the essential features of the sober and careful analysis prepared by the Commission in its White Paper.

In conclusion, there is room in EC law to defer to the special expertise possessed by sports regulators. *MOTOE* does not demolish the legitimate claim of sports regulators to set a calendar of events, just as *Meca Medina* does not outlaw doping controls. But the details of the

procedures involved are not immune from the application of EC law in so far as they exert economic effects. The structuring of the decision making process in sport must ensure that priority is not given to the economic interests of the sports federation. The frequently endemic ‘conflict of interest’ must be recognised and avoided so that regulatory power is not used to promote commercial advantage. Ultimately EC trade law puts public and private practices that fall within the scope of the Treaty *to the test* and frequently requires their adaptation, but it always leaves room for the relevant public and private actors to show *justification* for the cherished *status quo*.

41 S Weatherill, ‘On overlapping legal orders: what is the ‘purely sporting rule?’’, Ch. 3, pp.48-73, in Bogusz B, Cygan A, and Szyszczak E (eds), *The Regulation of Sport in the European Union* (2007) Cheltenham, Edward Elgar Publishing.

42 White Paper on Sport, COM (2007)

391, 11 July 2007, available via [ec.europa.eu/sport/index\\_en.html](http://ec.europa.eu/sport/index_en.html). For comment see S Weatherill, ‘The White Paper on Sport as an Exercise in Better Regulation’ [2008] 1-2 *International Sports Law Journal* 3.

43 Page 69, Annex I of the *Staff Working Document* n 42 above.



## Character Sports Merchandising: International Legal Issues

# The Legal and Practical Ways and Means of Protecting the Subject Matter in the UK, the Rest of Europe and Internationally

by Karen Williams\*

### Character Sports Merchandising v Character Merchandising

In the past classic ‘character merchandising’ has been more concerned with the merchandising of purely fictional characters<sup>1</sup> and as recently as 2006, in the words of Mintel:

*“At first glance the character license market is full of appeal ... With so many characters and so much industry marketing ‘noise’ surely the market is buoyant. In reality the market is in trouble. According to market estimates generated by Mintel, the UK character license market is estimated at £3.3 billion in 2005<sup>2</sup> and market values have been falling consistently since 1999. This pattern is mirrored in the US”*

It is acknowledged in the report that the industry may have ‘over-targeted’ the young<sup>3</sup> and the introduction of a debate as to whether there is an increasing competitive threat from music and sport<sup>4</sup>. Indeed, Mintel urge the expansion into areas of more appeal to adults including sport<sup>5</sup>. This recommendation of Mintel can either be perceived as old-fashioned, in the sense that current analysis of the character merchandising market perceives character sports marketing as being included within the character merchandising market (and that is has been for some time), or prophetic (in that it certainly is now). Either

way, the current understanding of character merchandising is more comprehensively understood to, “take many forms in addition to a fictional character; it may be, for example, a real person, a sports or other public event, a film or television series, a pop group or sports club or university or other institution, or exhibition<sup>6</sup>” and as such forms part of a far larger, more lucrative market with a far broader demographic reach.

Character sports merchandising can be considered to take in merchandising underpinned by:

- i. a (fictional/representative) character primarily based on the persona or endorsement of a well known sports-personality (from hereon in “*sports character merchandising*”);
- ii. a fictional character depicting a competition, event or league; or
- iii. a fictional character representing a sports club.

As such it can be seen that the genre of ‘sports character merchandising’ is one that in fact operates across the boundaries of character merchandising and personality merchandising (and endorsement, although Laddie J.<sup>7</sup> and other commentators may have split opinions<sup>8</sup>), whereas (ii) and (iii) are more closely affiliated to event mer-

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1 Indeed, Mintel differentiate ‘character merchandising’ from sport and personality merchandising describing it as “in turn part of a broader licensing industry which includes copyrighted intellectual properties such as sports organisations (e.g. Manchester United), celebrity endorsements (e.g. Lloyd Grossman) and brand extension (e.g. Cadbury)”, Character Merchandising, UK - July 2006;

2 And also accounts for 28% of the market, with the highest spend per person of any country in the world per Mintel “Character Merchandising, UK - July

2006” report at “Economic Factors”;  
3 “The character license industry has not fully developed the potential of the teenager and adult market. Children account for 17% of the population, so it stands to reason that there is considerable potential in focussing licences towards adults. Adults are already buying into the character license market for their children and for gift purposes” per Mintel “Character Merchandising, UK - July 2006” report at “Economic Factors”;

4 In the Mintel “Character Merchandising, UK - July 2006” report at figure 16 (Estimated UK market values for all licensed merchandise, 2005), of a total value of £7,000million worth of licences, “Character and Entertainment” are top with 47% of the market (£3,290million)

and “Sports” comes second with 17% (£1,190);

5 “Sports licenses are valuable, accounting for around 17% of market sales and are expected to grow share as interest increases due to the 2012 Olympics and Government health awareness campaigns. Celebrity licenses in contrast have not performed as strongly, despite a general ‘obsession’ with celebrity. Celebrity licenses are skewed towards cookware (chefs), clothing (pop singers), and cosmetics (film and music stars) but there is a lack of excitement surrounding these across the industry” at “A surprising competitor”;

6 per Jaffey, Peter and Couchman, Nic at p355 in Character Merchandising in Europe, ed Heijo Ruijsenaars;

7 “In my view nothing said above touches

on the quite separate issues which may arise out of character merchandising cases .. in those cases the defendant’s activities do not imply any endorsement. For example, although it was a trade mark registration case, in *Elvis Presley Trade Marks* much of the argument turned on whether the appellant had merchandising rights in the name of Elvis Presley or in his image. ... There could be no question of the performer endorsing anything since he had been dead for many years. So the argument being advanced was one which amounted to an attempt to create a quasi-copyright in the name and images. The Court of Appeal’s rejection of that is, with respect, consistent with a long line of authority.” *Irvine v Talksport Ltd* [2002] EMLR 32 at 695;

chandising and brand merchandising. In fact the merchandising opportunities relating to exploiting (ii) and (iii) are based fundamentally on trade mark law, whereas the area of sports character merchandising is one largely based on the individual sports person's ability to protect the use of his/her name and/or image in connection with merchandising which protection can be based on a mixture of interlinking intellectual property disciplines which can include trademark law but which also extend to other intellectual property strands such as 'passing off', copyright, design right and the rather more diaphanous "image rights" (also known variously in different jurisdictions as publicity rights, personality rights, right of privacy, character rights etc). Taubman Antony expresses the issues with the nature of these rights well<sup>9</sup>, "[t]he right of personality has an unsettled, hybrid quality, lacking coherence as a distinct legal doctrine. One may query the utility of this omnibus concept, given the diverse areas of law ushered beneath this umbrella: personality cases include statutory rights to privacy and publicity; conventional and expanded passing off; privacy; confidentiality; equity providing a fusion of confidentiality and human rights law; unfair competition and trade practices (including trade descriptions); moral rights; libel; malicious falsehood and trespass to the person; and trade marks".

The figures at stake can be astronomical and a canny sportsman can more than quadruple or more his/her income by playing the 'merchandising game'. Tiger Woods, for example, is reportedly<sup>10</sup> well on his way to becoming the first \$1billion athlete, leading the way in 2007 with a recorded annual income of \$122,702,706 which, on top of the reported \$769,440,709 he has already earned to date, pushes him to nearly \$1billion, largely from endorsements, licensing, books, instructional videos etc.

### Trade Mark Law

A trade mark is a sign used in relation to goods or services so as to indicate a connection in the course of trade between the goods or services and some person and/or entity having a right to use the mark. It distinguishes them from the goods or services of other traders<sup>11</sup>. Any sign that distinguishes will meet this requirement (*AD 2000 Trade Mark*<sup>12</sup>).

There is no compulsion to register a trade mark but it can be desirable on account of the legal advantages, a key one of which is to afford the owner of the trade mark (or the assignee, depending on the rights assigned) greater legal protection. This legal protection gives the benefit of not having to go through what can be the quite onerous and difficult procedure of proving the elements of passing off and reputation. A trade mark is fundamentally a badge of origin and as such means that customers can recognise the product and/or services of a particular trader (/club/league). Another key advantage is that where infringement can be proven, financial compensation for losses caused by infringement may take the form of damages or an account of profits. Account of profits is a discretionary remedy and a rightholder cannot enjoy both damages and an account of profits. There are a number of other non-pecuniary remedies that the injured rightholder can also pursue, which are declaratory relief (a declaration of infringement or non infringement), delivery up and destruction (of infringing merchandise etc), a court order to reveal information and an injunction.

Historically, the regime for the registration of trade marks was developed in the nineteenth century and trade mark law is currently formalised in the UK in the Trade Mark Acts 1994 (the "TMA"), which in turn implements the Council Directive 89/104/EEC (the "Directive") which in turn is incorporated into the (Community) Trade Mark<sup>13</sup> Regulation (EC) 40/94 (the "Regulations"). It is important to note that many of the registrability provisions of the TMA are mirrored in the Directive and the Regulations. A significant feature of the Regulations is the creation of a single trade mark right which extends throughout the European Union and gives effect to the Madrid Protocol<sup>14</sup> for the Registration of Marks internationally. As of 1<sup>st</sup> October 2004, as a consequence of the EC accession to the Madrid Protocol, trade mark owners have benefitted from this international registration system administered by WIPO<sup>15</sup>.

The UK has its own trade mark registry, as has the European

Community, and as do most developed economies. There are various international treaties<sup>16</sup> which look to link trade marks in one territory to other territories by way of conferring priority in terms of time in relation to subsequent applications for registration in the second territory but it is important to realise that a UK registration will not automatically give rights in any other territory and *vice versa*.

It is not uncommon for sports persons to register their names, and many have famously done so: "Gazza" being registered by Paul Gascoigne, Zinedine Zidane registering "Zidane", Eric Cantona registering "Cantona 7" and Damon Hill registering the image of his eyes looking out through the visor of his helmet, to mention but a few. However, it should be noted that such applications are not without their difficulties and if not registered early enough, such applications may well fail on the grounds of distinctiveness in that it can be considered that that where goods are connected to a famous image, the personality of the celebrity is considered more important than the indication of origin. Per Laddie J, in the *Elvis Presley* case, "*fame leads away from distinctiveness in the trademark sense*"<sup>17</sup>. A way to combat such allegations is for the sports person to be involved in the promulgation of the mark he/she has chosen from an early stage (i.e. show a reputation in terms of trading under that mark<sup>18</sup>), ideally when lesser known. It can be seen that this form of protection is of less use to sports stars to restrict third parties from using their images as even where a registration is legitimately granted it will only protect that particular mark in respect of the registered classes and traders are in any event generally legitimately permitted to use famous people's names and/or images in relation to products as it can usually be argued that the public will not be confused into thinking that such use indicated a particular trade source (unless it can be proven otherwise).

In considering the presentation of any trade mark application and its associated definition of class(es) (and indeed any stylized graphic representation of a mascot or sports person's name), the main issue at law, as per Advocate General's opinion in *Arsenal Football Club plc v Reed*<sup>19</sup>, is whether "*a registered proprietor is entitled to prevent third parties using a mark identical to a registered trade mark in relation to the same goods or services where such use is capable of giving a misleading identification as to the origin, provenance, quality or reputation of the goods or services to which the mark is affixed. The decisive factor is not the feeling that the consumer buying or using the goods harbours towards the registered proprietor of the trade mark but the fact that they are acquired because the goods are associated with the trade mark*"<sup>20</sup>. It will therefore be necessary to ensure that consumers are not under the illusion that goods (and/or services) to be marketed under any proposed mark could be thought to be associated with any other club/league/competition/sports person. Lack of confusion is the most important factor, neatly reflected in the courts rejection of the claim<sup>21</sup> by the famous Baywatch television series against "Babewatch" (a series of programmes broadcast on an adult channel parodying Baywatch and containing some pornographic material) of infringement under s. 10(2) and 10(3) of TMA as there was no likelihood of confusion between the two.

8 see comment by Learmonth, Alexander later at fn 70;

9 Taubman, Antony, "Is there a collective right of personality?" EIPR 2006, 28(9) at 486;

10 figures taken from Golf Digest, April 2008 and www.forbes.com, "Woods will rake in about \$90 million in endorsement contracts this year [2008]alone";

11 TMA s.1;

12 *The AD2000 Trade Mark* ([1997] RPC 169);

13 The Community Trade Mark will hereafter be referred to as "CTM";

14 oami.europa.eu/en/mark/default.htm generally and oami.europa.eu/en/mark/madrid/default.htm specifically;

15 by the World Intellectual Property Organization (WIPO - www.wipo.org)

16 see comment on TRIPS Agreement below;

17 *Elvis Presley Trade Mark* [1997] RPC 543 at 556;

18 The footballer Andrew Cole failed for such a reason in his opposition to Jo Cole's registration of "King Cole" for while he could produce evidence that he was known by the nickname, he could not show any history of trading under that name, O/468/01;

19 *Arsenal Football Club plc v- Matthew Reed Case C-206/01* (13 June 2002, unreported)

20 Lewis & Taylor, Sport: Law and Practice, Butterworths Press, 2003, at D6.41;

21 *Baywatch Productions Co Inc v Home Video Channel* [1997] FSR 22, Ch D;

The above will all be considerations for the 2012 Olympic Committee to take on board when they decide on a mascot for the 2012 games<sup>22</sup> and would also have been of prime consideration when choosing the mascot for the 2002 Manchester Commonwealth Games: a cat called Kit<sup>23</sup>.

### Sports Character Merchandising: Who has the rights?

Griffith-Jones succinctly defines merchandising (in a sporting context) as *“the process by which that pulling power [that is commercial pulling power or “goodwill” derived from “identity”, “profile”, or “reputation”] may be used to deliver a commercial return through the harnessing of the identity in question and by its use to promote the sale of products by association with it”*<sup>24</sup>

In relation to character sports merchandising, an essential element of any merchandising and marketing strategy will be the protection of the main intellectual property rights inherent in any sports person's image/persona and fame in order to protect the exclusivity of any personal endorsements and the merchandising of any products bearing the name and/or associated to the persona. Sports' sponsorship can be categorised broadly *“as arrangements which grant money ... to an individual or individuals in order to further that individual's or those individuals' sporting ambitions, either generally or for a period or in relation to a particular championship or event”*<sup>25</sup>, or more pertinently in today's marketing context, *“sponsorship ... seeks ... to harness the “identity”, “image” or “profile” of a sporting individual, event or competition and to borrow his/its goodwill or “commercial pulling power” in order to generate sales of the sponsor's products, which may comprise goods or services that may have little to do with the sporting context of the sponsorship arrangement itself”*<sup>26</sup>. These obviously have considerable overlap, but Laddie J. differentiated them rather eloquently<sup>27</sup>, *“[W]hen someone endorses a product or a service he tells the relevant public that he approves of the product or service or is happy to be associated with it. In effect he adds his name as an encouragement to members of the relevant public to buy or use the service or product. Merchandising is rather different. It involves exploiting images, scenes or articles which have become famous”*. He went on to cite the example of a plate bearing the image of Diana, Princess of Wales, stating that it could hardly be thought to be endorsed by her but that sales could nonetheless be enhanced by virtue of having her image on it.

To treat the sponsorship and endorsement market as one and to give an idea of its combined potential, sports' sponsorship is estimated to have grown by 25% in terms of value from \$24.4 billion (2002) to \$30.5 billion (2005)<sup>28</sup> and has experienced continued phenomenal growth. For an example of what an individual sports person can earn, when David Beckham (the English footballer) left Real Madrid for the US Soccer side LA Galaxy, he was reputedly offered a five year contract worth circa 200 million euros, only 20% of which was for his actual services the remaining 160 million euros were related to his image rights.

An entrepreneur aiming to exploit goods produced in connection with sports character merchandising will basically be aiming to benefit from the fact that the relevant sports-person is very well known and these rights have variously been called “personality rights”<sup>29</sup>, “character rights”, “rights of privacy”, “rights of publicity”, “endorsement rights” and “image rights” depending mainly on the relevant jurisdiction. The umbrella term is “image rights”, used *“not in the narrow sense of “likeness” but in the broad sense of “persona” or (better) “brand”*<sup>30</sup>.

As can be seen from the huge figures involved the value of such rights to a sports person (and particularly in the case of football, to the that footballer's club) can be phenomenal and since at least 2000<sup>31</sup> there has been official acknowledgement that promotional agreements could have an independent value and were not merely “smoke-screens” for additional remuneration. There will exist tensions between individual's and their team/club's claim on the ownership of image rights. Many professional contracts purport to take ownership of such rights and as a matter of caution will need to be carefully checked to ensure that the appropriate individual's rights are carved out. In Formula 1 the wording of the Team's Agreement<sup>32</sup> with the Federation Internationale de l'Automobile (FIA) assigns all such rights to the FIA (and therefore presumably the Driver's Agreement between the Team and the Driver will also carve out all such necessary rights). Although it should be noted that on 14<sup>th</sup> May this year it was reported by www.sportbusiness that Lewis Hamilton was set to sign a \$20 million personal sponsorship deal with sportswear manufacturer Reebok<sup>33</sup> which not only gives an indication of the sort of money at stake, but also more to the point, that the contractual freedom a professional sports person can exercise in relation to his own personal image rights will depend largely on the his (and the party in question's) relative bargaining powers<sup>34</sup>. The English football Premier League has a clause addressing these sorts of rights, but it is common practice to have them amended in the form of supplementary contractual provisions<sup>35</sup>. In respect of Spanish and Italian leagues, *“clubs such as Real Madrid and Juventus, frequently enter into agreements to purchase their players' Image Rights. In the absence of an agreement such as this, sporting bodies should have a specific agreement executed in which it is explained that the Football Club, in consideration for monetary payment, is entitled to use the footballer's image [in connection with the “total team image”]*<sup>36</sup>.

In Italy there is doubt as to the validity of what appears to be the existing mechanism whereby professional football players' image rights are, to an extent, automatically assigned via an agreement signed between the Associazione Italiana Calciatori (AIC) and the Professional Leagues (the Lega Nazionale Professionisti and the Lega Professionisti Serie C) back in 1981. The idea is that the players would automatically be entitled (collectively) to a percentage of the profits that their clubs make from “the promotional and advertising activities of the Club”<sup>37</sup> although according to Ferrari a *“waiver has ... become a standard, thanks to a short clause that is always added to the individ-*

22 Fu Wa (the Beijing 2008 Olympics mascots were reportedly carrying out a tour of London and there is some debate as to what the mascot(s) for London 2012 should be: [http://www.bbc.co.uk/london/content/articles/2007/03/02/2012\\_mascot\\_feature.shtml](http://www.bbc.co.uk/london/content/articles/2007/03/02/2012_mascot_feature.shtml) ;

23 m2002.thegef.com/The\_Games/Mascot/ and according to the “games legacy” website over 10,000 mascots were sold, see <http://www.gameslegacy.co.uk/cgi-bin/index.cgi/10> ;

24 Griffith-Jones, David, Law and the Business of Sport, 1st edition, Butterworths, 1997 at p239;

25 Griffith-Jones, 1997 at page 261;

26 Griffith-Jones, 1997 at p262;

27 Irvine v Talksport Ltd [2002] 2 All ER 414 at 418;

28 these figures are from International Events Group (IEG) and are published in the Executive Summary of “Advanced

Sports Sponsorship Strategies - the Ultimate Guide for Rights Holders, Brands and Agencies” by Ardi Kolah for [www.sportbusiness.com](http://www.sportbusiness.com);

29 Lien Vebauwhede, “Savvy Marketing: Merchandising of Intellectual Property Rights” WIPO website, *“Personality rights” or “publicity rights” are the rights attached to, inter alia, the name, voice, signature, image or appearance of a real person ... [and] ... include the right to control the commercial use of the essential personality features and to receive the benefits from such use”*;

30 Lewis & Taylor, 2003 at D3.5;

31 Special Commissioners' decision, 8 June 2000 in *Sports Club, Evelyn and Jocelyn v HM Inspector or Taxes*;

32 On the assumption that such procedural aspects have not changed significantly under the current arrangements to what they were under the 1997 Concorde

Agreement (published on [www.racefax.com](http://www.racefax.com) ), clauses 4.1 and 4.2 of that Agreement consist of a comprehensive definition of “Rights” and grant of them to the FIA;

33 Note the press release also states *“Maclaren, which does not usually allow its drivers to seek personal sponsors, is believed to have made an exception in this case because Hamilton is “one of the sport's most marketable stars” indicating that there may well have been some form of contractual flow-down of the Concorde Agreement “Rights” carve-out* <http://www.sportbusiness.com/news/166793/hamilton-set-to-sign-20m-sponsorship-deal> ;

34 In this instance it is likely that the FIA and his racing Team considered that there would be ‘reflected benefits’ to the sport and their commercial standing by having him sign up to such a deal;

35 For example the current English Premier League pro forma contract (Form 13A) defines “Player's Image” as *“the Player's name nickname fame image signature voice and film and other photographic portrayal virtual and/or electronic representation reputation replica and all other characteristics of the Player including his shirt number”* and under clause 4 specifically makes certain requirements of the player in respect of not exploiting his image in a “Club Context” (further defined as *“in connection or combination with the name colours strip trade marks logos or other identifying characteristics of the club ..”*;

36 Gelder, Paul, “Image is Everything: An Analysis of the Legal Protection of the Image of Sports Athletes” (2005) ISLJ 1/2 at 26;

ual contract forms". He also makes the point that the idea that players are not completely free to dispose of their image rights as they see fit is one that is in reality, consistently contradicted by the conduct of not only the players, but also the clubs and as such may not stand up to legal test, not to mention the issue of whether foreign federation players (not registered with the AIC) would come under the mechanism.

### Design Right and Copyright Law - Sports Character Merchandising in the UK and EU

Where a sports person is seeking to exploit his image in a fashion more typically associated with classic character merchandising methods, such as the production of a cuddly or other toy then there are other methods which may be used to protect such a business. There will be a design right that automatically exists once any design has been recorded or an article made to the design which will rest with the creator. "Artistic copyright" will be unlikely to exist in it unless it is a work of artistic craftsmanship<sup>38</sup>, that is a work of 'fine art' or similar. If a design is still only in the 'drawing phase' then the copyright<sup>39</sup> in the drawing(s) the copyright in the drawings will be owned by the creator (irrespective of the artistic quality<sup>40</sup>), always bearing in mind that anyone making the drawn design into an article will not normally infringe this copyright.

Under UK law this design right<sup>41</sup> ("UK URD") will exist in most 3-D articles providing that the design has not been copied from an existing design (i.e. if a product is being commissioned from a manufacturer's prototype the ownership of the design right will depend on whether the manufacturer uses a pre-existing template for any toy etc, or creates a new one<sup>42</sup>, subject always to contractual assignments to the contrary). The right will last for the shorter of either 10 years from the end of the first year the design is made available for sale or 15 years from the end of the year in which the design is created and in the last 5 years of the period for protection anyone can copy the design subject to the payment of a royalty under a "licence of right". The main characteristics (including longevity) of the UK UDR and the UK RDR (see below) are set out at the UK Patent Office website<sup>43</sup>.

Under UK law it is also possible to apply to have the design registered<sup>44</sup> ("UK RDR"). A design cannot be registered if (i) the appearance of it is dictated by its technical function or (ii) where the design is part of a complex product and it cannot be seen when the product is being used. The *design*<sup>45</sup> for the *product*<sup>46</sup> is subject to conditions of *novelty* and *individual character*<sup>47</sup> in the eyes of an informed user which is a person with a certain level of knowledge or design awareness, rather than a design expert.

Apart from the above UK URD there is also a quite different Unregistered Community Design ("UCD") right which can exist

both in the absence of or in parallel with the UK RDR and UDR and is valid throughout the EU being governed by the Community Design Regulations<sup>48</sup>. However the UCD is for lesser period<sup>49</sup> than that granted by the UK URD and as such won't be addressed in any more detail here.

It is considered by part of the design industry<sup>50</sup> that in practice the remedies for infringement of design right (both registered and unregistered<sup>51</sup>) are unsatisfactory and are not sufficient deterrent to prevent serial copying. Certainly in respect of endorsements, and possibly now, in respect of character merchandising litigation, alternative redress may be possible under the tort of passing off. Also a word of caution in respect of alleging infringement of design right as the useful recent reminder of the e-bay case of *Quads 4 Kids v Campbell*<sup>52</sup> showed. It is recommended not to allege infringement unless one is sure of one's case or one risks not only a thorough overhaul of one's own registered designs (no doubt previously subject to a non-too-thorough inspection) but also the very possibility of a damages action.

### Protection in the UK - Passing Off

The law of passing off has come into existence to prevent someone trading on another's reputation. The definitive case law on this is in the *Jif Lemon*<sup>53</sup> case in which the House of Lords summarised the three elements required to be proved in a passing off action, (known as the "classic trinity" formulation): (i) goodwill or reputation attached to goods and service (for example in claimant's goods, name, mark, get-up etc.), (ii) a misrepresentation made to the public (leading to confusion or deception) causing (iii) damage - actual or potential, to the claimant. You can see it is necessary to establish goodwill and the concept of "trade" is key here. In *BBC v Talksport Ltd*<sup>54</sup> (which was an action in which BBC accused Talksport's advertising of claiming that its Euro 2000 coverage was 'live') the BBC failed in its application for an injunction under passing off on the basis that although it had a reputation as a live broadcaster of sports, this reputation did not give rise to goodwill.

Apart from the goodwill issue the matter of "deception" (used interchangeably with confusion) was a stumbling block to successful actions in protecting celebrity rights in unauthorised goods for years. The concept of a "common field of activity" was introduced in *McCulloch v May [1948] 65 RPC 58*, (one of the first celebrity merchandising cases) in which it was found that a BBC children's broadcaster known as "Uncle Mac" would not succeed in his case against the use of his nickname on breakfast cereals. Thereafter the courts continued to deny the relevant connection between famous names and the merchandising of the relevant goods denying famous names the right to restrict unauthorised use of their names in a number of cases which included Abba not being able to restrict use of their name and like-

37 per Luca Ferrari, Italy, "Sports Image Rights in Europe", eds Blackshaw and Steckmann, TMC Asser Institut, 2005 at page 201;

38 the definition of "artistic craftsmanship" is uncertain but the ACID (Anti Copying in Design) website considers that it "is probably limited to works of or similar to fine art, e.g. hand-blown vases" <http://www.acid.uk.com> ;

39 This would give rise to protection for the lifetime of the creator plus 70 years (s.9(3) CDPA), however there are exceptions and the position can be complicated, see s. 12-15 Duration of Copyright Regulations 1995, SI 1995 No 3297;

40 Copyright Designs and Patents Act 1988 ("CDPA"), s.215(2);

41 ss.213-264 CDPA;

42 The toy/object needs to be an original creation - if it is a slight variation of a previously mass produced design then copyright in it may not exist, and indeed, in some countries even having an original element may not suffice: "copyright pro-

tection may be denied or curtailed where a work is created with the intention of being exploited industrially and embodied in mass-produced articles, which is an inherent quality of works (drawings, dolls, puppets, robots etc) designed for merchandising. This results from the overlap between the notions of artistic works and industrial design, where the two forms of protection are generally not available cumulatively at the same time" (Part IV, A.(a)(ii) WIPO Report cf FN 9)

43 [www.ipo.gov.uk/design/d-applying/d-should/d-should-designright.htm](http://www.ipo.gov.uk/design/d-applying/d-should/d-should-designright.htm);

44 Registered Designs Act 1949, as amended in December 2001 (and includes implementation of the Designs Directive (98/71/EC ("DD")) ("RDA")). Note an application for a national registered design is made to the Design Registry (part of the UK Patent Office) but it is also possible to apply for Registered Community Designs which are considered by OHIM (Office for the Harmonisation of the Internal Market in Alicante, Spain);

45 "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation" - Design Regulation (6/2002) ("DR") Art.3, DD Art. 1, RDA s.1(2);

46 "means any industrial or handicraft item other than a computer program: and in particular, includes packaging, get-up, graphic symbols, typographic typefaces and parts intended to be assembled into a complex product" - DR Art. 3, DD Art.1, RDA s.1(3);

47 DR Arts 5-7, DD Arts 3-5, RDA s1B;

48 No 6/2002 of December 12 2001;

49 very broadly speaking, although it grants a one year grace period between the publication of a design and the application for a registered design, it otherwise has a 3 year term;

50 Dids McDonald (ACID), 2004/2005, "Under an account of profits, the infringer is only required to account for the profit that they have made in dealing with the

infringing articles. The infringer is entitled to deduct all their expenses and overheads involved in those infringing activities. Consequently, there is no loss suffered by the infringer as a result of the infringing activities, and therefore no deterrent whatsoever against future infringing activities";

51 For UDR infringement: damages (CDPA s.229(2)) but not against an innocent primary infringer (s.233), damages of a reasonable royalty against an innocent secondary infringer (s.233) and possible additional damages (s.229(3)), account of profits (s.229(2)); for RDR infringement - damages (but not against innocent primary infringer (RDA s.9), account of profits;

52 *Quads 4 Kids v Campbell* [2006] EWHC 2482;

53 *Reckitt and Colman Products Ltd v Borden Inc* [1990] RPC 341;

54 *BBC v Talksport Ltd* (No 1) [2001] FSR 6;

55 *Lyngstad v Annabas* [1975] FSR 488;

ness on badges, clothing, bedding and t-shirts<sup>55</sup>, George Harrison and Ringo Star being unable to prevent the use of the name “the Beatles” and photographs of the band on a record collection of taped interviews<sup>56</sup> and the Spice Girls not being allowed to prevent the use of their images in a sticker collection album<sup>57</sup> (this despite a slight softening in the approach to “common field of activity” in the *Harroldian School*<sup>58</sup> case). Although 1991 did see the granting of an injunction pertinent to the issue of character licensing in *Mirage Studios v Counter-Feat Clothing*<sup>59</sup> which concerned the use of “Teenage Mutant Ninja Turtles” on various items of clothing and resulted in the court acknowledging that unlicensed merchandise could be connected in the mind of the public to the claimant’s goodwill<sup>60</sup>, this was perceived by some as being unusual on its facts in that there were very hefty royalties at stake, it had copyright as its core subject matter and it was an interim injunction application. However, in 1998 the unauthorised use of the “Teletubbies” characters on t-shirts was not considered to be a misrepresentation, as, in the words of Laddie J., “it is quite possible that members of the public look at T-shirts bearing this artwork and think no more than that it is artwork bearing illustrations of well-known television characters without having any regard whatsoever to the source of supply and without having any regard as to whether or not these T-shirts were put out with the sanction of or under the aegis of the plaintiffs.”<sup>61</sup>

The real breakthrough came in 2002 in the *Irvine v Talksport*<sup>62</sup> litigation where Laddie J. (relying on Australian law precedent<sup>63</sup>) stated that passing off would apply to unauthorised endorsement (because celebrity endorsement practices have become common knowledge) where the claimant can show he had a significant reputation or goodwill (which can arise from the mere fact of being famous)<sup>64</sup>. Klink considers it a logical step to make that the public knows that it is common practice for celebrities to grant merchandising licences and therefore such licences should also benefit from protection<sup>65</sup> but Lewis and Taylor urge caution<sup>66</sup>, citing Laddie J. from Irvine, “[I]n my view nothing said [above] touches on the quite separate issues which may arise in character merchandising cases ... In those cases the defendant’s activities do not imply any endorsement”<sup>67</sup>, which quote appears in the context of discussion surrounding the famous Elvis Presley trademark<sup>68</sup> case, however he does not exclude the possibility of protection for character merchandising coming about in the future, “[W]hether such a new right may be created either by development of the common law or as a result of the passing of the Human Rights Act, is not relevant to this action”<sup>69</sup>. More precisely summarised by Alexander Learmonth, “there is no cause of action in passing off for false merchandising where there is no element of false endorsement by the celebrity”<sup>70</sup>. In any event, it is prudent to start negotiating licences encompassing

obligations on the producer to bring the merchandise to market at the earliest stage possible so that protectable goodwill should follow quite swiftly<sup>71</sup>.

### Human Rights Act 1998, Data Protection Act 1998 and Other Options

The Human Rights Act 1998 (HRA 1998) incorporates into English law the European Convention for the Protection of Human Rights and Fundamental Freedoms which include, of particular relevance here, the right to privacy (s.8 HRA 1998) and the right to peaceful enjoyment of property (Article 1 of Protocol 1 of the HRA 1998).

Restriction of unauthorised use of images will all be part of a properly structured image campaign as the “loss of control or autonomy over the use of his or her [sports persons] image ... and the loss of control inherent in the defendant’s reaping an economic benefit from another person’s image and the reputation and goodwill associated with it ... with the resultant reduction in the scope of future potential licensing opportunities in the market sector”<sup>72</sup> will affect what a sports person can charge for the exploitation of his/her image. Since the implementation of the HRA 1998 there has been a ‘rash’ of cases<sup>73</sup> seeking to address and assess the correct balance between the s8 right to privacy and the s10 right to freedom of expression (relied on generally by the press). A useful judgment handed down by the Court of Appeal in rejecting a first instance striking out of JK Rowling and her husband’s claim of invasion of privacy on behalf of their son, David Murray<sup>74</sup>, set out the correct 2 tier test, clarifying a confusion and tension that had existed since the somewhat clashing verdicts of *Campbell* (House of Lords) and *von Hannover* (European Court of Human Rights) handed down within 7 weeks of each other (May 2004). The two stage test consists firstly of an inspection of whether the s8 rights are engaged, that is whether one has a ‘reasonable expectation’<sup>75</sup> of privacy in the information concerned and taking “account of all the circumstances of the case ... [to] include the attributes of the claimant, the nature of the activity in which the claimant was engaged and the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher”<sup>76</sup>. The second stage consists of conducting the balancing act between articles 8 and 10, (“in so far as it is or may be relevant to consider it in the context, not of whether article 8 is engaged, but of the issues relevant to proportionality, that is the balance to be struck between article 8 and article 10”<sup>77</sup>) that is, whether the article is ‘highly offensive’ given the circumstances and consideration to article 10<sup>78</sup>. On account of this particular case concerning a minor, a further interesting point to note is that the court can attribute to the child reasonable expectations about his private life based on

56 Harrison and Starkey -v- Polydor [1977] FSR 1;

57 Halliwell & Ors. V Panini, June 6 1997 (Lexis - unreported), per Lightman J., “I shall only say that I am far from satisfied that the absence of any disavowal of authorisation by the plaintiffs can reasonably lead members of the public to buy the defendant’s products on the basis or in the belief that it was authorised by the plaintiffs”;

58 The “common field of activity” was watered down to the plaintiff needing to prove that there was a clear risk to damage to the plaintiffs business due to a confusion with another product;

59 [1991] FSR 145;

60 Brown-Wilkinson V.C., “[7] The plaintiffs had no part in manufacturing or marketing goods, their only connection with marketing being the affixing of their characters on the goods under licence. On the evidence however, the public connected Turtles with the plaintiffs and this was sufficient link between the goods being sold and the plaintiffs to found a case in

passing off” at 146 and “a substantial number of the buying public now expect and know that where a famous cartoon or television character is reproduced on goods that reproduction is the result of a license” also at 146;

61 BBC Worldwide v Pally Screen Printing [1998] FSR 665, at 674.;

62 Irvine v Talksport Ltd [2002] 2 All ER 414;

63 Henderson v Radio Corporation [1969] RPC 218;

64 Laddie, J. “If someone acquires a valuable reputation or goodwill, the law of passing off will protect it from unlicensed use by other parties. Such use will frequently be damaging in the direct sense that it will involve selling inferior goods or services under the guise that they are from the claimant. But the action is not restricted to protecting against that sort of damage. The law will vindicate the claimant’s exclusive right to the reputation or goodwill. It will not allow others to so use goodwill as to reduce, blur or diminish its exclusivity” (use of bold author’s own);

65 Jan Klink, “50 years of publicity rights in the United States and the never ending hassle with intellectual property and personality rights in Europe” 2003 IPQ 363 at 374;

66 Lewis & Taylor 2003 at D3.56;

67 Fn 62 supra at 427;

68 ELVIS PRESLEY Trade Marks, Re [1997] RPC 543;

69 Fn 62 supra at 428;

70 Learmonth, Alexander, “Eddie are you okay? Product endorsement and passing off” [2002] IPQ 3 at 309, note also, “[o]f course, some sorts of merchandise are more valuable when they are, or appear to be, official; children may be particularly sensitive to such matters. Thus, merchandising and endorsement are not discreet categories; much merchandising also involves endorsement, but endorsement may occur ... where merchandising is not involved”;

71 In Stannard v Reay [1967] FSR 140 it was found that the plaintiffs had built up sufficient goodwill in the name MR CHIP-PY for their mobile fish and chips enterprise in 3 weeks;

72 Jones, “Manipulating the Law against Misleading Imagery: Photo Montage and Appropriation of Well-Known Personality” 1999, 1 EIPR 28;

73 Douglas v Hello Ltd (No 1) [2001] Q.B.

967, Theakston v Mirror Group

Newspapers [2002] 1 All ER 449,

Campbell v Mirror Group Newspapers

Ltd [2004] 2 AC 457, Von Hannover v Germany (2006) EWCA Civ 1776;

74 Murray v Big Pictures (UK) Ltd [2008] EMLR 12;

75 i.e. “to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than its recipient, would find the disclosure offensive” per Lord Hope in Campbell at 456;

76 Sir Anthony Clarke MR at paragraph 37;

77 Sir Anthony Clarke MR at paragraph 26;

78 Note in the recent controversial case surrounding Fi’s Max Mosley’s exposé (Mosley v News Group Ltd [2008] EWHC 1 7777) in the Sun newspaper no justifiable public interest under article 10 was found to be present;

matters such as how it has in fact been conducted by those responsible for his welfare and upbringing<sup>79</sup>, thus, for example, if a baby has been allowed to feature by and/or with its parents on the cover of a “Hello” magazine special, this is likely to be taken into account and affect that child’s expectations of ‘right to privacy’ boundaries at a later stage, should an action arise.

Whether the Data Protection Act 1998 (DPA 1998) gives a cause of action can also be considered. In the *Campbell* case Morland J. found, at first instance<sup>80</sup> that the information printed about Naomi Campbell attending AA Narcotics meetings was in his judgement, “information as to the nature of and details of the therapy that the claimant was receiving ... including the photographs with captions was clearly information as to her physical and mental health or condition, that is her drug addiction and therefore “sensitive personal data”.”<sup>81</sup>

Other possible recourses exist under the Control of Misleading Advertising Regulations 1988 under which the OFT has the power to apply to the court for an injunction to prohibit the publication of an advertisement where it is misleading providing always that the complainant has first tried to get the offending advertisement withdrawn under the Advertising Standards Authority (“ASA”) regime. The ASA is an independent body that oversees and applies the British Code of Advertising, Sales Promotion and Direct Marketing and at paragraph 13<sup>82</sup> of the code it protects the misuse of a person’s image. Although actions under 13.1 can be difficult to make out (the portrayal as unfair and adverse must be proven) and the punishments are relatively toothless (trading privileges removed, pre-vetting imposed and in the event of non-compliance, referral to the Office of Fair Trading), an action was successfully made out under the ASA code by the athlete David Bedford against the “118 118” television advertising campaign<sup>83</sup>, although tellingly, Ofcom refused to order the withdrawal of the offending adverts.

It remains to be seen whether the implementation of the new Unfair Commercial Practices Directive<sup>84</sup> in the guise of the Consumer Protection from Unfair Trading Regulations 2008<sup>85</sup> (“Trading Regulations”) in the United Kingdom (which came into force 26 May 2008) will make any substantial difference to the options available to sports’ persons wishing to protect their image. The main aim is to try to eradicate some of the differences between member states and to keep a good level of consumer protection which is supposed to be for the benefit of both consumer and business. Of the 31 practices banned under the new Trading Regulations the one that could be of use in the context of this article is misleading advertising falling under s.5(1) and (2)<sup>86</sup>. How useful they will be remains to be seen by future practice, but difficulties can perhaps be foreseen in the instigation and enforcement of actions as Trading Standards Officers are to police the regulations and with penalties of up to £5,000 for those found guilty in the magistrates court and £5,000 and/or 2 years in prison for more serious cases tried and found in the

Crown Court, they seem unlikely initially, at least, to put a spanner in the wheels of big business.

### Protection in Germany

In Germany § 12 of the German Civil Code<sup>87</sup> grants everyone the absolute right to use their name and to restrict others from using it without their consent. The right applies to first names<sup>88</sup>, surnames<sup>89</sup>, artist names<sup>90</sup>, nicknames<sup>91</sup> and pictures signs<sup>92</sup> but is not a property right in the name but is “a personality right which protects the holder’s interest of identity”<sup>93</sup>. Over time German courts have found that where a famous person’s name is used in advertisements without that person’s consent then the advert misleads, and this name right has been used to cover all forms of unauthorised use of popular names including use on t-shirts<sup>94</sup>. What the German system has done is effectively stretch a human rights doctrine (a personality right protecting the integrity of a human being) to cover issues arising within the ‘business of celebrity/fame’ but human rights should not be the subject of commerce. As Klink puts it, “[N]o one can sell, buy or wave human rights”<sup>95</sup> which created difficulties for business. It is also worth noting that the § 12 BGB right only protects against a fraudulent use or non-use of the personality’s name.

In Germany there also exists the right to one’s picture, mainly thanks to two journalists who illegally trespassed to take pictures of Otto von Bismarck’s corpse back in 1898. When the son of Bismarck took action in an attempt to prevent the publication of these pictures, the then German Imperial Court (Reichsgericht) resourcefully constructed an argument based on the Roman law notion of *conditio ob iniustam causam*<sup>96</sup> which prevented the keeping of ill-gotten gains. Subsequent mounting criticism of this convoluted temporary fix saw the introduction in 1907 of the right to control one’s picture under § 22 and 23 of the German Artistic Copyright Act<sup>97</sup>. A portrait for the purposes of § 22 is “any recognisable representation of the outward appearance in any form and in or on any medium”<sup>98</sup> and is a wide definition. It was found by the court to encompass the publication of a picture by the *Frankfurter Allgemeine Zeitung* which included a dummy of Boris Becker under a strap-line “our flailing favourite”<sup>99</sup> which amounted to an advertising misrepresentation that Becker had endorsed the advert via use of the portrait of his dummy. The right to one’s image is a personal one which does not expire on death but is transferred to next of kin death<sup>100</sup>. It should be noted that this right is balanced against a general public interest in information dissemination and other interests in the public domain. To keep matters brief and relevant, the main carve out that will be of concern to you is that under § 23(1) KUG in that images pertaining to contemporary history are free from consent and these will include images relating to professional sports. It is also worth bearing in mind that even with regards to images outside of this exemption, consent can be implied by conduct, for example, the Frankfurt court found Katharina Witt

79 Macmillan Kate, “Baby Steps”, 2008, Comms L 13(3) 72-75;

80 care should be taken as the decision was subsequently overruled by the Court of Appeal and then referred to the House of Lords where the CA decision was overruled;

81 *Campbell v Mirror Group Newspapers*, [2002] QB 633, quote from p327, Harrington, Dan and White, Nick, “Sports Image Rights in Europe”, ed.s Blackshaw and Sieckmann, TMC Asser Institut, 2005;

82 “13.1 Marketers should not unfairly portray or refer to people in an adverse or offensive way. Marketers are urged to obtain written permission before: ... b) referring to people with a public profile; references that accurately reflect the contents of books, articles, films may be acceptable without permission, c) implying any approval of the advertised product; marketers should recognise that those who

do not wish to be associated with the product may have a legal claim.”;

83 Outcome of the appeal by The Number (UK) Ltd regarding complaint by David Bedford, Ofcom Advertising Complaints Bulletin 27 January 2004;

84 Directive 2005/29/EC

85 S.I. 2008/1277, text to be found at [http://www.opsi.gov.uk/si/si2008/uksi\\_20081277\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20081277_en_1);

86 “Misleading actions: 5(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3); (2) A commercial practice satisfies the conditions of this paragraph (a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and (b) it

causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.”

87 Bürgerliches Gesetzbuch (“BGB”);

88 for example use of “Uwe” in connection with clothes was sufficient to bring to mind in most Germans the football

celebrity Uwe and to imply an endorsement, *Uwe* (1983) NJW (Neue Juristische Woche) 1185, German Federal Supreme Court (Bundesgerichtshof, “BGH”): use of “Berti” considered to be an infringement on Berti Vogts’ name right, (1988) NJW-RR 748, District Court of Düsseldorf (Landesgericht Düsseldorf “LGD”);

89 *Vogeler* (1960) GRUR (Gewerblicher Rechtsschutz und Urheberrecht) 490 BGH;

90 *Catarine Valente* (1959) GRUR 430, BGH: NJW 1269 BGH;

91 *Heino* (1987) NJW 1413 LGD;

92 *Zuillingszeichen* (1957) GRUR 288, BGH;

93 Jan Klink, 2003 at 377;

94 *Boris Becker* (1990) NJW 1106 BGH;

95 Jan Klink, 2003 at 378;

96 the recovery of benefits conferred under illegal or immoral transactions;

97 *Kunsturhebergesetz* (“KUG”);

98 Michael Gerlinger, Germany, “Sports Image Rights in Europe”, eds Blackshaw and Sieckmann, TMC Asser Institut, 2005, taken from *Antliche Sammlung des Reichsgericht in Zivilsachen* (RGZ) 45, p170;

99 *Boris Becker*, “der strachehende Liebling”, (5 March 2003), Landesgericht München, No. 7 O; 16812/02

100 Michael Gerlinger “Sports Image Rights in Europe”, eds Blackshaw and Sieckmann, TMC Asser Institut, 2005 at 2.12;

101 in *Katharina Witt* Oberlandesgericht (“OLG”) Frankfurt (2000) NJW 595;

had foregone her right to consent by her conduct in posing nude<sup>101</sup>. Under German law the use of Oliver Kahn's image without his consent in a computer game was actionable<sup>102</sup>.

The above statutory right to one's name and picture are also reinforced by the general personality right found in Articles 1 and 2 of the German Constitution<sup>103</sup> which articles were referred to in the *Caroline von Monaco*<sup>104</sup> decision to award substantial financial compensation<sup>105</sup>. This is in addition to the injunction that interference with this general personality right also generally gives entitlement to.

In summary, although Germany as a jurisdiction does offer options for protection for any merchandising and/or endorsement rights based on a mixture of property rights and human rights, these are not without their difficulties, particularly with regard to compensation but more recent cases appear to be going the way of the celebrity<sup>106</sup>.

### Protection in France

With ghoulish similarities bringing to mind to one of Germany's earliest cases involving recognition of rights over a (dead) person's image<sup>107</sup>, the Court of Seine in France recognised as early as 1858, in connection with a painting that had been done without consent of a dead actress' face, that it was not permissible to reproduce or make public the face of "a person lying dead on her bed, no matter how famous this person was and how public her life was"<sup>108</sup>. Nowadays in France in the Civil Code, the right to have one's private life is protected under Article 9<sup>109</sup> of the Civil Code (introduced by the Act of 17 July 1970) and although no express reference is contained within the text to the protection of one's image it is clear that action can be taken where privacy is invaded via the unauthorised use of one's image (subject to the balancing right of press freedom<sup>110</sup>), including action resulting in the granting of damages where an "...[a]ct of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it"<sup>111</sup>.

Famous athletes cannot object to their images being used for the purpose of dissemination of information (so long as those pictures are taken at a public event rather than a private place<sup>112</sup>) providing always that they are entitled to oppose commercial use of their image without their express consent<sup>113</sup>. The case that the footballer Eric Cantona won against the publishers of BUT magazine, Foot Edition, was clear vindication of such players' rights against unauthorised commercial exploitation.

In football, clear differentiation is made by the clubs and federations between the sports' persons individual image and the collective image of the team. Professional footballers are employees of clubs and as such sign up employment contracts which will specify certain rights in connection with uses of their image, such as those stipulated in Article 511 of the Charter of Professional Football in relation to national advertisements and promotional campaigns.

Overall character merchandising in France can be complicated and in the words of a leading commentator in the field, "many rules and laws are involved, such as Intellectual Property (see Intellectual Property

*Code ...), civil law, right to privacy, unfair competition (which under French law is a special application of the civil liability deriving Articles 1382 and 1383 of the French Civil Code), trademarks, etc. It is therefore essential to be careful when conducting a Character Merchandising project as it involves various rights that may be infringed."*<sup>114</sup>

### Protection in Italy

As a civil law jurisdiction, in Italy "personality rights" are protected under Articles 6 to 10 of the Italian Civil Code<sup>115</sup>. Although generally, publicly-known facts about well known figures are not protected under the legislation, use of a person's image or personal history have formed the basis of actionable causes under law. Fame will not eliminate the right to privacy as a well-known person, irrespective of any decision to trade in his/her image through publicity etc, has the right not to have their privacy invaded in the form of the publication of images in places which are not public or not open to the public. It is worthy of note that fame is irrelevant with regards to the useful protection granted under Italian law of any marketing or using of images (without consent) that harm the honour, reputation or even decency of the person the subject of those images. Protection is there for the sports person seeking to protect unauthorised use of their image in connection with marketing and indeed, the Italian courts have found a stylized image may very well itself be sufficient to call to mind and evoke a particular person<sup>116</sup>.

There is a balance to be struck between the above and Articles 96 and 97 of Law No 644/42 (Copyright Law) which provides that a person's image can be disseminated to the public without consent when it is justified by "that person's fame, or scientific, didactic or cultural purposes or where it is associated to facts, events, ceremonies or undertakings of public interest or those carried out in public."<sup>117</sup> Fame in itself is not sufficient justification to qualify for such "public interest".

With regard to personal information, any pertaining to workers (which would more often than not include professional sports persons) is strongly protected and pursuant to Act No 675/1996 (which implements the EU Directive on personal data protection), the informed consent of an individual employee is required prior to the processing of any sensitive identifying data.

### Protection in Spain

Under Spanish law Article 18.1 of the Spanish Constitution "guarantees the right to honour, to personal and family privacy and to self-image". There is quite a heavy burden on the judge in such cases due to the uniform treatment of these 3 different rights in the constitution. Also applicable is the Publicity Rights Act (the Organic Law<sup>118</sup> 1/1982 on the Civil Protection of the Right to Honour, to Personal and Family Privacy and to Self-image) of 5 May 1982 which "entitles each person to use his or her own image, name and voice for advertising, publicity or commercial purposes" and which states at Section 7, para 6, "the use of the image, name or voice of a person in order to sell goods and

102 Oliver Kahn (EA Sports), 25 April 2003, LG Hamburg;

103 Grundgesetz ("GG");

104 (1996) NJW 2870;

105 The Hamburg Court of Appeal awarded her £90,000 which was a breakthrough as, although the commercial aspects of the general personality right had been acknowledged since *Catarine Valente* (see fn 52), hurdles such as proving that the personality right could be commercialised, that the holder of the right would permit use and the cost of that use, had previously proved cumbersome;

106 The Boris Becker case resulted in the FAZ being ordered to pay him 1.2m Euros in compensation as reported by the Financial Times, Deutschland, 23 Feb 06;

107 see comment on the 1898 case concerning Otto von Bismarck's corpse above under 'Protection in Germany';

108 Per Delphine Verheyden, "Sports Image Rights in Europe", eds Blackshaw and Sieckmann, TMC Asser Institut, 2005 at page 93;

109 "Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe ... measures ... appropriate to prevent or put an end to an invasion of personal privacy ..";

110 France has long permitted certain justified infringements of privacy under the Freedom of Press Act (29 July 1881);

111 Article 1382 of the Civil Code;

112 a private place under French case law being a place not open to someone without express authorisation given by the person who stays in that place (permanently or a temporary period of time) per Besançon, 5 January 1978, D. 1978, 357;

113 in the sport of cycling as per Court of Appeal, Paris, 3 April 1987;

114 per Martowicz, Patrick in "Character Merchandising in Europe", ed Heijo Ruijsenaars, Kluwer Law International, 2003 at 117;

115 Other relevant legislation includes Art.s 2, 3 & 110f of the Italian Constitution, and Art 21 of the Italian Trade Mark Law (applicable both to names and pictures of real persons when they form, or are part of, a trademark, note also Article 21 i.m also reserves to well-known persons the right to register their name or trade mark) and Article 96 of Italian Copyright Law which states that images and pictures of real persons may only be distributed or exhibited with the consent of that person (although 97 dispenses the consent requirement where the reproduction has a cultural or scientific goal) per Toni, Anna Maria and Alessandri, Nicola in "Character Merchandising in Europe", ed Heijo

Ruijsenaars, Kluwer Law International, 2003 at 165;

116 Italian Supreme Court, 12 March 1997, No 223, in *Giur Civ.*, 1997, I, 2823;

117 International Encyclopaedia of Laws, Sports Law, General Editor Roger Blanpain, Editor Frank Hendrickx, August 2004, Kluwer Law;

118 per Jose Manuel Rey in "Sports Image Rights in Europe", eds Blackshaw and Sieckmann, TMC Asser Institut, 2005 at fn 1, page 261, "LO - Ley Orgánica [Organic Law] - Organic laws are those relating to the exercise of fundamental rights and public liberties. Their approval, modification, or repeal requires an absolute majority of the House of Representatives of the Spanish Parliament";



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Simon Gardiner, Richard Parrish, Robert Siekmann  
(editors)

*With a Foreword by Dr Michal Krejza, Head of Sport Unit, Directorate-General for Education and Culture, European Commission, Brussels.*

Much has changed since the publication of *Professional Sport in the EU: Regulation and Re-regulation* (edited by Andrew Caiger and Simon Gardiner, The Hague, T.M.C. Asser Press 2000). The present book explores new territory and its scope and tone reflect the maturity of the discipline of EU sports law and policy. The book seeks to balance contributions from established authorities and the best of the new generation of sports law and policy academics. New theoretical insights are revealed which accompany in particular two further sections dealing first with governance and regulatory issues (also including freedom of movement and competition law issues) and second with questions of representation. The issue of the representation of stakeholders within sports governance structures (Social Dialogue between employers/clubs and employees/players) is arguably the most significant development in the last decade and the inclusion of the word 'Representation' in the title is merited. Contributions on anti-doping, football hooliganism and sports betting are added to the book.

The editing team consisted of Simon GARDINER, Leeds Metropolitan University, United Kingdom, Richard PARRISH, Edge Hill University, Ormskirk, United Kingdom, and Robert SIEKMANN, ASSER International Sports Law Centre, The Hague, The Netherlands.

This book appears in the ASSER International Sports Law Series, under the editorship of Robert SIEKMANN and Janwillem SLOEK.

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## TV RIGHTS AND SPORT LEGAL ASPECTS

Ian S. Blackshaw, Steve J. Cornelius, Robert C.R. Siekmann  
(editors)

*With a Foreword by Dr Alexander Scheuer, Managing Director of the Institute of European Media Law (EMR), Saarbrücken/Brussels.*

It is fair to say that our lives in the twenty-first century are, in many respects, dominated by the media and sport; and, when combined, they are a very powerful force and mix indeed. Without the commercial exploitation of broadcasting rights and the resulting spectacular revenues generated, many sports events would never see the light of day.

The first part of *TV Rights and Sport: Legal Aspects* contains several contributions on the very important European Law aspects of sports broadcasting rights in the digital age as well as TV rights relating to major sports events. The second part of the book consists of 27 country studies within and beyond Europe.

The authors of the various chapters are all media law and sports law experts and address, from the point of view of the law and practice in their respective countries, amongst others, the following intriguing legal issues: the ownership of broadcasting rights; the commercial exploitation of those rights; and, with sport being such big business nowadays, the impact of competition law, including the vexed questions of the collective sale and purchase of sports broadcasting rights.

The book is a veritable mine of useful information and one that can heartily be recommended to all those involved in the creation, promotion, exploitation and protection of sports broadcasting rights around the world. A subject that will continue to challenge sports administrators, event managers, sports marketers, broadcasters and media service providers themselves and regulators, as well as their legal and other professional advisers, for many years to come.

The editing team consisted of Prof. Ian BLACKSHAW, Member of the Court of Arbitration for Sport, Prof. Steve CORNELIUS, Director of the Centre for Sports Law, University of Johannesburg, and Dr. Robert SIEKMANN, Director of the ASSER International Sports Law Centre.

The book appears in the ASSER International Sports Law Series, under the editorship of Dr. Robert SIEKMANN and Dr. Janwillem SOEK.

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services without his or her (prior or later) consent an unlawful interference of his or her privacy<sup>119</sup>. Alternatively put, “[t]here will be no perception of unlawful interference in the protected field when it is expressly authorised by law or when the holder of the right has granted their express consent to the effect<sup>120</sup> although the consent is at all times revocable (noting that in such an event, damages caused, including those of justified expectation will have to be compensated<sup>121</sup>).

In the event that merchandising cases arise which are not protected by any specific rules set out in the legislation it may always be possible to rely on the Unfair Competition Act<sup>122</sup> which act protects property rights against the “danger of confusion”, “or acts that are carried out with the unfair intention to take advantage of a foreign well-known or famous person or work<sup>123</sup> (paragraphs 6 and 12).

Articles 7 & 8 of the LO 1/1985 sets out certain exceptions to reproduction of images etc where “reproductions without the consent of the holder will not be deemed unlawful ... when they possess the support of the authorities, nor when the relevant historical, scientific or cultural interest prevails<sup>124</sup> nor where the image captures a public figure in a public act or space<sup>125</sup> and neither caricatures<sup>126</sup> nor images where the person captured is incidental to the picture overall will be unlawful<sup>127</sup>. A further balance is contained within LO 1/1982, Article 2.1, “[t]he civil protection of honour, privacy and self-image will remain delimited by law and by the social uses bearing in mind the field that, by their own acts each person keeps reserved for himself or his family<sup>128</sup>. The not uncommon tension between the right to self image on the one hand, and freedom of expression and information on the other is one developed by case law in the Tribunal Supremo in Spain.

With regard to payment to professional sports persons of their image for publicity (via sponsorship arrangements), it may be that other legal factors will affect what remuneration they may be able to earn from their image, for example, the Autonomous Regions of Navarra and Basque Country have an Article 15.2 of the Law 14/1989 whereby, “15% of the sums paid under the concept of publicity expenses derived from contracts of patronage of those sport activities declared of “social interest” by the Education and Culture Department may be deducted ...<sup>128</sup>. Rights of disposal over image rights will depend largely on the employment relationship of the sports persons. In relation to football, the Professional Football Collective Agreement lays down the rules which govern the working conditions for Spanish professional footballers when they are employed by clubs in the National Professional Football League<sup>129</sup> and it is clearly envisaged that image rights form part of the remuneration of professional player (and are hence taxable!), “[w]here the footballer exploits his image rights on his own behalf, since those rights have not been temporarily or permanently assigned to third parties, the sum which the club or SA<sup>130</sup>D pays to that player for use for commercial purposes of his image, name or face shall be deemed to be salary, under the provisions of Article 24 ...<sup>131</sup>, however how the income from image rights will be treated will depend on the nature of any assignment agreement. Overall it can be said that in

Spain the usual arrangement of an assignment of the image of the sports person (even just for delineated ‘club purposes’) direct to the sports club has been forsaken for complex assignments (no doubt advised by sports agents) in order to try and gain advantage over the Spanish tax authorities.

### Protection in Australia

Due to no recognition for ‘image rights’ per se, Australian protection for the exploitation of such rights tends to come under either s52 & 53 of the Trade Practices Act 1953 or under the tort of passing off. Section 53 clearly states, “corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services (a) represent that goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits they do not have; (b) represent that the corporation has a sponsorship, approval or affiliation it does not have<sup>132</sup> and although not specifically designed to protect sports’ persons images, it can be used to protect against unauthorised exploitation of a sports persons’ reputation or personality.

The Australian tort of passing off was applied in *Henderson v Radio Corporation Pty Limited*<sup>132</sup> in which case the claimants, famous ballroom dancing stars at the time, successfully brought an action in passing off in response to unauthorised use of their image on a record sleeve containing ballroom dancing music as it was established that the use of the images falsely represented that the claimants had endorsed the record despite there being no history of them endorsing records<sup>133</sup>. Further confirmation and comfort was to be found in *Hogan v Koala Dundee Pty Ltd*<sup>134</sup> and *Hogan v Pacific Dunlop Limited*<sup>135</sup>, in which case the actor Paul Hogan successfully sued for passing off against a shoe company who used an advert spoofing the “this is a knife” line from the Crocodile Dundee film in relation to their shoes<sup>136</sup>.

### Protection in the U.S.A.

Image right recognition is strong in the USA<sup>137</sup> whether recognised under common law or under state statute. The famous case of *Healan Laboratories v Topps Chewing Gum*<sup>138</sup> prohibited the use of names and pictures of famous baseball players on cards that were marketed with chewing gum as the rival had ownership of the copyright and consent had not been sought. This ‘publicity right’ was affirmed in *Zacchini v Scripps-Howard Broadcasting Co*<sup>139</sup> and the wide ranging nature of the right well illustrated in the *Here’s Johnny*<sup>140</sup> case. This strong right must be balanced against the First Amendment Freedom of Speech.

The alternate statutory approach is demonstrated in respect of California by § 3344(a) of the Californian Civil Code<sup>141</sup> which has exceptions in respect of incidental, education or news (sports and public affairs) programmes but which very robust right exists for life plus 70 years.

119 per Navarro, Susana Navas in “Character Merchandising in Europe”, ed Heijo Ruijsenaars, Kluwer Law International, 2003 at 295;  
120 Article 2.2 LO 1/1982;  
121 Article 2.3 LO 1/1982;  
122 LO 3/1991 of 11 January 1991;  
123 per Navarro, Susana Navas in “Character Merchandising in Europe”, ed Heijo Ruijsenaars, Kluwer Law International, 2003 at 296  
124 Article 8.1, LO 1/1982;  
125 Article 8.2 (a), LO 1/1982;  
126 Article 8.2 (b), LO 1/1982;  
127 Article 8.2 (c), LO 1/1982;  
128 developed by the Statutory Decree 267/89 which included amongst other activities of social interest, a list of sporting activities and competitions;  
129 LNFP: Liga Nacional de Fútbol Profesional;  
130 SAD is a “Sports Joint Stock Company”

[Sociedad Anónima Deportiva] - a special kind of company created by Law 10/1990 of October 15 (the Sports Act) to provide Spanish sports clubs with an easy way of converting from their traditional legal structure of (‘mere’) association into a fully fledged commercial company with the associated benefits of control, financial and legal security, transparency etc;  
131 Article 23 of the Royal Decree 1006/1985 as referred to in the Collective Agreement;  
132 [1947] 2 All ER 845 ChD;  
133 the judge, Chief Justice Evatt, famously renounced the ‘common field of activity’ requirement put forward in *McCulloch v May* (above);  
134 (1988) 83 ALR 187 (Federal court of Australia, Queensland District), “[A] personality ... is always free to grant or withhold his endorsement, and there any

unauthorised claim to such endorsement damages him by depriving him of the fee he could otherwise have insisted on“;  
135 (1989) 14 IPR 398;  
136 at 429/430, “The consumer is moved by a desire to wear something belonging in some sense to Crocodile Dundee (who is perceived as a persona, at most an avatar, of Mr Hogan). The arousal of that feeling by Mr Hogan himself could not be regarded as misleading; for then the value he promises the product will have is not its leather, but in its association with himself. When, however, an advertisement he did not authorise makes the same suggestion, it is misleading”;  
137 although the situation varies from State to State. For example some States such as California, Florida, Illinois, Kentucky, Ohio, Texas and Winsconsin have statutory publicity rights. Alabama, California, Connecticut, Florida, Georgia, Hawaii,

Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, Winsconsin recognise a common law right of publicity;  
138 202 F. 2d 866 (2d Cir. 1953);  
139 433 US 564 (1977);  
140 *Carson v Here’s Johnny Portable Toilets Inc.*: the regular prior use of the expression “Here’s Johnny” used at the beginning of a TV show was a sufficient indication of celebrity to prevent it being used in connection with portable toilets;  
141 “any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof”;

## International Protection: The TRIPS Agreement and Protection of IP rights<sup>142</sup>

It can be seen that image rights' protection mechanisms in developed economies will vary depending largely on whether they are common law jurisdictions (such as the UK, Australia etc) and or civil law jurisdictions (such as Germany, Italy etc) which begs the question to what extent are they protected in less sophisticated territories<sup>143</sup>?

The benefit of gaining protection for proposed merchandising under trade mark, copyright and/or design right law becomes apparent when the international commercial advantages of coming under The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>144</sup> ("TRIPS Agreement") can be shown to come into play. Technically, the TRIPS Agreement is not itself an independent treaty but Annex 1C to the Agreement Establishing the World Trade Organisation<sup>145</sup>. Of relevance to the current discussion, the TRIPS Agreement covers copyright and related rights, trademarks and industrial designs and it sets out minimum standards for the protection<sup>146</sup> of intellectual property rights that member states<sup>147</sup> must provide, provides rules for the enforcement of intellectual property rights in member states and it provides for the resolution of disputes arising between member states in relation to the TRIPS Agreement in accordance with the WTO's dispute resolution procedures.

In respect of copyright, under the TRIPS Agreement, the member states are required to provide copyright protection to certain literary and artistic works (as defined in the Berne Convention) including (of relevance to the current discussion), cinematographic works, drawings, paintings and photographic works. The copyright holder will be granted the rights set out in the Berne Convention which although they differ depending on the nature of the copyrighted work, will generally involve protection for the life of the author of the relevant copyrighted work plus fifty years after the author's death. There are limitations and exceptions to the copyright holder's rights but these consist of limited to instances which do not unfairly prejudice the legitimate interests of the copyright holder.

In respect of trademark protection member states are required to provide protection for signs (or combinations of signs) which distinguish goods and services of one undertaking from those of another undertaking. A trademark owner will be granted the exclusive right to prevent third parties that do not have the owner's consent from using the mark in the course of trade which is identical or similar and similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered, where there is a likelihood of confusion.

In respect of industrial design member states shall provide protection for independently created industrial designs that are new or original in the basis that that designs will not be considered new or original if they do not differ significantly from known designs or combinations of known design features and that protection is not available for designs dictated essentially by technical or functional considerations.

The owner of a protected industrial design is granted the right to prevent third parties from making, selling or importing articles bear-

ing a design which is a copy of the protected design without the owner's consent (when such acts are undertaken for commercial purposes). The duration of the protection must be at least ten years although limited exceptions may exist, always under the proviso that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the design, taking account of the legitimate interests of third parties.

It should be noted that 'transitional periods' were applied to give countries that were "original members" (i.e on 1 January 1995) with differing levels of development the opportunity to get 'their houses in order', which were to run out on 1 January 2006, bearing in mind WTO always reserved the right to grant extensions. Any 'new members' since then have generally agreed in their membership agreements (known as "accession protocols") to apply the TRIPS Agreement from the date they officially become WTO members, without the benefit of any transition period.

## Conclusion

Interestingly, Taylor Wessing<sup>148</sup> recently undertook a review of international jurisdictions in respect of IP exploitation and protection which found the UK to be the strongest overall, although not unsurprisingly considering the above, USA came top in respect of copyright. It is a matter of fact that the more sophisticated territories for merchandising have the more developed legal position in respect of protection of image rights.

To the extent that a sports person's image is to be exploited via merchandising or campaigns that do not easily lend themselves to protection under the classical IP doctrines of copyright, trademarks and industrial designs (and therefore fall within the ambit of TRIPS Agreement), then the interplay of Human Rights legislation (granting rights to privacy and peaceful enjoyment of property) along with possible protections available under unfair competition mechanisms in the given territory should be investigated, however it is unlikely that in less developed economies any easy path to protection will exist.

Indeed, even in jurisdictions where the TRIPS Agreement is in operation such as China<sup>149</sup> which has been a hotbed of licensing and marketing in light of the recent 2008 games where licensing has generated a reported \$60,000,000 (as estimated by a leading US practitioner<sup>150</sup>) of an estimated total of £3billion worth of revenues flowing to the IOC, actual IP litigation can be difficult, slow and confusing: "enforcing ones rights can be confusing to outsiders, as the jurisdiction over acts of infringement is spread across a number of State and provincial agencies, moreover a range of different practices and priorities can exist. In addition the administrative structure can appear intricate and convoluted<sup>151</sup>" but the position does appear to be improving. and China's governmental approval of a new "National IP Strategy" back in June of this year should lead to I improvements in the streamlining and fine-tuning of the court system<sup>152</sup>. It seems the truism that "money talks" is reinforced as where the focus of big business rests, improved protection is sure to follow.

<sup>142</sup> The text of which Agreement can be found at [www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPS](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPS), also a useful summary produced by [www.aqid.org](http://www.aqid.org) lawyers used by the author is contained at <http://www.aqid.org/at-a-glance-guides/default.aspx>;

<sup>143</sup> The WTO prefers the terminology "develop", "less developed" and "least developed";

<sup>144</sup> is a multilateral agreement administered by the World Trade Organisation ("WTO"). The WTO was established in 1995 to facilitate negotiations within the international trading system and it oversees and attempts to enforce a range of "covered agreements" which set out

the results of specific trade discussions concluded between the WTO's participant countries (referred to as "member states") which covered agreements included, in addition to TRIPS, the General Agreement on Tariffs and Trade (GATT), originally signed in 1947.

<sup>145</sup> which itself forms part of the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations;

<sup>146</sup> It does this via obliging member states to comply with the Paris Convention for the Protection of Industrial Property 1967 (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works 1971 (Berne

Convention) (excepting provisions on moral rights) via incorporating the substantive provisions of these conventions by reference through the TRIPS Agreement; it also places certain additional obligations on member states beyond those contained in the Paris Convention and the Berne Convention;

<sup>147</sup> The list of 153 member states (as at 23 July 2008) can be found at [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm);

<sup>148</sup> see the Global Intellectual Property Index produced by Managing Intellectual Property in conjunction with Taylor Wessing at [www.taylorwessing.com/ipindex/](http://www.taylorwessing.com/ipindex/)

[index.php?getfile=Global\\_IP\\_Index\\_-\\_Report.pdf](http://index.php?getfile=Global_IP_Index_-_Report.pdf)

<sup>149</sup> China joined WTO on 11 December 2001, although the People's Republic of China joined WIPO as far back as 1980 and acceded to the Paris Convention in 1985 and has ratified the Madrid Protocol;

<sup>150</sup> per Neil K. Wilkof, Head of IP, Herzog, Fox & Neeman on [ipfinance.blogspot.com](http://ipfinance.blogspot.com);

<sup>151</sup> page 7, publication from [www.ipo.gov.uk/chinroadmap.pdf](http://www.ipo.gov.uk/chinroadmap.pdf), Revised April 07, Warrington Borough Council in conjunction with SAIC

Notes continued on page 16

(State Administration for Industry and Commerce, Beijing), Copyright Society of China (Beijing), National Copyright Administration (NCA) (Beijing); 152 reportedly paragraph 45 of the Strategy

states that China's government will, "study the need for appropriately centralizing jurisdiction to deal with IP cases that require highly technical knowledge, for example patent cases; explore the pos-

sibility of establishing an appellate court specialising in IP appeals" see <http://www.managingip.com/Article/1945806/China-releases-National-IP-Strategy.html?ArticleId=1945806>;



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# An Excavation into the Legal Deficiencies of the FIFA 6+5 Rule and the UEFA Home-Grown Players Rule in the Eyes of the European Union Law

by Felix Majani\*

## 1. Introduction

Football has for a long time claimed its specificity and exemption from the so called ordinary legislations. It has since time immemorial adopted certain customs; *lex sportiva*, such as the payment of transfer fees by one club to the other for the signing of players, transfer windows and protected periods among other features.

It is, was and most likely will be clearly understandable that football is a specific sport. The specificity around which the regulations governing football have been built along three key pillars:

The need for clubs to maintain their financial stability;

The economic importance of football as a means of livelihood for those who play and run it as a profession;

The need for football to fulfil its objectives as a social and recreational activity.

The future and survival of football is dependent on how well it shall be able to self regulate itself in a manner which appreciates and encompasses these three pillars in one.

The EU has been quick to acknowledge and respect this specificity as evidenced in its white paper on sports and in the judgments delivered by the ECJ whose general principles are that sports is subject to the EU laws in as far as it constitutes an economic activity.

Whereas the football authorities (FIFA and UEFA) have been quick to enact legislations aimed at securing the future of the sport, it has to be said that a majority of these regulations have been directed towards those who are privileged enough to force their entry into the sport as a profession, either as players or clubs, and not towards the vast majority of clubs and players who engage in the sport as a recreational activity, perhaps with one eye set on turning it into a profession.

### 1.1. History of quotas

Before 1995, UEFA and European football leagues maintained a widespread practice of limiting the number of other EU nationals in a team to three players plus two others who were considered assimilated because they had played in their country for an uninterrupted period of five years. This was called the three plus five rule.

It was however not until 1995 when these disparities were reviewed to the effect that players ceased to become the club's "property", with foreigners, more importantly, being free to play in any national league matches without any limitations. There became greater freedom of work and movement for players, at least within the EU territory.

These were the consequences of the landmark ruling in the case of *ASBL v. Jean-Marc Bosman Case C 415/93, ASBL v. Jean-Marc Bosman, ECR I - 4921*, which laid to rest the established minimum quotas and restrictions on the number of EU foreign players who were eligible to feature in certain UEFA competitions and European leagues.

This ruling sent out a clear message that sports and football were subject to the EU laws in as far as they constituted an economic activity. Only when the rules in issue related to the laws of the game i.e. the playing laws would the EU not interfere.

## 2. Motives and Objects for the Research

### 2.1. Modern day anti labour restrictions from football's governing bodies

Despite this EU intervention and the *Bosman* ruling, modern day restrictions continue to engulf football. The FIFA transfer windows, transfer fees among other regulations are just but an example.

However, it is the two latest attempts by FIFA and UEFA aimed at

restricting the number of foreigners eligible to feature for any particular team, or the ability of minors to play the sport for recreation while keeping in mind the future potential benefits they could secure from it which draw our attention as to how compatible these attempts are with EU laws. Whether or not the recent FIFA and UEFA 6+5 and home-grown player's rules can be seen as giant steps towards re-directing football into the pre *Bosman* era are questions to be answered herein.

### 2.2. Questions

We must therefore ask ourselves several questions when trying to interpret the full meaning, impact and legal deficiencies of these rules.

Just what are these rules, and do they go against the fundamental provisions of the EU which guarantee freedom of movement, work, the protection against discrimination in employment and the freedom of competition between EU sports members?

Do these rules curtail the basic societal rights guaranteed by both the EU and football association's laws of engaging in sports as a tool of recreation? To what extent can they be challenged as being contrary to EU legislation? What are its effects, and do they have a future in sports in as far as the EU is concerned?

Are they quotas?

### 3. Background to the FIFA 6+5 and UEFA Homegrown Players Rules

European football has over the past decade in the post *Bosman* era, experienced an influx of foreign players playing in the major leagues in England<sup>1</sup>, Spain, Italy, Germany and France. Clubs have continued to employ and field imports from South America, Africa and other European countries at "the expense" of the local players<sup>2</sup>.

The second edition of the Annual Review of the European Football Players' Labour Market revealed a decrease in the number of home-grown players and an increase in the number of foreign players. As at 27 September 2007, home-grown players represented 24.3% of the total number of 2,744 footballers employed by the 98 clubs of the five top European leagues in England, France, Spain, Italy and Germany.<sup>3</sup> The influx of foreign players meant that clubs risked losing their national identity.

FIFA expressed its concern over the dominance of certain competitions like the English Premier League and the UEFA Champion's League by English clubs<sup>4</sup>, attributing their success to the high number of foreign players fielded by their teams. This has been claimed to reduce the competitive level of club competitions and increasing the predictability of results.

The national football teams of these countries have "suffered". England's failure to qualify for the Euro 2008 championships opened

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Wenger became the first team to name a squad of 16 foreign players for a match.

3 [www.fifa.com/worldfootball/releases/newsid=594883.html](http://www.fifa.com/worldfootball/releases/newsid=594883.html)

4 The top 4 English clubs- Manchester united, Chelsea, arsenal and Liverpool have featured in the finals of the last 3 editions of the champions league since the 2005-6 season, and have won it on two occasions. The 2007-8 final was an all English affair between Manchester United and Chelsea. The same teams have for the past 6 years finished in the top 4 positions in the English premier league, with the exception of the 2005 season.

1 As at May 2008, the number of EU foreign players who had played in the English premier league since its inception in 1992 stood at a staggering 617 players.

2 Chelsea fc became the first British club to field non English players in their starting eleven during a Barclays premier league match against Southampton fc on 26 December 1999. Six years later, Arsenal, under French coach Arsene

a can of debate over whether the influx of foreigners was to blame for what was viewed as a national disaster. Critics observed that England's youth football system was suffering as a result of foreign imports, with the youth facing little or no chance of playing top class football as a result of clubs turning to foreign and well finished foreigner players for instant success.

It was felt that time had come for legal interventions to be made. UEFA had already foreseen this crisis, and in 2005, reacted by introducing the so called "home-grown players rules". It was however not until England's failure that FIFA decided to follow suit with its 6+5 Rule.

#### 4. The UEFA Homegrown Players Rule

##### 4.1. Legal status

This rule has roots from Article 17.08 of the UEFA Champions League Regulations (UCL Regulations) which reads:

*"No club may have more than 25 players on List A during the season. As a minimum, places 18 to 25 on List A (eight places) are reserved exclusively for "locally trained players" and no club may have more than four "association-trained players" listed in places 18 to 25 on List A. List A must specify the eight players who qualify as being "locally trained", as well as whether they are "club-trained" or "association-trained". The possible combinations that enable clubs to comply with the List A requirements are set out in Annex VIII.*

*Under Article 17.09 - A "locally trained player" is either a "club-trained player" or an "association trained player".*

*Under Article 17.10*

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

This rule was introduced on 21 April 2005. Under it, UEFA requires the squads of all clubs participating in the Champions League and the UEFA Cup to have a minimum number of home-grown players, i.e. players who, regardless of their nationality, 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. This is a minimum of eight home-grown players to be included out of the entire twenty five man squad to be drafted by clubs for all UEFA club competitions.

Despite having received EU backing, question marks still linger as to the compatibility of this rule with the EU law, and the possible avenues for challenging it, particularly with regard to competition and discrimination.

##### 4.2. Objectives of the rule

The main aim behind UEFA's 'home-grown players' rule is to promote and protect the quality training of young footballers within the EU and to consolidate the balance in competitions. It aims at encouraging clubs to invest in training and setting up football academies for young children rather than spending their investments on employing footballers from foreign countries. The idea is to have the national football teams of all UEFA member countries served with a flowing degree of talent from their clubs' academies. The rule also aims at preserving club's identification with their towns/cities and regions of origin<sup>5</sup>.

##### 4.3. Scope

The homegrown players rule only applies to UEFA club competitions - the Champion's League and the UEFA Cup. They do not apply to domestic competitions, although UEFA has encouraged its members to adopt the rule in their own competitions. These rules apply in favour of all home grown players trained by clubs in whose national association they are playing for.

##### 4.4. Who is a homegrown player?

Home-grown players have been defined by UEFA as players who, regardless of their nationality or age, have been trained by their club or by another club in the national association for at least three years between the age of 15 and 21. The UEFA rule does not contain any nationality conditions.

The only condition required for one to be considered a home grown player is that he or she must have been trained for a minimum period of three years between his 15<sup>th</sup> and 21<sup>st</sup> birthday with a club belonging to a UEFA association, regardless of his or her nationality.

This means that a young American footballer, or a young boy from Africa or south America who during his 15<sup>th</sup> and 21<sup>st</sup> birthday migrates to a club belonging to one of UEFA's 52 member associations and receives training at this club for 3 years or more prior to his 21<sup>st</sup> birthday will be considered a home-grown player for purposes of participating in UEFA's club competitions regardless of his nationality.

##### 4.5. The meaning and catch behind the rule

What one can deduce from the definition accorded to a home-grown player is that this rule specifically targets foreign youngsters who migrate from their mother countries into the EU member states in search of a better future in football, and not the local players born in those EU countries.

It is hard for us to practically see under this rule for instance, how a talented English footballer who played football for his high school and university during his 15<sup>th</sup> and 21<sup>st</sup> birthday, but never played football for the academy of any English club during his days as a minor, cannot be allowed to participate in the UEFA club competitions<sup>6</sup> if he later on decides to turn professional at the age of 22 and signs, for example, with Manchester United. UEFA would certainly allow him to play, not as a home-grown player, but as a "foreigner" although technically speaking he is not.

##### 4.6. Implementation

These rules have been implemented gradually in successive stages. It began with the inclusion of four 'home-grown players' out of 25 for the 2006/07 season, followed by six home-grown players for the 2007/08 season. The 2008/09 season should see the complete achievement of the rule, with clubs being required to field eight home-grown players out of their 25 players. Only applies to UEFA club competitions. UEFA has also asked its 52 member associations to consider applying the same rule for their domestic competitions

##### 5. The FIFA 6+5 Rule

This rule was first proposed in February 2008. It seeks to compel all clubs to field, at any given match, a minimum of six local players who would otherwise be eligible to play for the national team of the country in which their club is domiciled.

FIFA intends to have this rule fully operational by 2010. Its first step towards attaining this goal occurred on 30 May 2008, when the rule received the required two thirds majority vote from the FIFA congress<sup>7</sup>. It has no legal status as yet.

##### 5.1. Objectives

Unlike the home-grown players rules which aims at ensuring the future of the national teams and their youth, the 6 + 5 rule targets the maintenance of competition and unpredictability of results at club

<sup>5</sup> "There are many reasons for wanting to do so, not least a desire to encourage clubs to invest in the training of young local players and to give them a way into first-team football with their clubs, which all too often succumb to the temptation of looking elsewhere for players who are already fully fledged. It is also a matter of preserving the supporters' attachment to 'their' club." UEFA Chief Executive Lars-Christer Olsson

<sup>6</sup> Because he has not undergone training at the academy of Manchester united or of any English football club for a minimum of 3 years during his 15th and 21st birthday.

<sup>7</sup> Interestingly, a number of members from the African and south American confederations whose football has vastly benefited outside the 6+5 rule voted in favour of this rule, which could well have repercussions on the standards of their national teams.

level. It is presumed that the mandatory fielding by each club of a minimum number of local players will make the league more competitive, with there being less of the same teams dominating the trophy cabinets year in year out.<sup>8</sup> It intends to address concerns that Europe's top leagues are increasingly dominated by foreign players.

It however remains to be seen whether this rule will see the light of the day, having been strongly opposed by several European clubs, most of who comprise the now extinct G14 group of clubs. The European Union has also expressed its criticism of this proposed rule, terming it as unlawful and a violation of the freedom of work and movement guaranteed by EU laws.<sup>9</sup>

These are quotas. They are certainly open to question or intervention from the EU.

### 5.2. Why does the EU law intervene in sports?

Labour principles have a distinctively major effect on all sectors of the economy, to which football is no exception. The world of football has often tended to disconnect itself from the real world. The effects of labour policies are one of the ways through which we and the football authorities are constantly reminded that football is very much a part of the world we have created.

According to the EU, its intervention on purely sporting matters is justified on a number of grounds;

Firstly, the strong growth of economic activities attributed to sports as evidenced from the increase in salaries and transfer fees for professional sportsmen, the rise in the value of broadcasting rights as well as an increase in sponsorship and advertising costs has, to the EU'S attention, been accompanied by a transformation in the structure and behaviour of large professional clubs and their federations, which are now managed as large industrial organisations or services. This has justified EU intervention in order to protect its own provisions in as far as the practices of economic activities by institutions may infringe the treaty provisions.

Secondly, the release of the *Bosman* ruling alerted the political world as well as the general public that the sports fraternity and their rules were susceptible to scrutiny under EU laws, and in fact opened the gates for sportsmen to submit their disputes to the ECJ<sup>10</sup>

Under the European treaty, all member states have agreed to accord certain rights to citizens from member states who either work or visit their country in search for work. These rights include the freedom of work and movement among whose elements entail the guaranteeing by all member states, of equal treatment to all member states.

Finally, under Article 81 of the EU Treaty, freedom of competition has been guaranteed within the community. Decisions or agreements between undertakings, or football associations which may either affect trade between the member states, or prevent, restrict or distort competition within the common market have been declared as null, void and incompatible.

Violation of these principles would definitely lead to intervention either from the EU or legal redress from the European Court of justice.

8 "There is a growing sporting and economic inequality, especially among clubs. There is a decrease of competitiveness. Many clubs do not play to be champions, but to finish fourth, fifth, sixth or even not to be relegated. Something is wrong here. This does not match with the philosophy of our game. We need to try to correct this" FIFA president Sepp Blatter's words at the FIFA congress  
 "...I can only start my season to fight to be fifth or sixth or seventh. It is impossible for me to go into the final four" former Newcastle united manager Kevin Keegan.

9 "Compared with the '6+5' plan proposed by 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 of workers while promoting the training of young European players" EU Press release of 28 May 2008, see [europa.eu/rapid/pressReleasesAction.do?reference=IP/08/807&format=HTML&aged=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/807&format=HTML&aged=0&language=EN&guiLanguage=en)

10 For further reading on the need for EU intervention, see the 26th annual EC conference report on international anti trust law and policy, [ec.europa.eu/comm/competition/speeches/text/sp1999-019\\_en.pdf](http://ec.europa.eu/comm/competition/speeches/text/sp1999-019_en.pdf)

11 See *Walrave v Koch*, ECJ Case 36/74, paragraph 8.

12 See *David Meca Medina & Igor Majcen v commission of european communities & republic of Finland*, Case C-519/04 P. C-191/97 *Deliège* [2000] ECR I-2549; C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681.

## 6. The Legal Consequences, Implications and Deficiencies of these Rules

### 6.1. The legal consequences and implications

In accordance with the ECJ ruling in the *Bosman* case, Article 39 of the EC precludes the application of restrictions by sports associations on the number of nationals from EU Member States participating in international or national club competitions is the cornerstone to this exclusion. The observation by Advocate General Lenz in the same case that rules limiting the employment of foreign players also infringed Article 81(1) EC by restricting the possibilities for the individual clubs to compete with each other by engaging players also confirm the unlikelihood of the FIFA 6+5 rule seeing the light of the day on grounds of competition law.

Legally speaking, the home-grown player's rule only allows players who have spent three years or more at the academy of their current club or at the academy of any club belonging to their national association to participate in UEFA Club competitions. On the other hand, FIFA's 6 + 5 rule seeks to restrict clubs to field a maximum number of 5 foreign players at any given competition.

And so with these consequences and implications come deficiencies.

### 6.2. The legal deficiencies

Whereas on one hand the UEFA home-grown players rule has passed the EU test, it has by no means fully exonerated itself from possible legal challenges from players and stakeholders on the possibilities of it being contrary to the same EU laws. From the outset, both rules appear to be legally weak and vulnerable. Would be litigators need to ask themselves the following questions when interpreting the effects and comparisons of the home-grown players rule to the EU law:

- Are there any economic aspects attached to this rule? Are they sporting per se?
- Are these rules applicable to minors? - Are minors considered workers within the meaning of Article 39 of the EU treaty?
- Do these rules in any way discriminate between players?
- Do these rules infringe on the very rights to engage in sports as leisure as guaranteed under the EU, FIFA and UEFA laws?
- Do these rules infringe the EU guarantees on freedom of competition?
- What possible loopholes can be exposed while interpreting and applying these regulations?

Should the answers to the above questions can be to the affirmative, then it can certainly be said that the home-grown players rule is certainly contrary to EU laws.

### 6.3. The economic nexus between football and the home-grown players rule

EU case law is clear that sports is subject to EU laws in so far as it constitutes an economic aspect.

Although 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,<sup>11</sup> 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<sup>12</sup>.

This is the situation facing the home-grown players rule. But in the words of UEFA's chief executive, Lars-Christer Olsson "the proposal (the homegrown players rule) is legal, because it is a sporting rule, not a restriction..." from a legal perspective however, the rule is not purely sporting per se.

UEFA, FIFA, as well as the EU have always defined what does and does not amount to a sporting rule. In the words of FIFA and UEFA, sporting rules have purely to do with the playing rules. The laws concerning, for example, when a yellow card or a red card is to be issued, the number of minutes to be played in a match, the intervals, the number of points due for a win or a draw, or the determination of who the champions are on the basis of the number of goals scored

over a season, or on head to head records between rival teams in case they are tied on points are certainly sporting rules.

The homegrown players rule bears certain features which are of an economic rather than a sporting nature. These features include;

- The establishment of academies by clubs.
- The education of minors by clubs.

In order to succeed under these rules and to be able to actively compete for the best young talents around, clubs will be forced to do two of the following things:

- To invest substantially towards the establishment of academies and to put up facilities of high standards.
- To oversee the education of the minors during their stay at the said academies.

There is no doubt that an economic aspect is linked to both these acts. There is also no doubt that minors will naturally be attracted to those clubs which shall have the best facilities and economic abilities to offer them good education. Eventually, this will lead to the maintenance of the *status quo* - with the richer clubs attracting all the best home-grown players in their countries, or with minors attached to poorer clubs moving to richer clubs within the same association under the lure of the present and future financial aspects<sup>13</sup>. Almost certainly will the economic status between the rich and poor clubs be retained.

And because minors are not legally required to enter into professional contracts with clubs, these rules are almost likely to give rise to cases of “unilateral termination of contract by minors”, who will move from club to club in search of the best educational and training offers. Here, the economy is still playing its part.

This is the clearest explanation de-linking the home-grown players rule from a “sporting rule” and linking it to the economic aspects of sports. It is difficult to see how this rule cannot be challenged as not being purely sporting, and therefore exempt from the EU laws as claimed by UEFA.

#### 6.4. The home-grown players rules equate minors to workers

Article 39 of the EU treaty accords freedom of movement to workers. Under EU laws, minors, who are normally children aged 18 years and below are not considered as workers.

Therefore, in restricting the right and freedom, for example of a 17 year old minor to play in UEFA club competitions because he has not met the criteria established by the home-grown players rules, UEFA have in effect considered the said minor to be a worker, who is not entitled to “work” by representing his club in UEFA competitions unless he fulfils the criteria fixed by UEFA.

The European Court of Justice has interpreted the concept of worker as encompassing a person who (i) undertakes genuine and effective work (ii) under the direction of someone else (iii) for which he is paid<sup>14</sup>.

Minors do not fall under the scope of labourers and are not gainfully employed and therefore ought to be excluded from the EU sporting rule exceptions to the freedom of movement of workers. There seems to be no reason why any aggrieved minor who wishes to play in the UEFA Club competitions cannot challenge the validity of these rules under the EU laws.

#### 6.5. Sports as leisure within the meaning of EU, FIFA and UEFA laws

It is apparent from the 6+5 rule and the home-grown players rules respectively that;

Only 5 professional foreign players shall be eligible to enjoy the sport and to take part in a match at any given time in any European League.

Only minors who spend more than 3 years training at the academy of any club shall reap the benefits of having played the sport as a past time during their youthful days, by being eligible to participate in UEFA club competitions as and when they mature.

One of the objectives FIFA and UEFA have and stipulate in their statutes is to ensure the creation of football as a past time and leisure

sport which must be played and enjoyed by anyone, in particular minors, without any limitations.

Under Article 2(a) of the FIFA statute, the objectives of FIFA are “to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes;

Similar provisions are contained in Article 2(i b) of the UEFA statute which aims at promoting football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, religion, race or any other reason;

One might ask himself whether a closer interpretation of both the 6+5 rule and the home-grown players rule cannot be said to be contrary to the promotion of football among the youth as intended by both FIFA and UEFA.

Whereas these rules might well promote football within a country, they might not do it “globally and in the light of unifying”. An instant look at the home-grown player’s rule gives an impression that only a limited group of youth will be privileged enough to secure places at academies for periods stretching 3 years and over, given the limited finances some clubs might be faced with when taking a risk in retaining and educating these youngsters over these years.

Moreover, the EU laws advocate for the promotion and facilitation of access to education, vocational training and sport among the youth.

Under Article 165(i) (ex Article 149 TEC) of the treaty, the union is entitled to “contribute to the development of quality education by encouraging the development of youth exchanges...and encouraging the participation of young people in democratic life in Europe. While doing this, the union endeavours to “facilitate access to vocational training and encourage mobility of instructors and trainees and *particularly young people*”<sup>15</sup>

It is evident from these wordings that the EU intends to accord access to sporting facilities to the youth of its member states. This is further backed by the provisions of the white paper on sport, which recognise the importance of access to sports among the youth for the social and health benefits it imparts into them in as far as in enhances social interaction and fends off diseases such as obesity.

Both the home-grown players rule and the 6+5 rule do not directly conflict with these regulations on access to sports. However, it is not difficult to see why professional players and current minors who are EU member states and who are not lucky enough to meet the home-grown players rule criteria cannot claim their rights either before the Court of Arbitration for Sport, or the ECJ to enjoy and engage in the sports as a pastime, in particular at UEFA club level as guaranteed by UEFA, FIFA and the EU.

### 7. Article 39 and the Homegrown Player’s Rule

#### 7.1. Indirect discrimination among players

Article 39 precludes the application of rules laid down by sporting associations under which football clubs may field only a limited number of professional players who are nationals of other Member States<sup>16</sup>. Such rules are contrary to the principle prohibiting discrimination on the basis of nationality. The only exception applies to matches which are purely of sporting rather than economic nature, such as competitions between national teams.

Although it is difficult to state with any certainty that the ‘home-grown players’ rule does not lead to indirect discrimination on the basis of nationality, the potential risk of this cannot be discounted. This is because young players attending a training centre at a club in a Member State tend to be from that Member State as opposed to other EU countries. The chances of having home-grown players who

<sup>13</sup> In the course of their training and education, the minors will almost certainly keep a future eye of the money they are likely to earn immediately they sign their first Professional contract. They would off course go for the club which is likely to offer them the best financial terms.

<sup>14</sup> [ec.europa.eu/employment\\_social/free\\_movement/index\\_en.htm](http://ec.europa.eu/employment_social/free_movement/index_en.htm)

<sup>15</sup> Art 166 (2) (ex art 150)

<sup>16</sup> The same prohibition was expressed in the Bosman case.

have not been born in the countries in whose academies they are playing for are therefore very remote.

In the era when the EU is tightening its laws on under age labour and with FIFA acting tough on the transfer of minors<sup>17</sup>, it is even difficult to see how any minor born outside the league(s) of any home grown player training club can acquire home-grown players' status, let alone migrate.

The irony behind this however, is the fact that both FIFA and the EU do have laws through which the spirit for which football was created as a past time and leisure sport must be played and enjoyed by anyone and in particular by minors without any limitations.

Whereas FIFA strictly prohibits discrimination of any kind against a country, private person or group of people on account of ethnic origin, gender, language, religion, politics or any other reason., UEFA on the other hand lists the promotion of football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, religion, race or any other reason as one of its objectives<sup>18</sup>.

The EU could not have made this spirit more clearer than it did in its answer to a question forwarded to its commission when it categorically stated that "the Commission is of the opinion that the rule of a sporting association which limits the number of amateur players having the nationality of other Member States who may be fielded in a match is also contrary to Community law, and notably to Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. That provision states that Community workers are to be granted the same social and tax advantages as national workers. The Court, in the case of *Commission v France (1996) ECR I-1307* ruled that the provision applies to leisure activities and it is indisputable that practising sport as an amateur is a leisure activity"<sup>19</sup>

This is by far the EU's stance on the rights of minors to freely move within the community in fulfilment of their pastime activities without discrimination of any kind. And as highlighted by the commission itself on 28 July 2002, "Article 13 of the EC Treaty establishing the European Community enables the Council to take appropriate action to combat discrimination on a range of grounds, including age...unless it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary", on the basis of this article and on Council Directive 2000/78/EC of 27 November 2000<sup>20</sup>. This is one avenue through which the illegality of the home-grown player's rule can be challenged.

## 7.2. Absence of justifications of public order, public safety or public health

Despite having a potentially inhibitive element on the freedom of movement, albeit indirectly, none of the exceptions to the freedom of movement guaranteed under article 39(3) of the EU Treaty qualify and/or justify the application of the home-grown or 6+5 rule.

It is difficult to see how free access of footballers or minors into the European labour market could affect public order, public safety or public health.

## 8. Article 81 and the Rules' Infringement on the Freedom of Competition

FIFA's main objective under the 6+5 rule is to restore and ensure equal competition among clubs competing in national leagues. There is a

belief that the bigger clubs, through their money, are "buying" success through importing foreign players at the expense of the poorer clubs which are unable to compete with them and therefore, competition can only be restored on the field through restricting the ability of these powerful clubs either to acquire, nurture or field as many foreign players as they wished.

Question marks can be pointed at how limiting the number of foreign players to 5 in a match cannot be said to be anti competitive from both a sporting point of view as well as a legal point of view.

From the perspective of a sporting spirit, it is a well known fact that competition is enhanced when the best are accorded the chance to weigh each other out at the highest possible level. This would certainly enable those who are yet to hit their peak to learn from the best and to become better. This is what sporting competition is all about.

Competition in the legal sense has also been recognised in sports. Article 81 of the EU treaty declares as incompatible and void within the common market, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states or have as their objects, or effects, the prevention, restriction or distortion of competition within the common market.

One would struggle to find reasons as to why the minimum 3 year home grown player training requirement cannot be seen as restrictive, and why limiting the number of foreign players in any particular match to five cannot be seen as preventing or distorting competition within the meaning of Article 81<sup>21</sup>. This distortion, restriction and/or prevention of competition as deducible from the home-grown and 6 + 5 rules may take place in two key forms of the competition market, namely;

The contest market - this is where the performances of the clubs and players are exploited in the sporting contest. Limiting the number of foreign players certainly does not enable players within the EU market to exploit their sporting abilities to the maximum. Neither does home-grown rule limiting clubs to field only foreign players who have spent 3 years or more in their academies in any way enhance the standards of competition within the UEFA competitions.

The supply market - this is where the clubs buy and sell players.<sup>22</sup> Competition is about buying and selling and as long as these sales and purchases are made within the legal limits of competition, there is no reason why clubs should be limited in the number of players they can field after having made such purchases.

One might argue that the home-grown rule is inherent, and probably proportionate to the objectives of ensuring competition and the sustainable development of national teams, and thereby exempt from the provisions of Article 81 on a sporting basis. However, the extent to which the imposition, most likely on minors who migrate, of a minimum number of 3 uninterrupted years of stay in a foreign country in order to be eligible to participate in European competitions for their future clubs, seems to be a rather long period which is disproportional and does not justify the intended objectives.

As a matter of fact, the ECJ in *Meca Medina* rejected the notion that certain sporting rules may fall outside the scope of Articles 81 and 82 of the EC if they are based on "purely sporting considerations" and do not relate to economic activity, holding that the specific requirements of Articles 81 and 82 EC need to be examined for each and every sporting rule.

One of UEFA's objectives under Article 2 b (e) of its statute is "to prevent all methods or practices which might jeopardise the regularity of matches or competitions or give rise to the abuse of football". It is questionable whether limiting the number of foreign players in a match, or requiring players to fulfil a minimum number of 3 years in a club in order to be eligible to play in UEFA club competitions actually jeopardizes or promotes competition in the positive or negative, or even an abuse of football in as far as it curtails the human rights to engage in the sport of their choice for leisure and without limitations.

They appear to not only restrain the players but also to restrain the abilities of clubs to engage in the market competition for both players and "trophies"

17 Article 19 of the FIFA regulations on the status and transfer of players prohibits the transfer of players below the age of 18.

18 See Article 3 of the FIFA Statute and Article 2(i, b) of the UEFA Statute respectively.

19 See <http://www.sportslaw.nl/> (Asser international sports law centre- publication section, subsection "European union law")

20 See the Commission's answer to the written question E-2133/02 by Bar tho

Pronk (PPE-DE), 12 September 2002, <http://www.sportslaw.nl/>

21 In the *Deliege case*, the ECJ confirmed that the selection rules applied by a judoka federation to authorise the participation of professional or semi-professional athletes in an international sport competition inevitably limit the number of participants.

22 See "sport and competition law at EU level" by Prof Michelle Colucci, [www.europa.eu](http://www.europa.eu), [www.info@colucci.eu](http://www.info@colucci.eu)

## 9. The Loopholes, Advantages and Disadvantages of These Rules

### 9.1. Advantages and disadvantages

One advantage perceivable from the home-grown players rules is quite clear - the development and career of minors as tomorrow's footballers receiving education and training at academies has certainly be secured as they stand greater chances of being signed or retained by their clubs once it is known that they have undergone the 3 year training period.

Smaller clubs might stand a slightly higher chance of competing against the bigger clubs if the so called bigger clubs are only allowed to field the five best foreign players they have under the 6 + 5 rule - in a way creating competition.

To the contrary, the 6 + 5 rule appears to overlook the fact that the bigger clubs shall always remain bigger. Given their financial power, their name and historical fame, clubs like Real Madrid, Manchester United, AC Milan and Bayern Munich shall always attract the best local talents in their respective countries, and will always lure or "tap" the local players playing for the smaller clubs in their leagues.

Added to this is the fact that these big clubs shall always be on the forefront when it comes to signing the best foreign talents situated in the rest of the world. Eventually, we shall have a situation whereby the squads of the so called big clubs shall be comprised of the best local players around as well as the best foreign players up for grabs.

This is exactly what is happening at Manchester United and Chelsea. The so called smaller clubs shall still continue in their struggle to compete against the bigger ones on the field. Therefore, the same "competition imbalance" sought to be cured by the 6 + 5 rule shall remain - if not become greater.

### 9.2. The cracks

Under the home-grown players rule, what would happen for instance if the following THREE situations were to occur:

A club comprised purely of foreign players none of whom have been trained locally wins its national league and qualifies for the following season's UEFA Champions league competition in accordance with the UCL qualifying regulations. During the close season, it does not buy any home-grown player. Will it be prohibited from participating in the UEFA Champion's league? Or:

A club begins its Champion's league season with the required number of home-grown players, but in the course of the competition, it loses one or two of its home-grown players or even all of them due to injury suspension or otherwise, and is therefore unable to raise the minimum number of 8 players out of their 25 for their next champion's league match. Given the fact that it can only replace an injured goalkeeper with a new non home-grown goalkeeper<sup>23</sup> and the fact a home-grown player can only be replaced with another home-grown player, Will that club be allowed to play in that match with a list short on the required number of home grown players? Or;

An English player (as highlighted earlier) signs his first professional contract with Manchester United age of 22 and happens to have never gone to the academy of any English football club during his 15<sup>th</sup> and 21<sup>st</sup> birthday.

It is worth noting with regard to the first two questions that in accordance with Article 17 of the UCL Regulations, the home-grown player's rule only concerns the eligibility of players to participate in the UEFA Club competitions, which eligibility does not affect the eligibility of clubs to participate in UEFA competitions. It has not been expressly provided for under Article 1.04 that clubs can only be admitted into the UEFA Club competitions if they meet the requirements of the home-grown player's rule. If quoted, Article 1.04 reads:

*"To be eligible to participate in the competition, a club must fulfil the following criteria:*

- it must have qualified for the competition on sporting merit;
- it must have obtained a licence issued by the national association concerned in accordance with the applicable national club licensing regulations as accredited by UEFA in accordance with the UEFA club licensing manual (version 2.0);
- it must agree to comply with the rules aimed at ensuring the integrity of the competition as defined in Article 2;
- it must not be or have been involved in any activity aimed at arranging or influencing the outcome of a match at national or international level;
- it must confirm in writing that the club itself, as well as its players and officials, agree to respect the statutes, regulations, directives and decisions of UEFA;
- it must confirm writing that the club itself, as well as its players and officials, agree to recognise the jurisdiction of the Court of Arbitration for Sport in Lausanne as defined in the relevant provisions of the UEFA Statutes;
- it must fill in the official entry form, which must reach the UEFA administration by 2 June 2008 together with all other documents which the UEFA administration deems necessary for ascertaining compliance with the admission criteria"

UEFA only requires these clubs not to have "more than 25 players on their list A, of which 8 must be locally trained players"<sup>24</sup> and that that any club which fields a player whose name neither appears on list A or B or who is otherwise ineligible to play shall bear the legal consequences<sup>25</sup>.

Once a club has fulfilled these admission requirements and has submitted its list of home-grown players to UEFA, it is then entitled to participate in that competition, regardless of what happens to any of their home-grown players in the course of the competition. As a matter of fact, the UCL Regulations do not provide for the exclusion from competition, of any club which fails to include the minimum number of home-grown player's in any given match after having been admitted to the competition.

This creates an interesting legal scenario where clubs could question the grounds under which UEFA could exclude or sanction them for being unable to comply with the home-grown player's rules as a result of circumstances beyond their control.

With regard to the third question, it is clear that aforementioned player is not a home-grown player within the meaning of the home-grown player's definition because his nationality is not taken into account. Does this mean that in the eyes of UEFA he will be considered as a foreigner and that Manchester United will be required to include him among the list of its foreign players for purposes of UEFA Club competitions? These are key questions which are likely to raise potential suits before UEFA and FIFA's legal bodies and ultimately before the CAS.

## 10. Conclusion and Recommendations

Sport provides citizens with opportunities to interact and join social networks; it aids citizens of the EU member states, and the world at large to develop relations with other members of the society. It constitutes a tool for reaching out to the underprivileged or groups that are at risk of, or which are experiencing discrimination. The home-grown players rules were invoked in the wake when some EU Member States had began using sport as a tool for social protection and inclusion.

It is, therefore, all the more important to promote an inclusive approach to sport. All residents of the European Union should have access to sport, regardless of their background. The specific needs of under-represented groups need to be addressed. Sport should play a role in promoting gender equality and in the integration of people with disabilities.

Football is a social sport which can be played by all - the young, the old, the foreigners, the locals, the rich and those who are not rich enough to join academies, or to establish clubs which offer training and education to the young. It is therefore paramount that its laws must give preference and recognition to the practical situations facing the society.

<sup>23</sup> Under Article 17.20 of the UCL Regulations the new goalkeeper need not be a locally trained player. Under Article 17.19, an injured home-grown player can only be replaced by another.

<sup>24</sup> See Article 17.08 UCL Regulations

<sup>25</sup> See Article 17.03 UCL Regulations.

Both rules were, or are being adopted through intense negotiation with the EU, perhaps an indication that they may well fall short of the EU treaty provisions on labour, competition and freedom of work. It appears difficult for one to see the FIFA 6+5 Rule seeing the light of the day. It is simply contrary to the EU provisions on free movement of workers. Voices have been raised from the EU warning FIFA of this intended rule.

Perhaps a through review of both legislations is required. Whether or not their justifications outweigh the need for free sport is questionable. And as evidenced in the loopholes particularly within the home-grown player's rules, it is only a matter of time before sleeves are folded and the balls are set rolling at the Court of Arbitration for Sport and the ECJ.



## The UEFA, the “Home-Grown Player Rule” and the Meca-Medina Judgement of the European Court of Justice

by **Andreas Manville\***

The football season is approaching its end and we are awaiting the final in Europe's top league, the UEFA Champions League. Beginning this season (2008/09) the UEFA's Champions League regulation requires a club to register a squad comprising a maximum of 25 players, of which at least 8 players must be “locally trained players” (the so called “home-grown players”). Otherwise the squad must be reduced accordingly.

The aim of this article is to analyse the “home-grown player rule” with regard to the application of Article 81(1) and (3) EC, in particular considering the statements of the ECJ in the Meca-Medina case<sup>1</sup>. Subsequent thereto, a short appraisal will be given with regard to Articles 82 and 39 EC.

### The Regulations of the UEFA Champions League

“Conditions for Registration: List A

17.08 No club may have more than 25 players on List A during the season. As a minimum, places 18 to 25 on List A (eight places) are reserved exclusively for “locally trained players” and no club may have more than four “association-trained players” listed in places 18 to 25 on List A. List A must specify the eight players who qualify as being “locally trained”, as well as whether they are “club-trained” or “association-trained”. The possible combinations that enable clubs to comply with the List A requirements are set out in Annex VIII.

17.09 A “locally trained player” is either a “club-trained player” or an “association trained player”.

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

17.11 An “association-trained player” is a player who, between the age of 15 (or the start of the season during which the player turns 15) and 21 (or the end of the season during which the player turns 21), and

irrespective of his nationality and age, has been registered with a club or with other clubs affiliated to the same national association as that of his current club for a period, continuous or not, of three entire seasons or of 36 months.

17.12 If a club has fewer than eight locally trained players in its squad (i.e. in places 18 to 25 on List A), then the maximum number of players on List A is reduced accordingly. Furthermore, if a club lists a player in places 18 to 25 on List A who does not fulfil the conditions set out in this article, that player is not eligible to participate for the club in the UEFA club competition(s) in question and the club is unable to replace him on List A.”

### I Scope and application of Article 81(1)<sup>2</sup> EC<sup>3</sup>

Article 81(1) reads:

“The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- a directly or indirectly fix purchase or selling prices or any other trading conditions;
- b limit or control production, markets, technical development, or investment;
- c share markets or sources of supply;
- d apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

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

<sup>2</sup> In its press release (IP/08/807) the European Commission stated that it deems the rule to be in compliance with Article 39 EC and founded its opinion on a research study published by itself (avail-

able on the website of the European Commission: [ec.europa.eu/sport/news/news270\\_en.htm](http://ec.europa.eu/sport/news/news270_en.htm)) As an indirect discrimination on the basis of nationality cannot be discounted, it further states, a it will closely monitor the effects and will assess at a later stage a possible violation.

However, considering the study and its outcome an indirect discrimination on the basis of nationality is likely. Some few national football associations require the nationality in order to be trained by the

association (in fact, even a direct discrimination), others require the young talents to be from the region of the club independent of their nationality in order to be trained by the clubs (a classical form of indirect discrimination). As the rule relates to the place of education (“locally trained” training in the region of a club/association) this condition requires a regional origin of the education in order to be a valid player for the seats 18 - 25 on the list. This regional requirement is

also a classical form of indirect discrimination on grounds of nationality violating Article 39 (see judgement on that subject matter of the ECJ in case C-258/04, Office national de l'emploi vs Ioannidis, [2005] I-8275). From this point of view, an indirect discrimination on grounds of nationality is likely. Nevertheless, this article will not further discuss Article 39 EC.

<sup>3</sup> Equally Article 53 EEA is applicable, see also Article 56 EEA.

## 1) Scope of Article 81(1) EC

### a) Scope of the EC Treaty, application of Article 81 in sport matters - "purely sporting rule"

The ECJ has ruled that having regard to the objectives of the Communities, sport is subject to Community law to the extent it constitutes an economic activity within the meaning of Article 2 EC<sup>4</sup>.

Consequently, the rule in question would be exempt from the scope of Article 81 if it did not constitute an economic activity, and thus would be considered as a "purely sporting rule" which does not fall within the scope of the EC Treaty.

The rule lays down the criteria for setting-up a squad qualified to participate in the Champions League. A squad may have no more than 25 players of which at least 8 must be "home-grown players" (otherwise a reduced squad).

At first glance it seems as if it were a "rule of the game" like the rule that maximum 11 players may be in the playing team. The notion "rule of the game" comprises those "core" rules which are indispensable to run the sports competition. Therefore, it is in general accepted that it cannot be judged on those rules.

The "home-grown player rule" relates to size and the composition of a qualifying squad. However, to play a football match it is irrelevant whether the size of a squad is 25, 30 or even 50 players and whether there are "locally trained" players in the squad. Yet, there is an indispensable rule setting out how many players may be fielded - 11 per team. That's what is needed to play a football match. There is, if any, only an indirect correlation given insofar as to define a minimum size of a squad. And equally, the composition of the squad is not necessary for the match. For a match, all is needed are two football teams with players.

Accordingly, the rule is no "purely sporting rule".

The rule sets out the conditions for clubs to participate in the Champions League. That means, it regulates the access to the sporting competition, which is in that case also the economic one; thus, the access to the economic competition is regulated<sup>5</sup> by the rule, too. And the original economic activity for the professional football clubs (at least) is playing matches. Such an economic activity falls within the scope of Article 2 EC.

Sporting activities and rules set up by sporting associations can fall within the scope of Community provisions as the latter ones do not only apply to the action of public authorities but extend also to rules of any other nature resulting from the exercise of their legal autonomy by associations or organisations not governed by public law and equally when the rules in question take effect in the Community they must comply with the European Competition Law. In the Meca-Medina case the ECJ decided in this way. It held that "if the sporting activity in question falls within the scope EC, the conditions for engaging in it are then subject to all the obligations which result from the various provisions EC."<sup>6</sup>

In its latest case, MOTOE<sup>7</sup> in relation to sports matters it decided similarly. The Grand Chamber held that, if the "... condition [of an

economic activity] is satisfied, the fact that an activity has a connection with sport does not hinder the application of the rules EC...". The ruling is of particular interest for two reasons. First, in a very clear and unmistakable way it confirms that sports governance is not regulated autonomously by the sports associations in a space free of any legal scrutiny and that all Treaty provisions, also the European antitrust provisions, are applicable and must be complied with. Secondly, the ruling resumes consequently the "spirit" of the Meca-Medina judgment<sup>8</sup> and clarifies that the application of the antitrust law was no "bloop" and the Grand Chamber confirms the Third Chamber's opinion to subject sports governance matters to the scrutiny of the European antitrust law.

Hence, the "home-grown player rule" falls within the scope EC and must comply with Article 81.

## 2) Agreements between undertakings or decisions of associations of undertakings

### a) Undertakings or associations of undertakings

First, it must be tested whether the clubs, the football associations and the UEFA are to be seen as undertakings or associations of undertakings within the meaning of Article 81 because the European antitrust law refers to the activities of undertakings.

However, the Treaty does not define the concept of an undertaking. Nevertheless, according to the ECJ, the concept of an undertaking "encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed"<sup>9</sup>. Furthermore, neither the size of the undertaking nor a profit-making intention matters.

Football clubs are economically active, e.g. by selling media rights, tickets or on the transfer market for players<sup>10</sup>. Consequently, football clubs are undertakings within the meaning of Article 81(1). The football clubs are members of the national football associations. The national football associations are therefore associations of undertakings within the meaning of Article 81(1). Insofar as they engage in economic activities the national football associations are also undertakings themselves. The members of UEFA are the national football associations. UEFA is therefore both an association of associations of undertakings as well as an association of undertakings. UEFA is moreover an undertaking in its own right<sup>11</sup> as it also engages directly in economic activities<sup>12</sup>.

### b) Agreements between undertakings or decisions of associations of undertakings

The rule in question provides the admission requirements to participate in the Champions League and is therefore UEFA's regulatory basis for granting or denying a club's participation in the Champions League.

UEFA's Congress, the membership of which consists of the national football associations of which the football clubs are members, appoints the Executive Committee which adopts the Regulations of the UEFA Champions League. The Regulations of the UEFA Champions League are binding on the national football associations and on the football clubs and are confirmed when they sign up for participation in the UEFA Champions League.

Therefore, the rule in question constitutes a decision taken by an association of associations of undertakings within the meaning of Article 81(1)<sup>13</sup>.

## 3) Is the "home-grown player rule" a provision sanctioned by Article 81

If the rule were a measure which Article 81(1) would not want to prohibit the rule could not constitute an infringement of the said Article.

a) This would not be the case if the rule was an indispensable condition to make the product concerned. For if a rule is necessary in order to enable (establish) the competition in the first place it must be assumed in principle that such a rule does not infringe Article 81 even if it appears to contain a restriction of competition *prima facie*<sup>14</sup>. The rule sets up one of several conditions to be fulfilled by the clubs

4 Established case-law of the ECJ since case C-36/74, Walrave, [1974] ECR 1405, last in Meca-Medina (supra 1) pt. 2.

5 And there is no doubt as to that the Champions League is one of the most important economic activities in football. Only the participation in the first round guarantees already a profit of several millions of Euros for each club.

6 Meca-Medina, pt. 28 (supra 1).

7 C-49/07, MOTOE, judgment of 1. July 2008, not yet published in the Court's records, pt. 22 (w.f.ref.). In this preliminary ruling the question has also been whether the European antitrust provisions (here: Article 82 and 86 EC) apply in sports governance matters.

8 Although Articles 82 and 86 EC were at stake and thus the test-structure was different to Meca-Medina (supra 1).

9 See also the Commission's submissions in point 6.3. of its decision of 23 July 2003 regarding the joint selling of the commercial rights of the UEFA Champions League (2003/778/EC, OJ L 291 of 8.11.2005, p. 25); Advocate General Lenz in his conclusions in case C-415/93, Bosman, [1995] ECR I-4924, pts. 255 ff.; MOTOE (supra 7), pt. 21.

10 The modern club has many "facets" of economic activities.

11 See the Commission in pt. 6.3. (supra 9).

12 In particular, the selling of rights (media, sponsoring etc.).

13 As Article 81(1) applies equally to both forms of cooperation there would be no difference in concluding the rule to be an agreement between undertakings.

14 In the same way, Advocate General Lenz, pt 265 (supra 9).

in order to be admitted and to participate in the “European Championship”. The product being made hereby is the “Champions League”, being the common product of the UEFA and the clubs.

However, the rule in question is not an indispensable condition following already from the fact that the product “Champions League” existed successfully already for more than 10 years before the introduction of the rule. Neither is the content of the rule a “constituting” element.

Thus, this argument cannot be taken into account.

b) The same conclusion must be drawn having regard to a possible sole ownership of the UEFA. If that was the case the UEFA could claim to have the sole right to determine the content of the product<sup>15</sup>.

Nevertheless, it is not necessary to determine the ownership structure finally for two reasons.

First, the UEFA cannot “produce” the Champions League on its own. Without the participation of the clubs the product would be without any content, and therefore, worthless.

Second, as a consequence, the UEFA can at best be considered as co-owner with regard to the rights making the Champions League so valuable, the media rights<sup>16</sup>.

Consequently, from the above it follows that the UEFA does not have the sole right to determine the content of the product “Champions League”, and therefore, the rule in question is not excluded from the scope of Article 81.

c) The conduct of the UEFA (the setup of this rule) is neither a unilateral measure with the consequence that the rule could not be seen as an agreement between several parties and therefore falling outside the scope of Article 81. This presupposes that the conduct of the UEFA was genuinely planned unilaterally and adopted by itself without any express or implied participation of another undertaking (the national associations and/or the clubs)<sup>17</sup>.

As already said above, the national associations as well as the clubs accepted the rule expressly.

Thus, the rule is no unilateral measure taken by the UEFA.

Consequently, the rule in question falls within the scope of Article 81 and constitutes a sanctioned provision within the meaning of Article 81(1).

#### 4) Restriction of competition

In order to determine a restriction of competition and its appreciable affection it is necessary to define first the relevant markets enabling an evaluation of the rule’s impact on the relevant markets affected.

a) The competition concerned is the competition between the clubs, in particular the one for new players. Therefore, the relevant product market could be the market of professional football players, the staff supply market for the clubs. The complete market without any differentiation between players’ categories must be considered relevant, thus a single staff supply market. There is no practical way in defining different kind of players and different “player markets” - e.g. players of higher quality, or differentiation in age groups or by field position. Consequently, the definition of the relevant product market should not be done on grounds of cross-price elasticity of demand but rather on a relevant product market concept comprising all professional players in one single product market.

As the rule in question applies across Europe the relevant geographic market is the Community market.

b) The rule in question restricts the clubs in filling in the squad places, thus in engaging new players.

Its effect is a share or a split up of supply resources with the consequence that the clubs cannot decide freely on the engagement of new players. The rule restricts the possibilities for the individual clubs to compete with each other by engaging players. Consequently, the normal system of supply and demand does not apply to the clubs and the clubs are deprived of the possibility of making use of the chances, with respect to the engagement of players, which would be available

to them under normal competitive conditions. That is a restriction of competition between those clubs.

Although the rule in question does not relate to the nationality of the players it creates, nevertheless, a share and even a foreclosure of the markets with regard to each Member States and its frontiers. A “home-grown player” is connected and “seated” in one Member States as he is “locally trained” in the region of a certain national association.

That means that with regard to the 8 seats concerned a club is restricted to players of the “training market” of its national association whereas the “training market” is determined by the frontiers of a Member States.

Thus, a trans-frontier competition for those 8 seats is completely foreclosed.

This view cannot be changed by the fact that a player can, in principle, play everywhere, so he is not restricted as to where he will play after his training to become a “qualified home-grown player”. And a club may engage a player for the 8 restricted seats who plays abroad but being trained in the “home area” of the club and making a trans-frontier trade.

Whereas this constitutes trans-frontier trading, however, it does not constitute an unrestricted competition.

A club may search for a new player in another Member States; but the club may “acquire” only “domestic products” (players trained in the home national association), thus only products being produced in the club’s Member States. Consequently, the club may have to decline opportunities of better quality but not fulfilling the criteria for the 8 seats.

Eventually, this means protectionism of domestic products.

Protectionism of domestic products applied in football matters means that players with the nationality of the Member State where the club is seated are preferentially promoted or fielded (similar to the rule in the case *Bosman*; however that rule directly referred to the nationality). And that the “home-grown player rule” pursues (also) such protectionism inherently can be deduced from the fact that a club is obliged to list “home-grown players”. That means a player’s decisive quality is not to be a young talent but to be “locally trained”<sup>18</sup>. Hence, the rule is connected to the regional origin constituting the protectionism of domestic products. Thus, it seems that the rule’s name, “the home-grown-player rule”, is program!

Moreover, it results in a partial restriction of the clubs to participate in economic competition. If the rule in question did not exist the clubs would be completely free with regard to their personnel policy without facing any sanctions and being expelled from a sports competition, in case. But it is just the personnel policy which is the “core element” of a club. Through its personnel policy clubs are trying to distinguish themselves from the other clubs, trying to influence their success decisively and to be recognised in the “grey mass”.

In order to achieve this clubs are making a lot of effort to create a squad which seems promising to succeed in sports matters and thus, also in economic. Economic success follows the success in sporting competitions as success in sport leads to higher revenues, in particular the participation in prestigious and profitable events (esp. in the European competitions) leads to a significant increase.

In doing so the clubs are competing with regard to the “personnel”, the players. But the “home-grown player rule” restricts that competition.

c) In order to establish the relevant product market, products or services which are substitutable or sufficiently interchangeable with the product or service in question are to be included. In that regard, it can be concluded that the relevant product market concerned by the rule in question is the competition for players constituting the original element for each club<sup>19</sup>.

<sup>15</sup> In case it would be the right conclusion, the application of Article 82 EC must be tested.

<sup>16</sup> See pt. 6.5.1. of the Commission’s decision (supra 9).

<sup>17</sup> CFI in case *Bayer/Commission of* 26.10.2000, [2000] ECR II-3383.

<sup>18</sup> See also below in pt. I(6)(c)i) regarding the *Wouters* test.

The geographical scope of the affected market is the European one as the rule in question addresses to all clubs in Europe.

- d) But there are two possible arguments against the conclusion of a restriction of competition:
- i. As the rule in question is applied by all clubs a restriction of competition could be excluded as the rule would create a uniform competition, thus it be a neutral factor to the competition.
  - ii. The rule in question would just reflect the will of the clubs because they voted through their national associations in favour of the said rule, meaning that the clubs actually would want to have the competition regulated by such a rule.

Regards i): A rule could only be neutral if it had no effect at all on the “normal functioning of the competition”. But as already described above the rule does indeed affect the competition and it moves the competition with a tendency to the national markets. Consequently, the rule in question is not a neutral factor to the competition and thus, the argument is unconvincing.

Regards ii): Against this objection speaks already the fact that not all associations were happy with the rule and several clubs were not in favour of it<sup>20</sup>.

In addition, it applies European wide only to those clubs participating in the Champions League. Even though the UEFA has encouraged the national associations to adopt a similar rule applying to the national leagues there is no conformity and thus no uniformly applied market rule regulating and guaranteeing a fair competition. Even if there was a uniform application it is doubtful that the said argument could convince. There is no homogeneous market as the structures at national as well as European level are too different and the permanent change of the member clubs in the leagues at the start of each new season prevents the creation of a homogeneous market.

Moreover, competition law is not at the discretion of the market participants but it sets the limits to them within which they can set up market rules which are in compliance. A rule like the one in question falls within the scope of competition law and it is for competition law to decide whether compliance is given. The market participants cannot define a rule as being in accordance with the law applicable just as they wish it to be.

Nevertheless, the (assumed) uniform application of the rule only seems to guarantee a fair competition on the surface. Obviously, Member States like Germany, France or the UK have “access” to a much larger “pool of potential home-grown player” as they have a larger number of citizens, thus a bigger quantity to find quality, than small Member States. Considering this it is barely a fair competition given as the rule in question does not take different aspects, e.g. demographic factor, into consideration.

That means that the rule is advantageous for big Member States having a larger assortment to find talented youngsters, and so having more “qualified home-grown player” to fill in the seats reserved at a later stage.

Consequently, this argument cannot convince either.

- e) As the entire European staff supply market of professional players is concerned the appreciable affection of rule is given.

#### 5) Effect on trade between Member States

a) Furthermore, the rule in question falls within Article 81 only if it may affect trade between Member States. Agreements are thus covered only if they are capable of constituting a threat to freedom of trade between Member States with a sufficient degree of probability in a direct or indirect, actual or potential manner in such a way as might hinder the attainment of a single market between the Member States based on a set of objective legal and factual elements. The adverse effect must also be appreciable<sup>21</sup>.

As regards the question whether the rule in question produces an effect between Member States, it is obviously the case as it is applied all over Europe.

The concept of “trade” is not restricted to trade in goods but covers all economic relations between the Member States<sup>22</sup>. Professional players being engaged by paying an appropriate transfer fee constitute an “economic good” which is “traded” and falling thus in the scope of Article 81(1)<sup>23</sup>.

If the assumption of an indirect discrimination is followed<sup>24</sup> the rule in question would constitute indirect forms of discrimination on grounds of nationality, affecting obviously the trade between the Member States.

But even without that assumption the rule in question affects trade between the Member States. The clubs being significantly restricted as regards their squads with regard to engaging new players<sup>25</sup> may not have a “free” exchange and engagement of players and thus, the rule is in fact appropriate to hinder the attainment of a single market between Member States. Moreover, it would suffice if trade between Member States was potentially affected in an appreciable manner. This is certainly the case because of the restriction and the numbers of places in the squad concerned.

b) The rule in question inherently pursues market protectionism<sup>26</sup>. In general, a rule with the effect of a market foreclosure is of such massive restriction of competition that the infringement of the competition law is given “per se”<sup>27</sup>.

At present, the better arguments speak against an “automatic application” and to only deem it an appreciable infringement of Article 81(1) as the rule is applied in sports matters and should also be tested considering the special characteristics of sport<sup>28</sup>.

It can be concluded that the rule in question is appreciable to restrict the competition between the clubs. Whether this means eventually that the rule infringes Article 81(1) must be tested on the basis of the “Wouters criteria” applied by the ECJ in the Meca-Medina case<sup>29</sup>.

19 Players are as well concerned. Although Advocate General Lenz in *Bosman* (supra 9) has denied a possible market for players pointing out their employee characteristics the transfer market and the characteristics of the players have changed since and another possible relevant product market could be seen in the transfer market. However, in that case it seems appropriate to distinguish between the “free” players (those who are not engaged) searching for a new club and the transfer market of those eager to change the clubs being still under a contract. Undoubtedly, individual athletes can be seen as undertakings within competition law. Free players on the transfer market do act similar to undertakings as

they are in a strong position for negotiations due to the fact of their independency and they emphasise more and more their individual marketing and sponsoring even though they will eventually be again employed by a club. In following this arguments and accepting a separate product market of a transfer market for “free players” it can be concluded that there is also a restriction of competition and an effect on trade given as the “free players” compete for the best clubs but the available seats are restricted and there are less seats available for “non locally trained players”. Thus, the competition is not as it would be without the restriction laid down by the rule in question.

20 See press release EurActive.com of

12.05.205 regarding “UEFA home grown player rule” saying that, in particular, Italy and England were not happy about the rule.

21 Established case-law since case *Maschinenbau Ulm*, 30.6.1966, ECR [1966] 281, 303; see also Advocate General Lenz pts. 260f (supra 9); see also *MOTOE* (supra 7), pts. 39ff.

22 Case 172/80, *Züchner/Bayrische Vereinsbank*, ECR [1981] 2021, pt. 18.

23 See Advocate General Lenz pt. 261 (supra 9).

24 See below point IV).

25 See Commission’s study (supra 2).

26 See above pt. I)5a).

27 There is no intention to discuss the dogmatic question whether there is in the

EU antitrust law a “rule of reason” and a “per-se rule” according to the doctrine in the US antitrust law. Nevertheless, the European Commission and the ECJ assume in case of particular infringements that they are too grave to be justified directly concluding a violation (examples can be found in the so-called “black list” of the European Commission, see e.g. Article 4 of Commission Regulation 2790/1999, OJ L 336 of 29.12.1999, p. 21).

28 See also below pt. I)6a).

29 *Meca-Medina* pt. 42 (supra 1); see also pt. 2.1.5. of Annex I to the Commission’s White Paper on Sports COM(2007)391final.

## 6) The “Wouters test”

Following this test a rule does not infringe Article 81(1), even though appreciable to do so, and thus complies with Article 81(1) if

1. in the overall context in which the rule was adopted or produces its effects, and more specifically, of its objectives; and
2. whether the restrictive effects are inherent in the pursuit of the objectives; and
3. whether the rule is proportionate in light of the objective pursued and is applied in a transparent, objective and non-discriminatory manner.

a) At first, the overall context in which the rule was adopted or produces its effects, and more specifically, of its objectives must be examined.

The overall context: “The specificity of sport”

There are in particular two differences which distinguishes sport from other markets.

The “special characteristics of sports” are understood as those elements which distinguishes sport and its participants from “normal” economic activities and thus, from the other markets.

On the one hand, sport serves important purposes in society with a social, educational and health dimension.

On the other hand, sport can only exist if sports events are organised, the *modus operandi* is laid down prior to the event and when there are similar (and if possible) equally strong competitors participating.

Sport and the interest in it are especially living from the fact that a well organised, uniform, fair and exciting competition ensuring the uncertainty of the outcome of the sporting competition is given.

In order to achieve this, competitors, if possible many strong, and a “neutral” organisation are required. As they need each other the relation between the sports competitors is often referred to as “interdependence” in sport.

This specificity is recognised by the European Commission, the European Courts and the Member States and is taken into consideration by them<sup>30</sup>.

In order to promote and to sustain those specificities the sports organisations adopt “special sports rules”. However, the recognition of the sports specificities does not give way to a space free of any legal limits without any scrutiny. Sporting rules have to comply, as already said above, with law in general and also with European competition law, in particular. In order not to be covered by the prohibition laid down in Article 81(1), the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport<sup>31</sup>. This opinion was recently confirmed in its latest ruling in case MOTOE<sup>32</sup>.

### *Legitimate objectives*<sup>33</sup>

Among other objectives, the UEFA intends for clubs to promote and educate young talents, in particular originating from the region of the clubs, and wants to reduce the financial influence so that the rich clubs do not only buy young talent trained and developed by other clubs but also “invest” in youngsters and train them. Having regard to the fact that finance plays its part in football the game should not be

a mere financial contest. Thus, less rich clubs should attain a better position. Some clubs are not training enough of their own players, but just buying them from other clubs. Therefore, a better balance in competitions should be achieved, and also preventing clubs from simply “hoarding” players in squads without having them fielded and giving locally trained players the opportunity to play regularly and thereby guaranteeing a larger reservoir of talents for national teams.

These objectives, promotion of young talent and a better balance between the clubs, are legitimate in UEFA’s sport promotion and development efforts in football.

b) In a next step it must be tested whether the restrictions caused by the rule are inherent in the pursuit of the objectives.

It goes without saying and it is generally accepted that for a rule introduced there must be a mechanism to enforce its compliance by its addressees. However, this approach may only justify a mechanism of sanctions, in this case the exclusion from the Champions League participation.

Nonetheless, this argument cannot be put forward to justify the introduction of the rule itself. As in this case the question is whether the rule itself is already violating competition law and not only its sanction system<sup>34</sup>.

The objectives as described above are legitimate. But it seems questionable whether the competition restrictions caused by it are inherent.

On the one hand, the rule itself offers already a possibility to “undermine” (at least partially) the pursuit of its objectives by giving the clubs the possibility to reduce the size of a squad down to even a zero-home-grown-player-squad and being still entitled to participate in the Champions League<sup>35</sup>.

On the other hand, the restrictions of the competition between the clubs are of no necessity if there are alternatives given to also pursue the legitimate objectives effectively.

There is no obvious inherent connection between the restrictions and the objectives as there are alternative and effective possibilities at hand<sup>36</sup> and, unlike a sanction system (to ensure the compliance) the introduction of the “home-grown player rule” is not stringently needed in the pursuit of the objectives described.

In conclusion to this, it seems doubtful whether the restrictions are inherent in the pursuit and, probably, the said condition is not fulfilled.

c) In any case, the rule will eventually fail the test of proportionality in light of the objectives pursued.

Apparently, the rule is transparent, objective and applied in a non-discriminatory manner<sup>37</sup>.

A rule is proportionate if the rule first is suitable to achieve the desired objective and second is necessary to achieve the desired objective<sup>38</sup>. There are doubts whether the ECJ will make a third inquiry (proportionality strict sensu, whether the rule imposed a burden on the individual that was excessive in relation to the objectives sought to be achieved). Unless there are obvious reasons that there might be a breach of proportionality strictu sensu it will not be exercised. In the following the test will not be reviewed as the arguments at the second stage will already consider similar aspects.

i) A rule is suitable if it is appropriate to achieve the desired objective and if there are no other similar appropriate measures available which are less restrictive in achieving the objectives pursued.

- Is the rule appropriate to achieve the objectives pursued?

The rule requires that there are at least 8 “home-grown players” in the squad to be entitled for the maximum squad size of 25 players. Otherwise, the squad will accordingly be reduced by the number of unfilled “home-grown player”-seats. And, it also sets out the definition of the term “home-grown player”. That means the rule only sets out the admissibility conditions and definitions. The necessary framework laying down the criteria to fulfil those conditions is to be set up by the national associations (rules laying down directives with regard

<sup>30</sup> See e.g. Declaration on the specific characteristics of sport and its social function in Europe, declaration to the Nice Treaty (2000); Commission’s White Paper on Sports (supra 29).

<sup>31</sup> Meca-Medina pt. 47 (supra 1).

<sup>32</sup> MOTOE (supra 7).

<sup>33</sup> Objectives described on www.Uefa.com.

<sup>34</sup> Different the Meca-Medina case as there in the first place the sanction system according to a violation of the anti-doping rules was at stake; only in second place and alternatively the ECJ tested the anti-doping rule itself, see Meca-Medina pts. 43 - 45, (supra 1).

<sup>35</sup> See possible squad constructions fulfilling the conditions given in Annex VIII to the Champions League rules.

<sup>36</sup> See below pts. 1)6c)ii) and ii).

<sup>37</sup> This condition may not be confused with the question whether the rule is directly/indirectly discriminating on grounds of nationality, Article 39/49 EC. This condition tests whether the application of the rule regarding its addressee (the clubs) is non-discriminatory. Obviously it is the case as it applies uniformly to all participating clubs.

<sup>38</sup> See for example, EU law, Paul Craig and Gráinne de Búrca, fourth edition, p. 545.

to the youngsters, the clubs, the training etc.). The result is that there are many (quite) different directives applying in the national associations and that there is no harmonised standard available for all the clubs across Europe. In some Member States the directives applicable for the protection of minors are of high level and the clubs have higher conditions to fulfil working with minors (e.g. the regional recruitment area, origin of the minors, their minimum age, etc.<sup>39</sup>) whereas in other Member States the clubs are largely free in the recruitment process. In some Member States the national associations conduct the education of the youngsters whereas in other Member States only the clubs. Moreover, regional differences and specificities are not taken into account by the “home-grown player rule”. E.g. in a large national association, like the German, it is less difficult to find sufficient talented youngsters for all major clubs, whereas in small Member States, like Luxembourg<sup>40</sup>, it is much more difficult probably leading to regional disadvantages. The “poorer” Member States might encounter similar difficulties as in those countries sport is a means to escape poverty. Young talent emanating from those countries will try to find abroad a promising football training centre also enabling them to profit financially as in their home country the possible payment, if any, is nothing compared to international standards. Clubs of those countries might also encounter difficulties in fulfilling the rule.

The “home-grown player rule” does not appreciably recognise demographic and social factors nor the problems arising in the Member States concerned in order to comply with the rule.

Even the question must be examined if the rule is not in the interest of the “big” football nations and should ensure their competition edge. Having regard to the last years Champions League participants some suspicion might raise. The regional origin of the participating clubs is overall stable and it seems that the structure of the participating clubs during the last decade is even not varying a lot. In this way, the well-established structures are becoming manifest in the rule to the detriment of those who are not part of the “inner circle” of the “big players”. Against this, the argument that each club is free to follow the rule cannot be put forward. Obviously, the rule is only obligatory for the participation in the Champions League. Such an argument, however, would subvert the (alleged) objective that it should apply across Europe and not only to the participants in the Champions League.

But those non-uniform framework conditions are constraining, if not even impeding, the achievement of the objectives pursued as they should be achieved European-wide and not only in the major football nations.

The objective, promotion of young talent, is not only desirable it is even a MUST and vital for each association. The promotion of young talent thus has always been performed. A comparative study would be interesting to investigate whether the rule has led to higher investment and a more intensive performance in the promotion of young talent.

Top clubs which were and are still planning to play an important role in the European football in the future are since long aware of the importance of the promotion of youngsters and are investing considerably in that area. Therefore, it is doubtful that the rule has a significant and positive impact on the promotion of youngsters. However, it can be established that also in the past clubs have invested in the promotion of youngsters, even though with different means, different financial involvement and different success. But this will always be the case.

Therefore, it seems questionable whether the rule will effectively be appropriate to achieve the objective. Or, will the rule rather manifest the structures of the existing promotion system in addressing “only” to those clubs investing anyway but will not really achieve measurable results across Europe.

Another argument against the efficiency of the “home-grown player rule” is the fact that the rule which wants to influence the promotion of youngsters positively and sustainably does not necessarily lead to having (more) young talented trainees fielded. A young trainee is in general understood as a young player growing into a team, thus being a trainee of the team and the club. However, the “home-grown player

rule” would be fulfilled if a club lists 8 “old” “home-grown players” (e.g. older than 30 years). This is because a “qualified home-grown player” will always be a “home-grown player” independent of his age<sup>41</sup>. That means a club can comply with the rule without listing any young talent as each “home-grown player” was once a young talent but from a certain age on he is not anymore. Hence, the rule promotes essentially the listing and fielding of “home-grown players” and focuses less on talented trainees. But if the target is primarily the “home-grown players” it means that eventually there is a market foreclosure as the clubs shall rather field players with the nationality where the club resides.

Consequently, the “home-grown player rule” is at best only appropriate to a limited degree to promote youngsters.

Another objective of the rule is to avoid or at least to diminish that rich clubs without doing any investment in youngsters only “buy in” talent from those investing in the training of talent. But it is just the rule itself offering the possibility to build up a squad of 21 players only by “buying in”. In this way the rule is offering a backdoor for the rich clubs.

And last but not least, the rule seems to be inappropriate with regard to the objective improving the position of the clubs with less financial potential. If a club wants to set up a squad of 25 players the rule must be followed, meaning investment in the promotion of youngsters has to be made. As that investment is in general a considerable charge it constitutes a significant part of the financial resources being not anymore available in other fields of sport planning. In particular for small clubs with less financial power it means that they have to cut investment in the construction of the team and supporting staff, respectively. Whereas the big, financially powerful clubs have no problem with investing in young talent and having then still sufficient money to buy the best players.

Studies<sup>42</sup> over recent years confirm that sporting and financial success are closely correlated and that without a sufficient financial background sporting success on the international football stage is rather unrealistic. Moreover, it can be realised that “great talents” developed by small clubs are regularly bought by top clubs having the necessary cash in their “kitty”. It seems that the rule has even a counterproductive effect with regard to the objective of strengthening smaller clubs as in relation to the big clubs the financial charge is much higher for them.

Therefore, it can be concluded that there are considerable doubts whether the rule is appropriate to achieve the objectives pursued.

- Are there any less restrictive measures available being (more) appropriate to achieve the objectives pursued?

The primary objective of the rule is the promotion of young talent. However, this objective should not be restricted to professional football but it should be a primary task of the associations on all levels. It can be realised that football has to “fight” the modern circumstances cutting down the “flow” of children and teenagers into the football clubs as the possibilities of sporting activities are nowadays of quite diversity. This development in sporting activities offered leads to a diminishing dominance of football in society. In strengthening the base (meaning more children and teenagers at all levels) the available “pool” of potential talent increases and thus the probability of discovering talent is rising.

With financial support the bigger clubs could contribute to their obligation towards the society resulting from the “specificity of sports” and their position in a society<sup>43</sup>. This would also lead to the promo-

39 See in particular Commission’s study (supra 2).

40 Even though Luxembourg did not (yet) play a role in international football.

41 As expressly stated in the Commission’s press release (supra 2).

42 See research study of Deloitte „Football Money League”, February 2008 showing that bigger football clubs are exceeding the economic figures of SMEs and could compete in asset size with stock

exchange listed enterprises (what some of the football clubs are in fact).

43 The associations and the clubs like to refer to the “specificity of sports” to justify their measures and attitude. But conversely, in setting these standards for justification purposes they must accept that they are measured by them, too. And, obligations towards the society are part of it.

tion of talent coming from the club's region which is another concern of the rule as it relates to talent originating in the regions of the clubs. It goes without saying that the associations are engaged in promotion matters; nevertheless, they put their focus on the upper levels, meaning the higher leagues. Whereas a better equipment and engagement at the base (small clubs)<sup>44</sup> would make football more "sexy" for children and teenagers thus leading to a higher "flow" of youngsters. A strong base will bring up more talent promising more success in the long run. Besides, this point of view, a stronger engagement down to the small clubs, would maintain an unrestricted competition between the big clubs.

Another, less restrictive approach would be a sort of a bonus system where those clubs having "home-grown players" in their squad and also fielding them would receive a higher support. Similar to the Formula 1 where each team receives a financial support per kilometre driven during the race and not only by points/victories won<sup>45</sup>, a rule could lay down that clubs investing in and promoting youngsters who are eventually registered in the squad and are also fielded would receive more financial support from the Champions League money (and from the national associations). A bonus rule could lay down that a club shall receive a bonus for each young talent listed (whereas "young talent" must be defined, e.g. maximum age of 21 or 22) and an additional bonus if fielded (whereas a minimum period must be set up in order to avoid that young talent is only fielded in the last 1 or 2 minutes, e.g. for each 15-minute-period completed). The bonus must be considerable and independent of the result of the match so that it constitutes real and significant profits for the clubs, which conversely has the effect that the money of the Champions League left to be distributed just for participation etc. is significantly less. Smaller and less rich clubs actually promoting youngsters would profit from such a rule whereas those clubs just "buying-in" their teams would receive a considerable smaller financial share. A club spending hundreds of millions of Euros to buy-in a top team knows very well being successful it can count on a revenue of millions upon millions because of the current rule applicable. But if that were not the case and there was also significant revenue for promoting youngsters and thus fulfilling also the obligation towards the society a revision in the clubs' minds would occur.

On the one hand, this would support small clubs being strongly engaged in the promotion of children and teenagers, hence youngsters, and would reward, on the other hand, those clubs contributing their part to their obligation towards society being engaged in their region. Hereby, youngsters and their promotion would be directly and not only indirectly supported. Moreover, the competition would not be restricted because the clubs could dedicate themselves to the promotion of the youngsters and development of the players without any restrictions. In any case, the focus of such a rule would be on the promotion of youngsters and on clubs carrying out the promotion instead of focusing on players having received their education in a certain region or Member State as the "home-grown player rule" does.

Another alternative would be a change of UEFA's performance system concerning the national leagues and the clubs established to determine the available places and to grant participation to the clubs. Next to the sporting performance, there could be conditions with regard to youngsters and their promotion and their actual fielding in competition. This would support especially clubs and national associations promoting and investing accordingly in youngsters. Similar to the additional places granted by the UEFA for the "best fair play leagues"<sup>46</sup> the UEFA could grant additional places to national associations or even directly to clubs<sup>47</sup> to participate in the Champions League. In particular clubs usually unable to fulfil the access condition would enjoy and profit from this. This alternative would likewise concern the promotion of the youngsters without restricting the competition and would not relate to the region or Member State as a place of education.

The alternatives presented leave the clubs not only their autonomy of decision and action but they do not interfere either in the competition between the clubs in a restrictive manner. Moreover, those clubs promoting their youngsters would be able to actually build upon their

youngsters as they receive revenue directly linked to the promotion and thus, they would be less dependent on profit made from the sales of talented youngsters. Consequently, young talent would not be so easily available and hence, rich clubs would be forced to increase their efforts and their promotion of youngsters. That would lead to a better balance between the clubs and a reduced dominance of money in football.

Hence, the "home-grown player rule" is, at best, suitable to a limited degree to achieve its objectives pursued. In any case, there are alternatives available which are not only less restrictive to the competition but which are even better suited to achieve the objective of promotion of youngsters. Likewise, the alternatives count for some redistribution of the revenue in favour of those clubs actually investing in youngsters and fielding them being conversely to the disadvantage of those rich clubs only cobbling their squads together with their money, also an objective pursued by the "home-grown player rule".

In any case, the "home-grown player rule" may just be suitable to achieve its objectives pursued but it is not the least restrictive measure which is equally appropriate to achieve the objectives pursued. There are alternative measures which are more appropriate and less restrictive to the competition in the pursuit of the objectives.

ii) The rule is necessary to achieve the desired objectives if the burden imposed is in an appropriate relation to the objectives pursued. That means the restrictions thus imposed by the "home-grown player rule" must be limited to what is necessary to ensure the proper conduct of competitive sport<sup>48</sup>.

However, a rule which is not appropriate cannot either be necessary, and thus this test would not have to be examined.

But even supposing the rule was appropriate it would not be necessary.

The rule does not only have effect for the Champions League but applies in general to the clubs and thus to all of their sporting events. A club must run its squad as registered and may not have different squads for different (national or international) competitions. That means, next to the Champions League the rule has significant implications in all areas concerned, in national as well in international events. The rule originating from a single, particular sporting event (the Champions League) takes also effect in all other sporting areas and restricts the clubs also with regard to other sporting events. It even produces effects if the club does not participate in a European competition. A club planning to play at European level must already now (at least partially) fulfil the requirements of the rule if the club does not want to endanger participation for which it qualifies. As a club's management can never be 100% sure of being able to set up a squad in accordance with the rule during the transfer period and as a replacement of a big part of the squad bears too much sporting risk a club's management will always try to have a squad in place which is in conformity with the rule to be sure of the participation in the lucrative business should it qualify.

Certainly, the Champions League is a very lucrative business. Nevertheless, in relation to the number of matches to be played at national level the Champions League is of minor importance. However, the "home-grown player rule" originating from the Champions League regulation takes effect at all levels of football competitions and thus far beyond its fairly limited original scope (the Champions League).

As already shown above in point ii) there are effective alternatives at hand being less restrictive and leaving the clubs their autonomy of planning and action in personnel matters without constituting a restriction of competition.

Having said this, it can be concluded that the rule takes effect in

44 E.g. promotion campaigns for small clubs, better equipped sports facilities, better support for higher skilled staff.

45 In particular, smaller teams can benefit from this rule as profits from points achieved are too rare.

46 But this concerns the UEFA Cup and not the Champions League.

47 The difference would be that in the first case it would be the national association determining the club to participate whereas in the second case it would be UEFA directly identifying the club.

48 Meca-Medina pt. 47 (supra 1).

areas having nothing to do with the sporting competition - the Champions League - and is therefore not necessary because it is not limited to what is necessary to ensure the proper conduct of competitive sport.

Hence, the „home-grown player rule” fails the Wouters test being not proportionate.

That means the „home-grown player rule” infringes Article 81(1).

## II Application of Article 81(3)

The “home-grown player rule” might nevertheless be applicable if pursuant to Article 81(3) the beneficial effects of the rule outweigh its restrictive effects<sup>49</sup>.

### 1) Article 81(3)

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which [first] contributes to improving the production or distribution of goods or to promoting technical or economic progress, while [second] allowing consumers a fair share of the resulting benefit, and which does not:

1. [third] impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
2. [fourth] afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

### 2) On the substance, four conditions of Article 81(3) must be cumulatively fulfilled in order to gain exemption

a) Improving the production or distribution of goods or to promoting technical or economic progress.

In the case at hand the goods are the “players”. Essentially, the “home-grown player rule” seeks to achieve of two objectives; firstly and mainly, the promotion of young talents; secondly, it seeks to reduce the dominance of the rich clubs to the advantage of the less rich ones.

The condition “promoting technical or economic progress” relates in its essence to the collaboration of enterprises beyond the production or distribution of goods; thus, in particular it concerns research and development of know-how etc.. This condition could apply if the objective was, for example, the common development of training know-how (by and for all clubs)<sup>50</sup>. But this is actually not the case.

Thus, the question is whether the condition “improving the production or distribution of goods” applies. Both terms must be broadly interpreted and are usually encompassed under the term “efficiency gains”<sup>51</sup>. Only objective benefits may be taken into account and the efficiencies must not be assessed from the subjective point of view of the parties<sup>52</sup>.

The “home-grown player rule” seeks, among other objectives, to promote young talent, to set up a better training standard and to have thus more talented player at the disposal of European professional football, meaning “to produce more and better goods” i.e. to improve quality.

Essential for the determination of an improvement pursuant to Article 81(3) is whether there are positive effects flowing from the restrictive rule and whether there is a causal link between them, meaning that there is a positive effect compared to the status being in place without the restrictive rule. It must be tested whether the efficiency gains envisaged by the rule can be objectively achieved.

At first glance, the “home-grown player rule” seeks to encourage clubs to invest more in the promotion of youngsters and of young talent, so that more and better players are “built up” in order to improve balance, to strengthen smaller clubs and to improve their competitiveness as well as of the national teams and not least of European football and to reduce the “power of the money”.

Nevertheless, the rule has already been in force for three years although applied progressively<sup>53</sup>. However, there are more or less the same clubs playing on the international stage, money is still the dominant ruler and the transfer costs are further increasing, in particular for the top teams. Besides, an improvement due to the rule cannot be identified. Having regard to the European Championship 2008 and its qualification matches there are some doubts about any efficiency gains of the rule considering that some national associations either did not qualify at all or were eliminated in an early round although in those associations the investment in the promotion of youngsters has been very high for years already<sup>54</sup>.

Moreover, the fact that clubs invest in young talent and promote youngsters is not a novelty resulting from the rule. Promotion of youngsters has always existed and there were even some very successful promotion systems<sup>55</sup>. Having said so, it seems doubtful whether the rule can achieve the improvement of quality and quantity as envisaged. And there are two aspects with regard to the supposed efficiency to be considered. First, the clubs have to pay for a supposed efficiency gain in form of improved player quality as the clubs invest in the promotion of youngsters in order to increase their quality and performance. Second, from a practical point it is merely impossible to evaluate an improvement in form of increasing sportive success, an achievement quite doubtful if all clubs will play a better game with players of supposed higher quality because of the rule in question.

Therefore, a positive projection seems too uncertain even considering that the rule needs some time to unfold and to develop its effects, although there is already a period of experience given, even though a short one. As the projection needs to be done with at least some likelihood of achievement of the efficiency gains envisaged there are doubts about it given the considerations made above. In general, the efficiency claims must even be substantiated for verification purposes and in order not to be rejected<sup>56</sup>. But substantiated claims given what was just said are actually not at hand.

Therefore, it is already questionable whether the “home-grown player rule” fulfils the first condition of Article 81(3), and thus whether an efficiency gain can be achieved.

b) Allowing consumers a fair share of the resulting benefit.

European antitrust law wants only such efficiency gains to be considered being passed on to the consumer and giving him a fair share.

Consumer in the meaning of Article 81(3) encompasses all direct or indirect users of the products covered by the rule in question<sup>57</sup> meaning all those who have subsequently a business relation with the parties of the rule in question. Thus in the present case, “consumers” within the meaning of Article 81(3) are the clubs as well as the viewers<sup>58</sup>.

Further, the clubs must have a fair share of the efficiency gains in such a way that the benefits for the clubs outweigh the restrictive effects of the rule to be declared applicable.

The question is, as already said above, whether the rule produces an effective benefit. But even supposing that the rule’s effect is an improvement of the “players’ quality” it is uncertain whether this is a

49 If it is concluded that the „home-grown player rule” violates Article 39 because of indirect discrimination as a consequence a possible application of Article 81(3) must be denied in order to guarantee a uniform application and interpretation EC in its totality.

50 Mestmäcker/Schweitzer, *Europäisches Wettbewerbsrecht*, 2. edition, §13, Rn 43.

51 See in particular pt. 3.2. of the Communication Notice from the Commission “Guidelines on the application of Article 81(3) EC” (2004/C 101/08), OJ C 101 of 27.4.2004, p. 97.

52 See pt. 3.2.1. of the Commission’s Guidelines (supra 51).

53 It applies since the season 2006/2007, starting with 4, then 6 home-grown players.

54 See England and France although in Europe the highest investments are even done in France (see study of the European Commission (supra 2)).

55 E.g. the well known talent academy of Ajax Amsterdam, so to become Ajax a very successful team with many international victories.

56 See pt. 3.2.1. and in particular paras. 51 and 55 of the Commission’s Guidelines (supra 51).

57 See Mestmäcker/Schweitzer, §13, pt. 59 (supra 50).

58 See pt. 3.4. of the Commission’s Guidelines (supra 51) with details regarding consumer qualities.

benefit of which a fair share is granted to the clubs by the “home-grown player rule”.

The education, the training and thus the promotion of youngsters is done by the clubs and by their investment. That means, in fact, the clubs do pay for it<sup>59</sup> and it is actually them paying for the supposed benefit - the improvement of the quality. That means that in the end the situation for those clubs promoting youngsters is the same as before the introduction of the “home-grown player rule”.

Neither the viewers will possibly receive a fair share of the supposed efficiency gains. At best a share in form of a “match of better quality” could be considered. However, it is rather an illusion that the rule will lead to an increase in the quality and thus to an increase of the entertainment of football matches.

Thus, the rule is disadvantageous with its negative effects without producing effective benefits which the clubs and the viewers would receive their fair share of. Moreover, taking into consideration the rule’s negative effects, the restriction of competition and also because of demographic and social factors it is thus to the detriment of the clubs concerned<sup>60</sup>. They cannot enjoy the supposed benefits at all. And those (few) clubs, persistently uninvolved in the promotion of youngsters and “buying-in” their teams can still continue with this practice (though with a smaller size of their squad).

Pursuant to what is said above, the rule does not grant a fair share of efficiency gains of the restrictive rule to the clubs.

In addition, the efficiency gains are vague and uncertain and the fact that the rule might produce some positive effects with regard to a small group of consumers whereas the majority does not profit and thus does not receive a fair share of the supposed benefits, it is eventually not sufficient to fulfil the second condition of Article 81(3).

For the sake of completeness, the third and fourth conditions shall be tested briefly. But in practice there would be no need to do so as the four conditions must be fulfilled cumulatively.

c) The rule may not impose restrictions which are not indispensable to the attainment of these efficiencies created by the rule in question.

This condition is fulfilled if, first, the restrictive rule as such is reasonably necessary in order to achieve the benefits, and if, secondly, the individual restriction of competition is also reasonably necessary for the attainment of the efficiencies<sup>61</sup>.

As this condition refers to the efficiency gains (like the second condition) it is not fulfilled resulting from what was said above in point b).

But even supposed the second condition was fulfilled and there was a fair share of the benefits neither the “home-grown player rule” is necessary in order to achieve the benefits nor are the individual restrictions of competition reasonably necessary for the attainment of the benefits.

The first prerequisite of the third condition requires that the benefits be specific to the “home-grown player rule” and that there are no other economically practicable and less restrictive means to attain the benefits given.

As already described above<sup>62</sup> it is not evident why only the rule in question should be able to achieve the benefits, considering in particular, that most clubs promoted youngsters without such a rule. In addition, there are possible and better alternatives given which are economically practicable and less restrictive.

Thus, the rule would fail the test of the first prerequisite.

From this point of view the second prerequisite of the third condition cannot be fulfilled as the individual restriction cannot be reasonably necessary.

Consequently, the third condition would not be fulfilled either.

d) The fourth condition requests that the “home-grown player rule” may not offer the possibility of eliminating competition in respect of a substantial part of the products in question.

This condition would be fulfilled as there would not be any danger of a monopolisation.

This view is supported by the argument of the “specificity of sports”<sup>63</sup>. As football can only function when there are real competitors and as a monopolist would destroy the game and the interest in football the sport and equally the monopolist would be destroyed. Sport is not able to “live and function” within a monopoly or oligopoly situation.

e) In that respect, the conditions of Article 81(3) are not met and the “home-grown player rule” cannot be exempted.

### III. Article 82 EC

There could be a collective dominance within the meaning of Article 82 EC at present.

The expression “more undertakings” in Article 82 means that a dominant position may be held by one or more economic operators legally independent of each other provided that from an economic point of view they present themselves or act together on a particular market as a collective entity<sup>64</sup>. In order to find a collective dominance three cumulative conditions must be met: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy<sup>65</sup>.

In the present case the staff supply market of professional football players is the relevant market<sup>66</sup> affected by the rule in question where the clubs on the one hand represent the demand side and on the other hand together with the players they are the suppliers. As found above the UEFA constitutes an association of associations of undertakings (the clubs)<sup>67</sup> the UEFA can be regarded as acting on behalf of the football clubs. The decision, the “home-grown player rule”<sup>68</sup>, is binding for the national associations, the members of the UEFA, and thus for the clubs as far as they are possibly concerned with the Champions League. Those subject to the rule are linked in a durable manner insofar as to the acceptance of the rule by all participants envisaged whereas a break of the rules is sanctioned by exclusion and the other actors (on the supply side) cannot do but abide to the practice exercised.

Having regard to the three conditions set out above such a situation characterises a collective dominant position for clubs on the staff supply market since through the rules to which they adhere the clubs lay down the conditions under which the professional football players are demanded.

The fact that the UEFA is not itself an economic operator on the relevant market and that its involvement ceases in a rule-making activity is of no relevance regarding the application of Article 82 since the UEFA emanating from the associations and the clubs operates on this market through its members. Moreover, considering the supervisory power UEFA exercises on the European football it seems rather unrealistic to claim that UEFA does not hold a collective dominant position on the relevant market in question in the absence of being an economic actor on that market<sup>69</sup>.

As the rule in question is not obligatory to all but only to those clubs envisaging the Champions League comprising all potential candidates and not only the actual clubs participating. Considering the quantity

59 Even though in some Member States the national associations do participate in the training of youngsters the “main” education is done and financed by the clubs which makes sense as only in the clubs players can play and gain experience.

60 There is even a double disadvantage, the restriction and no benefits.

61 See pt. 3.3. of the Commission’s Guidelines (supra 51).

62 See above pts. 1(6)(c)i) and ii).

63 See above pt. 1(6)a), in particular because of the so-called “interdependence”.

64 Joined case C-395/96 P and 396/96 P, *Companie maritime belge transports and others v Commission*, [2000] ECR I-1365, pts. 34, 36.

65 Case T-193/02, *Piau v Commission*, [2005] ECR II-209, pt. 111 (w.m. references).

66 See above pt. 1(4)a).

67 See above pt. 1(2)a).

68 See above pt. 1(2)b), the rule is to be considered a decision.

69 *Piau*, pts. 115 and 116 (supra 65).

of those clubs and players concerned it could be that a collective dominant position is not given since this number probably represents less than 50% of the total of the relevant market in question. However, it seems more reasonable to evaluate and define the market share by its economic factors involved, like players' salaries, transfer payments and annual payroll costs of the clubs concerned. Putting these economic factor of the clubs concerned into relation to those not being concerned the situation must be appraised in a different way and having regard to this the market share will far exceed 50%<sup>70</sup>.

Ultimately, an abuse is given because of the partial market foreclosure and the regional market sharing of supply resources and the subsequent quantitative restriction on access thereto constituting an anti-competitive restraint.

In accordance with the findings regarding Article 81 (3) EC<sup>71</sup> a justification cannot be considered.

Consequently, the "home-grown player rule" infringes Article 82 as well.

#### IV Article 39 EC

Article 39(1) guarantees the right of free movement of workers<sup>72</sup> by abolishing inter alia in its paragraph 2 any - direct and indirect - discrimination based on nationality. This right is of central importance has been emphasised repeatedly by the ECJ.

As the Commission has correctly stated in its communication<sup>73</sup> on the "home-grown player rule", the rule does explicitly not relate to the nationality, thus a direct discrimination on grounds of nationality can be ruled out. However, the Commission also says that the rule might lead to an indirect discrimination on grounds of nationality a potential risk which cannot be discounted.

In general, indirect discrimination on the basis of nationality is given when a condition of eligibility for a benefit is more easily satisfied by national than by non-national workers.

At first glance, the rule in question seems to be neutral in that respect. It lays down the conditions of a eligible squad and defines the different players' categories and which criteria shall be met in order for a player to fall within a certain category.

However, this view is to careless with regard to the details given the fact that places 18 - 25 are reserved for players of the category<sup>74</sup> "locally trained". As set out above<sup>75</sup> this promotion and training in order to set up "locally trained players" leads to a regional foreclosure with the result that nationals of that Member State where the club concerned is seated are more likely to be trained and promoted than non-nationals. To make things worse the Member States and the national associations have set up rules concerning the possible recruitment of youngsters restricting the maximum range<sup>76</sup> and in some cases even restricted to nationals<sup>77</sup>.

Hence, stipulating the eligibility condition for to be listed on places 18 - 25 is to be "locally trained" this requirement relates to the place of education (the training)<sup>78</sup>. Eventually, the condition "locally" relates to the region where the

clubs have their seat and is therefore a condition referring the regional origin as well as to the place of education, a condition which can be more easily satisfied by nationals.

Having said so, such a condition is a classical form of an indirect discrimination on grounds of nationality falling foul of Article 39 EC.

#### V Summary

The "home-grown player rule" is a rule falling within the scope of Article 81(1) EC.

The infringement of the said Article is given because the "home-grown player rule" is not proportionate and fails eventually the Wouters test.

The rule is neither able to fulfil the conditions of Article 81(3) EC. Apart from the doubts whether the rule produces efficiency gains, and even supposing it did so, there is nevertheless no fair share of the supposed benefits granted to the clubs. Therefore, the possible positive effects of the rule cannot outweigh its restrictive effects on competition.

However, it must also be said that the UEFA certainly pursues legitimate objectives which are very important for the football and its future. The measures, nevertheless, installed in its pursuit are ultimately disproportionate, and it seems that it becomes again "à la mode" to protect nationals as can also be seen in FIFA's "6+5" rule. Instead of focusing on the origin the UEFA would do better to concentrate on the future and thus on the promotion of youngsters as well as on those clubs/associations being seriously engaged in the promotion, independent from the origin. There is already a focus on the regions by the national associations and another rule reinforcing that focus bears more disadvantages than benefits. The article presents alternatives focusing on the promotion of youngsters and offering support for doing so, also financially. Such an approach would be to the benefit of all participants involved - the youngsters, the clubs (in particular the financially less potent clubs) as well as the national associations and last but not least the future of European football.

After all, the "home-grown player rule" infringes Article 81(1) EC and it cannot be declared applicable under Article 81(3) EC. Equally, it falls foul of Articles 82 EC and 39 EC.

<sup>70</sup> Already the clubs concerned of the „Big Leagues“ (UK, Spain, France, Germany, Italy, Portugal) claim from an economic view a major part of the staff supply market of professional players.

<sup>71</sup> See pt. II) above.

<sup>72</sup> There is no doubt where the players or youngsters fall within the scope of Article 39.

<sup>73</sup> See supra 2.

<sup>74</sup> See pt. 17.08 of the Champions League Regulation.

<sup>75</sup> See pt. I)4) above.

<sup>76</sup> In general it is stipulated that the youngsters must be resident in the region of the clubs.

<sup>77</sup> For more details, see the report mentioned in the Commissions communication (supra 2); see also pt. I)6)c) above.

<sup>78</sup> Case C-258/04, Office nationale de l'emploi v Ioannidis, [2005] ECR I-8275.

## SPORTS LAW: PROSPECTS OF DEVELOPMENT THROUGH COOPERATION

In Minsk, on 15 June 2009 the European Commission's DG Enlargement organized – within the framework of the Technical Assistance Information Exchange (TAIEX) instrument - a workshop on the above-mentioned subject.

The workshop was organized in cooperation with the National Olympic Committee and the National Centre of Legislation and Legal Research of the Republic of Belarus. A Dutch/English team of international and European sports law experts contributed presentations to this event: "The European Union and Sport: Law and Policy" by Dr Robert Siekmann, Director of the ASSER International Sports Law Centre, The Hague, who also co-chaired the Workshop; "Community law and Sport" by Prof. Dr Richard Parrish, Director of the Centre for Sports Law Research, Edge Hill University, and Samuli Miettinen, University of Salford, and "Contracts, Transfers, Players' Agents" by Roberto Branco Martins, University of Amsterdam.

# A Case Study before the Court of Arbitration for Sport\*

by Gregory Ioannidis\*\*

The status and transfer of football players has been a central issue and at the core of judicial intervention in important cases over a period of forty years. It would be pointless to mention the pioneer George Eastham and his successful application on the restraint of trade argument, back in 1964; or Jean-Marc Bosman and his desire and successful attempt to transform European sport in 1995. This article has not been written with an aim to analyse issues of commodification or commercialisation, but rather to test the application of the regulations in question by national federations and whether this application, violates European law.

This article concentrates on the author's interpretation of the current regulatory framework and it does not attempt to challenge the FIFA Regulations [the outcome would find the author in agreement with the intention of FIFA]. It rather attempts to challenge the application of the said Regulations by national federations and their attempt to circumvent specific decisions of the European Court of Justice and the Court of Arbitration for Sport. It raises issues of competition law, employment law, freedom of movement and issues of governance and regulation.

Before the legal analysis can be produced and an insight into the closing speech of the Appellant's counsel could be given, a factual analysis is imperative, as the reader will be able to appreciate the different dynamics in the application of the current regulatory framework. What follows is an insight into the Appellant's closing speech written for the hearing of this appeal.

## The Facts

The Appellant's football player Mr Roman Wallner agreed terms with the Appellant and signed a contract of employment on January 28, 2008. Mr Wallner joined the Appellant on a free transfer, after completing his contractual responsibilities with FALKIRK FC, a club associated with the Scottish FA and participating in the Scottish Premier League<sup>1</sup>. Upon such agreement Mr Wallner was selected to participate in the "Super League" [The Hellenic Premier League, thereafter the "Super League"] game between the Appellant and Respondent 2, on February 3, 2008. The Appellant won the game by the score of 1-0, thereby obtaining the three points according to the Laws of the Game of FIFA and Respondent 1. At this point, it is important to state that Respondent 2 had knowledge of the participation [and its particular circumstances] of Mr Wallner in the game that gave rise to the arbitration, as the list with the line up of the players of the two teams, was produced approximately 30 minutes before the start of the game.

Respondent 2 [Olympiakos FC] filed an Objection, 3 days after the end of the game, before the Disciplinary Committee of the Super League, against an alleged invalid participation of Mr Wallner in the game between the Appellant and Respondent 2 and Pursuant to Article 5.3 on the Status and Transfer of Players, which states:

*Players may be registered with a maximum of three clubs during one season. During this period, the player is only eligible to play official matches for two clubs. As an exception to this rule, a player moving between two clubs belonging to associations with overlapping seasons (i.e. start of the season in summer/autumn as opposed to winter/spring) may be eligible to play in official matches for a third club during the relevant season, provided he has fully complied with his contractual obligations towards his previous clubs. Equally, the provisions relating to the registration periods (article 6) as well as to the minimum length of a contract (article 18 paragraph 2) must be respected.*

Further, Respondent 2 requested that the Appeal be allowed and a sanction to be imposed on the Appellant, Pursuant to Rule 23.11 of the Regulation of Professional Matches of Respondent 1. The Disciplinary Committee of the Super League allowed the Appeal, annulled the result and ordered that the game be played again.

Both teams [the Appellant and Respondent 2] appealed against this decision, before the HFFAC<sup>2</sup>. The HFFAC allowed the appeal by Respondent 2 and dismissed the Appellant's own appeal. As a result, it forfeited the game in favour of Respondent 2 and deducted a further point from the Appellant and consequently, ordered the Super League to re-adjust the Standings Table, according to its decision.

The HFFAC announced its decision on March 5, 2008 and notified the Appellant the following day. No reasons were given for such a decision<sup>3</sup>. The Appellant appealed against the Decision, before the Court of Arbitration for Sport.

*What follows is the analysis of the regulatory framework, as it appeared in the closing speech of Counsel for the Appellant. It must be stated, here, that this analysis was not produced before the Panel in this case, as the Appellant decided to withdraw the Appeal, just a few days before the hearing and contrary to Counsel's Opinion.*

## Closing Speech - Court of Arbitration for Sport Lausanne - July 2008

*CAS 2008/A/1525 Apollon Kalamarias FC v Hellenic Football Federation & Olympiakos FC*

Mr President, Members of the Panel,

This case has given us the opportunity to examine and analyse important issues, currently at the core of the development of the study of sports law. Issues that, no doubt, give rise to different interpretations of the current regulatory framework and suggest that further discussions are needed, but most importantly, changes are imminent. The Court has a unique opportunity to interpret the legislator's intention and to effect these changes.

The undisputed and material facts of the present case have identified one important element: that the current regulatory framework needs further interpretation and clarification, so any additional legal challenges could be prevented. We would aim, in this analysis, to assist the Court with the correct interpretation and application of the Regulations currently in force.

The material facts of the case have also showed that the body

\* *Apollon Kalamarias FC v Hellenic Football Federation & Olympiakos FC CAS 2008/A/1525.*

\*\* Dr. Gregory Ioannidis is an Advocate and a Lecturer in Sports Law at the University of Buckingham School of Law. He represented and acted as Counsel for the Appellant in the above named case, which was withdrawn by the Appellant a few days before the final hearing.

1 Mr Wallner had also played for Hamilton Academicals FC, on a loan spell, in December 2007 and for three weeks only. Thus, for the purposes of

the FIFA Regulations on the Status and Transfer of Players, he played for two teams in the same national championship and in the same season. FIFA Regulations do not differentiate between the original agreement of club and player and the loan agreement.

2 Hellenic Football Federation Appeals Committee.

3 The reasons for the Decision were produced in April 2008, approximately one month after the actual date of the Decision and when the Appellant had already appealed the Decision before the Court of Arbitration for Sport.

responsible for observing and applying the current regulatory framework, in our case, namely the HFF<sup>4</sup>, has failed miserably and without compelling justification to interpret, apply and follow the rules currently in force. We showed, above the established standard of proof that the responsibility lies with the HFF. Sadly, the HFF not only breached and failed to apply important regulations, but its inability and sheer incompetence to properly apply the duty of good faith that owes to all clubs in the Hellenic championship, seriously jeopardised the integrity, transparency and independence of the championship.

We also showed that as a result of the HFF's inability to properly investigate and examine the regulations currently in force, its Appeals Committee reached an erroneous decision. Despite the strict instruction from FIFA, that certain regulations must be incorporated into the national framework and applied without any modification, the HFF ignored those instructions and its Appeals Committee misdirected itself by ignoring the binding nature of FIFA Regulations on the Status and Transfer of Players. As a result, this Appeal became inevitable, as the Appellant was deprived of his right to have a fair and proper hearing, and was forced into producing its own investigation and analysing the regulations currently in force. But the omissions and errors at first instance continued further, as the examination of the case showed.

The HFFAC not only failed in its duty to properly apply the FIFA Regulations, but it also ignored the CAS and the European Court of Justice's past decisions. Evidence to this effect, was the reasoned decision rendered by the HFFAC.

It is my respectful submission that the factual analysis clearly indicated to us, that there is a need to follow the established CAS and European Court of Justice Decisions, which provide useful guidance in this difficult and complicated legal analysis. To do otherwise, would mean an unjustified departure from the precepts of the European legal framework, which so clearly has identified and explained the intention of the Treaty of Rome: that workers are free to move within the EU without any restrictions towards providing services and that no discrimination would be tolerated, in terms of nationality. Sport is not immune from these binding decisions and the sporting governing bodies cannot achieve immunisation from judicial intervention: in so far as sport constitutes an economic activity and established European Union law says it does<sup>5</sup>, sport must follow the Treaty of Rome. And this Court has an obligation to consider, follow and apply these principles.

Before, however, we reach a point where we need to apply the legal principles of the established European Court of Justice Jurisprudence, it is first of all necessary to examine the intention of the legislator or creator of the current regulatory framework. In addition, we must, very carefully, literally and purposefully, try to discover the actual aim pursued.

As it has been argued by the parties in these proceedings and certainly by FIFA, the aim pursued is the "contractual stability" between clubs and players and the "protection of the sporting integrity" of national and international competitions. We couldn't agree more. But we fail to see how Mr Wallner's professional and contractual activity with the Appellant would "harm" the sporting integrity of a different national championship or "destabilise" the contractual stability of FALKIRCK FC or HAMILTON ACADEMICAL FC!!! And this is true if one considers that both Mr Wallner and FALKIRCK FC have terminated their contractual obligations by agreement!

In addition, Respondent 2 in particular, appears to agree with our interpretation of the current FIFA Regulations, when it states that "Art. 5(3) of the FIFA Regulations - particularly taken by itself - at first sight may appear to restrict the contractual freedom of clubs and players to freely organise their labour relationship."<sup>6</sup> It further states that "The objectives that this provision intends to protect and safeguard are consequently justifying a possible restriction of contractual freedom between the parties."<sup>7</sup> With respect, this is not so. This interpretation falls foul of the CAS and the European Court of Justice's Jurisprudence and violates the very meaning of the Provisions of the Treaty of Rome. I would, respectfully, aim to substantiate this later on in my submission.<sup>8</sup>

## The Current FIFA Regulations on the Status and Transfer of Players

It is my respectful submission that the application of Rule 5.3 of the FIFA Regulations on the Status and Transfer of Players, in our case, has gone beyond the aim pursued. It is not clear and it does not lead to the desired result. But, with respect, do not take my word for it. Just follow what FIFA itself and this Court have said about it.

Previous CAS jurisprudence has tried to interpret and analyse Provision 5.3 of the FIFA Rules on the Status and Transfer of Players. Indeed the CAS Panel in the case of *Cork City FC v FIFA [Farrelly] CAS 2007/A/1271*, bottom of page 3, cites the interpretation of the Single Judge of FIFA's Players' Status Committee. The Single Judge attempted to produce the rationale of Provision 5.3 by stating:

*"This provision was necessary to maintain the contractual stability in football and to preclude a distortion of championship competition between clubs."*

## Reasons for the creation of FIFA Rule 5.4 on the Status and Transfer of Players

This is the interpretation given by FIFA's own judiciary body and explains the intention of the legislator. The creation for this Provision is the prevention of the distortion of CHAMPIONSHIP COMPETITION BETWEEN CLUBS. It clearly identifies ONE championship between clubs. This is the reason, following the Decision in the *Cork case*, as to why FIFA established Provision 5.4, with its amendment of January 1, 2008: To prevent distortion of competition IN THE SAME CHAMPIONSHIP. It fits perfectly well into the draftsman's pattern and intention for the protection of the "sporting integrity" of the competition as it is clearly explained in Provision 5.4 of FIFA Rules on the Status and Transfer of Players.

FIFA itself has also acknowledged this urgent need for legal clarity and certainty. Following the *Cork case*, FIFA sent a circular letter to all its members [including the Hellenic Football Federation] asking them to incorporate the new additions and amendments into their national regulatory framework. In its Circular Letter No. 1130 of 20 December 2007, FIFA states: "*The other additions and amendments to the regulations largely relate to the jurisprudence of the Players' Status Committee and its single judge and Dispute Resolution Chamber. The revised provisions in the text are intended to more precisely reflect the jurisprudence handed down by the relevant bodies and thus improve legal certainty and clarity. Therefore, we particularly refer you to article 5 paragraphs 3 and 4 of the regulations (registration and eligibility for official matches during the season)*". Emphasis added. It goes on to state on the second page of the same letter: "*We believe that the additions and amendments to the regulations will contribute to the positive further development of the legal framework governing players' status and transfers, particularly because they take into account practice in the field and are largely based on the jurisprudence of the relevant bodies.*"

One additional reason that Provision 5.4 came into existence, is the acknowledgement by FIFA that Provision 5.3 may create confusion, or indeed, restrict the ability of professional football players to organise their contractual relationships. The CAS Panel in the *Cork case*, page 15, para 75 states the same concern:

*"The Panel agrees with the Appellant that the rule contained in Article 5 paragraph 3 of the Regulations may result in a restriction of the ability of football clubs and players to organise their contractual relationships."*

It is respectfully submitted that this is not what FIFA envisaged or indeed tried to achieve with the creation of Article 5.3. The said regu-

4 Hellenic Football Federation.

5 See *Walrave and Koch v Association Union Cycliste Internationale [1974] ECR 1405; [1975] 1 CMLR 320*, which states that sport does not fall outside the reach of EU law because it constitutes an economic activity, and *Dona v Montero, Case 13/76 [1976] ECR 1333, [1976] 2 CMLR 578*, which states that

"Community law applies to the rules of sporting associations", at 1341 (17-18).

6 At page 4 of Respondent 2 Response to the Appellant's Appeal Brief, dated 5 May 2008.

7 As footnote 2 above, at page 5.

8 See below, under the heading: "European law, freedom of movement and proportionality."

lation has been created and enacted towards the achievement of contractual stability and the protection of the sporting integrity which was in danger as a result of the situation that arose with the Anelka doctrine. This is one of the reasons that FIFA enacted Article 5.4, that is, in order to make 5.3 more specific in relation to players that attempt to “jump” contracts within the same national championship. This regulation has as an aim to fulfil two conditions:

- i to protect clubs from players who attempt to “jump” contracts, within the same season;
- ii to protect the sporting integrity of the national championship, should players decide to change more than two clubs in the same championship in any one season.

It is respectfully submitted that, in our case, Mr Wallner fulfilled both of these conditions:

- i his previous contract was terminated by mutual agreement; he only played for two clubs in the SAME national championship.

Thereby, Mr Wallner fulfilled and followed the intention of FIFA legislators.

The confusion created by the application of Regulation 5.3 cannot be overlooked, nor can it be ignored in a case where justice has been denied. It is, no doubt, of immense importance for the Panel to acknowledge this confusion and take this opportunity to follow once again the statement produced by the CAS Panel in the *Cork case*, page 16 para 80, where it clearly identified a problem with the interpretation of Regulation 5.3. The Panel stated that:

“...the very existence of these proceedings is partly based on the lack of transparency of the rules applicable to enforcement of Article 5 para 3 of the regulations and the impossibility for the Appellant to establish such rules with certainty...”

Once again, it is respectfully submitted that this is the reason for the creation of Regulation 5.4 by FIFA. The legislator recognises the existence of a problem of interpretation and decides to create Regulation 5.4 in order to provide professional clubs and players with the predictability, certainty and transparency required. This intention has been identified in FIFA’s Circular Letter No 1130 above.

#### **Application and Interpretation of FIFA Rule 5.4 on the Status and Transfer of Players**

If one considers the above arguments, it would arrive at the safe conclusion that Regulation 5.4 comes into existence for the clarification of the uncertainty produced by Regulation 5.3. As already explained, Regulation 5.4 makes it clear that the prohibition FIFA is trying to establish, regarding the participation of players in competitions, concerns the *same national championship* and FIFA’s intention is clearly demonstrated in Regulation 5.4. And it is correct to assume that allowing a player to play for 3 clubs IN THE SAME NATIONAL CHAMPIONSHIP, would affect the contractual stability of players and clubs and it would destroy the sporting integrity of the competition. This interpretation can further be qualified by Article 6, paragraph 1 [TAB 2, page 9 Appellant’s Appeal Brief] which states: “*Players may only be registered during one of the two annual registration periods fixed by the relevant association.*” So, provided that a player has registered during one of the two registration periods, i.e. August or January, the player can play for a maximum of two clubs in the SAME NATIONAL CHAMPIONSHIP. The prohibition, therefore, contained in Regulation 5.4 makes it impossible for a player to play for more than two clubs in the same national championship, even where a loan has taken place. This is exactly the kind of anomaly FIFA is trying to prevent by creating Regulation 5.4. If a player were allowed to participate in official matches, in the same national championship, for more than two clubs, the sporting integrity of the competition would have suffered, and it would have made mockery of the results between the different clubs for which the said player would have played.

The Respondents, therefore, could not argue that the above is subject to stricter individual competition regulations of member associations, for two reasons: (1) nowhere in the HFF’s Regulations is there a provision adopting Regulation 5.4 of the FIFA Regulations on the

Status and Transfer of Players; (2) Article 1, paragraph 3a [Tab 2, page 6, Appellant’s Appeal Brief], of the FIFA Regulations on the Status and Transfer of Players clearly states: “*The following provisions are binding at national level and must be included without modification in the association’s regulations: 2-8, 10, 11, 18 and 18bis.*” This clearly illustrates that Regulation 5.4 should have been included in the Regulations of the Hellenic Football Federation and it should have been followed. Sadly, the Appellant finds itself in a position where it has to claim relief, reject the interpretation given by the HFFAC, regarding the application of Regulation 5.4 and claim that its decision was erroneous. Why is this so?

Amongst other things, I would respectfully invite the Panel to turn to the HFFAC’s decision, at page 12 and consider the Appeal Committee’s interpretation, which states:

“*Finally, rejected as actually ungrounded should also be considered the claim of APOLLO KALAMARIA F.C. on the restriction of the validity of Article 5, par. 4 of RSTP in the Greek championship, as the raised provision concerns the participation of a football player in official matches played by two or more teams participating in the Greek championship. It should be rejected because the said provision does not differentiate between whether the clubs for which the player played in official matches belong to the same or different Federation and, as a result, the same or different country. In any case, it is a provision which has been in effect since 3.7.2007 and provides regulation stricter than the FIFA provision included in Article 5, par. 4 of the Regulations on the Status and Transfer of Players (RSTP), which was adduced in October 2007 and came into effect on 1.1.2008, according to which the football player should not play for more than two clubs participating in the same national championship or cup during the same period. This regulation by no means is a positive law with immediate implementation, but a FIFA guideline to its federations-members, which can either adopt it and include it in the relevant Regulation after the procedures defined by their articles of association (i.e., vote in the general assembly, etc.) or establish stricter regulations, such as that of par. 4, Article 5 of RSTP.*”

This interpretation, with respect, not only is contradictory and erroneous, but it also defies belief! It shows that either the members of the HFFAC were not informed about the binding nature of Regulation 5.4, or if they did, they ignored it for reasons that they only know! How could someone reach the conclusion that Regulation 5.4 is not binding, when FIFA itself says it is! How could 5.3 be “a positive law” but 5.4 only “a guideline”!!! Why did the HFFAC ignore such an important provision? Why did the HFF ignore the instructions of FIFA? Why did the HFF not incorporate 5.4 in its regulatory framework?

Furthermore, the above erroneous interpretation or omission to interpret the current regulatory framework, is not the only one re-rendered by the HFFAC. The first point I wish to make relates to the application of a sanction in relation to the ineligibility of a player to play in official matches. The HFFAC’s decision is based on the Hellenic version of Regulation 5.3 of the FIFA RSTP. The said regulation, as already explained, does not deal with any sanctions whatsoever. It simply states that a player is not allowed to play official matches for more than two clubs. The question that arises, therefore, is on what grounds did the HFFAC base its decision to sanction the Appellant? Although FIFA does acknowledge that its Provision 5.4 on the Status and Transfer of Players is subject to stricter national individual rules, the HFFAC did not decide according to Provision 5.4, but according to Provision 5.3. It follows therefore, that the application of the sanction is erroneous and also makes the provision imperfect [*lex imperfecta*].

In addition, the above argument must be considered in conjunction with Articles 18 and 34 of the Football Matches Regulations of the HFF, located at TAB 3, of the Appellant’s Appeal Brief. The Respondents’ arguments centre on the allegation that the Appellant demonstrated culpability in relation to the participation of his player. They also allege that the Appellant demonstrated intention or negligence towards allowing his player to participate in the competition. It

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is questionable, however, that the Respondents or indeed the HFFAC with its decision, say absolutely nothing about the applicability of Article 34 paragraph 1 of the Football Matches Regulations of the HFF! This Provision, located at TAB 3, page 57, of the Appellant's Appeal Brief states:

*"Until the HFF revokes the player status card issued by it, the player may continue to play regularly, unless the issue of the card is due to a fraudulent act of his club or the player himself."* Emphasis added.

No such fraudulent acts were raised by the Respondents at first instance, nor were the HFFAC considered the above provision, despite the undisputed fact that the Appellant specifically raised this argument at first instance. We are at pains to comprehend as to why the HFFAC ignored the said provision, as if it didn't exist. On the contrary, the appealed decision by using erroneous reasoning, on one hand, considers that the violation of Regulation 5.3 of RSTP is a given fact, and on the other hand, examines the question as to whether the Appellant is liable for breach of Regulation 5.3. It raises concerns the fact that the appealed decision doesn't mention anything about the constitutional provision of art.34 of the Professional Matches Regulations of the HFF. What is the meaning of searching for provisions outside the Professional Matches Regulations or indeed ignore FIFA Regulation 5.4, with the view to build a case of irregular participation of the player on this disputed match, when, at the same time, the competent special Regulations, namely 34.1.a and 18.1 [TAB 3, pages 57 and 26 respectively of the Appellant's Appeal Brief] that describe the regular or irregular participation of players in matches, clearly state that the Appellant legally and validly used its player during the match in question?

In addition, if FIFA Regulation 5.3 could be read in conjunction with art. 34.1 of the Professional Matches Regulations of the HFF, the result would be absurd and a mischief would be created. FIFA Regulation 5.3 concerns the status and transfer of players whereas art. 34.1 concerns the legality of a player's participation in a given competition. Why is therefore article 34.1 currently in force if it is in direct conflict with FIFA Regulation 5.3? As it can be seen from the undisputed and material facts of the case in hand, art 34.1 authorises the player to play in official matches as long as the precepts of art. 18.1 have been observed! Talking about confusion, lack of clarity and absence of certainty!

### Case Law For Interpretation & Confusion of the Rules

It is my submission that certain regulations create confusion as to their application in practise and the analysis so far illustrates the argument. Undoubtedly, the real victims in the instance where there is confusion in the regulations are the clubs and the players. Both clubs and the players must be able to comprehend the regulatory framework and understand their responsibilities before they enter into contractual relationships. The regulations in force must make clear what the normative field is and must emanate from proper constitutional bodies and ways.

However, this is not always the case. It has been argued in the past that rules of sporting governing bodies, especially at national level, tend to resemble the architecture of an ancient building: a wing added here, a loft there, a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole<sup>9</sup>.

Every Tribunal obviously must interpret these regulations according to the surrounding circumstances of the case in question, the intention of the legislator and of course the intention of the party who drafted it. To this extent, Lord Denning's judgement in the English Court of Appeal case of *Reel v Holder [1981]*<sup>10</sup> page 5 provides useful guidance. The former Master of the Rolls argues:

*"One can argue to and fro on the interpretation of these rules. The people who drew them up could not possibly have envisaged all the problems which would have to be coped with in the future in regard to them. The courts have to reconcile all the various differences as best they can."*

This is also true in the case where the rules create conflict. The rules

must be interpreted purposively and not pedantically. In the case of a conflict or injustice the rules must be interpreted "*contra preferentem*" in favour of the aggrieved party or the party who has suffered an injustice.

Following the above arguments, it is my contention that we must follow the intention of the legislator and its true meaning. The SGBs responsible for decisions based on the interpretation of the regulations, should not be allowed to re-write the rules so they could be given the opportunity to circumvent, the otherwise confusing provision. They should not be allowed, as is the case with the HFF, to ignore regulations that they have been established in order to produce certainty and clarification. This is certainly the case with the HFFAC, who so blatantly ignored Regulations 5.4, 10.2, 1.3.a, 6 and 7 of the FIFA Regulations on the Status and Transfer of Players. Fortunately for the aggrieved parties, the CAS has been operating as a kind of "watchdog" and has sent the message that circumvention or avoidance of the regulations would not be TOLERATED! As the CAS Panel notes in the case of *Baxter v IOC CAS 2004/0/645*, p11, para 3.31:

*"The Panel is unable to rewrite or to ignore these rules unless they were so overtly wrong that they would run counter to every principle of fairness in sport."*

This above authority, therefore, clearly suggests that Regulation 5.4 on the Status and Transfer of Players cannot be ignored or avoided. It is a provision that has been established for certainty and clarity and it is a provision that has a binding effect at national level.

Furthermore, it is important for those involved in the organisation of sport and are responsible for decision making in disciplinary matters, to establish regulations that can be understood by all those involved in a particular sport. It is my respectful submission that this is a unique opportunity for the Court to interpret the intention of the legislator and remedy the injustice occurred at first instance, by the inability and sheer incompetence of the HFF to properly investigate and adjudicate upon the matter. The jurisprudence of the CAS on this point is extremely helpful and suggests that it is important for the sporting community that the SGB establish clear and concise rules. As the CAS Panel notes in the case of *USOC v IOC & IAAF 2004/Al 725*, p.23, para 73:

*"The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which the rules apply."*

In the same case, the Panel also cites a passage from the case of *Quigley [Arbitration CAS 94/129, USA Shooting and Quigley v ISU]* p.24, para 74. The Panel states:

*"...the rule makers and the rule appliers must begin by being strict with themselves. Regulations that affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders."*

### European Law, Freedom of Movement and Proportionality

It can be argued that the transfer windows, as they operate in European football, would fail the test of proportionality. The reason being, that they are too restrictive. One would argue that they essentially favour the larger richer clubs who can afford to create large squads and spend enormous sums on transfers in a very small period of time. Eventually,

<sup>9</sup> Michael Beloff QC, "Drugs, Laws and Versapaks", in "Drugs, Doping and Sport", Cavendish, 2000, p.42. <sup>10</sup> [1981] 3 All ER 321.

I respectfully submit, such rules would constitute an invalid restraint of trade.

Transfer windows could be the reason of the anomalies and the tensions created in the world of football. I respectfully submit that the introduction of transfer windows was not part of the changes that the European Commission was seeking.

The above arguments were considered by FIFA, in its subsequent discussions with the European Commission. FIFA has understood the argument that *"In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify exemption from the application of EU law"*, as the European Commission explains in its *White Paper on Sport* at p.14. The European Commission, in the same paper, rejects *"the notion of 'purely sporting rules' as irrelevant for the question of the applicability of EU competition rules to the sport sector"*, at p.15, and in addition acknowledges that *"At the same time, any rule on the transfer of players must respect EU law (competition provisions and rules on the free movement of workers)"*, at p.16.

As a consequence, FIFA has decided to clarify Provision 5.3 and established Provision 5.4. Its application [5.4] in our case clearly prevents issues of restraint of trade, free movement of workers and restriction on the worker's ability to provide services. Participation for two clubs in the same championship and only for two clubs in the same championship, can justify the aim pursued and it can certainly observe the balance between the worker's rights as they derive from the Treaty of Rome and established case law, and those rights of the competition as a whole and the protection of its integrity.

It is my respectful submission that we cannot and we should not ignore the established case law of the EU. The European Court of Justice has made it abundantly clear and on several occasions, as I will explain in a few seconds, that the Provisions of the Treaty of Rome on the freedom of workers and their ability to provide services must be followed at all times and an attempt to divert from them would not be tolerated. Eventually, the question contains a finding of fact: do the rules of FIFA on the Status and Transfer of Players have an effect on European Union territory? The case of *Walrave and Koch*<sup>11</sup> provides useful guidance. At page 6, third paragraph, down the page, the Court states:

*"Your Lordships cannot of course answer the question directly, for that would be to cross the hedge between the field of interpretation of Community law and the field of its application. But two things are, in my opinion, certain. One is that a restriction on the freedom of movement of workers, to be incompatible with Article 48, or a restriction on the freedom to provide services, to be incompatible with Article 59, need not take the form of an absolute prohibition. It is enough that it should have the effect of placing the nationals of one member-State at a disadvantage compared with those of another. The second is that such a restriction, unless it is the subject of a particular exemption or exception, is incompatible with Community law if it affects events on Community territory."*

This message is clear and as I explained above, FIFA has received the message, by creating Provision 5.4. It is important, however, to qualify the above arguments further and try to discover whether Provision 5.3 does not meet the criteria of the freedoms protected by the Treaty

11 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405; [1975] 1 CMLR 320. It was held that sport does not fall outside the reach of EU law because it constitutes an economic activity.

12 *Lehtonen and another v Fédération Royale Belge des Sociétés de Basket-ball ASBL (FRBSB) (Ligue Belge Belgische Liga ASBL, intervenier)* (Case C-176/96). It was held that those rules [transfer rules] consequently constituted an obstacle to freedom of movement for workers. The fact that the rules concerned not the employment of such players, on which there was no restriction, but the extent to which

their clubs could field them in official matches was irrelevant. In so far as participation in such matches was the essential purpose of a professional player's activity, a rule which restricted that participation obviously also restricted the chances of employment of the player concerned.

13 At page 6, paragraph 18 of the judgement the Court stated: "In those circumstances the Tribunal de Première Instance, Brussels, after allowing the BLB's application to intervene, stayed proceedings and referred the following question to the Court for a preliminary ruling: 'Are the rules of a sports federation which prohib-

of Rome and established case law and whether Provision 5.4 could meet these criteria and most importantly meet the aim pursued, which is the contractual stability and the protection of the sporting integrity of national and international competitions.

I would respectfully submit that the above arguments could be clarified by following the decision of the European Court of Justice in the case of *Lehtonen*<sup>12</sup>. This case clearly illustrates that Regulation 5.3 seriously violates the provisions of the Treaty of Rome and established case law. As the jurisprudence of the CAS suggests, this Panel, with respect, is bound to examine the facts and the law. As such, the Panel must follow the interpretation of the *Lehtonen* case, as established by the European Court of Justice. Such interpretation would also suggest that the application of Regulation 5.4, could certainly prevent any attempt to divert from the current established law. I would now seek the Panel's permission to allow me to produce the interpretation of the *Lehtonen* case, and most importantly, to apply it to the facts of our case under examination.

The *Lehtonen* case, which is very similar to the facts of the present Appeal, eventually concerned the validity of transfer rules in the Belgian Basketball League and consequently their effect on the free movement of players from and within the EU. Although the *Lehtonen* case could be distinguished on the facts, as the claim concerned eligibility of players to participate in official matches after a specified date, nevertheless, the merits of the case are identical to the Appeal before us<sup>13</sup>. In the case of *Lehtonen*, the Court had to examine whether the transfer rules produced a restriction on participation of players, restriction on employment, restriction on the freedom of movement and the ability to provide services.

In doing so, the Court followed the cases of *Bosman* and *Walrave* and clearly established first, that sport is subject to community law and that the Treaty of Rome applies to sport<sup>14</sup>. Of particular relevance to our case, are paragraphs 35 and 36 of the Court's judgement, at page 8:

35. *As to the character of the rules at issue in the main proceedings, it follows from Walrave, paragraphs 17 and 18, and Bosman, paragraphs 82 and 83, that the Community provisions on freedom of movement for persons and freedom to provide services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner. The abolition as between Member States of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.*

36. *In those circumstances, it must be stated that the Treaty, in particular Articles 6 and 48, may apply to sporting activities and to rules laid down by sports associations, such as those at issue in the main proceedings.*

It can be understood that if the sporting rules are part of community law, then it is necessary to establish whether the current transfer rules are violating any of the provisions of the Treaty of Rome. The *Lehtonen* case again proves the point and illustrates the situation. As the Court states at paragraph 49, page 10 of its judgement:

it a club from playing a player in the competition for the first time if he has been engaged after a specified date contrary to the Treaty of Rome (in particular Articles 6, 48, 85 and 86) in the case of a professional player who is a national of a Member State of the European Union, notwithstanding the sporting reasons put forward by the federations to justify those rules, namely the need to prevent distortion of the competitions?"

14 At paragraph 32 of its judgment, the Court held that: "It should be noted, as a preliminary point, that, having regard to the objectives of the Community, sport is subject to Community law in so far as it

constitutes an economic activity within the meaning of Article 2 of the EC Treaty (now, after amendment, Article 2 EC) (see Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405, paragraph 4, and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921, paragraph 73). The Court has also acknowledged that sport has considerable social importance in the Community (see *Bosman*, paragraph 106

*“49. Those rules are nevertheless liable to restrict the freedom of movement of players who wish to pursue their activity in another Member State, by preventing Belgian clubs from fielding in championship matches basketball players from other Member States where they have been engaged after a specified date. Those rules consequently constitute an obstacle to freedom of movement for workers (see, to that effect, Bosman, paragraphs 99 and 100).”*

In the following paragraph, the Court establishes the *ratio decidendi* of the case. I would respectfully invite the Panel to follow and apply this particular part of the judgement to our case, and produce relief for the Appellant. This particular part of the Court’s judgement in the *Lehtonen* case, is the cornerstone of today’s established case law on players’ transfers and it fits perfectly well into the facts of our case. It further proves that regulation 5.3, is not to be followed, as seriously violates the provisions of the Treaty of Rome, already explained earlier. The Court states at paragraph 50, page 10:

*“50. The fact that the rules in question concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a professional player’s activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned (see Bosman, paragraph 120).”*

This, I respectfully submit to the Panel, is the essence of EU law on the status and transfer of players. This is the essence and the aim that FIFA is trying to achieve with the creation of Regulation 5.4: To create contractual stability and to protect the integrity of competitions, without trying to violate the provisions of the Treaty of Rome and the established case law.

Without trying to pre-empt the Respondents’ arguments, I could presume, with respect, that they would try to argue that the above restrictions on the freedom of movement of players, are necessary in order to achieve the aim pursued. Respondent 2 has certainly produced such argument, in its letter of 5<sup>th</sup> May 2008, and stated that the lifting of such restrictions would make FIFA’s norm ineffective. With respect, I disagree and I am not the only one! The European Court of Justice, in the case of *Lehtonen*, appears to disagree too.

It is my contention that the existence of justifications for the restrictions on the freedom of movement, could not go beyond the aim pursued, which in our case is to maintain contractual stability and to protect the integrity of sporting competitions. Although I acknowledge that the restriction on the number of teams a player can play in a year may meet the objective of ensuring the regularity of the national championship and it may preclude the substantial sporting strength of one club over another in the course of the championship, nevertheless, I fail to see, with respect, how, prohibiting Mr Wallner from playing in the Hellenic championship, could destroy the contractual stability of FALKCIRK FC, notwithstanding the fact that both parties terminated their contractual relationship by mutual agreement. I also fail to see, with respect, how, prohibiting Mr Wallner from playing in the Hellenic championship, will destroy the sporting integrity of either the Hellenic championship or the Scottish championship. It is clear beyond any reasonable doubt, that such interpretation goes beyond the aim pursued by FIFA and it is also clear that 5.3 produces an erroneous result. As the Court states at paragraphs 56 and 58 of its judgement in the case of *Lehtonen*, located at TAB ,:

*“56. However, measures taken by sports federations with a view to ensuring the proper functioning of competitions may not go beyond what is necessary for achieving the aim pursued (see Bosman, paragraph 104).*

*58. At first sight, such a rule must be regarded as going beyond what is necessary to achieve the aim pursued. It does not appear from the material in the case-file that a transfer between 28 February and 31 March of a player from a federation in the European zone jeopardises the regularity of the championship more than a transfer in that period of a player from a federation not in that zone.”*

As the Court clearly explained in the *ratio decidendi* of the case, earlier, regulations that go beyond the aim pursued, would fall foul of the provisions of the Treaty of Rome, in relation to the free movement of workers and their ability to provide services. The application of Regulation 5.4 in our case, it is submitted, would prevent such violation of EU law and it would produce certainty and clarity in this area. This is the intention of FIFA and the precepts of EU law and as such they must be followed.

## Conclusion

Finally, it can be concluded that the revised FIFA transfer system must meet the requirement of proportionality. This, however, is conditional upon the strict application of the rules by the national federations and without any unnecessary diversions or departures from the intention of the legislator. If the regulatory framework is not applied according to the intention of FIFA, then any player would be allowed to leave a club through unilaterally terminating his current contract in circumstances where the club will have no option other than to release the player’s registration. Although, this particular aspect of the transfer system was not examined in our case, there is an argument which suggests that the transfer system must respect EU law and all the freedoms and rights that derive from the Treaty of Rome. In any other given case, the regulatory framework will become ineffective and legal challenges will continue to mount.

Allow me to submit, without any sign of arrogance and self-gratification, that we must praise ourselves, in that we are facing a unique opportunity to interpret the current regulatory framework and establish the field that future cases will follow. It is unfortunate that the Appellant had to suffer so clarification could be produced. However, the hunt for justice and fairness always suggests that sacrifices must be made. The Appellant has been sacrificed because the highest authority in Hellenic football failed to investigate thoroughly the facts of the case and ignored the intention of FIFA towards interpreting the current regulatory framework. Much rests on this...

The Appellant has been relegated and along with it all the principles of fairness, morality, equality and justice. Justice, however, could be restored and the search for justice does not discriminate between legal interests, divisions of power or time limits. The examination of the evidence and the analysis of the regulatory framework showed, beyond reasonable doubt, that an injustice has taken place. Respondent 1 failed miserably in its duty to properly investigate, examine the case and interpret the regulations in force, Respondent 2 was unjustly enriched and the Appellant was precluded from being allowed to use Mr Wallner in official matches and therefore minimise the risk of relegation. This is unfair...

For these reasons, I would respectfully Request that the Panel Allow this Appeal.

Mr President, unless I can help you with anything further, this concludes my submission.



Round Table on the Status of Football Players and the FIFA Rules, organized by Legal League Football Lawyers association in Donetsk, Ukraine, 14 November 2008, with the participation of representatives of Legal League, CIC Group, The T.M.C. Asser Institute, Spartak Moscow and Ruben Kazan

# Players' Agents and the Regulatory Framework on Corruption in International Sports Law\*

by Ronny-V. van der Meij\*\*

## 1. Introduction

### 1.1. Description of the thesis and the subject

During the last decade we have seen a significant commercialization in sports all over the world. The sports stars of today are earning more than their predecessors could even dream of. An illustrating example can be seen in football where star players like Jimmy Greaves and Dennis Law earned a little more 20 BP a week in the 1960s, whereas one of today's top players, Zlatan Ibrahimovich, is paid around 170000 BP per week under his current contract with Inter Milan.<sup>1</sup> Even compensated for the inflation, this example illustrates the tremendous increase of money circulating in many sports today compared to relatively recent times.

The increased commercialization has led to growth in the demand for expertise when deals are concluded among the various stakeholders in football, thus giving birth to the profession called sports (players') agents. In a global perspective the perception of the need for this profession has developed in line with the commercialization of sports. In the United States, where the commercialization of sports started prior to the European, the profession came into prominence in the 1960s and 1970.<sup>2</sup> In Europe, agents faced greater skepticism and for a long time clubs and managers refused to negotiate with players that used agents. The following quotation from the legendary manager Brian Clough gives a good indication of the how the atmosphere was during his era (1975-1993) as coach:

"If a player had said to Bill Shankly 'I've got speak to my agent', Bill would have hit him. And I would have held him while he hit him".<sup>3</sup>

However as the transactions have become more and more complex and involve more and more money the profession has gained terrain also in Europe the last 20 years, and today you will hardly see a transfer where an agent is not involved in one way or another.

Sociological studies have shown that changes in a business sector such as we have seen in international sports will generally call for the creation of a regulatory framework.<sup>4</sup> That this is the case in sports today is inter alia observed by Beloff, a reputable scholar and practitioner in the field of sports law, that describes the increased legalism as *a natural function of raised financial stakes produced by increased sophistication, particularly of a technological nature, and by a ready market fueled by the demands of a public whose craving for sports appears insatiable*.<sup>5</sup>

Thus we have recently seen many incentives to regulate sports agents. However, the international dimension complicates the legislative process because in addition to the questions of how the profession should be regulated, the crucial question of competence arises. In international sports law there are three tiers of agent regulation today, namely: international law, national law and the law of the sports bodies.<sup>6</sup> Between these tiers there are problems connected to jurisdiction and contradictions giving rise to conflicts of law requiring one to consider, firstly; the substantive question of whether or not a conflict

exists, and secondly; which set of rules will prevail in case of a conflict between the set of rules.

### 1.2. Terminology, scope and the further structuring of the analysis.

#### 1.2.1. Corruption

According to the Miriam Webster dictionary corruption can be defined as: "impairment of integrity, virtue or moral principle; depravity, decay, and/or an inducement to wrong by improper or unlawful means, a departure from the original or from what is pure or correct, and/or an agency or influence that corrupts".<sup>7</sup> This wide definition that will be used in the following covers a broad range of activities. With regard to Players' agents accusations of corruption normally arise because the agent makes - or at least is accused of having made - use of means that are contrary to norms deriving from one of the 3 tiers of legislation that governs the profession in order to facilitate a transfer. A violation of one of the 3 tiers will constitute an "*inducement to wrong by improper or unlawful means*", implying an action may be caught by the scope of this article although it might not represent what one would normally think of as corruption in everyday language.

The forms of corruption that has drawn most negative attention to the profession of players' agents are the phenomenon's called *bungs*, *tapping up and dual representation*. In addition, attention has been drawn to problems concerning *protection of minors* both by the media and at EU level. In chapter 2 an elaboration on this set of problems will be given to identify obstacles concerning the attempts of regulation and the enforcement of these. Whereas chapter 3 deals with problems faced by stakeholders as a consequence of the international dimension of the problems we are dealing with.

#### 1.2.2. International sports law

To give the reader an understanding of the concept of 'international sports law' it is appropriate to take a closer look at the individual components, hereunder the meaning of 'sport' and "sports law". To discuss these terms in depth will fall outside the scope of this essay, but as they give rise to heavily discussed topics in the legal world of sports a brief overview is in place.

The term 'sports' has a number of legal implications and there might be financial and legal advantages implied for an activity that can be defined as sport.<sup>8</sup> According to the Olympic charter only "sports" can be part of the Olympic program; an example that clearly shows the importance of the term legally as well as financially.<sup>9</sup> Despite the need for a definition there is no agreed and precise definition of the term, and attempts to give a definition often become vague or futile. A common definition is that sport is a "Physical activity that is governed by a set of rules or customs and often engaged in competitively."<sup>10</sup> Such a wide definition will embrace activities that are quite different from what one normally would think of as sports. A good example can be seen in a case from England where a defendant argued that sadomasochistic homosexual activity was to be considered as sports.<sup>11</sup> Such activity is probably quite far from what people would think of as the normal meaning of 'sport', but the definition above may fit as it could be possible to prove that it involves 'physical activity' and 'a set of rules'.

In the absence of a common definition, the legal practitioner will have to seek guidance in sources relevant to the rules he is dealing with. The following analysis will be focused on football because it represents the field of sports where problems connected to agents regularly rises due to its degree of commercialization. Although the focus is on football it is likely that the views presented will be of relevance in connection with transfers of players in other popular team sports such as basketball and ice hockey, but as all of these must be said to

\* The essay was awarded "the International Legal Award" in a competition arranged by ISDE (Instituto Superior de Derecho y Economía) and FIA (Federación Interamericana de Abogados).

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1 Duguid p. 1 and article in Verdens Gang www.vg.no/pub/vgart.hbs?artid=527546.

2 Siekmann p. 3.

3 Duguid p. 1.

4 Mathisen page 85-108.

5 Beloff Sports law 1999 p 6.

6 Parish s. 8.

7 www.merriam-webster.com/dictionary/corruption.

8 Gardiner 2007 p 14.

9 See article 46 and bye-law to article 46.

10 Open mic:What is sport p. 1

11 Gardiner 2007 p. 15

fall in the core of the word “sports”, there is no need for a precise definition of the term in the following.

In academic circles a big issue has been made of whether or not one can speak about existence of such a thing as sports law. This discussion contains two questions, firstly, whether sports law can be considered a particular branch of law such as for instance contract law, torts or mercantile law.

Secondly, whether it is appropriate to speak about a *lex sportiva* implying that the case law of the Court of arbitration for sports (hereinafter referred to as CAS) is developing into an independent source of law in the form of custom such as for instance *lex mercatoria*.

The CAS is an arbitration tribunal situated in Lausanne, Switzerland that began its operations on the 30 June 1984. The idea behind this tribunal was created by the former International Olympic Committee President Juan Antonio Samaranch, who identified the need for a specialized body to resolve sporting disputes outside the normal court systems, hoping that the CAS should become the supreme court of the world of sport.<sup>12</sup> It might be a bit early to conclude with regards to whether these goals are yet achieved, but that it is going in that direction is indicated by the significant increase of cases registered with the CAS the later years (only from 2003 to 2004 the increase was 149 %).<sup>13</sup>

In this essay sports law will be considered as: *a legislative and transnational legal system created by sporting federations which legitimacy derives from the contractual relationship between the parties.*<sup>14</sup> *As such sports law is not considered hermetically sealed field of law but has a more or less cohesive body influenced by general rules of national and international law.*<sup>15</sup> This definition implies that my conception of sports law is that it is a particular legal system where rules are generally given and enforced by sporting organizations and CAS, but subject to the limitation of the private autonomy.

When case law is being used it will not be referred to the term *lex sportiva* as the word in the opinion of the author only serve to blur the reality.

On the one hand it is clear - and seems to be agreed - that CAS jurisprudence does not have currency as *stare decisis*.<sup>16</sup> On the other hand it is equally clear that CAS give, and should give weight to previous cases based on the values of; the efficiency in legal process, predictability or stability of expectations and equal treatment of similarly treated bodies. That CAS itself is of this opinion can be seen in a case concerning the Norwegian Olympic committee where it holds that: “CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed as a part of an emerging ‘*lex sportiva*’. Since CAS jurisprudence is largely based on a variety of sports regulations, the parties’ reliance on the CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations”.<sup>17</sup>

On this basis it will rather be commented on the probable argumentative value of the cases being dealt with when used in later proceedings, instead of referring to terms such as *lex sportiva*.

The above definition of sports law emphasizes the international dimension of sports law. In the following the objective is to analyze the questions in a European perspective. As such the questions that will be raised will be focused on Europe although the considerations may be relevant also in a global perspective.

### 1.2.3. *Players’ agents*

According to FIFAs regulations on players’ agents (hereinafter referred to as the FRPA) article 1.1, an agent is a person “who introduce players to clubs with a view to negotiating or renegotiating an employment contract or introduce two clubs to one another with a view to concluding a transfer agreement within one association to another”. As we see this definition does also cover agents that introduces clubs to players’ and clubs to clubs and it could therefore be appropriate to speak about players’ and club agents. Although one might speak about two groups of agents, both will be referred to as players’ agents in accordance with the terminology used in the FRPA.

The definition in the FRPA describes an agent as an intermediary who ensures that supply and demand for labour within sport is met.<sup>18</sup> However, the agents and agents companies of today often provide a much a broader range of services such as:

Contract negotiation and mediation (sponsor agreements, television rights etc.)

Management and services (providing assistance in matters such as housing, taxes, social security, permits and licenses, financial planning, legal advice, career development and so forth)

Organization of sports activities and events, press conferences, publicity and sports promotion;

Acting in case of conflicts, mediation and arbitration<sup>19</sup>

These functions fall outside the scope of FRPA and also the scope of this thesis. What are to be scrutinized in the following are agents in their role as intermediaries in transfers. Furthermore the scope will be limited to football agents as it is the area of sports where most problems have arisen. However, it is probable that many of the considerations will have relevance also for other sports agents.

## 2. Agents and corruption

### 2.1. Bungs

#### 2.1.1. *The concept of bungs*

Bungs can be defined as the use of payments (in the form of money or other benefits) from the agent to a coach or manager or vice versa in order to facilitate a transfer. As such one could also use the more general term bribery, which is a classical example of corruption found in many sectors of society.

The use of bungs is not a new phenomenon, but has been a part of the game for several years. During his period as a manager from 1945-1969 (and 1970-1971) the legendary Manchester united manager Sir Matt Busby was known for his liking of a bung despite being a reputable manager and a devout catholic.<sup>20</sup> In recent days attention has been drawn to this phenomenon by the BBC panorama program “Undercover footballs dirty secrets” that was shown in March 2006.<sup>21</sup> This made the FA commission order an investigation that in its interim report identified as many as 39 requiring further investigation.

#### 2.1.2. *Considerations*

As bungs constitute a classical example of corruption, the problem will generally not be finding norms that prohibit such action. Although FRPA does regulate the issue directly one may assume that such activity will be caught by the agents professional code of conduct that inter alia prescribes that an agent is required to perform his activities in “a manner worthy of respect and benefiting the profession”. It would of course be preferable if FIFA prohibited the practice explicitly, but as bribery represent an act that is generally condemned and considered a criminal offense in most national legislations it is likely to believe that the use of bungs will be considered a violation of the Players’ agents professional code of conduct.

Notwithstanding the existence of rules prohibiting bungs the only known case in the major football nations where someone was brought to justice was in 1995, where Arsenal manager George Graham received a sanction for receiving such payment from the Norwegian agent Rune Hauge for signing the players Pål Lydersen and John Jensen.<sup>22</sup> However, on the basis of the BBC program and the interim report it is reasonable to suspect that we are talking about a widespread activity among agents when they conduct their business. As such the problem does not seem to be on a regulatory level, but rather to make stakeholders in football aware of the problem so that the rules are enforced. As we have seen above the English FA took action to investigate the problems straight after the BBC documentary was shown. Whether or not this will lead to findings of violations remains

12 Blackshaw p. XI and the CAS code art 1

13 Ibid

14 Foster p. 421

15 Gardiner 1999 p 6

16 Nafziger p 409

17 CAS 2002/O/372

18 Siekmann p. 1

19 Siekmann p. 106.

20 Dugid page 1.

21 World sports law report p 1.

22 Siekmann p. 5

to be seen, but for our purpose it shows that it is not sufficient to have a set of norms that prohibits an action. In order to clean up the game stakeholders also need the knowledge and will to enforce the relevant rules.

## 2.2. Tapping up

### 2.2.1. *The concept of tapping up*

The practice of tapping up describes the situation where players are offered for sale without the knowledge and consent of the club with whom the player is registered.<sup>23</sup> Such activity is *inter alia* prohibited by the FRPA article 22.2 which sets out that players' agents are "prohibited from approaching any player who is under contract to a club with the aim of persuading him to terminate his contract prematurely or to violate any obligations stipulated in a contract." The reasoning behind this rule is the need to ensure contractual stability between player and clubs in professional football, and as such it is not a classical example of what one would consider as corruption such as for instance bungs, but falls under the broader conception of corruption as set out above.

There are two aspects of tapping up that makes it an interesting topic today. Firstly, CAS has recently rendered a decision that might make it profitable for both agents and players to violate this prohibition. Secondly, cases in the aftermaths of the above mentioned BBC program show that such conflicts cause jurisdictional problems that make stakeholders unable to enforce the rules given by the sporting bodies. In the following it will be elaborated more closely on this in the before mentioned order.

### 2.2.2. *Webster and the potential impact on the prohibition on tapping up*

One of the most debated cases last year is a case commonly referred to as the Webster case (which will be used in the following).<sup>24</sup> This case has been deemed to be a landmark case comparable to the Bosman case and have given rise to an alleged doctrine implying that players outside the protective period<sup>25</sup> are only liable to pay compensation for the outstanding salary of the players contract until its expiry. The reason why this case is interesting for our purpose is that it may affect the agents' possibility to persuade players to violate their contract with their current club. In the following, the case will be analyzed and it will be considered whether or not one may assume that CAS meant to establish a general rule and how such a rule might affect stakeholders' attempts to prevent tapping up.

The Webster case concerned a player of Scottish origin that prematurely made a unilateral termination of his contract without just cause with his Scottish club Heart of Midlothian, and signed for an English club, Wigan Athletic. By doing so he violated article 13 of FIFAs regulations on the status and transfer of players (hereinafter referred to as FSTP) that sets out the principle of *pacta sunt servada*. On this basis he was liable to pay compensation as prescribed in article 17 of the regulations, and CAS had to rule on *how* compensation for the contractual breach should be calculated.

According to FSTP art 17 1. compensation "shall" be calculated with due regard to "the law of the country concerned" "the specificity of sport" and "any objective criteria" These rather vague criterions are developed in the next sentence where after the following elements "shall" be reflected in the compensation, "remuneration and other benefits due to the player under the existing contract and/or the new contract", "the time remaining on the existing contract", "fees and expenses paid or incurred by the former club (amortized over the term of the contract)". In the case CAS goes through each of these elements before deciding that the appropriate compensation in this case is reflected through the salary for the remaining time under the current contract. The question is therefore if this ruling can serve as a basis for a general rule limiting the clubs compensation to the remaining salaries under the current contract.

As pointed out in pt 1.3.1 CAS decisions does not have value as *stare decisis*, but one may assume that they will be given considerable weight when similar cases are being considered. However, the nature of article 17 indicates that one can not deduct such a general rule from the case as the word "shall" implies that according to the wording the court must consider all the elements; it is not left to the courts discretion to create a general rule that excludes some of the criterions.

That this is the opinion of the CAS is indicated by the fact that the panel scrutinizes all the elements, but finds that the relevant benchmark to assess in the Webster case is the remaining salaries under the current contract. In addition in paragraph 135 of the sentence CAS holds that "article 17(i) includes a broad range of criterions, many of which cannot in good sense be combined, and some of which may be appropriate to apply to one category of case and inappropriate in others". As such, both the nature of the article as well as the referred statement of the CAS that article 17 prescribes a consideration on a case by case basis and indicate that one can not speak about the creation of a general rule based on the Webster case.

This was also underlined by FIFAs dispute resolution chamber (hereinafter referred to as DRC) in the so-called Matuzalem case that was made public 29th February 2008<sup>26</sup>, where the elements included in the compensation differs completely. In the Matuzalem case the DRC takes into account: "non amortized expenses incurred by the club", the reflection of the remuneration and other benefits due to the players previous "and new contract" and in addition an amount assessed by the courts discretion for the "sports-related damage caused to the club by the player in the light of the specificity of sport and the impact of serious disrespect to the principle of good faith". Furthermore, DRC underlines that "each request for compensation for breach of contract has to be assessed on a case-by-case basis."

This decision will not have any sustainable weight in front of CAS as it is a decision from the DRC (DRC serve as a first instance), which has been appealed to the CAS. The hearing of the case has been held, but the decision has not yet been rendered. It therefore remains to be seen whether CAS considers Webster as an expression of a general rule for players outside the protected period or sets out that each case has to be dealt with on a case-by case basis.

In the case that CAS meant to establish a rule that clubs will only be entitled to compensation equal to the remaining remuneration of the current contract and maintains this position in the Matuzalem case, it is probable that this will have a negative effect on the attempts to fight the practice of tapping up. This is because such a rule will lead to lower compensations than if all the elements of article 17 were included, thus making it easier for the player to terminate the contract and in turn making it easier for agents to persuade the players to terminate their contracts prematurely.

One might object that the effects of this will be minimal as such activity is prohibited by FRPA article 22.2, thus still making the agent liable for sanctions. However, as will be demonstrated in part 3, FIFA is only competent to regulate and sanction "licensed agents", thus implying that the indirect effect of the interpretation of article 17 may have a grater impact on the attempts to prevent agents from this kind of activity that it may appear on the surface. As the purpose of both rules preserve contractual stability between players and clubs these considerations should therefore be kept in mind when determining the contents of article 17.

### 2.2.3. *Problems caused by lack of jurisdiction*

In the aftermaths of the above-mentioned BBC program and the FA's investigation conducted by Lord Stevens, five clubs and eight agents were named. Among these were Bolton, Chelsea, Newcastle, Portsmouth, Middlesbrough and the agents Pini Zahivi, Craig Allardyce and Willie McKay to name the most celebre examples.

Chelsea and its manger Jose Mourinho along with former Arsenal player Ashley Cole were found guilty of tapping up by the FA premier league Independent Disciplinary Commission. Afterwards Cole's agent was found guilty of having breached the prohibition and his license was revoked for 18 months for his role in the affair.<sup>27</sup> On the other hand the FA was unable to sanction the Israeli agent Pini Zahivi

<sup>23</sup> World sports law report p 1.

<sup>26</sup> 07-00623/ecl.

<sup>24</sup> CAS 2007/A/1298

<sup>27</sup> Siekmannpage 5

<sup>25</sup> FIFAs regulations on the Status and Transfer of Players "Definitions" pt. 7

for his part in the transfer. This was not because a violation could not be proven, but because the FA lacked jurisdiction as Zahivi was licensed in Israel. This illustrates a significant problem faced by stakeholders regulating these issues, because their legal basis for regulating the profession is based on contract. Thus, if an agent is not licensed by the relevant association no contractual relationship exists between the parties and consequently the agent falls outside the regulatory control of the association.<sup>28</sup> These problems will be elaborated in detail in part 3.

### 2.3. Dual representation

#### 2.3.1. The concept of dual representation

The prohibition against dual representation is set out in article 19.8 in FRPA whereafter an agent shall avoid “conflict of interest” and “may only represent the interest of one party per transaction.” The reasoning behind this rule is reflected in the wording, namely to avoid conflict of interest. This standard is well known from other professions such as for instance lawyers, although the threshold when considering what constitutes a conflict of interest will differ from profession to profession. What these rules have in common is that they are meant to ensure that the professional acts in the best interest of his client by prohibiting him from being in a position where he has clients with contravening interests, thus making him unable to act in the best interest of both. In the following we will take a closer look at the relationship between prohibitions against dual representation, hereunder if the prohibition might go further than its rationale.

#### 2.3.2. Considerations

According to FIFAs previous regulations on players’ agents article 14(d) a Players’ agent was prohibited from representing more than one party “when negotiating” a transfer.<sup>29</sup> Under this rule it was common practice for agents to suspend his representation of the player until he found a club willing to sign him. Thereafter he would switch side in order to represent the club.<sup>30</sup> This was done because in many countries, such as for instance in the UK, a payment by the club to the players’ agent would be considered a benefit, thus being subject to taxation. It was commonly recognized that this practice fell outside the scope of article 14 as the agent were only representing one side “when negotiating” the transfer. The phrase “when negotiating” was generally understood as referring to the time of conclusion of the contract, thus making the practice described above acceptable.

However, under the new regulations such a practice might be slightly problematic as article 19.8 states that an agent may only represent the interests of one party “per transaction”. At the time of writing we do not have any published CAS jurisprudence that deals with the question, but a normal understanding of the word “transaction” covers more than the final negotiations, thus preventing an agent from switching side if he has taken care of the interest of the player at an earlier stage of the transfer.

In the UK the practice of agents switching side at the moment of conclusion of the contract is now clearly prohibited as the FA regulations<sup>31</sup> article C2 and C3 preclude an agent that has already acted for the Player himself (whether by signing a representation contract or by carrying on agency activity) or has acted for another club already in the respect of the Player in either the immediately preceding transfer or renegotiation of that players’ contract *or* at any time during or since the two last completed transfer windows. According to these regulations the scope is not limited to the agent himself, but identifies the agent with another agent if one can establish that they are “connected”.<sup>32</sup> In essence this means that the agent is prevented for circumventing the rules by using another agent in his firm to conduct the conclusion of the contract. As such these rules are even more restrictive than the FIFA rule both with regard to extent of persons that is covered as well as the substantive restrictions which in effect are not only limited to the current transfer, but prescribes a 12 months quarantine.

The tendency towards stricter rules on dual prohibition seen in the changes of the FIFA rules and the FA rules can also be seen at EU level. In a report carried out in connection with the EUs’ white paper

on sport it was stated that “Too many agents are acting for players and football clubs at the same time and sometimes on the same deal” and that “A player should pay the agent, not the football club”. On this basis it was concluded that the phenomenon of dual representation should be abolished at EU level.<sup>33</sup> The question is however, if these rules go too far if the bearing argument of the rules is to prevent conflict of interest.

In a case against Newcastle United<sup>34</sup> where Newcastle was found guilty of violating the prohibition on Dual representation an unnamed players’ agent said that “whilst the Club, players and licensed players’ agents, it is generally acknowledged that the rules do not always reflect industry practice”.<sup>35</sup> Another similar statement was the chief operating officer of Newcastle United who said, “it is generally acknowledged throughout the industry that rules cannot accurately reflect the global business we are now operating in”.<sup>36</sup> Such arguments are of course of little argumentative value in a substantive perspective and - not surprisingly - the tribunal replied to this “industry practice cannot prevail over regulations, and if practice differs from them it contravenes them.”<sup>37</sup>

However, at a legislative level such arguments should be considered if the objective is to create a business characterized by transparency.

In the discussion about dual representation some of the participants seem to mix conflict of interest with the fiscal aspect of the rules. This is for instance reflected through the commentary in the above mentioned EU report stating that a “player should pay the agent, not the football club”. Such a rule may be well grounded from a taxation point of view, but cannot be justified by reference to conflict of interest. In general such a circumvention of the tax rules will be made in full consensus and in the interest of both parties, thus no conflict of interest exists. As such one may ask if the stakeholders in football should rather focus on creating and enforcing rules that prevents situations where an agent represents parties with interests that are incommensurable without their knowledge, and leave taxation issues to the relevant tax authorities.

### 2.4. Protection of minors

The last years scores of children and young people, in particular from Africa have left their country, family and friends with stars in their eyes created by the promise of a glorious future as a professional football player in Europe. The football clubs of Europe have scouts of agents covering close to every inch of the enormous African continent, trying to make a fortune by finding undiscovered talent. Some agents and clubs do not hesitate presenting potential talent offers; unfortunately they often seem to forget mentioning that there is an inherent danger of not making it as a professional football player. Children, young people and parents from the third world generally represent an easy bait in the meeting with experienced and cynical agents and other representatives of clubs, which has led to many personal tragedies for the young athletes and their families.

It has been estimated that as many as 20000 African boys are living on the streets of Europe after having been taken to Europe with the assistance of an agent, and left after not having received an offer after a couple of try outs without money, papers granting them legal stay or any kind of social network in a foreign country.<sup>38</sup> Only in France a private initiative called Culture Foot Solitaire that provides assistance to victims of such activities have folders on over 7000 homeless African boys who have come to Europe to become professional footballers.<sup>39</sup>

That the so-called football family is aware of the problems is reflected in documents available on the WebPages of UEFA where it is stated that “Players’ agents and the trafficking of child footballers

28 Siekmann p. 12  
29 FIFAs regulations on Players’ Agents 1999

30 Siekmann p. 6  
31 FA Players’ Agents regulations 2007  
32 Devine page 9

33 The Post. IE, Agents face EC clamp-down p 1.

34 Newcastle United PLC (Appellant) and the commissioners for her Majesty’s Revenue and Customs (Decision 19718)

35 World sports law report 2006 p 3  
36 Ibid

37 Ibid

38 BackeMadsen/Johansson page 25.

39 Ibid p 201.

have been identified by UEFA Chief Executive Lars-Christer Olsson as two major areas of concern facing the European football authorities".<sup>40</sup> The FIFA president Joseph Blatter has even used words as "social and economic rape" to characterize the behavior of the European clubs involved in this business.<sup>41</sup> Also at EU level there is keen awareness of the problem. In the white paper the commission points out the exploitation of young players as one of the new major challenges the European society is facing<sup>42</sup> and in another report known as the Belet report the scenario highlighted above is directly addressed stating that "There is an inherent danger of social exclusion for young people who become dependent on their club only to fail to be selected".<sup>43</sup>

Having established that there is an urgent need for regulation of this matter and that the potential regulators are aware of the need to protect minors it is appropriate to take a closer look at the current regulatory framework.

According to article 19 subparagraph 2 of the FRPA an agent may represent a minor "if the player's legal guardian(s) sign the representation contract and this is in "compliance with the national law of the country in which the player is domiciled". As such the FRPA seems to leave the protection of minors from agent abuse to the law of the country where the player is domiciled. However, point 2 of annexe 1 of the agents' professional code of conduct requires him to abide by the statutes and regulations of FIFA implying that the rules of the FRPA must be seen in light of the FSTP and its rules on the protection of minors.

The general rule is set out in article 19 subparagraph 1 where after international transfers of players are "only" permitted if the player is over the age of 18. This implies that although the player may sign a representation contract, a transfer will be prohibited thus preventing the agent from conducting a transfer.

There are 3 exceptions to this rule. Firstly, if the player's parents move to the country in which the new club is located "for reasons not linked to football". Secondly if the player is over 16 and the transfer takes place within the EU or EEA, and the club can guarantee fulfilling certain minimum obligations. Finally, there is an exemption for players that live close to the border and the distance between his domicile and the clubs headquarters is no more than 100 km, he continues to live at home and the national associations give their explicit consent.

Especially the first exception has led to a series of attempts at circumvention where the clubs have provided work for the parents thus claiming that the parents are moving "for reasons not linked to football". Case law, however, shows that this is a narrow exception when such cases are brought before the DRC and CAS. A good example is a case concerning a Paraguayan player and the Spanish club Cadiz F.C.<sup>44</sup> In this case the mother of the Paraguayan player had received an offer to work in a restaurant in Cadiz, and the club claimed that she had found this job on the Internet and that her decision to move to Cadiz was not linked to the transfer of her son. The CAS, however, did not buy this argument and established that the club was trying to circumvent the rules protecting minors.

This case illustrates that some agents and clubs are being very creative when it comes to taking advantage of the exceptions to circumvent the rules, but also that FIFA and CAS are aware of this and places a heavy burden of proof on the party that wants to rely on them when cases are being brought in front of the panels.

However, based on discoveries in a newly published book by two award winning Norwegian journalists concerning trafficking of footballers in general and the Nigerian football player Jon Obi Mikel's journey to Chelsea in particular<sup>45</sup>, one may assume that it is rather common that clubs and agents are able to conduct their business without being brought to justice.

The story of Jon Obi Mikel (hereinafter referred to as Mikel) has led to numerous news headings all over Europe, and especially in Norway where the sporting director of the football club FC Lyn was sentenced for having forged the contracts of Jon Obi Mikel and Chinedu Ogbukes (hereinafter referred to as Edu). According to the authors of this book however, the forgery part is only to be considered a minor part of all the violations that were committed by all the parties in this case, especially with regards to the rules protecting minors. In the following some examples from the book will be used to illustrate problems connected to the current regulatory framework issued by FIFA and its governance of the rules.

The Mikel farce started when Manchester United (hereinafter referred to as United) discovered him during a competition for national youth teams in Cairo in 2003. After this competition United invited the Nigerian youth team to a training camp in Manchester and Mikel impressed to such a degree that United wanted to contract him. As could be expected, it did not take long before the word of the extraordinarily talented Mikel was out and about and at the youth world cup in Finland that year he was considered as one of the main attractions. After this competition United was no longer the only club wanting to sign the player and in particular another giant had awoken, namely Chelsea. The problem for both clubs, however, was how they could ensure to get the player as he was only 15 years of age implying that FRSP art 19 prevented them from signing him. This led to a bitter fight between two of the monoliths of European football, that according to the book included everything from the offering of so-called scholarships to unofficial contracts; even kidnapping.

The first interesting detail in this case for our purpose is that at the end of the year 2003, the father of Mikel had signed a contract stating that "I, Mr. Michel Obi, hereby authorize my son (name above) to go to Chelsea Football club..." and that he authorizes "Sports & Media Group Plc to act on my behalf in securing a club for my son".<sup>46</sup> With regard to this contract it should be clear that the first provision of this contract is null and void or can not be interpreted as something other than the wish of the father in light of article 19 subparagraph 1, whereas the latter could be valid with regard to the substantive content as a representation contract may be made as long as the player's legal guardian signs the contract. However, the FRPA stipulates in pt 1. of its definitions that only "natural persons" can act as agents, thus neither this clause of the contract can be seen as legally binding.

The player was moved to the South African club called Ajax Cape town together with three friends from the Nigerian youth team and was paid a so-called scholarship of 150 Rand by Sport & Media Group (hereinafter referred to as SEM) that had the exclusive right to provide Chelsea with African players.<sup>47</sup> This illustrates a way of circumventing the rules or more precisely; a way to ensure that the violations are not detected.

As the player was never attempted transferred and thus not licensed to play for the club, the sporting authorities had no incentive to intervene. By stationing a player in a club without transferring him and making an agency pay him to keep him happy, they might be able control him without being able to sign him. This practice would clearly - at least in this case - constitute a violation on the prohibition of dual representation as set out in article 19.8 in the FRPA where after an agent shall avoid "conflict of interest" and "may only represent the interest of one party per transaction.", thus violating another of the FIFAs provisions. Such a violation, however, should be easy to camouflage, as long as both parties are satisfied because then no claim will be made to make the relevant authority intervene.

Mikel stayed in Cape Town for about half a year, and later, on the 19th July 2004 the Agent of United (not SEM) also managed to sign a representation agreement with him.<sup>48</sup> It falls outside the scope of this work to make a standing with regards to exactly what happened or who was responsible for what, but what can be said with certainty is that on the 14th August 2004 Mikel and his three friends arrived at Oslo airport and were immediately matriculated into a Norwegian school called Norges Toppidretts Gymnas (hereinafter referred to as NTG) that offers talented athletes an academic study program

40 [www.uefa.com/uefa/Keytopics/kind=newsID=462974.html](http://www.uefa.com/uefa/Keytopics/kind=newsID=462974.html).

41 <http://www.panapress.com/mondial2002/lead.asp?lead=election&code=eng&dte=27/10/2008>.

42 White paper p. 1.

43 Belet paras 16-19.

44 CAS 2005/A/955.

45 Backe Madsen/Johansen.

46 Backe Madsen/Johansson page 46.

47 Ibid page 47.

48 Ibid page 48.

focused on sports. This school collaborates with the Norwegian football club FC Lyn Oslo, but as long as the players only have status as students there is no violation of the rules protecting minors.

Once again however, the clubs and agents were making arrangements behind the scenes and during the following month the rights of the players were attempted secured by different agreements, notwithstanding the fact that neither of the involved parties had a valid legal basis to dispose of the rights of the players.<sup>49</sup> This apparently changed when the players turned 18 in April 2005, and FC Lyn Oslo announced that they had gotten the signatures of Mikel and his friend Edu. It later turned out that the sporting director of FC Lyn Oslo, Morgan Andersen had forged (sentenced by a judgment that was not appealed thus having status as final)<sup>50</sup> the contracts of Mikel and his friend Edu providing that the players belonged to Lyn FC Oslo. Nevertheless, with this apparent authority Mikel was sold to United for the amount of 5 million pounds.<sup>51</sup>

The weeks afterwards were followed by a circus that has never seen its like in Norwegian football with reports of threats, kidnapping and it reaching a peak when the player disappeared and reappeared in London where he suddenly claimed that he wanted to play for Chelsea but had been pressured to sign for United by Morgan Andersen.<sup>52</sup> What is interesting for our purpose is that this conflict made United and FC Lyn Oslo send a claim to the English FA and FIFA containing material that described the methods Chelsea had used to get a hold of the players in this conflict.<sup>53</sup>

In this way FIFA was provided with material that could lead to severe sanctions for the club, but more importantly in this essay is to emphasize that the agents used by Chelsea were licensed, thus subject to the FRPA as well as the FRSP. Despite the fact that these rules were enforceable on the agents, FIFA dropped the case when the parties settled the conflict and withdrew their claims. In this case FIFA was provided with considerable information and evidence that might prove severe violations of its regulations. Accordingly, the claim was composed of 9 pages and 8 annexes.<sup>54</sup> In addition the settlement agreement contains information that should at least be sufficient to raise suspicions. The settlement agreement - that was supposed to be strictly confidential - fell into the hands of the authors of the book "Den forsvunne diamanten" (The missing diamond) and is now made publicly available through this.<sup>55</sup> This demonstrates a severe problem with regard to the enforcement of the rules on the protection of minors. It shows that FIFA does not interfere ex officio, not even when they are provided considerable evidence and the violations concern rules that are set to protect general interests such as the protection of minors.

To complete the picture it may be mentioned that Chelsea in the autumn of 2008 sued FC Lyn Oslo claiming them to pay £ 16 millions, which is the same amount as Chelsea paid to Man U and FC Lyn Oslo according to the said settlement agreement.

## 2.5. Conclusions

Based on the above analysis several problems with regard to the fight against corruption in international sports law can be identified.

Firstly, the discussion in pt. 2.2 concerning bungs and the problems regarding the need to protect minors in pt. 2.4 shows the existence of a problem with regard to *enforcement*. There might be several explanations as to why these rules are not effectively enforced and the reason why must be seen as an open question that will not be intended answered here because it would call for thorough empirical studies. However, an outline of possible explanations will be given to serve as basis for further discussion.

First of all, one might identify a problem with regard to *communication*. According to Aubert communication of norms is a necessary condition if the norms are to achieve their desired effects.<sup>56</sup> With regard to bungs the absence of a clear prohibition against the use of such means in transfers in the FRPA is a good indication of the lack of communication. This is also the case in connection with the protection of minors that only has a rule saying that minors need the signature of a guardian. In this regard one cannot only identify a problem with regard to lack of communication, but a failure to address the

legality of dubious practices such as scholarships and placement of underage players in training academies in countries far away from their family and friends. As this is one of the more severe problems relating to players' agents today it would be preferable if the regulations contained clear rules on this matter.

Clear regulations from the most powerful association in football would create awareness among the so-called football family by signaling what is to be considered unacceptable activity. In turn this would create awareness by the public and especially the media that will not only contribute to inform about the contents of the provision, but also give the media incitement to investigate potential violations, thus forcing the relevant authorities to take action on violators. This is especially true for football because of the immense interest in sporting news. As we have seen in England the role of the media will not only be informative, but also ensure that associations take action to enforce its prohibitions. By this the author does not believe that the creation of a clear prohibition is sufficient, but it would be a small and simple step to take in order to communicate what kind of activities that is to be tolerated in international sports.

Another possible explanation is *the lack of an active body* - especially on an international level - which investigates and brings well-founded suspicions in front of the relevant tribunals. Both FIFA and UEFA have legal divisions, but the mere absence of cases relating to corruption before the DRC and CAS indicates that they are not being particularly active with regard to these problems. This can be explained by the fact that in general these bodies remain passive until cases are referred to them by private parties, and that they do not have the capacity to investigate and bring to justice the problems seen above ex officio. However, if their intention is to clean up the game and rid it of such practices, it should not be an incommensurable obstacle to increase their internal capacity or hire external firms to conduct these matters considering the considerable economical means available to these organizations.

The last and less plausible explanation that can be presented is that organizations such as *FIFA and UEFA might be satisfied having given the rules*. In this way they create a facade where they give the impression of taking action against behavior that is generally condemned by the rest of society. In this way they may avoid being criticized because by giving rules they appear to be doing something, and at the same time they avoid conflicts with potentially powerful forces in the sports world such as leagues, clubs, investors and agents. This phenomenon is addressed in studies of legal sociology where the conclusion based on empirical studies indicate that in general legislative authorities often find such a way of compromising the contesting interest as a convenient way of satisfying the representatives on both sides.<sup>57</sup>

Another challenge seen in the analysis concerning tapping up in pt 2.3 is the importance of *creating coherency* between the practicing of rules that are given to achieve the same objective. As we saw the rules on tapping up in FSTP and FRPA are both given to maintain contractual stability in football, as such the influence of the interpretation of one of the rules on the other should be considered when decisions are rendered. This is first and foremost a task for the decision making authorities of sport, but to create coherency among rules pursuing the same goal should also be born in mind when legislative authorities give or revise their regulations.

In the elaboration on dual representation in 2.4 it was pointed out that the tendency towards a stricter regime may be in strong contrast to the interests of the affected parties. In the book law in society (my translation) Thomas Mathisen addresses this problem and based on studies from various sectors of law he concludes that generally the achievement of a laws desired effect depends on *the social, economical and political context* the norms are meant to work in. He emphasizes that if this social context to a sufficient degree goes against the law the

49 Ibid p 56.

50 TOSLO-2007-155951.

51 Backe Madsen/Johansson page 46.

52 Ibid page 225.

53 Ibid page 229.

54 Ibid page 227.

55 Pages 318-333.

56 Aubert page 85.

57 Mathisen page 75.

desired effects will not occur.<sup>58</sup> As we have seen above, several stakeholders have pointed out that there is a severe gap between the industry norms and some parts of the regulations, thus making it reasonable to believe that creative minds might try to find ways to circumvent the rules or ensure that violations are not discovered. This should of course not make the legislators refrain from giving rules they consider highly important to fight corruption, but it should be born in mind that overly restrictive rules might serve against its purpose as it will result in attempts of circumvention and lack of transparency. On this basis it can be concluded that the law making authorities in sports should at least avoid giving rules that go further than its reasoning if its objective is to create a clean and transparent business characterized by integrity.

The final problem that can be identified on the basis of the issues addressed above are the problems caused by the international dimension present in many transfers. The proceedings against Pini Zahivi showed that associations are often left helpless when they try to enforce the rules because they lack jurisdiction. This issue gives rise to two questions, namely whether or not there exists a regulatory framework that is enforceable on an international level. And secondly, which organ might have competence to regulate the profession of players' agents on an international level. These are the questions that will be treated in depth in the next part of this essay.

### 3. Legal challenges in the creation of a coherent regulatory framework internationally

#### 3.1. Introduction

As presented in 1.1 there are 3 sets of rules that might regulate the problem corruption in the profession of players' agents:

1. International law
2. National law
3. Association law

According to FRPA 1.1 these regulations apply when agents are involved in transfers "within one association" or from "one association to another." The significance of this is that FRPA pretends to regulate the profession on an international level both in domestic and in international transfers. However, FIFA does not exist in a legal vacuum and the validity of their provisions must be seen in light of the other tiers of law such as International law and National law. In the following we shall first take a look at the legal basis for FIFAs competence. Thereafter FIFAs competence and the potential limitations caused by existing tiers of regulation with status as *lex superior* in relation to norms given by FIFA will be analyzed and discussed.

#### 3.1. FIFA and its legal status

FIFA is a private association located in Switzerland, registered and constituted in accordance with art 60 ff. of the Swiss civil code and has as its objective to exercise executive, legislative and judiciary functions in international football.<sup>59</sup> In this way its powers and activities in international football in many ways resemble that of a state within its territory, which is a typical feature of the European model of sport.

Two key features, its pyramidal structure and the promotion of competition through promotion and relegation, characterize the European model of sports.<sup>60</sup> This is contrary to the so-called American model where sport is organized by franchise companies that have established other criteria to attend competitions than sporting success implying that there is no need for a pyramidal structure as seen in the European model. With regard to football, the European model of sport has been adapted throughout the world except North America, thus a brief explanation of the model will serve to explain the legal basis for FIFAs competence to regulate the game in general and the profession of players agents in particular.

The hierarchical idea of the European model is codified in the FIFA statutes. According to article 10 an association responsible for organizing and supervising football in its country can become a member of FIFA provided that it includes in its statutes to always comply with the statutes, regulations, and the decisions of FIFA and its confederations. In turn, leagues and clubs must subordinate to the national association as set out by article 18 of the statutes. Finally, players will be subordinated due to their membership in the club. In this we see the pyramidal structure where FIFA is given competence through a subordination system creating a chain of contracts from players to clubs, clubs to regional federations, regional federations to national federations and finally from national federations to FIFA.

Based on the elaboration above it is clear that in principle FIFA does not have competence to regulate Players' Agents. The regulations of FIFA 'trickle down' to clubs and players through their compulsory membership of national associations whilst players' agents remains outside the realm of FIFA because they do form a part of this contractual chain.<sup>61</sup> However, in order to obtain a FIFA license the agent has to agree to abide by the statutes, regulations, directives and decisions of the competent bodies of FIFA as well as the relevant confederations and associations.<sup>62</sup> Because FIFA lacks competence to regulate the profession as such, it cannot oblige agents to become licensed by imposing sanctions on unlicensed agents. On the other hand FIFA does have competence to issue and enforce their regulations on players and clubs, and according to FRPA art 2 pt. 2 these are forbidden from using unlicensed players' agents. Violation of this provision may be sanctioned by fine, match suspension, ban (on taking part in any football related activity or transfer ban), deduction of points or demotion to a lower division according to FRPA article 34 and 35. In this way FIFA possesses a legal tool to regulate players' agents indirectly in the way that they by sanctioning clubs and players for the use of unlicensed agents can force agents to become licensed, thus making them subject to its regulations. In practice however, a significant number of agents are operating without license, and the near absence of clubs and players being sanctioned for the violation of this provision shows that FIFA is not using this opportunity to gain competence in this area.

#### 3.2. The hierarchy of norms

In the previous paragraph we saw that FIFAs competence is based on contract. This implies that its competence corresponds to the autonomy of private parties, thus being limited by norms of a higher comparative value. In an international perspective this means - very simplified - that in the case of competing legal claims, two forms of regulation will prevail and limit FIFAs competence namely; international law and mandatory national law. Especially with regard to international law, this question is much more complicated as it gives rise to constitutional questions concerning the conditions for such norms to be applicable in a territory. In addition, it can be difficult to decide whether or not national law laws possess status as mandatory. A general analysis of these rather complicated issues falls outside the scope of this essay. As such the simplified general rule where international law and mandatory national law prevails over association law will be kept, and potential problems caused by the questions outlined above will be addressed when the analysis of the particular matters discussed in the following so requires.

#### 3.3. FIFA and EU law

EU and its interference in sports has been a heavily discussed subject in Europe, and the applicability of the rules of the current treaty to sports have given rise to numerous discussions at a political level, as well as disputes in the European court rooms. Ever since 1974, when the European court of Justice (hereinafter referred to as ECJ) rendered its first important decision on the issue in the so-called Walrave case<sup>63</sup>; European politicians, representatives of sporting organizations and European courts have expressed diverging opinions on this matter. On one hand the governing bodies of sport and some member states have argued for a maximum degree of autonomy with reference to the fact that sports is special compared to the rest of economical market.

<sup>58</sup> Mathiesen page 61.

<sup>59</sup> See FIFA statutes articles 1 and 2.

<sup>60</sup> European commission report: The European Model of sport Page 1.

<sup>61</sup> Siekmann p. 41.

<sup>62</sup> See article 10.4.

<sup>63</sup> C-36/74.

The mantra specificity of sports have been a recurrent feature of the debate and regularly referred to by sporting organizations as if this phrase was self-explanatory, and that it should be obvious to everyone that sports should enjoy absolute autonomy. In essence this argument is founded on thoughts of sport being different to normal economic activity as it contains important social and cultural functions that can only be effectively regulated by the sports governing bodies. It is held that it is the sporting governing bodies that possess the expertise and that the intervention of bureaucrats without a sufficient understanding of the games will seriously endanger the proper functioning and future of sports.

On the other hand sports accounts for 3,7% of EU GDP and 5,4 % of the European labour market and as such represent an important economic activity that have made interests within the EU - as well as other observers - claim that sports should be treated no differently from other parts of the European market.<sup>64</sup>

That neither of these views could be maintained in its pure form was established by ECJ in the before mentioned Walrave case although it seemed to go quite far in granting sporting organizations autonomy. However, the so-called sporting exception have been developed gradually by the EC courts and in the last contribution to the saga, the so-called Meca Medina case<sup>65</sup> one might start to see the settlement of the state of law.

In the following we shall take a closer look at the autonomy sporting organizations enjoys within the legal framework of the treaty. Thereafter FIFA and its competence to regulate Players' Agents under the current rules of the European treaty will be analyzed and discussed. The purpose of this analysis is to clarify if the FRPA can be relied on to resolve the problems addressed in part two; hereunder if there are any alternatives on both a national and an international level.

### 3.3.1. Sporting Autonomy; the substantive content of the so-called sporting exception

Due to the fact that EU consist of 27 Member states pursuing divergent national sports policies it has been difficult to agree on a coherent sports policy within the EU.<sup>66</sup> Hence the treaty does not contain a legal base for direct intervention in sports in its constitutional framework.

According to article 2 that sets out the scope of the treaty the Community shall have as its task the establishment of a common market and an economic and monetary union to implement common policies or activities referred to in Articles 3 and 3a.

Sport is not mentioned in the Articles 3 and 3a, however, article 2 provides that the Community shall also promote "a harmonious and balanced development of economic activities" among the member states. Although a general legal basis for intervention in sports is missing, the Community thereby has a legal tool to interfere insofar as the sporting issues constitutes "economic activities". A crucial question is therefore when sporting issues can be seen as "economic activities".

As mentioned above the first important case that addressed the applicability of Community law was Walrave. This case concerned two Dutch nationals, Mr. Walrave and Mr. Koch, who regularly participated as pacemakers in medium-distance cycle races. The regulations of the international cycling union set out that the pacemakers should be of the same nationality as the rider. This rule prevented the two Dutchmen from participating on their team as the rider was of a different nationality. They therefore brought action against the international cycling union as well as the Dutch and Spanish cycling federations pretending that the provision was discriminatory and contravened their treaty rights; in particular their freedom to provide work set out in article 39.

The court first turned to the question of interest for our purpose, namely whether community law applies to sport. To this it pointed out what can be read out of the treaty namely that "having regard to the objectives of the Community, sport is subject to Community law only insofar as it constitutes an *economic activity* within the meaning of Article 2 of the treaty" (italics added).<sup>67</sup>

The court, however, went further in paragraph 8 of its diction,

where it held that not only will sport fall outside the scope of the treaty when it does not concern economic activities, but it also laid down an exemption from the principle of non-discrimination on the basis of nationality for "sports teams, *in particular* national teams, the formation of which is a question of *purely sporting interest* and as such has nothing to do with economic activity" (Italics added).<sup>68</sup> This sentence gave birth to the so-called sporting exception, because in a literal reading national teams were listed as an example, but not as an exhaustive list of rules relating to composition of sports teams.<sup>69</sup> On this basis supporters of a limited applicability of Community rules on sport, claimed that this implied not only that rules were based on motives "of purely sporting interest" could be justified as with reference to a lawful purpose, but fell entirely outside the scope of the treaty.

The next case of interest was rendered 18 months later in Doná<sup>70</sup>, concerned the legality of a rule of the Italian Football federation stipulated that in principle only Italian nationals could take part in matches as professionals or semi-professionals. In this case ECJ reiterated its statements in Walrave and gave further nourishment to the notion of a broad sporting exemption.

During the next two decades there were no cases giving a significant contribution to the question of the applicability of Community law to sports. With regard to the analytical framework to be used when dealing with free movement set out in article 39 and 49, however, a significant development took place. The prohibition against "discrimination" was in case law developed into covering every measure which place non-nationals at a disadvantage to nationals, hereunder "restrictions", "obstacles" and "hindrances".<sup>71</sup> According to this system "discrimination" could generally only be justified by reference to express treaty derogation i.e. art 39(3), whereas the other disadvantages may objectively justified because of motives that are not mentioned in the treaty.<sup>72</sup>

In the famous Bosman case<sup>73</sup>, the influence of this development can be spotted. The Bosman case originated from a dispute between the Belgian football player Jean Marc Bosman and his club Royal Club de Liégeois. Bosman claimed that nationality restrictions known as the 3+2 rule and the current transfer rules contravened Article 39, and ECJ was thereby forced to address the applicability of the treaty rules to sports.

In Bosman, the ECJ maintained its position in Walrave and Doná with regard to the economic threshold, pointing out that Community law was only applicable to Sport when it constituted "an economic activity within the meaning of article 2"<sup>74</sup>.

In its development on this criterion the court holds that even rules with some economic implications may be subject to the provisions of the treaty. Referring to the sporting exception set out in Walrave and Doná the court pointed out that such rules may be *justified* on "non-economic grounds which relate to the particular nature and context of certain matches"<sup>75</sup>, but limited the scope to rules that "concern specific matches between teams representing their countries".<sup>76</sup>

As we can see, the court both expanded the scope of the treaty by setting out a broad conception of "economic activity" and limited the scope of the sporting exception. Parrish observes that this expansion is compensated for by the introduction of the analytical framework of objective justification known from other sectors.<sup>77</sup> With regards to the possibilities of justification the ECJ seems to go even further than in other sectors by apparently accepting objective justification of directly discriminatory rules.<sup>78</sup>

The methodology to be used when applying Community law to

64 Parish/Miettinen p. 49.

65 C-519/04.

66 Parish/Miettinen p. 25.

67 Walrave paragraph 4.

68 Walrave paragraph 8.

69 Parrish/Miettinen p. 74.

70 C 13/76.

71 See Parrish Miettinen p. 59 with reference to Commission v. Netherlands I - 9141 Para 20.

72 Parish/Miettinen p. 63.

73 C-415/93.

74 Ibid 73.

75 Ibid para 76.

76 Ibid para 128.

77 Parrish/Miettinen page 89.

78 Ibid.

sports was further developed 7 years later in the cases *Deliège* and *Lethonen*<sup>79</sup>. *Deliège* concerned rules given by the Belgian Judo league whereas *Lethonen* regarded rules given by the Belgian basketball federation; in both cases ECJ was asked to rule on whether or not the sports could be considered “economic activities” within the meaning of article 2 of the treaty. The courts applied a broad definition of the phrase and held that in order for sports to be considered an economic activity it does not need to be directly remunerated.<sup>80</sup> This implies that sports that are generally considered as amateur sports, such as for instance judo, may be subject to the treaty provisions, because according to these cases; income that derives from for instance sponsorship may be sufficient to categorize the sports as economic activity.

In addition to its contribution on the criterion “economic activities”, *Doná* introduced a new element to the sporting exception that was later developed in the *Meca Medina* case and as such one of the important features of the sporting exception today, namely the concept of “inherency”.

In paragraph 51 the ECJ holds that some rules are “inherent in the conduct of of an international high-level sporting event” and will therefore avoid being seen as discrimination (obstacles, hindrances and restrictions) because the governance of sports “necessarily involves certain selection rules or criteria being adopted”.

The final case rendered on this issue, *Meca Medina*<sup>81</sup>, provides a valuable contribution by addressing most of the elements for a proper analysis of the applicability of Community law developed in the case law treated above.

The case concerned two swimmers who were sanctioned by the relevant federation as a consequence of a positive test of a substance prohibited in the WADA code. According to the athletes the application of these rules lead to an infringement of article 49 (free movement) and articles 81 and 82 (competition law) of the European treaty. The relevance of the case for our purpose is that the reasoning can be seen as an expression of the approach to be used to consider the applicability of treaty law today.

Firstly, ECJ confirms that the first test is whether the threshold of “economic activities” is passed.<sup>82</sup> It was not contested that the sport at issue constituted an economic activity, implying that the court did not elaborate further on the contents of this criterion. On this basis one may assume that the broad definition given in *Doná*, where it was made clear that in order for sport to constitute economic activity it need not to be directly remunerated, but can be deemed as such if the athlete receives “higher levels of income because of their celebrity status”<sup>83</sup> still can be seen as an expression of the state of law.

Secondly, the decision refers to the sporting exception seen in *Walrave and Koch* in paragraph 27 and 28 and concludes that “it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing it from the scope of the treaty”. This can be interpreted as a limitation of the broader sporting exception developed on the basis of *Walrave and Koch* to *nationality rules in national team sports*. In juridical literature this view is presented by Richard Parish and Samuli Miettinen who, on the basis of this passage of the sentence, concludes that the reference to motives of “purely sporting interest” in this context, should be read as an indication of the Court’s refusal to countenance nationality rules based on primarily economic motives. Their conclusion is inter alia supported by reference to the developments in *Bosman* where it was observed that whenever rules restrict the essence of a professional’s activity, they cannot be ‘purely sporting’ within the meaning of paragraphs 8 and 9 of *Walrave*.<sup>84</sup> If one takes into account the tendency towards considering other forms of restrictions than nationality rules in national team sports as subject to the treaty, but liable to objective justification, this is a plausible deduction shared by the author of this essay.<sup>85</sup>

The third feature of the *Meca Medina* case is the development on

the concept of inherency. In paragraph 45 the court elaborates on the inherency test first seen in *Deliège* and holds that although a restriction, obstacle or hindrance in principle could be established, they will not be viewed as such if the rule “is inherent in the organisation and proper conduct of competitive sports and its very purpose is to ensure healthy rivalry between athletes”. The importance of this rule is that the language of the court indicates that rules that are inherent does not constitute a restriction, obstacle and hindrance, implying that such rules fall outside the provisions of articles 39, 49. This also indicates that although rules issued by sporting organisations are not considered “inherent” they can still be objectively justified as seen in *Bosman*.<sup>86</sup> On this basis it can be concluded that a consideration of a potential violation of the European treaty article 39 and 49 will consist of 4 steps:

The economic activity test

The exception for nationality rules in national team sports

The inherency test

Objective justification

In the following we shall take a closer look at the FRPA and its validity in light of the analytical framework established above.

### 3.3.2. FIFA and its competence to regulate Players’ Agents under EU law.

The question of the relationship between FRPA and Community law has been directly dealt with by the European courts in the so-called *Piau* case<sup>87</sup> where the ECJ decided on appeal in February 2006. The case concerned a French agent who inter alia objected to FIFA’s requirement to obtain a compulsory licence to engage in the profession. Furthermore, he contested that FIFA’s competence to sanction a violation of this provision. In contrary to the claims of *PIAU*, the Court of first instance (hereinafter referred to as CFI) found that the FRPA were legitimate. This was later upheld by the ECJ, thus it stands as an expression of the state of law today.

The observant reader will notice that such a result seems quite peculiar in light of the conclusion in pt 3.1 in this analysis, where it was concluded that FIFA’s competence is limited to regulate its internal organisation. In light of this conclusion the result in *PIAU* should therefore be the opposite. Unless the agent is licensed, FIFA has no power with regard to this person, implying that an agent operating without a licence can not be sanctioned. However, as the case stands as the only authoritative source of law on the matter it deserves a closer scrutinization.

The objective of a players’ agent is defined by the CFI. It holds that “The object of the occupation of a players’ agent is, *for a fee* and on a regular basis, to introduce a player to a club with a view to the conclusion of a contract of employment, or introduce a player to a club with a view to the conclusion of a contract of employment, or to introduce two clubs to one another with a view to the conclusion of a transfer contract.” (Italics added). This definition covers an element that is not contained in the definition in article 1.1 of the FRPA, namely the economical motivation. However, if one sees the definition of the FRPA in its context (for instance article 20) it should be fairly clear that also FIFA is of the opinion that it is trying to regulate an activity in which a person generally engages in order to make economical profits. On this basis it can be concluded that the regulation of players’ agents is to be seen as “economical activities” within the meaning of article 2 of the European treaty, thus in principle subject to Community law. Secondly, it can be established that the profession of players’ agents cannot be considered as nationality rules in national team sports, implying that the exception in the second tier of the analytical framework presented in 3.3.1 does not apply.

Due to procedural matters the case was not considered under the free movement provisions in articles 39 and 49, but decided on competition law i.e. articles 81 and 82. The legal basis for the justification of the FRPA was therefore the exemptions listed in article 81 subparagraph 3. To this the CFI held that the FRPA where justified because of “the need to introduce professionalism and morality to the occupation of players’ agents to protect players whose careers are short, the fact that competition is not eliminated by the licence system, the

79 C-51/96&C191/97 and C-176/96.

80 Parrish/Miettinen p. 90.

81 C-519/04 P.

82 Ibid para 22.

83 C-51/96&C191/97 para 13.

84 Parrish/Miettinen p. 100.

85 Ibid and C-415/93 paragraph 76.

86 See Parrish/Miettinen p 102 with reference to *Bosman*, *Kolpak* and *Simultenkov*.

87 C-193/02.

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Andreas Wax liefert mit der vorliegenden Arbeit einen weiteren Baustein zur Erschließung des internationalen Sportrechts. Zu diesem Zweck zeigt er die lange Geschichte dieses „Querschnittsbereichs“ auf und unterzieht seinen Begriff einem Neuverständnis. Sodann erfolgt eine Darstellung der Bestandteile des internationalen Sportrechts einschließlich ihrer wesentlichen Inhalte, wobei auch die „vergessene“ Disziplin des Sportvölkerrechts Berücksichtigung findet. Ferner setzt sich Wax intensiv mit dem „Dilemma“ des internationalen Sportrechts – der Anwendung unterschiedlichen nationalen Rechts auf vergleichbare Sachverhalte – auseinander: Vorhandene Lösungsansätze werden kritisch analysiert und weiterentwickelt. Mit dem Ziel, der sportrechtlichen Praxis einen Nutzen zu bereiten, unternimmt der Autor schließlich den Versuch, mit Hilfe des Sportvölkerrechts einen Beitrag zur Beseitigung dieses „Dilemmas“ zu leisten.

## Einführung

### Erster Teil: Internationales Sportrecht

Geschichte des „internationalen“ Sportrechts — Begriff des internationalen Sportrechts — Bestandteile des internationalen Sportrechts außerhalb des Sportvölkerrechts — „Dilemma“ des internationalen Sportrechts und Lösungsansätze zu dessen Behebung

### Zweiter Teil: Sportvölkerrecht

Einführung — Bekämpfung von Apartheid und sonstiger Diskriminierung im Sport — Friedenssicherung bei Olympischen Spielen und Verhinderung und Bekämpfung von Gewalt beim Sport — Anerkennung eines „Rechts auf Sport“ als Menschenrecht? — Verhinderung und Bekämpfung von Doping im Sport — Sportvölkerrecht als weiterer Lösungsansatz zur Behebung des „Dilemmas“ des internationalen Sportrechts?

## Résumé und Ausblick



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almost general absence (except in France) of national rules, and the lack of a collective organisation of players' agents, are circumstances which justify the rule-making action". With regard to this justification it can be demonstrated that the European court has erred both in fact and in law.

Firstly, FIFA has drafted and adopted the FRPA unilaterally.<sup>88</sup> As demonstrated in 3.1 FIFA can only evoke provisions to its members. This is a question of constitutional nature and cannot be justified by reference policy considerations. On this basis the court should have made it clear that FIFA does not have power to impose sanctions on an unlicensed agent before even getting to the substantive questions relating to the articles of the EC treaty.

Policy considerations is a term frequently used in Norwegian theory on sources of law used to describe a category of various considerations to which a judge gives weight in determining whether the result in a legal controversy would be just or reasonable. In this sense such considerations have similarity to rules of equity known from common law systems, but the authorisation of such a source of law as relevant is a peculiarity in the Norwegian legal system, that is not recognized as a legal means of interpretation in International law or Community law, see Vienna convention on the law of treaties article 31.<sup>89</sup>

Secondly, notwithstanding the fact that the court has overlooked the crucial question of competence, Branco Martins observes that the court was also wrong with regard to the facts used to justify the legality of the regulations.<sup>90</sup> He points out that the justification was based on three elements;

There was a need to introduce professionalism and morality into the occupation of players' agents in order to protect players whose careers are short.

The absence of national rules

A collective organisation of players' agents was lacking

Firstly, he points out that collective organization of players' agents exists. On an international level the organization is called International association of FIFA Agents (IAFA), and in countries as Spain, England, Portugal, Italy, France, the Scandinavian countries and the Netherlands such organizations have been established.

Secondly, he has undertaken empirical studies where he demonstrates that 16 of 25 member states have a type of public regulation or legally structured framework for regulation of the profession of players' agents. Furthermore 1477 of the 1592 players' agents that were licensed at the time of the judgment were subject to public legislation, which constitutes 93% of the FIFA-licensed agents in the European Union.<sup>91</sup> On this basis he concludes that "a legal basis is lacking for FIFA to issue a set of rules that create a barrier to carry out the profession of players' agent in the European Union. In the vast majority of cases, (national) formal legislation exists regulating the profession of an agent that safeguards professionalism and moral standards, even to a further extent than the FIFA Regulations."<sup>92</sup> He further emphasizes the fact that Piau never had the opportunity to challenge the FIFA rules under article 49 (free movement on services), and insinuates that the probable outcome of such a claim would be the opposite of the one seen in the PIAU case. The author of this essay coincides with Branco Martins at least with regard to the fact that its way of justification cannot amend the lack of a legal basis to sanction unlicensed agents. Nevertheless, one important aspect is missing in his analysis. The perspective of his work is focusing on the legality of FIFA issuing the rules and enforcing them by sanctioning the agent, which was the matter at issue in Piau. On the basis on the elaboration above this is probably right although ECJ was of a different opinion in Piau, at least with regard to competition law. However, as demonstrated in pt 3.1 FIFA does have competence to issue and enforce their regulations on players and clubs who, according to FRPA art 2 pt. 2 are forbidden from using unlicensed players' agents. Through FRPA articles 34 and 35 FIFA has the competence to sanction players and clubs with severe measures such as fines, match suspensions, bans, deduction of points or demotion to lower divisions. These are all powerful means that if used can force players and clubs to deal only with licensed agents or exempt individuals under FRPA Article 4. If players and clubs were effectively sanctioned for using unlicensed agents, they

would probably refrain from doing so, thus forcing agents that want to stay in the business to obtain a license. In this manner FIFA can in theory gain power in the profession although the contractual link is originally missing.

A crucial question is therefore if this approach would violate article the 39, 49 on free movement or 81, 82 on competition law. With regard to competition law the European courts' constant refusal to statute an abuse of a dominant position in sports, indicate that if a treaty violation is to be established it will be under the rules of free movement, and as ECJ have already considered the question with regard to FIFA's regulation and competition law, what will be addressed in the following is the rules on free movement.

The first question relating to article 49(39) is if the FRPA constitute a "discriminatory" measure. Because the FIFA regulations, pretend to regulate the issues internationally, and do not establish different rules for professionals from different member states, the regulations can not be seen as directly discriminatory. However, it is seen as established doctrine that the prohibition against "discriminatory" practises covers every measure which place non-nationals at a disadvantage to nationals, hereunder "restrictions", "obstacles" and "hindrances".<sup>93</sup> Even under this broad definition it can be argued that the FRPA falls outside the scope of article 49(39) because it does not place any disadvantage on non-nationals compared to non-nationals. However, due to the quite expansive scope given to the rules in ECJ jurisprudence on free movement this can be seen as an open question and for the purpose of the following analysis the precondition will be that the FRPA will be seen as a practice constituting restrictions/obstacles/hindrances that places non-nationals at a disadvantage to nationals.

Having established that we are dealing with an economic activity that can not be exempt as nationality rules in national team sports and constitutes a discriminatory practise, the next key questions will be if the measures can be exempt under the inherency criterion or objectively justified.

The concept of inherency is in Meca Medina defined as rules that are "inherent in the organisation and proper conduct of competitive sports and its very purpose is to ensure healthy rivalry between athletes". The FRPA contains several features that are meant to ensure proper conduct of sports hereunder, ensuring contractual stability, the protection of minors and - as emphasized in Piau - introduce professionalism and morality to the occupation of players' agents. These are all important objectives to ensure the proper conduct of sports. However, one can hardly say that the very purposes of these rules are "to ensure healthy rivalry between athletes". This latter element of the definition indicates that this exemption is aimed at rules concerning the organisation of the competition as such as for instance was the case in Meca Medina where the contested rules were rules on anti doping. Such an interpretation is also supported by the history of the inherency exception that has been developed as a clarification of the vague notion of "purely sporting" rules set forth in paragraph 8 and 9 of Walrave. On this basis the conclusion is that the FRPA can not be exempt as "inherent in the organisation and proper conduct of competitive sports and its very purpose is to ensure healthy rivalry between athletes". The remaining question is therefore if the rules can be objectively justified.

According to article 45 derogation from the freedom to provide services can be established if the measures can be justified on the basis of "public policy", "public security" or "public health". As FIFA is a private entity acting without any form of public mandate, it is clear that none of these alternatives can be relied on to justify the FRPA. However, the concept of objective justification has been developed in EC case law and in the so-called Gebhard case<sup>94</sup>, ECJ ruled that a practise could be justified if it was "applied in a non-discriminatory manner", justified by "imperative requirements in general interest",

88 Siekmann p. 40.

89 see Roald page 194.

90 Siekmann p. 41.

91 Ibid p. 46.

92 Ibid 47.

93 See for instance I -9141 Para 20.

94 C55/60.

“suitable for securing the objectives pursued” if they do “not go beyond what is necessary” to attain the objectives pursued.<sup>95</sup> The applicability of this test to the sports sector has been established in several cases, hereunder; *Bosman*, *Simultenkov* and *Kolpak*.

This test requires an overall assessment, dealt with on a case-by-case basis, where it must firstly be proven that the “measures” are applied in a “non-discriminatory manner” that are motivated by “imperative requirements in general interest”; secondly that the means are proportional. The latter test consists of two components, implying that the first test will be to prove that the measures are suitable of pursuing the objectives pursued, and finally, that the objectives could not be achieved by less restrictive means. According to establish case law the burden of proof is placed on those who seek to rely on the derogation.<sup>96</sup>

In the application of this test to our question it can first be established that the FRPA is “applied in a non-discriminatory manner”, as it applies equally to professionals in the European community regardless of nationality.

The first interesting question is therefore if the FRPA can be considered “imperative requirements in general interest”. It has been outlined above that the rules of the FRPA are inter alia ensuring contractual stability, the protection of minors and introduce professionalism and morality to the occupation of players’ agents. One can hardly say that ensuring contractual stability in international football is a matter of general interest. On the other hand it should be equally clear that the protection of minors can be considered as a highly important matter of general interest that passes the threshold of “imperative requirements”. In addition the ECJ itself (in the *Piau* case) underlined the general need to fight corruption in the field of agents in general and to ensure the protection of minors and morality to the business, thus making it likely to assume that also this can be seen as a legal motive. That this is also the opinion of the European Commission can be seen in the *White paper on sports*, where it is stated that “There are reports of bad practises in the activities of some agents which have resulted in instances of corruption, money laundering and exploitation of underage players. These practices are damaging for sport in general and raise serious governance questions. The health and security of players, particularly minors, has to be protected and criminal activities fought against.”<sup>97</sup> The crucial question should therefore be, not if one can rely on the motivations for FIFA’s issuance of the FRPA as legal, but whether or not they constitute a proportionate measure in the pursuit of their objectives.

With regard to this question it is not possible to determine with any kind of certainty what will be the outcome if this question is brought in front of the ECJ, because it requires a scrutiny on a case-by-case basis and the case law of today is not sufficiently established to draw general conclusions. For instance the question of whether or not the objectives could be achieved by less restrictive means requires measure of comparison. What can be pointed out is that the fact that the ECJs as well as the Commissions’ recognition of the importance of the objectives sought realised by the FRPA, indicates that the threshold for constituting that the FRPA is disproportionate should be high. Furthermore it can be argued that FIFA’s regulation of this profession is necessary due to its international applicability and the absence of a coherent regulatory framework on an international level. This argument can be supported by the observances of the Commission in the before mentioned *White paper on sport* that underlines the problems caused by diverging policies with regard to the matter stating that “agents are subject to differing regulations in different Member States. Some Member States have introduced specific legislation on players’ agents while in others the applicable law is the general law regarding employment agencies, but with references to players’ agents”. Through an authorisation of the FRPA this problem could be amended, because of its universal applicability. The provisions of the FRPA could of course still be contrary to mandatory

national law and in that case it will not solve the problems caused by different regulation policies among the member states, but it would at least serve to fill an empty space where member states have not taken action to get rid of the problems addressed in this essay. On this basis the conclusion is that although one cannot predict the outcome of a potential dispute on the legality of the FRPA under the rules of free movement de lege lata, there are good reasons to consider the regulations objectively justifiable de lege ferenda.

### 3.4. Other potential limitations to FIFAs competence created by international laws.

On an international level there exists another Convention that is applicable to the activities of players’ agents, thus creating a potential limitation in FIFAs competence to regulate the profession. This convention is issued by the International Labour Organization that is an UN agency that seeks to promote social justice and internationally recognized human labour rights.<sup>98</sup> In 1997 it drafted the *Private Employment Agencies Convention*, C 181 which is ratified by Albania, Algeria, Belgium, Bulgaria, the Czech Republic, Ethiopia, Finland, Georgia, Hungary, Japan, Italy, Lithuania, Moldova, Morocco, the Netherlands, Panama, Poland, Portugal and Spain, Suriname and Uruguay.<sup>99</sup>

According to Article 1 this convention applies when any natural or legal person, independent of the public authorities provides:

services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise there from;

services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) which assigns their tasks and supervises the execution of these tasks;

These are both alternatives that fit the work of an agent as defined in the FRPA article 1. Hence the convention is applicable if the convention is ratified by the relevant state. The states that have ratified the convention may however deviate from the substantive rules “After consulting the most representative organizations of employers and workers concerned” cfr. Article 2 subparagraph 4.

Of interest for our purpose is article 7, subparagraph 1 that prohibits remuneration of such services setting out that “Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers”. It has been highlighted elsewhere in this essay that in general the incitement for an agent to engage in this profession will generally be potential profit. In addition the FRPA does not only recognize that such services shall be remunerated, but indicate that this is also the general rule; see for instance article 20, that prescribes how remuneration shall be agreed if the parties have failed to agree on this question in advance. On this basis both the validity of the FRPA article 20 as well as particular agreements between the parties may be challenged in states that are party to the treaty, if the treaty has status as national law in the territory, and the state has not derogated from this rule after consulting the most representative organizations of employers and workers concerned.

This provision is the only paragraph that might be problematic with regard to the FRPA, and although the objective of the convention is to formulate minimum standards of labour rights it does not contain any provisions that may contribute to create a transparent business characterized by integrity or protect minors from abuse. This is the only treaty that besides the EU treaty addresses certain sides of the Agents’ business, which leads to the conclusion that without the FRPA there is an absence of applicable international norms that seek to solve these problems.

### 3.5. FIFA and National law

The attitude towards sporting autonomy differs significantly between the European states. Some states that are commonly referred to as interventionist states for instance France, Portugal and Greece have adapted specific public laws that regulate sports. These may be contrary to the rules given by FIFA and will in the case of conflict prevail (given that they have status as mandatory). A complementary elaboration on potential conflicts will burst the frames and fall outside the

<sup>95</sup> Ibid 37.

<sup>96</sup> See Parrish/Miettinen p 65.

<sup>97</sup> The white paper on sport p. 12.

<sup>98</sup> Siekmann p 42.

<sup>99</sup> [www.ilo.org/ilolex/cgi-lex/ratific.pl?C181](http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C181).

scope of this paper, but a good example is the French regulation of access to the Agent profession.

According to Art 15-2 of the French sports law<sup>100</sup> “any person carrying on, occasionally or regularly, for a valuable consideration, the activity of bringing together parties interested in the conclusion of a contract relating to the carrying on of a remunerated sports activity must hold a license”(italics added).

By setting out that “any person” must hold a license the wording thereby establishes a stricter access to the profession than the FRPA that in article 4 exempts “parents”, “siblings”, the “spouse of the player” and a “legally authorized practicing lawyer”. Rules that in this manner are stricter than the FRPA with regards to access to the profession can be seen in other states such as Greece, Portugal and England.<sup>101</sup> In this manner such rules can be seen to go further in its pursuit of introducing morality, integrity and transparency to the game if one considers licensing as the most appropriate instrument to achieve these goals.

This is for instance the opinion expressed of Mick McGuire, a board member of the worldwide players’ union FIFpro, who has stated that “it can be questioned whether lawyers can be sanctioned in the same manner as licensed agents if the FIFA regulations are contravened. The fact is that they have not signed FIFA’s code of Professional conduct”<sup>102</sup>

This statement expresses an important point emphasized repeatedly in this essay. On the one hand the exception for lawyers may be well founded with regard to the fact a “legally authorized practicing lawyer”<sup>103</sup> will often possess knowledge that is more than sufficient to maintain the interest of his client. In addition he will be subject to a regulatory framework, in the form of a lawyer’s code of conduct. On the other hand, he remains outside the realm of the sports organizations, because - as pointed out by McGuire - he has not signed the agents’ code of conduct. In most countries, a lawyer’s code of conduct will be a sufficient to prevent problems such as bungs and dual Representation, but you will hardly find rules addressing more sports specific matters such as tapping up and the protection of minors. In this way, strict access to the profession might be an important mean to clean up the game, because the licensing process makes the substantive rules of sporting organizations applicable. With regards to “parents”, “siblings”, the “spouse of the player” this is even more evident as these are not subject to any code of conduct, thus making the need for applicable norms more urgent. One might intervene that the close personal relationship between these parties that might serve as a guarantee that these persons will act in the best interest of the player. Unfortunately, the history of football contains many examples of parents that have lead their offspring into tragedy due to their lack of competence (and in extreme cases motivated by potential personal profit) when dealing with experienced and cynical stakeholders of certain football clubs.<sup>104</sup>

As pointed out, there are only 3 countries that have adapted an interventionist approach to sport. In other states the activities of an agent will be subject to norms under regulations known from traditional disciplines of law such as contract law and labour law. In some countries such rules may be sufficiently developed to safeguard the problems sought regulated in the FRPA. However, especially with regard to the protection of minors’, country reports from 31 countries in the book *Players’ Agents Worldwide: legal aspects* show that such rules are not sufficient to deal with these problems. Hardly any of the countries have regulations that protect minors from being taken advantage of by the agent. Even for the interventionist states this holds true with regard to the substantive content of their general rules concerning protective measures for young players. Both the French and the Portuguese sports laws address the issue, but the consequences of a violation are quite futile. According to article 15-3 of the French sports law the only consequence of dealing with a minor is that the agent is prevented from obtaining a legally enforceable claim on remuneration as the provision prescribes that “The conclusion of a contract relating to a minor carrying on a sporting activity cannot give rise to any remuneration or compensation or to the granting of any advantage...”.<sup>105</sup> On this basis a framework prescribing severe

sanctions for violations on rules concerning protection of minors seems to be absent on a national level.

### 3.6. Conclusions

The purpose of this part of the essay is to analyze FIFA’s and its competence to establish if it has regulatory powers in the field of players agents and if their current regulations can be relied upon to solve problems identified in part 2, and further if there exists any alternatives to FIFA regulations. Based on the discussion above, it can first be established that FIFA’s regulations are only applicable to licensed agents, implying that a significant part of the persons engaging in these activities remains out of the reach of FIFA. However, we have also seen that FIFA may force agents to become licensed by sanctioning clubs and players for using non-licensed agents. For instance, the ban of a club from the transfer window for one or two periods would generally be catastrophic both in a sportive and an economic perspective. Therefore, if the probability of being sanctioned was high they would probably refrain from dealing with unlicensed agents. Such a regulation of the market would probably not be contrary to EU-law, firstly because it applies equally to every agent, regardless of his origin, and secondly because there are strong arguments in favour of objective justification. The absence of players and clubs being sanctioned, however, shows that FIFA is not actively using this opportunity.

The next important point is that there does not seem to exist any alternative regulation(to the FIFA regulations) of players’ agents, in national law or international law, that are suitable to solve the problems identified in this paper. Branco Martins has pointed out that 1477 of the 1592 players’ agents, i.e. 93% of the FIFA-licensed agents in the European Union,<sup>106</sup> are subject to some form of public regulation. However, as pointed out in the White paper on sport this implies that agents are subject to differing regulation in different states, which indicates that there is a need for a coherent internationally applicable regulatory framework.<sup>107</sup>

In addition, the elaboration under 3.6 shows that even in states that have introduced sport specific regulations, the regulations do not seem to contain substantive rules that to a sufficient degree can serve as remedies for the problems identified in chapter 2 of this essay. This is especially true with regard to the protection of minors, which should be considered one of the most urgent problems to be solved in international football today. The trade of players from the third world, particularly from Africa is, often compared to trafficking. As such it could be claimed that the players are sufficiently protected by the rules on trafficking in the statutes of the International court of justice. The International Criminal Court became effective on July 1, 2002 after 74 countries ratified the Rome Statute of the International Criminal Court (hereinafter referred to as the ICC Statute). According to the Statute, the Court shall have universal jurisdiction over the most serious crimes of concern to the international community. These crimes include genocide, war crimes, and crimes of aggression and crimes against humanity.<sup>108</sup> This court inter alia safeguards Article 7 of the 1956 Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Unfortunately, this Article has proven to be of little use preventing minors from the abuse of clubs and their agents because it generally requires the presence of force. Thus the article does not fit, because it is normally sufficient for an agent to say the word Europe to make children (with the consent of their parents) and young people decide to come voluntarily. Living under poor conditions makes the dream of becoming a professional footballer so strong that it is easy to forget what the leader of the foundation Culture Foot Solitaire Jean-Claude Mbvoumin have expressed on several occasions when commenting on the trafficking of African players; “It’s important to dream, but the

100 law nr. 84-610 of 16 July 1984.

101 See Siekmann p. 11.

102 Ibid p 49.

103 Siekmann p. 49.

104 See for instance various stories in Backe Madsen/Johansson.

105 Siekmann p. 224.

106 Ibid p. 46.

107 The White paper p 12.

108 [www.protectionproject.org/commentary/icc.htm](http://www.protectionproject.org/commentary/icc.htm)

dreams about football now are not realistic.<sup>109</sup> The general absence of force, therefore makes this article an insufficient instrument trying to prevent these problems, which is shown by the fact that several cases regarding trafficking in football have been raised in front of different European courts, but to this day nobody have been convicted.<sup>110</sup>

Having established that there is a need for a coherent and internationally applicable framework regulating agents, the question that remains is how such a framework can be established. One of the conclusions in the White paper on sports is that it shall evaluate whether action at EU-level is necessary.<sup>111</sup> This may be a solution, but it has many catches. First of all the commission itself has not even evaluated if it has the specific competence to establish a specific regulate players' agents, and as such it will still take many years before a regulation could be in place. Furthermore, the protection of minors is a global problem although Europeans are normally responsible for the activities. This implies that such a regulation would not be applicable in cases where the children are brought from Africa to countries outside Europe. A good example is the Arsenal JMG Football Academy in Thailand, where many of the underage boys have been brought from the Ivory Coast.<sup>112</sup> Such a case would clearly be outside the realm of the European Union, but subject to the FIFA regulations that is not limited to Europe, given that it has regulatory competence. Finally, there is a procedural aspect that goes against a European approach. A procedure for the European courts generally takes several years, which can be seen for instance in the Bosman case, where the players' career ended long before it was established that he was free to move to another club. As such a sporting approach seems more favourable, as the procedures in FIFA and CAS are regularly less time demanding.

Other international approaches created by treaties, or by implementing or changing the ICC statutes could also be a solution. However, there are currently no such incentives. Considering that such changes in these treaties will be at least as time consuming to changing the European treaty, such a possibility does not seem very realistic. Therefore, the only realistic alternative to an EU approach within the reasonably foreseeable future seems to be regulation by FIFA. We have seen that the problem connected to this approach derives from the fact that FIFA lacks competence to regulate players' agents as such because there is a missing link in the contractual chain. This problem could be amended if FIFA was given public mandate to do so. By delegation of power from national states it could be provided with the necessary powers. The problem is that this would call for a similar procedure as changes in the treaties mentioned above, and require an incentive where representatives from nations all over the world had to be gathered and agree to give FIFA such power. First of all, no such incentive exists, and secondly, making so many states agree on such an empowerment of FIFA seems even less realistic than the dreams born of young boys wanting to become professional footballers. As pointed out in pt 3.3.1 the differing policies on sports within the 27 members of the EU have made it very difficult to agree on matters related to sport, which makes it likely that to reach such a consensus on a global level would be close to impossible.

On this basis my conclusion is that in the fight against players' agents and corruption with the objective to create a clean and transparent business characterized by integrity and morality, one will have to rely on FIFA equipped with the powers it has today. It is my opinion that FIFA has the necessary means available to deal with the problems through their possibility to sanction players and clubs, thus forcing those who want to act as agents submit to their regulations. What is lacking is the will to do what has to be done in order to achieve their noble and publicly expressed goals.<sup>113</sup>

109 [news.bbc.co.uk/2/hi/africa/7187713.stm](http://news.bbc.co.uk/2/hi/africa/7187713.stm).

110 Backe Madsen/Johanson p. 304.

111 White paper page 13.

112 Backe Madsen/Johanson p. 104.

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# Player's Agents in Norway

by Ronny-V. van der Meij\*

## 1. Introduction and overview of the regulatory framework in Norway

Norway has not introduced any national sports law nor a specific law regulating players' agents. There are, however, various national norms that might be applicable depending on the service provided by the agent and his role in the transaction such as the law on conclusion of contracts, agent authority and invalidity<sup>1</sup>, the penal code<sup>2</sup>, and the lawyers' code of conduct.<sup>3</sup>

Although general national laws might be applicable in disputes concerning players' agents, the questions arising from these will generally be governed by the regulations of the sports associations. Furthermore the most developed set of regulations are those of the Norwegian Football Federation (hereinafter NFF). Therefore the structure in the following will be that the NFF regulations on players' agents (hereinafter NRPA) will serve as a starting point of the analysis, and problems caused by norms of a higher comparative value will be treated continuously.

The current NRPA entered into force 1. January 2009. According to § 1-1 of these regulations they are designed with due consideration to the FIFAs regulations on Players' Agents (hereinafter FRPA). The NRPA is, however, more detailed and at some points more restrictive than the FRPA.

In the following a brief overview of the most important rules will be accounted for. Since the formal criterions as to who can obtain a license, the procedure for application and issuance of the license, the insurance requirement etc. generally coincides with the provisions of the FRPA, these matters will not be addressed in this contribution.

## 2. The scope of the regulations

According to § 1-1 the NRPA aims at regulating the profession of agents in general. With regard to the extent of activities governed by the rules these are limited and developed by the introductory provisions in chapter 1, and the definitions in chapter 2.

The first important limitation can be found in § 1-3, which sets out that NRPA only applies to agent services provided to players and coaches. This rule has its parallel in article 1 subparagraph 3 of the FRPA and implies that services rendered to coaches and managers fall outside the scope of the regulations. The provision in § 1-3 further limits the applicability of the NRPA by prescribing that the regulations do not apply to other services than those agreed between an agent and the player *in connection with transfers, loan or contract negotiation*. Hence, the regulations govern the work of agents in their role as intermediaries in transfers, implying that other services commonly conducted by agents such as management services, mediation of for instance sponsor agreements or representation in potential disputes fall outside the scope of the regulations.

The second important element of importance when assessing the applicability of the NRPA, is the definitions in chapter 2 that underlines and develop the interpretation of the provision seen in the latter paragraph.

The NRPA § 2-1 defines an agent as *a person holding a valid license issued by one of FIFAs member associations*. The wording does not distinguish between natural persons and legal persons. However, read in the context of the definition in FRPA paragraph 1 it should be clear that only natural persons may obtain status as agents.

In § 2-2 agent conduct is defined. According to this article agent conduct includes the following activities:

- Introduce/Market a club towards a player.
- Introduce/Market a player towards a club.
- Participate in meetings on behalf of, or together with a club or a player in connection with a transfer, loan or contractual terms.
- Discuss or negotiate terms in a potential transfer or loan with a club or a player.
- Negotiate with a club on behalf of a player or another club

- Communicating with the media on behalf of a player or a club about a transfer/loan or the possibility of such a deal.

The wording of this article is more or less self explanatory and gives useful guidance when determining whether an activity is caught by the scope of the NRPA. In this relation the NFF has also taken into account that many agents are organized as corporations by giving rules on activities that are related to agent conduct, but might be performed by persons that do not possess a license.

In this connection § 2-3 addresses the legality of the performance of administrative duties for persons that perform work for a players' agent. According to this article such a person may not conduct any of the activities described in § 2-2, but may perform:

- Ordinary secretary tasks, such as drafting and preparing documents for instance letters in connection with a transfer/loan/negotiation.
- Make agreements and facilitate meetings between the players' agent and a club/player.
- Assist the players' agents clients with practical issues such as for instance change of domicile.

Although this provision is meant to clarify the relations between an agent and his assistants it leaves open certain important questions.

Firstly, it can be asked if an assistant will be entitled to attend transfermeetings (as an advisor) when the agent is present. Neither the wording nor the context seem to solve this question, but if the reasoning behind the rule is to ensure that the player gets the best possible advice in a transaction, and to ensure that the rules are followed there is no reason to prevent the assistant from attending.

Secondly, the phrase "make and facilitate meetings" might be quite difficult to distinguish from "introducing/marketing". It can for instance be asked if it will represent marketing if an assistant makes a phone call to a club regarding a player to facilitate a meeting on behalf of the agent. If one applies a strict literal interpretation of "introducing/marketing" the answer to this might be yes. However, as long as the players interests are safeguarded by the fact that the NRPA requires to the agent to personally conduct the crucial parts of the transaction, a liberal interpretation should be applied.

The NRPA also addresses another group that commonly play a role in transfers, namely scouts cfr. § 2-4. According to this provision scouting means *identification, observation and evaluation of players*. Such an activity is not to be seen as agent conduct if:

- The scout does not have any form of contact with the player
- The scouting does not include any kind of presentation or counselling to players or clubs concerning transfers.
- The scout is not involved in establishing contact or negotiating about transfers/loan.

Subparagraph 3 exempts a scout that is permanently employed by a club from the restrictions set out above, if he exclusively acts on behalf of the club where he is employed.

## 3. The right to participate in negotiations concerning transfers/loan and player contracts.

Chapter 3 of the NRPA specifies the circle of persons that may represent or assist a player or a club during the negotiation of transfers/loan and players contracts. In accordance with the principle of contractual freedom § 3-1 subparagraph 1 states the obvious, namely that players and clubs may negotiate without being represented or assisted by

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1 Avtaleloven, 31. mai nr. 4 1918

2 Straffeloven, 22. mai nr 10 1902

3 Advokatforskriften, FOR 1996-12-20 nr.

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anyone. However, § 3-2 subparagraph 2 prescribes that if a player has chosen to be represented by an agent, all contact shall be made *through* the agent.

In addition to licensed agents, § 3-2 subparagraph 2, allows a player to be assisted by a spouse, non-marital cohabitant, parents, siblings, legal guardian, a representative of a labour organisation (to which the player is a member recognised by NFF) or a lawyer. According to subparagraph 3 of the same provision a club may only make use of lawyers besides players' agents.

These exceptions create problems with regard to the rules applicable to potential disputes. As emphasised in the introductory chapters of this book the legal basis of a sportive organisation such as the NFF to regulate the profession derive from contracts. None of the exempt individuals has a contractual link that makes the NRPA applicable to them. For lawyers such an exception may be defended on the basis of the fact that a law degree might be sufficient to ensure that the advisor is capable of safeguarding the interests of his client. Furthermore he will be bound by the lawyers' code of conduct implying that if he does not conduct his business in a satisfactory manner, claims can be made by reference to these norms. However, this creates an inherent danger of conflicts of law. In addition, it is not clear how far the exception reaches.

The NFF have signaled that the exception for lawyers is limited in the sense that a lawyer may participate in the negotiations, but he may not actively market the player, by contacting clubs etc. Such an interpretation can not be deducted from a normal understanding of the wording, and it is hard to see any plausible reasoning for such a limitation. The mayor problem of the exemption is that the exempt individuals are outside the realm of the NFF. This is first and foremost a problem with regard to the persons that are not subject to a code of conduct. On this basis it should be carefully considered whether or not the NRPA should make exemptions to the licence requirement when the rules are revised in the future.

#### 4. Remuneration and formal requirements.

According to § 2-1 subparagraph 2, a players' agent will be entitled to remuneration when he has entered into a valid representation contract with a player or a club. The NFF have issued a standard representation contract that is made mandatory through § 10-1. They may, however, agree on additional clauses as long as these do not violate applicable sportive or civil norms.

The agent and a player may agree on the remuneration *before* the signature of the representation contract cfr § 12-2. This paragraph gives the parties discretion to decide on a lump sum or a monthly, quarterly or annual remuneration through the contract period. If the parties have not reached an agreement before the conclusion of the representation contract the agent will be entitiled to 3% of the players' salary, sign on-fee and *regular bonuses* cfr. § 12-3 and 12-1. According to § 12-1 bonuses based on performance and other benefits shall not serve as basis for the calculation. If an agent represents a club, he can only be remunerated with a lump sum set out in the representation contract, this payment may not be connected to the transfer fee, solidarity mechanism or training compensation cfr. § 12-5.

With regard to the question of who is responsible for the payment § 12-6 sets out that the party that has contracted the agent shall pay him directly. However, after the negotiations of the players' personal contract, subparagraph 2 provides that the player may grant the club authority to pay his agent. In this connection subparagraph 3 also forbids the agent to receive payment from any other party.

#### 5. Bungs

Bungs are commonly defined as the use of payments (in the form of money or other benefits) from the agent to a coach or manager or vice versa in order to facilitate a transfer. As such, one could also use the

more general term bribery, which is a classical example of corruption found in many sectors of society. The phenomenon has drawn considerable attention recently, and it has been held that this represents a severe problem in International football today.<sup>4</sup> An example that illustrates the actuality of this problem also in Norway is an article in a Norwegian newspaper about an infamous agent mentioned elsewhere in this book that supposedly made his career by such means.<sup>5</sup> The article systematically scrutinizes several transfers involving the agent and includes accusations of embezzlement<sup>6</sup> as well as bungs. To make as standing as to whether the accusations are rightful falls outside the scope of this contribution, but it illustrates that also in Norway this might be a severe problem.

Notwithstanding the severity of the problem, the NRPA does not address bungs. However, such activity will constitute a criminal offence according to § 276 a) of the penal code, that criminalizes the party making use of such means to facilitate a transfer, as well as the party accepting it. Although we have a general rule in the civil regulation applicable to bungs, it would be preferable if the NRPA addressed it directly to create awareness by the stakeholders in Norwegian football and signalize that such activity is condemned also by the NFF.

#### 6. Tapping up

The practice of tapping up describes the situation where players are offered for sale without the knowledge and consent of the club with whom the player is registered. This matter is regulated in § 18-2 of the NRPA that sets out that, it is forbidden for an agent to contact a player that is under contract when the purpose inquiry is to encourage the player to terminate or violate the players' contractual obligations. Furthermore the provision establishes a presumption implying that, unless the agent is able to demonstrate the contrary it shall be assumed that he has induced the contractual breach.

#### 7. Dual representation

The prohibition of dual representation is set out in chapter 14 of the NRPA. The general rule is provided in § 14-1 subparagraph 2, stating that a players' agent shall avoid any conflict of interest. This provision further specifies that the agent is responsible for ensuring that that he:

- Only represents one party during a transfer, loan or contractual negotiations
- Does not have any informal cooperation or companionship with the other parties in the negotiations.
- Does not have any informal cooperation or companionship with the other involved agents.
- Is not employed by or in any way connected to the same firm as any of the other agents.
- Is not currently representing or in any other way in a position where he has coinciding interests with a coach, other employees or other representatives of the club.
- Not to have offices, be employed or having economical interests in a company that has a cooperation agreement or an investor agreement with the clubs involved.

Furthermore § 14-2 forbids an agent to convey a player when the agent have previously represented or assisted one of the selling clubs' current coaches in negotiations concerning his contract with the club. Finally, § 14-3 establishes a 2 year quarantine for agents to represent a player in a transfer, loan or contractual negotiation when he has previously represented the club. It can be questioned if the latter provision goes too far if the bearing argument of the rule is to prevent conflict of interest as the objective might be achieved by less restrictive means such as a duty to disclose such information. If the parties are made aware of such circumstances and chooses to make use of the agent, one can hardly say that there exists a conflict of interest that justifies such a restrictive rule.

#### 8. Protection of minors<sup>7</sup>

The NRPA § 10-3 prescribes that any agreement that directly or indirectly binds a player below 15 years is to be considered null and void.

4 See for instance, World sports law report 2006 p. 1

5 See, <http://www.dn.no/forsiden/naringsliv/article796866.ece>

6 See for instance the decision of Jæren Herredsrett(1.instance) with status as final, 97-00617 A

If the player is under 18, the players' legal guardian must cosign in order for the contract to be valid. This rule, however, has to be seen in connectivity with the FIFA regulations on the status and transfer of players (hereinafter FRSP) article 19 regarding the protection of minors. Although an elaboration on these rules in principle fall outside the scope of this contribution, these rules and the so-called Mikel case that has been referred to as one of the dirtiest in the history of football deserves to be addressed as many of the facts in this case are only available to those who understand Norwegian.

In the autumn of 2008 a book was published by two award winning Norwegian journalists concerning trafficking of footballers in general and the Nigerian football player Jon Obi Mikels journey to Chelsea in particular<sup>8</sup>. This book illustrates the futility and the lack of enforcement of the rules protecting minors.

The story of Jon Obi Mikel (hereinafter Mikel) has lead to numerous news headings all over Europe, and especially in Norway where the sporting director of the football club FC Lyn was sentenced for having forged the contracts of Jon Obi Mikel and Chinedu Ogbukes (hereinafter Edu). According to the authors of this book however, the forgery part is only to be considered a minor part of all the violations that were committed by all the parties in this case, especially with regards to the rules protecting minors. In the following some examples from the book will be used to illustrate problems connected to the current regulatory framework issued by FIFA and the governance of these rules.

The Mikel farce started when Manchester United (hereinafter United) discovered him during a competition for national youth teams in Cairo in 2003. After this competition United invited the Nigerian youth team to a training camp in Manchester and Mikel impressed to such a degree that United wanted to contract him. As could be expected, it did not take long before the word of the extraordinarily talented Mikel was out and about and at the youth world cup in Finland that year he was considered as one of the main attractions. After this competition United was no longer the only club wanting to sign the player and in particular another giant had awoken, namely Chelsea. The problem for both clubs, however, was how they could ensure to get the player as he was only 15 years of age implying that FRSP art 19 prevented them from signing him. This lead to a bitter fight between two of the monoliths of European football, that according to the book included everything from the offering of so-called scholarships to unofficial contracts; even kidnapping.

The first interesting detail in this case for our purpose is that at the end of the year 2003, the father of Mikel had signed a contract stating that "I, Mr. Michel Obi, hereby authorize my son (name above) to go to Chelsea Football club..." and that he authorizes "Sports & Media Group Plc to act on my behalf in securing a club for my son".<sup>9</sup> With regard to this contract it should be clear that the first provision of this contract is null and void or can not be interpreted as something other than the wish of the father in light of article 19 subparagraph 1, whereas the latter could be valid with regard to the substantive content as a representation contract may be made as long as the players legal guardian signs the contract. However, the FRPA stipulates in pt 1. of its definitions that only "natural persons" can act as agents, thus neither this clause of the contract can be seen as legally binding.

The player was moved to the South African club called Ajax Cape

town together with three friends from the Nigerian youth team and was paid a so-called scholarship of 150 Rand by Sport & Media Group (hereinafter referred to as SEM) that had the exclusive right to provide Chelsea with African players.<sup>10</sup> This illustrates a way of circumventing the rules or more precisely; a way to ensure that the violations are not detected.

As the player was never attempted transferred and thus not licensed to play for the club, the sporting authorities had no incentive to intervene. By stationing a player in a club without transferring him and making an agency pay him to keep him happy, they might be able control him without being able to sign him. This practice would clearly - at least in this case - constitute a violation on the prohibition of dual representation as set out in article 19.8 in the FRPA where after an agent shall avoid "conflict of interest" and "may only represent the interest of one party per transaction.", thus violating another of the FIFAs provisions. Such a violation, however, should be easy to camouflage, as long as both parties are satisfied because then no claim will be made to make the relevant authority intervene.

Mikel stayed in Cape Town for about half a year, and later, on the 19th July 2004 the Agent of United (not SEM) also managed to sign a representation agreement with him.<sup>11</sup> It falls outside the scope of this work to make a standing with regards to exactly what happened or who was responsible for what, but what can be said with certainty is that on the 14th August 2004 Mikel and his three friends arrived at Oslo airport and were immediately matriculated into a Norwegian school called Norges Toppidretts Gymnas (hereinafter referred to as NTG) that offers talented athletes an academic study program focused on sports. This school collaborates with the Norwegian football club FC Lyn Oslo, but as long as the players only have status as students there is apparently no violation of the rules protecting minors.

Considering the expansive interpretation of the rules protecting minors laid down by the CAS in CAS/2008/A1485 (FC Midjylland vs FIFA), such a practice will probably be caught by the scope of FRSP article 19, but in the Mikel case no such claim was made.

Once again however, the clubs and agents were making arrangements behind the scenes and during the following month the rights of the players were attempted secured by different agreements, notwithstanding the fact that neither of the involved parties had a valid legal basis to dispose of the rights of the players.<sup>12</sup> This apparently changed when the players turned 18 in April 2005, and FC Lyn Oslo announced that they had gotten the signatures of Mikel and his friend Edu. It later turned out that the sporting director of FC Lyn Oslo, had forged (sentenced by a judgment that was not appealed thus having status as final)<sup>13</sup> the contracts of Mikel and his friend Edu providing that the players belonged to Lyn FC Oslo. Nevertheless, with this apparent authority Mikel was sold to United for the amount of 5 million pounds.<sup>14</sup>

The weeks afterwards were followed by a circus that has never seen its like in Norwegian football with reports of threats, kidnapping and it reaching a peak when the player disappeared and reappeared in London where he suddenly claimed that he wanted to play for Chelsea but had been pressured to sign for United by the sporting director of FC Lyn Oslo.<sup>15</sup> What is interesting for our purpose is that this conflict made United and FC Lyn Oslo send a claim to the English FA and FIFA containing material that described the methods Chelsea had used to get a hold of the players in this conflict.<sup>16</sup>

In this way FIFA was provided with material that could lead to severe sanctions for the club, but more importantly in this essay is to emphasize that the agents used by Chelsea were licensed, thus subject to the FRPA as well as the FRSP.

The NFF issued a decision in mars 2009, sanctioning FC Lyn and the agent Rune Hauge. The fine imposed on the agent however, has been criticized as being insignificant compared to the violation committed, and that withdrawal of the license would be the appropriate sanction.<sup>17</sup>

Despite the fact that these rules were enforceable on the agents, FIFA dropped the case when the parties settled the conflict and withdrew their claims. In this case FIFA was provided with considerable

7 This section is based on my essay: "Players' agents and the regulatory framework on corruption", that contains a more detailed description of the problems faced by the stakeholders of football regulating the issues addressed in this book. The work was awarded the "International legal award" in a competition arranged by Instituto superior de derecho y economia (ISDE) and federacion interamericana de abogados (FIA).  
8 Backe Madsen/Johansen - "Den forsømte diamanten, historien om fotballens mørke side"(The missing dia-

mond, a history about the dark side of football).  
9 Backe Madsen/Johansson page 46  
10 Ibid page 47  
11 Ibid page 48  
12 Ibid page 56  
13 TOSLO-2007-155951  
14 Backe Madsen/Johansson page 46  
15 Ibid page 225  
16 Ibid page 229  
17 See [arkiv.nettavisen.no/Nyhett/338839/NFF+straffer+Agent-Hauge.html](http://arkiv.nettavisen.no/Nyhett/338839/NFF+straffer+Agent-Hauge.html)

information and evidence that might prove severe violations of its regulations. Accordingly, the claim was composed of 9 pages and 8 annexes.<sup>18</sup> In addition the settlement agreement contains information that should at least be sufficient to raise suspicions. The settlement agreement - that was supposed to be strictly confidential - fell into the hands of the authors of the book "Den forsvunne diamanten" (The missing diamond) and is now made publicly available through this.<sup>19</sup> This demonstrates a severe problem with regard to the enforcement of the rules on the protection of minors. It shows that FIFA does not

interfere ex officio, not even when they are provided considerable evidence and the violations concern rules that are set to protect general interests such as the protection of minors.

To complete the picture it may be mentioned that Chelsea in the autumn of 2008 sued FC Lyn Oslo claiming them to pay £ 16 million, which is the same amount as Chelsea paid to Man U and FC Lyn Oslo according to the said settlement agreement.

<sup>18</sup> Backe Madsen/Johansson page 227

<sup>19</sup> Ibid pages 318-333

# Tickets, Policy and Social Inclusion: can the European White Paper on Sport Deliver?

by Mark James and Guy Osborn\*

## Introduction

Whilst sport is increasingly seen by many in terms of its commercial potential, the broader social function of sport should not be overlooked. There are myriad examples of this, particularly at the European Union level. The social role of sport is specifically stressed in Declaration 29 of the 1997 Treaty of Amsterdam, 'The Conference emphasizes the social significance of sport, in particular its role in forging identity and bringing people together' and in the Treaty of Nice, '[T]he Community must, in its action under the various Treaty provisions, take account of the social, educational, and cultural features inherent in sport.'<sup>1</sup> Further, the European Commission's White Paper on Sport noted that '[s]port is an area of human activity that greatly interests citizens of the European Union and has enormous potential for bringing them together, reaching out to all, regardless of age or social origin',<sup>2</sup> whilst the British Olympic 2012 bid set much store in the integrative function of sport, and the possibility of kick starting a revolution in sporting participation as part of its legacy. The London 2012 website proclaims that:

'London 2012's ambition is to create a Games for everyone, where everyone is invited to take part, join in and enjoy the most exciting event in the world. London 2012 will create the most accessible and participative Games. It will touch people as it has never done before, stimulating people to do more and to try new things and reassess what we are all capable of.'<sup>3</sup>

This seeming polarity between the commercial and the cultural has vexed the European Commission, which has struggled to reconcile

these seemingly incompatible aspects of sport and this tension has produced notable schisms and contentious decisions. In particular, this has occurred in respect of the transfer regulations and associated restrictions imposed on professional footballers when seeking new employment at a different club<sup>4</sup> and the sale of broadcasting rights,<sup>5</sup> although there have been other, perhaps less newsworthy, areas of intervention in addition to these. The focal point of much of the debate has often been on the definition and application of the concept of 'the specificity of sport' to justify a particular outcome.<sup>6</sup>

The area of ticketing has also not been without legal intervention. Whilst historically centred on issues of spectator safety and public order,<sup>7</sup> other aspects of ticketing policies have come to the fore more recently, particularly in terms of access to tickets. These developments have become particularly marked with the advent of sophisticated online environments for buying and selling tickets such as ebay in a general sense, and more specifically, ticket focussed online vehicles for selling tickets such as seatwave and viagogo. The creation of on-line environments and the associated increase in online transactions has led to EU action to control unscrupulous sales.<sup>8</sup> In addition, the EU has considered ticketing issues on a number of occasions in the past, with Commission decisions being handed down on the legality of exclusive distribution rights and discriminatory practices, particularly around FIFA World Cup packages.<sup>9</sup> In England and Wales the role of the law as regards policing the primary and secondary ticket markets has also recently become the subject of scrutiny, with a series of ticket touting summits held under the auspices of the Department for Culture, Media and Sport.<sup>10</sup>

\* This paper arose out of the TMC Asser Institute International Workshop on the White Paper on Sport that took place on 22 February 2008 in The Hague. The authors gratefully acknowledge the support of the British Council and Asser Institute. Dr Mark James is Reader in Law at the University of Salford, Dr Guy Osborn is Professor of Law at the University of Westminster and Professor (II) in the Department of Sociology and Political Science at the Norwegian University of Science and Technology, Trondheim.

<sup>1</sup> (2000/C80/01). A great example of the social value of sport comes from cricket and the English case of *Miller v Jackson* [1977] 3 All ER 338. Here, when adjudicating on a dispute between a neighbouring householder, who had recently come to the village and was therefore an 'out-

sider' and a local cricket club, Lord Denning examined the implications of allowing the claim, 'I suppose, that the Lintz Cricket club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground' (at p340). Here the 'social utility' of the sport is writ large.

<sup>2</sup> *White Paper on Sport*, 11.7.2007, COM (2007) 391 final, para 3 (*White Paper*).

<sup>3</sup> Available via the 'Our Brand' section of the London 2012 website, <http://www.london2012.com/about/our-brand/index.php> (date last accessed 9 January 2009).

<sup>4</sup> *Union Royale Belge des Societies de Football Association ASBL v Bosman*

[1996] 1 CMLR 645 and further on the agreement reached between FIFA and the European Commission, [www.fifa.com/mm/document/affederation/administration/ps%5f769%5fen%5f68.pdf](http://www.fifa.com/mm/document/affederation/administration/ps%5f769%5fen%5f68.pdf) (date last accessed 13 January 2009).

<sup>5</sup> For detail on the agreement between UEFA and the European Commission regarding the sale of broadcasting rights to the Champions League, see [www.uefa.com/newsfiles/25624.pdf](http://www.uefa.com/newsfiles/25624.pdf) (date last accessed 13 January 2009).

<sup>6</sup> The specificity of sport, or the specific characteristics of sport, were referred to in the Declaration of the Nice European Council, 2000, as expanded by the European Sports Forum, 2001, [ec.europa.eu/sport/pdf/doc412\\_en.pdf](http://ec.europa.eu/sport/pdf/doc412_en.pdf) (date last accessed 13 January 2009) and most recently mentioned in Annex 5 of the Conclusions of the French Presidency of the European Council 2008,

[ec.europa.eu/sport/pdf/doc412\\_en.pdf](http://ec.europa.eu/sport/pdf/doc412_en.pdf) (date last accessed 13 January 2009). See also R Parrish and S Miettinen, *The Sporting Exception in EU Law*, (TMC Asser Press, The Hague, 2008).

<sup>7</sup> See for example Greenfield, S and Osborn, G (1996) 'After the Act? The (re)construction and regulation of football fandom' *Journal of Civil Liberties* 7

<sup>8</sup> See *EU Directive on Unfair Commercial Practices* (2005/9).

<sup>9</sup> See Commission Decision 27 October 1992, Case 33384 and 33378, *Distribution of package tours during the 1990 World Cup*, OJ 1992 L326/31 and Commission Decision of 20 July 1999, Case 36888 *1998 Football World Cup*, OJ 2000 L 5/55.

<sup>10</sup> These were held in November 2005, April 2006, July 2006 and February 2007. The key issue at the heart of these was whether the criminal law should be extended to cover ticket touting at events

Rather than focussing specifically on regulatory initiatives, this article analyses ticketing from the perspective of policy imperatives and issues of social inclusion, particularly the problems associated with access to tickets for sporting events. It examines various policies and approaches before going on to look at the issue of secondary markets and possible threats to inclusionary policies. It concludes by analysing how this fits in to the specific framework of sport and examines how this fits with the aims of the *European White Paper on Sport* (the White Paper) as regards social inclusion.

### Ticketing policies: inclusion and access

The White Paper is the culmination of a number of developments and focuses on the societal importance and influence of sport, an aspect that we noted above is seen as important on a number of levels.<sup>11</sup> The White Paper had an avowed aim:

‘[t]o give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy making and to raise public awareness of the needs and specificities of the sector’.<sup>12</sup>

On a more specific level, and importantly for our purposes, the White Paper made some particular suggestions in the areas of social inclusion<sup>13</sup> and the Commission Staff Working document made specific reference to ticketing issues and policies.<sup>14</sup> In terms of social inclusion, the White Paper stated that:

‘Sport makes an important contribution to economic and social cohesion and more integrated societies. All residents should have access to sport...the Commission believes that better use can be made of the potential of sport as an instrument for social inclusion in the policies, actions and programmes of the European Union and of Member states’.<sup>15</sup>

Whilst this may have been more focussed on job creation, economic growth and participative issues, access to professional sports events as spectators could, and perhaps should, also come under this rubric. At a national level, the access of spectators to sport has become a serious issue. In the United Kingdom, and especially within football in the English Premier League, there have been particular problems regarding ticketing policies and issues of inclusion and exclusion. To a large degree this has been created by the massive commercialisation of, and spectator interest in, football post-Italia 1990.<sup>16</sup> This problem was recognised by the Football Task Force (FTF), which was established to investigate, amongst other issues, whether football should be regulated in any specific way to prevent the unchecked commercialisation of the game. The FTF noted in its fourth Report to the Minister of Sport that, as regards ticket policies, the proposed Football Audit Commission should:

‘Receive reports from all clubs annually on how they have widened access to fans who would otherwise have been excluded; [and] encourage and ensure compliance on best practice amongst clubs on issues of ticketing policy, aiming to encourage accessibility to all supporters’.<sup>17</sup>

The Report went on to suggest a number of strategies for encouraging this, including stretching the price range to allow for the cross-subsidy of cheaper tickets, offering various concessions to embrace a wider cross-section of the community and utilising imaginative marketing strategies, particularly with respect to less popular fixtures.<sup>18</sup>

Whilst many of the FTF recommendations were never implemented, in particular the proposal that football be overseen by a powerful Independent Regulator, many of these suggestions have in practice been utilised by clubs within the Premier League. From the beginning of the 2000-2001, season Premier League Clubs agreed to implement their own Club Customer Charters.<sup>19</sup> All clubs now have Charters detailing their avowedly inclusive approach; Arsenal FC, for example, has instituted a number of policies designed to facilitate wider spectator access, which includes setting aside at least 25% of tickets to each game to non-season ticket holders, concessions for junior supporters and senior citizens and a broad range of ticket prices.<sup>20</sup> Most Premier League clubs have similar policies, and there are examples of even more creative responses from other clubs outside the Premiership, such as Sheffield Wednesday FC, that pre-date the FTF Report:

‘A broad range of ticket prices are available. Special schemes, for example ‘Kids for a Quid’ and ‘Friend for a Fiver’ are run on a one-off basis. A scheme is available for supporters to pay for their season ticket by instalment. The club makes no profit from this service, and always receives several quotes to secure the most competitive rate for supporters’.<sup>21</sup>

It is of course the case that outside of the Premier League tickets are not at such a premium and so it is imperative that these clubs are more minded to be creative in their marketing to ensure maximum sales. During the 1990s, Birmingham City FC adopted a number of innovative policies to encourage fans not only to come to games, but also to arrive early. One of these included a free beer if you arrived at the ground by a certain time. This policy not only had the added bonus of ‘capturing’ the fan and encouraging them to spend more time and money inside the ground rather than at some independent facility outside it, but also attempted to deal with one of the main problems associated with gaining entry to a football stadium identified in the Taylor Report; that of the majority of fans arriving close to the kick-off time thereby creating difficulties because of the large volume of people attempting to gain access to the ground during a short period of time.<sup>22</sup>

Access to Olympic tickets for London 2012 is another contentious issue, particularly in the light of the rows of empty seats seen on the television coverage of the Beijing Games in 2008.<sup>23</sup> The London Organising Committee are keen to avoid this and one suggestion put forward at the end of 2008 was to tie allocations of tickets for the Games to membership of sporting clubs.<sup>24</sup> The idea behind this policy is that priority will be given to people who are participating in sport at the grass roots level. This is similar to the reasoning behind the current schemes operated by the Lawn Tennis Association for the distribution of tickets to the Open Championships at Wimbledon and by the England and Wales Cricket Board, through the county cricket

other than association football. For more on the legislation as regards football see S. Greenfield, G. Osborn and S. Roberts, (2008) ‘Contradictions within the criminalisation of ticket touting: what should be the role of the Law’ [2008] *Web JCLI* 3.

11 See for example the *Independent European Sport Review* 2006, available online at [www.independentfootballreview.com/doc/Full\\_Report\\_EN.pdf](http://www.independentfootballreview.com/doc/Full_Report_EN.pdf) (date last accessed 15 January 2009)

12 *White Paper*, para 1.

13 *White Paper*, para 2.5.

14 Commission Staff Working Document, *The EU and Sport: Background and Context. Accompanying Document to the*

*White Paper on Sport* 11.7.07, SEC (2007) 935, paras 3.0 and 3.2.

15 *White Paper*, para 2.5.

16 There are a number of texts that have charted this trajectory, taking in as it does the reinvention of football following a number of important developments including in the UK the Taylor Report into the Hillsborough disaster (1990), the first satellite TV deals for football and the formation of the Premier League (1992). See for example here the preface to Greenfield S and Osborn G (2001) *Regulating Football. Commercialisation, Commodification and the Law* Pluto Press: London.

17 *Football Commercial Issues. A Submission by the Football Task Force to the Minister*

*of Sport*, 22 December 1999, [www.sportdevelopment.org.uk/footballcommercial99.pdf](http://www.sportdevelopment.org.uk/footballcommercial99.pdf) (date last accessed 13 January 2009).

18 Other suggestions included half price tickets for under-16s and those in full-time education for all competitive matches amounting to at least 10% of ground capacity, season ticket payments to have an instalment option, a limit on the total number of season tickets and to increase the cheapest tickets by no more than the RPI rate of inflation each year.

19 See ‘Fans’ charter seeks back-to-basics soccer’ *The Independent* 17 August 2000.

20 Arsenal Ticket Charter, available online at [www.arsenal.com/the-club/](http://www.arsenal.com/the-club/)

[corporate-info/the-club-charter](http://www.arsenal.com/the-club/corporate-info/the-club-charter), date last accessed 9 January 2009.

21 Sheffield Wednesday FC Ticket and Merchandising Policies 2 October 2008 available online at <http://www.swfc.co.uk/page/FansCharter/0,,10304-1026993,00.html> date last accessed 9 January 2009.

22 Taylor LJ, *The Hillsborough Stadium Disaster Final Report*, (1990) Cm 962 HMSO, London paras 29-33.

23 See Kelso P ‘Olympics: Empty seats a concern for Games’ *The Guardian* 12 August 2008

24 See ‘Join a Club if you want a ticket for London 2012’ *The Telegraph* 11 December 2008 available at [www.telegraph.co.uk/sport/othersports/olympics/lon-](http://www.telegraph.co.uk/sport/othersports/olympics/lon-)

clubs, for international cricket games; that those actively involved with the playing, coaching and spectating of the day-to-day fixtures should be rewarded for their loyalty by getting priority when the premium event tickets are distributed. The added bonus of such an approach is that, by encouraging people to join a variety of sports clubs, the potential to increase participation levels across a number of sports at the grass roots level is significantly increased. This of course ties more broadly into the theory that mega-events such as the Olympics have the ability to kick-start participation levels as an integral part of their legacy, a central aspect of the London 2012 bid, notwithstanding the fact that this galvanising effect is somewhat unproven.<sup>25</sup>

The problem with many of these attempts at inclusion is that, paradoxically, they create the opportunity for a secondary market in these tickets to evolve. This in turn creates a dilemma of whether it is ever appropriate to interfere with the primary ticket market.

### Increasing access and the regulation of secondary sales

As already discussed, watching live sports events has become increasingly popular in recent years. Attendances at professional football matches, for example, have increased dramatically in recent years, from a cumulative total for the old First Division in 1988-89 of 7.8m spectators to 13.6m for the 2007-08 Premier League season.<sup>26</sup> This creates a paradox for inclusionary policies; the increased interest in a sport creates a more aggressive market for tickets to watch it. This in turn can have the effect of excluding 'real' fans, which usually means those who attended live events even when the game was not so popular, by either pricing them out of the market or by them being unable to secure tickets as easily as they could previously. The single biggest threat to the success of any social inclusion or equality of access programme for any primary rights holder is this buoyant market and the concomitant increase in demand for tickets.

The most obvious side effect of this increased demand, particularly for major events, is the creation of a secondary market for the tickets. Although ticket touting, or ticket scalping as it is also known, has been in existence for many years, social inclusion policies and the ease with which people can now buy and sell tickets is fuelling the secondary market and has the potential to undermine genuine equality of access to the primary market.

Historically, before the advent of remote sales, whether by telephone or on the internet, touts had to buy any tickets that they wanted to trade from the box office, or from those who had made purchases from the primary rights holder. Secondary sales would usually have been conducted in person, in or around the venue where the event was going to take place. This temporal and spatial connection with the venue meant that it was practically more difficult to buy and sell large numbers of tickets without being drawn to the attention of the primary rights holder.

The 'anonymity' provided by the internet means, in addition to other technological and availability advantages,<sup>27</sup> that it is now much easier to engage with the secondary market with relative impunity. The ticket tout need never have any contact with the primary rights holder, nor need ever be anywhere near the venue. Touts can obtain their tickets from third parties, usually the official or nominated ticket seller, and sell them on to anyone prepared to pay the market price, as opposed to the face value, of the ticket. All of this can be done from the privacy of the tout's own home.

Each attempt to improve equality of access leaves open loopholes which touts are able to exploit; each attempt to close the loopholes and shut out the touts makes it more difficult for the purchasers who are supposed to be protected by a primary rights holder's ticketing policy to engage with the primary market. There is a paradox here in that inclusionary policies may curiously impede wider access. For example, where tickets are priced below market value so that a broad spectrum of fans can attend an event, touts are able to buy up these cheaper tickets and sell them on at a profit. Where tickets are reserved for locals, who are likely to be less interested when a non-local team or individual is playing, a pool of potential sales in the secondary market is instantly created. This has been seen in the past, for example, when ticket access for certain ticket allocations for events such as the World Cup or Olympics has seen non-interested parties buy tickets specifically to sell on the black market.<sup>28</sup>

A further example of how primary rights holders attempt to widen access is by stretching the range of prices charged for their tickets. However, such inclusionary policies can be undermined by the commercial imperatives faced by the primary rights holding club. For example, for the 2008/2009 football season, Manchester United FC season ticket holders are contractually obliged to purchase additional tickets to all of the clubs home cup games.<sup>29</sup> The club's own assumption is that season ticket holders will have to purchase a minimum of three additional match tickets at a cost of at least £75. This is on top of the £494 already paid for the lowest priced season tickets. This not only adds significantly to the cost of the season ticket but also forces fans to buy tickets to games that they might not want to attend, inevitably creating a supply to the secondary market for those wishing to claw back some of their additional outlay. It also encourages creativity and ingenuity amongst touts as they attempt to dispose of their tickets without being caught.

At the same time, club resale schemes have been developed to try and deal with some of the problems of ticket touting. Ticket exchange schemes have been instigated in some form by all Premiership clubs, some of whom utilise viagogo as a mechanism for doing this. However, whilst laudable, this facility is only open to season ticket holders or club members and whilst it does, to an extent, deal with less legitimate touts, it does little for social inclusion.

The law's response to the complaints of the primary rights holders has been erratic at best. Where the criminalisation of ticket touting at professional football games could be justified as promoting public order and helping to prevent football hooliganism, the same cannot be said about the need, whether perceived or actual, to prevent the secondary sale of tickets to rugby union Test Matches, the Wimbledon Open Championships, the London Olympics or the Glasgow Commonwealth Games.

Section 166 of the *Criminal Justice and Public Order Act 1994* was initially introduced to prevent 'traditional' at-venue touts from subverting the crowd segregation policies that had been introduced at professional football matches throughout the 1980s and 1990s. However, the legislation was little used with an average of only 118 arrests over the past eight years for which statistics are available.<sup>30</sup> The amendments implemented in April 2007 with a view to making it easier to catch remote and online touting have been equally little used with only 80 arrests for ticket touting being made last season.

Despite this, s.166 has been used as a template for anti-touting provi-

don2012/3702617/Join-a-club-if-you-want-an-Olympic-ticket-says-Sebastian-Coe.html (date last accessed 9 January 2009).

<sup>25</sup> The notion of mega-events as kick starting regeneration more generally has been treated with some scepticism. See for example Smith S and Fox T (2007) 'From event led to event themed regeneration: the 2002 Commonwealth Games Legacy Scheme' *Urban Studies* 44, 1125

<sup>26</sup> See [www.footballeconomy.com/stats/stats\\_att\\_12.htm](http://www.footballeconomy.com/stats/stats_att_12.htm) (date last accessed 13 January 2009).

<sup>27</sup> Whilst the internet offers certain advantages to the consumer, it is not all advantageous; 'the rapid growth of the Internet has brought a dramatic rise in the amount of secondary selling. Seatwave said that the Internet had disrupted traditional business models, released the "stranglehold" which event organisers previously held over the supply of tickets, and "democratised access for consumers". The Office of Fair Trading said that the Internet had provided the means for many secondary agents to operate on a

national and international scale, hugely opening up their customer base and increasing the scope for competition between agents'. *Ticket Touting, Second Report of Session 2007-8*. HC 202 10 Jan 2008 House of Commons: The Stationery Office.

<sup>28</sup> The ticketing arrangements for events such as World Cup 1998 were considered by the Commission, see fn 10 above and also the response of Van Miert to written question E-0029/98 of Glyn Ford, 'Does the commission not think the French

Football association's decision to restrict 80% of the sale of tickets for the forthcoming World Cup to French nationals and residents is a contravention of EU competition law?' (98/C 223/111)

<sup>29</sup> For more detail see [www.manutd.com/default.sps?pageid={CC11A5C5-A17E-4F63-B7EB-02C3BC75888F}](http://www.manutd.com/default.sps?pageid={CC11A5C5-A17E-4F63-B7EB-02C3BC75888F}) (date last accessed 13 January 2009).

<sup>30</sup> [www.homeoffice.gov.uk/crime-victims/reducing-crime/football-disorder/](http://www.homeoffice.gov.uk/crime-victims/reducing-crime/football-disorder/) (date last accessed 13 January 2009).

sions at both the London Olympics in 2012<sup>31</sup> and the Glasgow Commonwealth Games 2014.<sup>32</sup> At neither of these multi-sport events is there any history of significant spectator disorder. Any public order worries concerning spectators at the Olympic Football Tournament can be answered very simply; section 166 already covers the Olympic football tournament as a FIFA sanctioned event and football is not a part of the Commonwealth Games programme.<sup>33</sup>

Thus, the justification for the Olympic and Commonwealth Games legislation is less clear, as indeed it would also be to the other sports that have lobbied the government for similar protection. If the criminalisation of secondary sales to these events is designed to protect the Organising Committees' clearly stated policies on social inclusion, then that at least appears to be a noble aim. Whether it is an achievable aim and whether the criminal law is an appropriate tool for controlling simple breaches of contract are much more difficult questions to answer.

Perhaps the problem here is that the primary rights holders are attempting to both have their cake and eat it. On the one hand, they want to be able to demonstrate that their events are not elitist, are open to anyone and everyone to attend at a reasonable rate and that the tickets are available from a range of sources to ensure that all those hoping to attend have an equal chance of securing a ticket. Yet on the other, they are not prepared to invest in adequate security measures, or where they are, the associated increase in costs that must be passed on to the consumer means that access is in effect restricted, not widened. Forcing prospective spectators to buy multiple tickets, or season tickets, or giving priority to those using a credit card or the internet so that purchases can be more easily logged requires access to greater resources than does the cash purchase of a single ticket from a box office. Where the cost of investigation and prosecution is passed on to the criminal justice system, however, the state rather than the primary rights holder subsidises the regulation of the secondary market; a strange phenomenon when the state does not control the initial primary market.

At the same time there may be a wider agenda as to why the clubs should be considering inclusionary policies. During periods of untrammelled expansion and where there is a buoyant market for tickets, clubs are in a strong position to try and capture affluent fans

and charge high prices for tickets. At those points, inclusionary policies that might try and encourage a local committed fan base may be seen as peripheral. However, clubs disconnect with their local communities at their peril. Whilst when times are good and the economy is thriving clubs may see their community in international or even global terms, in less prosperous times the local community, whose connection with the club is rooted in its history, may be crucial. Ticket policies that have excluded the local may then come back to haunt clubs.

## Conclusion

The underlying vision of the White Paper is undoubtedly a laudable one, where, inter alia, all citizens of the EU will have an equal opportunity to participate in sport, and attend popular sporting events. The difficulty lies in achieving that goal. The UK's current legislative framework ensures that where public order,<sup>34</sup> providing deliberately misleading sales information<sup>35</sup> and failing to provide specific information necessary to make an informed purchase<sup>36</sup> are at issue, criminal offences are committed by the touts. What the Parliamentary draftsmen had not fully considered, and what the subsequent legislation does not adequately address, is the growth in 'bedroom touts'. These are the people best able to exploit the social inclusion goals of primary rights holders by purchasing tickets cheaply and selling them on at (sometimes vastly) inflated prices using only electronic transactions. The challenge is to determine whether further state intervention to create a framework in which access to tickets is widened and commercial rights protected is appropriate, or whether the primary rights holders themselves should be charged with protecting their own brands.

31 Section 31 London Olympic Games and Paralympic Games Act 2006.

32 Section 17 Glasgow Commonwealth Games Act 2008 (Scottish Act).

33 Article 2 Ticket Touting (Designation of Football Matches) Order 2007/790.

34 Section 166 Criminal Justice and Public Order Act 1994

35 Sections 2 and 3 Fraud Act 2006

36 Consumer Protection (Distance Selling) Regulations 2000, Consumer Protection from Unfair Trading Regulations 2008 and Consumer Protection Regulations 1999.



*Participants in the Rider's Meeting on Social Dialogue in the Professional Cycling Sector in Barcelona, Spain, 18 and 19 December 2008*

# The FIBA Arbitral Tribunal (FAT)

by Ian Blackshaw\*

## Introductory Remarks

Established two years ago in May 2007 - with very little fanfare outside the world of basketball - FIBA - the International Basketball Federation - set up its own dispute resolution body, known by the acronym 'FAT' - the FIBA Arbitral Tribunal - with the laudable objectives of settling disputes speedily, informally, inexpensively and effectively. So far, the FAT has dealt with 37 cases, with 20 more pending at the time of writing.

The FAT, which is the brainchild of Dr Dirk Reiner-Martens, a former Secretary-General of FIBA and well-known sports arbitrator, has its seat in Geneva, Switzerland, where FIBA itself is based; and offers arbitration under Swiss Law. It is independent of FIBA, and the language of its arbitrations is English. Hearings are by application only and appeals from FAT awards lie to the Court of Arbitration for Sport (CAS), which is based in Lausanne, Switzerland. All its arbitrators have CAS experience and its President is Professor Gabrielle Kaufmann-Kohler of Geneva University, who is well-known in CAS circles.

However, exceptionally, no appeals lie from awards of the FAT or appeals to the CAS to the Swiss Federal Tribunal. These are expressly renounced by the parties to the FAT (see below). In fact, to date, at least, there have been no appeals to the CAS or legal challenges to FAT awards.

The FAT is proving to be an effective body within the European world of basketball. In fact, the FAT standard form arbitration clause is now commonplace in European basketball contracts. However, the FAT is also growing in popularity outside Europe in other countries such as China, the Lebanon and Saudi Arabia.

## The FAT Standard-Form Arbitration Clause

The standard express contractual reference to FAT arbitration takes the following form:

"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland

and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President.

The seat of the arbitration shall be Geneva, Switzerland.

The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English.

Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.

The arbitrator and CAS upon appeal shall decide the dispute *ex aequo et bono*."

As will be seen, FAT arbitration is handled by a single arbitrator - rather than a panel of three which is more common in CAS cases - and this helps to speed up the process of getting a FAT award. Also, short deadlines are set for the parties to reply; and submissions are made on line.

Likewise, time is saved by the fact that the dispute is decided on an *ex aequo et bono* basis - in other words, by applying general rules of justice and fairness, including, of course, the rule of *due process* - obviating the need to refer to any particular national or international law. This basis also applies to the determination of any appeals from the FAT to the CAS. This possibility is foreseen in article R45 of the CAS Code of Sports-related Arbitration (2004 Edition).

In general, a decision of the FAT is made within 6 weeks of the end of the proceedings; and, this, in turn, is usually within 3-4 months of the date of the filing by the claimant of the request for arbitration.

## The FAT Request for Arbitration

Arbitration by FAT is commenced by filing a written request for arbitration, a template of which is as follows:

### Request for Arbitration

To the  
FIBA Arbitral Tribunal  
Fédération Internationale de Basketball  
51-53, Avenue Louis Casar  
1217 Meyrin/Geneva  
Switzerland

By facsimile to: +41-22-5450099

By E-mail: FAT Secretariat [ctrl + click]

Date:

The Claimant(s)

Name of the Claimant [Second Claimant, if applicable]

Full Address:

Telephone:

Facsimile:

E-Mail:

Counsel (if applicable):

Name:

Company:

Full Address:

Telephone:

Facsimile:

E-Mail:

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Centre, The Hague, The Netherlands, and the author of a forthcoming Book on 'Sport, Mediation and Arbitration' to be

published by the TMC Asser Press. He may be contacted by e-mail on 'ian.blackshaw@orange.fr'.

hereby request(s) that an arbitration be commenced against  
**the Respondent**

Name of the Respondent:

Full Address:

Telephone:

Facsimile:

E-Mail:

Contact person of the Respondent

according to the Arbitration Rules of the FIBA Arbitral Tribunal ("FAT Rules") in force at the time of the filing of this Request for Arbitration.

The Claimant and the Respondent are parties to an arbitration agreement dated \_\_\_\_\_ according to which this dispute shall be submitted to the FAT.

Copy of the Arbitration Agreement \_\_\_\_\_ [must be] attached .

The Claimant requests that any communication to him/her/it concerning this arbitration be made as per the FAT Rules

to the Counsel specified above.

to the Claimant specified above, as no Counsel is appointed.

### 1. Facts and Legal Arguments

### 2. Request for Relief

[e.g. salaries, agent fees, compensation, late payment fee, interests, costs of the arbitration, legal fees and expenses, other requests]

Claimant(s) request(s):

### 3. Evidence

All written evidence on which the Claimant intends to rely is attached hereto.

### 4. Request for Hearing and for Examination of (a) witness(es) [not mandatory]

The Claimant requests that a hearing be held   
and that Mr./Mrs \_\_\_\_\_ is/are to be examined as witness(es) .

Witness(es): \_\_\_\_\_ [Second Witness, if applicable]  
Name:

Full Address:

Telephone:

Facsimile:

E-Mail:

### 5. Costs

The Claimant(s) recognise(s) that the arbitration will not proceed until a non-reimbursable handling fee of EUR 3'000 is received in the FIBA bank account as follows:

Beneficiary: FIBA (Arbitral Tribunal)

Bank: UBS Lausanne, Switzerland

Account No.: 0243-509384.60F

IBAN: CH480024324350938460F

Swift: UBSWCHZH80A

A copy of the bank transfer voucher is attached to the Request of Arbitration.

The costs of the arbitration will be fixed by the Arbitrator at a later point in time.

Signature \_\_\_\_\_

Name and Title in print:

### POWER OF ATTORNEY

The undersigned hereby appoints

Mr. / Ms \_\_\_\_\_

[name(s) of representative(s)]

each individually to fully and generally represent the undersigned, including the right to grant sub-power of attorney, vis-à-vis third parties and courts / courts of arbitration in the matter of

[Claimant(s) vs. Respondent]  
before the FIBA Arbitral Tribunal (FAT)

This power of attorney can be transferred and continues to be valid in case of death or legal incapacity of the undersigned. It shall include, but not be limited to, the authority to

- make and receive statements and declarations of any nature, in particular, to receive service of process;
- represent the undersigned in any litigation / arbitration as well as enforcement and ancillary proceedings,
- enter into settlement agreements, and
- accept on behalf of the undersigned money and other valuables.

\_\_\_\_\_  
Place, Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of the Undersigned in Print

As will be seen, the request for arbitration, which is similar to the one filed with the CAS, is accompanied by a Power of Attorney in favour of the claimant's (legal) representative.

The claimant is also required to pay an administration fee of €3,000; and, in addition, the claimant and the respondent share an advance payment of the arbitrator's fees. These fees are determined according to the value and complexity of the dispute. If the respondent fails to pay its share of these fees, the claimant can pay that share; and all these factors are taken into account in any final award that is made on costs by the FAT.

### The FAT Procedural Rules

Arbitrations before the FAT are conducted in accordance with the FIBA Arbitral Tribunal Arbitration Rules of December 2007. These can be downloaded from the FIBA official website to be found at 'www.fiba.com'.

These Rules are subject to the FIBA Arbitral Tribunal Regulations, which form part of section L.2 of the FIBA Internal Regulations, which provide as follows:

## **“L2 FIBA Arbitral Tribunal (FAT)**

### **L2.1 General Principles**

L2.1.1 FIBA establishes an independent FIBA Arbitral Tribunal (FAT) 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 FAT.

L2.1.2 FAT awards can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland.

L2.1.3 The FAT is primarily designed to resolve disputes between clubs, players and agents.

L2.1.4 It is recommended that parties wishing to refer their possible disputes to the FAT use the following arbitration clause in their contracts:

*“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President.*

*The seat of the arbitration shall be Geneva, Switzerland.*

*The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties’ domicile.*

*The language of the arbitration shall be English.*

*Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.*

*The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”*

### **L2.2 The FAT Arbitration Rules**

Arbitration proceedings before FAT will be conducted in accordance with the FAT Arbitration Rules which are available from the FIBA Secretariat on request and which are available also on the FIBA website.

Any proposed changes to the FAT Arbitration Rules shall be prepared by the FIBA Legal Commission and shall be submitted to the FIBA Central Board for approval.

The proceedings are governed by the version of the FAT Arbitration Rules in force at the time of the filing of a request for arbitration.

### **L2.3 Seat of the FAT**

The FAT has its seat in Geneva, Switzerland.

### **L2.4 Financing**

The financing of the FAT is guaranteed by FIBA, it being understood that the FAT is designed to be self-financing.

### **L2.5 The FAT President / the FAT Vice President**

The FAT President and the FAT Vice President shall be appointed by the FIBA Central Board for a renewable term of 4 years between the ordinary sessions of the FIBA Congress. They shall have legal training.

The FAT Vice President shall substitute for the FAT President in case of the latter’s inability to exercise the functions assigned to him under the FAT Arbitration Rules, including instances where the FAT President is prevented from exercising his functions due to a conflict of interest.

### **L2.6 The Duties of the FAT President**

The FAT President shall have the following duties:

- a) To ensure the proper functioning of the FAT, inter alia, by establishing administrative guidelines for the tribunal.
- b) To establish a list of at least three (3) FAT arbitrators for a

renewable term of four (4) years between the ordinary sessions of the FIBA Congress. The FAT arbitrators shall have legal training and shall have experience with regard to sport.

- c) To appoint, on a rotational basis, a FAT arbitrator to the individual arbitration proceedings before the FAT.
- d) To establish a system of remuneration for the FAT arbitrators.
- e) To exercise those functions assigned to him under the FAT Arbitration Rules.

### **L2.7 Honouring of FAT Awards**

L2.7.1 In the event that a party to a FAT Arbitration fails to honour a final award or any provisional or conservatory measures (the “first party”) of FAT or of the Court of Arbitration for Sport upon appeal against a FAT award, the party seeking enforcement of such award (the “second party”) shall have the right to request that FIBA sanction the first party. The following 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 competition if the second party is a club.

The above sanctions can be applied more than once

L2.7.2 The second party shall send to FIBA with his request a complete file of the FAT/CAS 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.

L2.7.3 The decision to sanction the first party shall be subject to appeal to the FIBA Appeals Tribunal according to the Internal Regulations governing Appeals.”

### **Enforcing FAT Awards**

As will be seen from the above provisions in L2.7.1, failure to honour a FAT award may give rise to a number of sanctions being imposed by FIBA on the party concerned. These sanctions include: a monetary fine; the withdrawal of a FIBA Agent’s Licence; a ban on the international transfer of players; and a ban on the registration of new players.

To date, apparently there is only one case in which the party concerned has failed to comply with a FAT award.

As will also be seen from the above provisions in L2.7.3, FIBA sanctions are appealable to the FIBA Appeals Tribunal in accordance with the corresponding Regulations.

### **Concluding Remarks**

The FAT is proving to be an effective and, therefore, popular body for resolving disputes in the sport of basketball and, perhaps, this winning formula/model may be adopted by other sports bodies for the settlement of their disputes. That remains to be seen, of course.

However, not all sports may wish to adopt the *ex aequo et bono* basis of decision-making and/or exclude further appeals to external courts or tribunals - in other words, the ordinary courts of the land which may otherwise have jurisdiction in dealing with disputes. In this connection, there is always the legal problem of ousting the jurisdiction of the courts, which in many jurisdictions is not legally possible - at least, until all internal remedies of the sports body concerned have been exhausted. See, for example, the English House of Lords decision in the case of *Scott v. Avery* [1856] 5 HL Cas 811.

But what may be said with more certainty is that the FAT can expect to have a heavier caseload in the foreseeable future, as the dispute resolution procedures of the FAT are invoked by more countries outside Europe. This, of course, will necessitate the appointment of more FAT arbitrators, who currently comprise a rather select and limited band of pioneers!

# The Regulation of Gambling in the United States

by Paul Anderson\*

## 1. Introduction

Gambling, and in particular sports gambling, is big business. In 1996, due to the rise in legalized gambling at the state and local level, the growth of Internet gambling, and questions regarding the social and economic impacts of gambling, the United States Congress enacted the National Gambling Impact Study Commission Act (Pub. L. 104-169, 110 Stat. 1482, 1996). This legislation established the National Gambling Impact Study Commission. The Commission's role was to conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States. In its 1999 report, the Commission estimated that Americans illegally wager between \$80-380 billion annually on sporting events (Nat'l Gambling Impact Study Comm'n, 1999, pp. 2-14). Although this is the last national study of sports betting within the United States, this number has surely increased in the past decade.

Betting or gambling in sports is typically perceived as a threat to the integrity of sport itself as money spent on gambling may influence the outcome of the contest outside of the normal field of play. In the United States, virtually all forms of sports gambling are illegal because they have long been associated with organized crime or other criminal influences. With the expansion of sports gambling to the internet, concern about the corrupting influence of gambling has also increased. This contribution will focus on the extensive legislative regulation of gambling within the United States. This contribution will focus on the legislative regulation of sports gambling in the United States. The main focus will be on a chronological review of the many federal laws that have been created in an attempt to regulate gambling, often with a specific focus on curbing sports gambling. In addition, the contribution will include a short analysis of the regulation of gambling at the state level.

## 2. Federal Regulations

The starting point for an understanding of the regulation of sports betting in the United States is an analysis of the many federal laws that have been put in place to enforce this regulation. This section will provide a brief overview of the following laws:

- The Wire Communications Act of 1961 ("The Wire Act")
- The Transportation in Aid of Racketeering Enterprises Act of 1961 ("The Travel Act")
- The Illegal Gambling Business Act of 1970
- The Racketeer Influenced and Corrupt Organizations Act of 1970
- The Professional and Amateur Sports Protection Act of 1992

In addition to the basic federal regulatory structure put forth through these laws, there are other federal statutes that regulate gambling activities and impact sports. However, these laws will only be discussed within an ending subsection as they do not impact the sports landscape extensively. In addition, regulation of gambling on the internet, and the recent federal Unlawful Internet Gambling Enforcement Act of 2006, will not be discussed within this article as the next one is devoted to an analysis of the *Regulation of Gambling on the Internet*.

At the outset, it is important to recognize that virtually all federal laws that regulate gambling within the United States are based on Congress' authority under the Commerce Clause, Article 1, Section 8,

Clause 3 of the United States Constitution, which provides that Congress has the authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." As a result, these laws regulate activities that take place as part of interstate commerce, or the regulation of commercial activity between different states. In this way, states are left to create their own independent regulations of many activities within the individual state itself, but the federal government has enacted many federal laws that regulate commerce among the states overall.

### 2.1. The Wire Act

The first federal regulation of gambling was passed in 1961. The Wire Act essentially prohibits people from using a "telephone facility" to receive bets or send gambling information while engaged in interstate commerce (18 U.S.C. §1084, 2008). Many legal commentators believe that the law was passed because there were concerns that people outside of Nevada (the state that has historically allowed legalized forms of gambling) were making illegal sports bets over the phone. As the United States Court of Appeals for the Fifth Circuit explained, the purpose of the Wire Act

is to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce (*Martin v. United States*, 1968, 895 n. 6).

The first part of the Act criminalizes certain types of gambling behavior as it provides that

- a Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both (18 U.S.C. §1084(a), 2008).

Under this section, it is illegal in the United States to transmit bets or wagers, use information assisting betting or wagering on a sports event or contest, or to engage in any communication that entitles the recipient to receive money or credit resulting from betting or wagering. In order to be found liable, the individual must engage in this conduct using a "wire communication facility," which is defined as any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission (18 U.S.C. §1081, 2008).

This definition encompasses virtually all forms of communication, from telephones and cell phones, to email and text messages.

The second section of the Act contains a safe harbor provision providing that

- b Nothing in this section shall be construed to prevent the transmis-

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sion in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal (18 U.S.C. §1084(b), 2008).

This section includes an exemption from liability for news reporting of information from sporting events, and an exemption when the information used or the bet placed is transmitted from a state or country where gambling is legal to another jurisdiction where gambling is also legal.

In the United States, most federal regulations are best understood by analyzing how the courts have interpreted them. The following case explains how the Wire Act specifically applies to sports betting.

Barbara McLeod was involved in a football parlay card business that operated out of Indianapolis, Indiana (*United States v. McLeod*, 1974). Although the business operated out of Indianapolis, McLeod was working in Las Vegas and called in the lines of games over the phone. This information was crucial to running a successful football parlay card business because bookmakers need to print the most accurate point spreads on their cards. The information was available through other sources in Indiana, but it was not as up to date and accurate as the information in Las Vegas. Therefore, McLeod was stationed in Las Vegas and called in the lines to Indianapolis on a regular basis.

While McLeod was making the phone calls from a public telephone in Las Vegas, a government official stood about four feet from her and heard her give out the football line information. Phone records were then checked and it was determined McLeod made phone calls to various phone numbers in Indiana. McLeod was arrested for violating the Wire Act. Before the court, she made several challenges to the charges against her.

McLeod claimed that the evidence obtained against her when the agent listened to her phone calls was a violation of her constitutional rights to be free from unreasonable searches because the government agent did not obtain the proper authorization to intercept her communication. In response, the court found that the government agent did not need a listening device to hear her conversation and those constitutional protections did not extend to conversations on public telephones as they are “conversations knowingly exposed to the public” (p. 1188).

In addition, she claimed that the evidence against her was not sufficient to show that she made the disputed calls because the agent did not provide evidence of phone records. However, the court found that there was enough evidence to substantiate the charges against her. McLeod was seen copying the football line in a Las Vegas sports book, and after copying the information, she made a phone call to the operator, pulled out a line sheet, and read the information on the line sheet into the phone. Within an hour of making that phone call, McLeod’s codefendant was arrested with a football line sheet with the same information that McLeod had been heard reading over the phone. Although phone records did not provide the evidence that phone calls were made across state lines (as required by the statute’s interstate commerce language), the court ruled that reasonable inferences could be made about the phone calls actually being made from Las Vegas to Indiana (*United States v. McLeod*, p. 1188).

In the end McLeod was found to have violated the Wire Act by transmitting sports betting information across state lines. Most cases under this Act are similarly easy for the government to prosecute. As long as the individual involved engaged in some form of prohibited betting activity as defined in the Act, and as long as that activity took place in interstate commerce, the individual will typically be found to have violated the federal law. Overall, any form of sports betting within the United States can be found to violate this federal law, and therefore, result in criminal prosecution, as long as the activity does not take place in the states that will be discussed at the end of this contribution as they legalize sports betting.

## 2.2. Travel Act

In conjunction with the Wire Act, in 1961 the United States Congress also passed the Travel Act. Most cases contesting gambling activities actually charge the plaintiff under both acts and so it important to move to an analysis of this second federal law. In general terms, the Travel Act prohibits the use of mail or other methods, including the Internet, to send illegal gambling materials, such as winnings from an illegal betting operation, or using a credit card over the phone or Internet to make an illegal bet (18 U.S.C. §1952, 2008). The Travel Act specifically provides that

- a Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to
  - (1) distribute the proceeds of any unlawful activity; or
  - (2) commit any crime of violence to further any unlawful activity; or
  - (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,and thereafter performs or attempts to perform-
  - (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
  - (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life (18 U.S.C. §1952).

For purposes of the Travel Act, an “unlawful activity” includes illegal gambling, which can include sports betting.

In the *McLeod* case discussed earlier, McLeod was also convicted of violating the Travel Act, because she traveled across state lines to help “facilitate” the gambling operation. McLeod argued that the information was not essential to running the gambling business because line information was available in Indiana as well. However, the court ruled that “the use of any facility in interstate commerce need not be essential to the gambling operation; ‘it need only facilitate’ the carrying on of illegal gambling” (*McLeod*, 1974, p. 1189). As the court explained, as used in the statute, “facilitate,” means to “make easy or less hard” (*Id.*). Therefore, the court determined that the information McLeod received helped contribute to the success of the operation because it allowed the operator to distribute their cards before other sources would have been available.

Although traveling across state lines in connection with running an illegal gambling business violates the Travel Act, it is not the only way to violate the Act. Individuals can also be found guilty of violating the Act if they use a phone or the internet to communicate across state lines in connection with running an illegal gambling business.

Another case involving sports betting in violation of the Travel Act was *United States v. Wilkinson* (1979). Thomas Wilkinson and Broadus Stewart operated a sports bookmaking business in Jackson, Mississippi. On November 20, 1976, a search warrant was executed to search Wilkinson and Stewart’s place of business. Government agents found gambling and phone records from people who wanted to place bets or wanted betting line information. In addition, during the trial one of the defendants’ customers said that he called the defendants’ business from Baton Rouge, Louisiana. He also said that when he told the defendants he was not calling from Mississippi, they told him to say he was calling from Mississippi if they asked.

The court affirmed the jury’s decision that the defendants had violated the Travel Act finding that they were involved in interstate commerce because they had at least one customer calling from a state outside of Mississippi (*Wilkinson*, 1979, p. 796).

In the end, the combination of the Wire and Travel Act’s make all forms of sports betting across state lines illegal in the United States. However, the federal government has gone further in attempting to regulate sports and other forms of gambling.

## 2.3. Illegal Gambling Business Act

In 1970, in a shift from attempting to regulate only individuals who engage in gambling activities, Congress passed the Illegal Gambling



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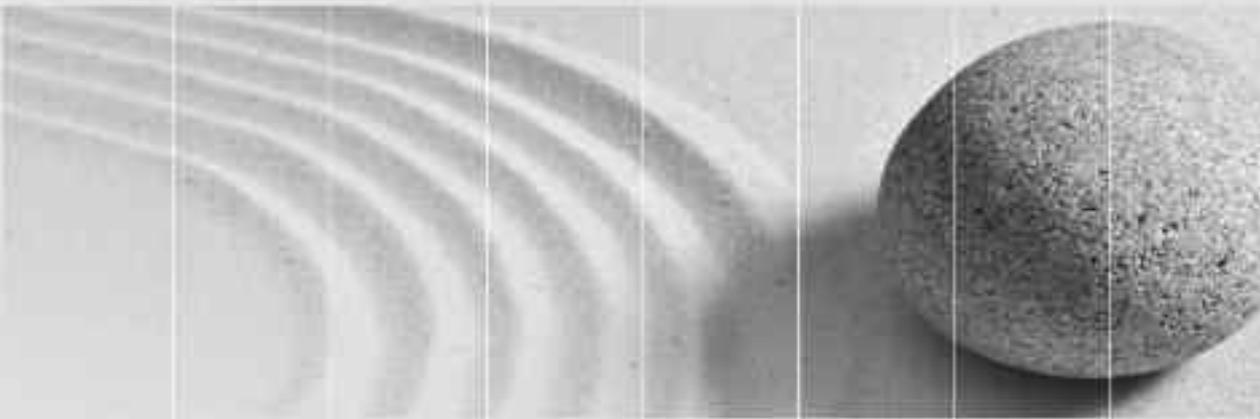
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Business Act, a law prohibiting people from running an illegal gambling business. The law specifically provides that “(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both” (18 U.S.C. §1955, 2008). In order to find that a business is an “illegal gambling business” that violates this Act, the government must establish that there is a gambling operation that violates a state or local law where it is conducted; involves five or more persons that conduct, finance, manage, supervise, direct or own all or part of the business; and remains in substantially continuous operation for more than thirty days or has a gross revenue of \$2,000 in any given day.

Courts have been very liberal when determining who can be counted towards the five individuals required. In *Sanabria v. United States* (1978), the court determined that anyone involved in the business to any degree, except those merely betting, will count towards the five individuals. Further, the court in *United States v. Heacock* (1994) ruled that the five people may include everyone “from layoff bettors and line services to waitresses who serve drinks” (p. 252).

In another case, Robert Mick and his girlfriend, Harriet Brodzinski, ran a bookmaking business out of a trailer in Alliance, Ohio, for over ten years. The business provided their sole income from the late 1980s until 1997. The trailer was set up with three telephone lines, one of which was used for a fax machine. During a two-month period in 1997, the FBI ran surveillance, which found there were over 3,400 calls on the fax machine and over 6,400 calls on the other two lines. About 98% of the fax machine calls were outgoing and about 90% of the telephone calls were incoming. In addition, Mick had a friend in Kentucky maintain a telephone line in her house to help with the betting operations. This allowed bettors in Kentucky to make a local call, which was then forwarded to one of Mick’s lines in Ohio. Mick and Brodzinski, along with Mick’s two sons, answered the phone calls, which were mainly people calling to place bets on various sporting events. Mick also provided a local bar owner with parlay slips, which the bar owner then sold to his customers and took a cut. Mick also took bets from a group of people at a local car wash, and eventually provided the owner of the car wash with a fax machine so they could place bets in that manner.

After government officials talked to several informants who claimed that Mick was involved in a bookmaking business, a search warrant was issued for Mick’s home, trailer, and safety deposit box. Bank records, gambling records, utility bills, and over \$125,000 in cash were found. Following the search, Mick was charged with violating the Illegal Gambling Business Act, among other federal laws, for running an illegal gambling business (*United States v. Mick*, 2001). Although Mick admitted his bookmaking activities were illegal, he claimed that he could not be convicted of running an illegal gambling business because there were not five or more people involved in the business at all times during a thirty day period. He admitted that he, his girlfriend, and at least one of his sons were regularly involved in the business, but he argued that nobody else’s actions should be counted against him. The court included bookmakers who regularly placed bets, the friend who set up a phone line in Kentucky, and the bar owner who distributed parlay sheets on Mick’s behalf, which put the amount of people regularly involved in the business well above the necessary five to classify as an illegal gambling business for purposes of the Act (p. 569).

Even though the Illegal Gambling Business Act focuses on interstate commerce, at times, sports betting activities can be so extreme that they are found to violate the Act even if they only take place within the confines of one state. In *United States v. Zizzo* (1997), several Chicago, Illinois, based mobsters were convicted of violating the Illegal Gambling Business Act in relation to their sports gambling operations within the Chicago area. Although the gambling operations were not conducted outside of Illinois, the court reasoned that because the gambling operation had a substantial affect on organized crime, which affected interstate commerce, the Act did apply to this otherwise local gambling business (*Zizzo*, p. 1351).

In the end, the Illegal Gambling Business Act expanded the reach

of federal regulations of sports betting in an attempt to curb larger gambling businesses and activities. As the *Zizzo* case points out, much of this focus is also on curbing organized crime. The next federal law continues this focus as it more explicitly focuses on the regulation of gambling activities and organized crime.

#### 2.4. Racketeer Influenced and Corrupt Organizations Act

Also in 1970, as part of the overall federal laws aimed at controlling organized crime (and also including the Illegal Gambling Business Act), Congress also passed the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §1962, 2008). RICO was intended to combat organized crime by attacking the sources of its revenue, such as gambling and bookmakers. The law imposes both criminal and civil sanctions on those who engage in certain prohibited activities. As defined in the Act, prohibited activities are extensively defined in the Act as follows:

Prohibited activities

1. It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
2. It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
3. It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt (18 U.S.C. §1962).

In general, this Section provides a threefold effort to combat racketeering (which can include sports betting). First, the Act makes it unlawful to invest funds derived from a pattern of racketeering activity or collected from an unlawful debt. Next, the Act forbids an entity from acquiring or maintaining an interest in an enterprise that affects commerce through a pattern of racketeering activity or through collection of an unlawful debt. And finally, as a catch-all, the Act forbids any person from being employed by or associated with these types of activities.

The *Zizzo* (1997) case discussed earlier, also involved allegations of violations of the RICO Act. In *Zizzo*, a group of notorious Chicago gangsters were involved in a sports bookmaking business in Chicago during the 1980s and early 1990s. The group often moved their operations from place to place in order to keep government agents off their trail. The mobsters took bets from people on various professional sporting events and horse races. The business was so lucrative that one of its bookies would take in \$75,000 to \$125,000 in wagers on an average weekend. All bets were allowed to be taken on credit, but in an effort to make sure that all bets were collected, the bookies were held personally responsible for any of their customers’ past-due accounts. It was also well known that many of the bookies threatened to harm or kill customers who owed money. As a result of all of this evidence the

defendants were convicted of violating the RICO Act, in connection with running an illegal gambling business (*Zizzo*, 1997, p. 1346).

### 2.5. Professional and Amateur Sports Protection Act

The next major piece of federal legislation to impact sports betting came in 1992 with the enactment of the Professional and Amateur Sports Protection Act. This Act prohibits a person or government entity from operating or authorizing any betting or wagering scheme based on “competitive games in which amateur or professional athletes participate” (28 U.S.C. §3701, et. seq., 2008). Four states (Nevada, Oregon, Montana, and Delaware) previously had state statutes allowing sports wagering prior to this Act being passed; therefore, they were not affected by the Act. This allowed Nevada to continue to offer legalized sports wagering, allowed Oregon and Delaware to continue their sports lotteries, and eventually allowed Montana to create a sports lottery.

The provisions of the Act are relatively short and simple as they provide that

#### §3702. Unlawful sports gambling

It shall be unlawful for-

- 1 a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- 2 a person to sponsor, operate, advertise, promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games (28 U.S.C. §3702, 2008).

Of particular interest to those within the sports industry, the Act applies to both amateur and professional sports organizations. Specifically, the Act defines “amateur sports organizations,” as “(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or (B) a league or association of persons or governmental entities described in subparagraph (A)” (28 U.S.C. §3701(1), 2008). “Professional sports organizations” are then defined as “(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or (B) a league or association of persons or governmental entities described in subparagraph (A)” (28 U.S.C. §3701(2)). As a result, amateur sports organizations such as the National Collegiate Athletic Association and the Wisconsin Interscholastic Athletic Association, along with professional organizations including the National Basketball Association and the National Football League, are all subject to the provisions of the Act.

Although it has been in place since 1992, to date there is only one reported case involving the Act. In 2007, a citizen of New Jersey, James Flagler, challenged the constitutionality of the Act before the United States District Court for District of New Jersey ruled the statute constitutional (*Flagler v. U.S.*, 2007). Flagler alleged that the United States Constitution did not specifically mention gambling, and therefore, any laws related to gambling should be reserved for the states. His claims were dismissed for lack of standing because Flagler was not able to show that the right to gamble on professional and amateur sports was a legally protectable interest, nor was he able to show that he suffered any harm. Further, invalidating the statute most likely would not redress his issue because Congress allowed states one year to enact legislation that would allow New Jersey residents to gamble on sporting events, but New Jersey failed to do so (p. \*7).

### 2.6. Other Federal Laws

The federal laws discussed so far provide an extensive structure that has the potential to significantly regulate all forms of gambling in the United States.

- The *Wire Act* prohibits the use of most forms of communication devices to conduct gambling activities,

- The *Travel Act* regulates the mail and other forms of commerce that could be used to conduct gambling activities,
- The *Illegal Gambling Business Act* regulates businesses that might be set up to engage in gambling activities,
- The *Racketeer Influenced and Corrupt Organizations Act* criminalizes gambling and other racketeering activities,
- The *Professional and Amateur Sports Protection Act* prohibits the operation of gambling schemes based on amateur and professional sports.

In addition, to these comprehensive laws, a few other federal laws add to the general framework of gambling regulations within the United States, although they do not focus extensively on the types of conduct already addressed. These laws include:

- While not directly related to the regulation of gambling, the *Bribery in Sporting Contests Act* (18 U.S.C. §224, 2008), makes it a crime to bribe or attempt to bribe an individual in a scheme to influence the outcome of a sporting event. The actual scheme involved must take place in interstate commerce (18 U.S.C. §224(c)(1)). And the event involved can involve athletes at any level of sports participation as the act defines a “sporting contest” as “any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence” (18 U.S.C. §224(c)(2)). Violations of this law can lead to fines and imprisonment. As many sports gambling schemes involve allegations that participants were bribed in order to affect the outcome of a game to meet or change bets made, this Act can have a wide impact and adds to the federal governments efforts to combat gambling.
- The *Money Laundering Control Act* (18 U.S.C. §1956, 2008), criminalizes money laundering activities. People taking part in sports betting or gambling schemes often try to disguise where the money involved originated. This is known as money laundering. The statute criminalizes certain forms of laundering, including (1) financial transactions where the individual involved knows that the proceeds involved are from some form of unlawful activity, (2) the intentional transportation, transmission, or transfer (or attempts to do the same) of funds known to be the proceeds of an unlawful activity, and (3) intentionally conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of or used to conduct or facilitate a specified unlawful activity (18 U.S.C. §1956(a)). This conduct can lead to extensive fines and incarceration of up to 20 years.
- The *Illegal Money Transmitters Act* (18 U.S.C. §1960, 2008), makes it a crime to conduct, control, manage, supervise, direct, or own all or part of a business, knowing the business is an illegal money transmitting business. This type of business is one that involves the transmission of money and affects interstate commerce in any manner and fails to comply with either state law or the registration requirements for such a business. Specific to gambling, under the Act, “money transmitting,” includes transferring funds on behalf of the public by any and all means, and therefore, could cover those who transfer money as part of a sports betting scheme.
- The *Interstate Transportation of Wagering Paraphernalia Act* (18 U.S.C. §1953, 2008), prohibits an individual from knowingly carrying or sending in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game (18 U.S.C. §1953(a)).

The statute focuses on the actual paraphernalia used within betting transactions and specifically includes materials used within wagering pools for sporting events.

- The *Federal Anti-Lottery Act* (18 U.S.C. §1301, et. seq., 2008), bans the transmission of lottery related materials and paraphernalia within interstate commerce. In 1994 the general prohibitions found

in the statute were modified to allow for states to create their own lotteries. Many of these state level lotteries have been used to fund the construction of sports facilities.

- The *Bank Records and Foreign Transactions Act* (Pub. L. No. 91-508, Titles I, II, 84 Stat. 114, 1970), also known as the *Bank Secrecy Act*, requires “financial institutions” and casinos to report all currency transactions greater than \$10,000 in effort to fight money laundering. Nevada casinos are exempt from these reporting requirements.
- The *Gambling Devices Transportation Act* (15 U.S.C. §1171, et. seq., 2008), makes it unlawful to knowingly transport a gambling device to a state where that device is prohibited by state law.
- The *Gambling Ship Act* (18 U.S.C. §1081, et. seq., 2008), prohibits offshore gaming except on certain voyages beyond the territorial waters of the United States.

In addition to these federal laws that add to the regulation of gambling within the United States, these federal laws actually support limited types of gambling operations.

1. The *Interstate Horseracing Act* (15 U.S.C. §3001, et. seq., 2008), supports the legality of state specific gambling and wagering connected with horse racing in order to further the horseracing and legal off-track betting industries in the United States. As gambling involved with horse races may otherwise be considered illegal under the other federal laws already discussed in this contribution, this Act immunizes such activity from liability under those other laws.
2. The *Indian Gaming Regulatory Act* (25 U.S.C. §2701, et. seq., 2008), allows for Indian tribes to control their own gaming activities. The Act allows Indian tribes to conduct gaming activities that could otherwise be found to be illegal forms of gambling, from bingo and electronic games, to slot machines and other similar high-stakes games of chance. According to the National Indian Gaming Association, 225 tribes across 28 states participate in gaming which has grown into a \$25.7 billion industry for the tribes (National Indian Gaming Association, 2008).

In the end, this complicated regulatory scheme leaves only one general conclusion: sports betting or gambling is illegal in virtually all forms within the United States. The only legalized forms of sports betting (besides horse racing and Indian gaming) can be found at the state level.

### 3. State Law

Each American state has created its own scheme to regulate gambling. An in depth analysis of each state’s gambling laws can be found on the *Gambling Law US* website found at [www.gambling-law-us.com/](http://www.gambling-law-us.com/) (Humphrey, 2003-8). Specifically, the website provides links to each state’s particular laws (<http://www.gambling-law-us.com/State-Laws/>) and a summary chart of these different laws by state ([www.gambling-law-us.com/State-Law-Summary/](http://www.gambling-law-us.com/State-Law-Summary/)). For purposes of this contribution, it is only necessary to understand that the majority of states have outlawed all forms of gambling, and these all encompassing bans include sports betting.

For example, in Wisconsin, a person can be criminally liable for gambling if they make a bet, enter into a gambling place with the intent to make a bet, participate in a lottery, or play a gambling machine, or conduct, intent to conduct, or possess the facilities necessary to conduct a lottery (Wis. Stat. §945.02, 2007). In addition, participants in contests (including sports contests) are liable for illegal gambling, as the statute provides that “any participant in, or any owner, employer, coach or trainer of a participant in, any contest of skill, speed, strength or endurance of persons, machines or animals at which admission is charged, who makes a bet upon any opponent in such contest is guilty. . .” (Wis. Stat. §945.07, 2007). Similarly, bribery of participants “with intent to influence any participant to refrain from exerting full skill, speed, strength or endurance” is also illegal (Wis. Stat. §945.08, 2007). Most states gambling laws mirror this example. However, a few states allow for limited forms of legal sports gambling.

Title 41 of the Nevada Revised Statutes is devoted to Gaming,

Horse Racing, and Sporting Events. Specifically, in Nevada a sports pool is “the business of accepting wagers on sporting events by any system or method of wagering” (Nev. Rev. Stat. Ann. §463.0193, 2008). In order to operate a legal sports pool (or book), an individual or organization must obtain also obtain a proper license (Nev. Rev. Stat. Ann. §463.160, 2008). Currently Nevada has some 142 legal sports books where bettors from around the country and world can engage in sports gambling (Rogers, 2005, p. 51).

Oregon allows betting on football games through a game called Sports Action, which is a part of the Oregon Lottery (<http://www.oregonlottery.org/sports/index.php>). The specific funds from this sports lottery are used “by the State Board of Higher Education to fund sports programs at state institutions of higher education” (Ore. Rev. Stat. §461.543, 2007). However, this lottery is the only form of legalized sports betting in Oregon as it also criminalizes sports bribery, which is an offer or agreement to confer on an athletic participant or official some benefit with the intent to influence the participant or official to not to give their best effort in a sports contest (Ore. Rev. Stat. §165.085, 2007).

In Montana, sports pools and sports tab games are authorized by statute (Mont. Code Anno., §23-5-502, 2007). The actual sports pool is called *Montana Sports Action* and can be found online at <http://www.montanaspportsaction.com/index.xsp>. It is also legal to participate in a fantasy sports league in Montana (Mont. Code Anno., §23-5-802, 2007), but it is still illegal to bet or wager on the outcome of a sports event (Mont. Code Anno., §23-5-806, 2007).

Overall, even though there are limited exceptions, most Americans states do not allow their citizens to gamble on sporting events.

### 4. Conclusion

In the end, although the federal regulatory scheme is extensive and complicated, the reality is that gambling on sporting events in any manner in the United States is illegal. The only way for a person to legitimately gamble on sporting events is in the state of Nevada, in limited ways in Montana and Oregon, and possibly on horse races or in Indian casinos. Otherwise, all forms of sports betting are illegal due to the many federal laws discussed in this contribution.

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# Regulation of Gambling on the Internet

by Paul Anderson\*

## 1. Introduction

Coinciding with the explosive growth of the Internet, there has been exponential growth in Internet gambling, especially sports gambling. As with many new industries, the United States Congress is currently trying to catch up as the Internet has allowed for illegal gambling activities to proliferate in a medium that is much more difficult to regulate. This contribution will focus on the regulation of Internet gambling within the United States.

The problem of Internet gambling can perhaps best be understood by the statement of Thomas E. McClusky Vice President, Government Affairs Family Research Council, testifying before the House of Representatives concerning online gambling:

When you add the anonymity of the Internet, the troubles caused by gambling increase exponentially. The theft of credit card numbers from customers is a very real concern and it is much easier for gambling web sites to manipulate games than it is in the physical world of highly regulated casinos. Additionally, gambling on the Internet provides remote access, encrypted data and, most importantly, anonymity. Because of this, a money launderer need only deposit funds into an offshore account, use that money to gamble, lose a small amount of that money, and then cash out the remaining funds.

It is the uniqueness of the Internet when it comes to gambling that inspired Dr. Howard Shaffer, the director of Harvard Medical School's Division on Addiction Studies, to call Internet gambling the “crack cocaine of the Internet” due to the ease with which online gamblers can play from home. Online players can gamble 24 hours a day from home with no real sense of the losses they are incurring. Additionally, while many Internet gambling sites require gamblers to certify that they are of legal age, most make little or no attempt to verify the accuracy of the information. The intense use of the Internet by those under the age of 21 has led to concerns that they may be particularly susceptible to Internet gambling.

Problem gamblers between the ages of 18 and 25 lose an average of \$30,000 each year and rack up \$20,000 to \$25,000 in credit card

debt, according to the California Council on Problem Gambling. In a health advisory issued by the American Psychiatric Association in 2001, ten percent to 15 percent of young people reported having experienced one or more significant problems related to gambling (McClusky, 2007).

Numerous studies have attempted to gauge the extent of gambling on the Internet, both by the increase in gambling websites available, and via industry revenues. Some estimates show that internet gambling is now a \$12-13 billion a year industry, with about half of that coming from gamblers in the United States (H.R. 2046, 2007). In addition, in 2007 it was estimated that nearly 2,300 different websites provide gamblers with ample opportunities to place bets online.

Although these numbers are hard to verify as they are ever changing and virtually immeasurable within the online environment, the United States Congress has determined that internet gambling is a problem that needs to be dealt with. Considering the fact that the United States has regulated gambling in all of its forms since at least 1961 (as discussed in the previous contribution), this is not surprising. This contribution will focus on the regulation of gambling on the Internet within the United States at both the federal and state level.

## 3. Federal Regulation of Internet Gambling

Although gambling is illegal in the United States, except for specific exceptions in certain states, businesses have tried to avoid this issue by setting up internet gambling operations overseas. Many of these businesses have been extremely successful as gambling on the internet has become an extremely lucrative business. However, in an attempt to combat Internet gambling in the United States, the government has used traditional gambling statutes to try to shut down these operations. This section will introduce the various federal laws that currently regulate gambling and various bills that have been recently introduced in the legislature. First, the Wire Communications Act of 1961 (“The Wire Act”) (18 U.S.C. §1084, 2008) and the Transportation in Aid of Racketeering Enterprises Act of 1961 (“The Travel Act”) (18 U.S.C. §1952, 2008) will be discussed as both have been used to regulate Internet gambling. Next, the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. §5361, et. seq. 2008) will be discussed. It is currently the only Internet-specific gambling statute in

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the United States. Finally, recent legislation that could affect Internet gambling will be discussed.

### 3.1. Regulations That Are Not Specific to the Internet

In 1961, the government passed a variety of antiracketeering statutes. Because racketeering activities often included gambling, many of these statutes focused on regulating gambling as well. Although internet gambling was not an issue in 1961, the Wire Act and Travel Act have been used to regulate Internet gambling because the Wire Act deals with wire communications facilities, which includes the Internet, and the Travel Act deals with facilities in general.

#### 3.1.1. The Wire Act

One of the most useful statutes used in trying to combat illegal Internet gambling operations is the Wire Act. The Wire Act prevents a person engaging in interstate or foreign commerce from using a wire communication facility to assist in placing a bet on a sporting event. The first part of the Act criminalizes certain types of gambling behavior as it provides that

- a Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both (18 U.S.C. §1084(a), 2008).

Both the telephone and the Internet are considered wire communications facilities; and therefore, the government has used the Wire Act to prosecute individuals running Internet gambling operations overseas.

#### 3.1.2. The Travel Act

Another important federal statute used to combat gambling is the Travel Act. Similar to the Wire Act, the Travel Act may also be used to prosecute people in the business of Internet gambling. This Act prevents anyone from using any facility in interstate or foreign commerce to distribute the proceeds of any unlawful activity, including gambling. The Travel Act specifically provides that

- a Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
- 1 distribute the proceeds of any unlawful activity; or
  - 2 commit any crime of violence to further any unlawful activity; or
  - 3 otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
- and thereafter performs or attempts to perform—
- A an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
- B an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life (18 U.S.C. §1952).

For purposes of the Travel Act, an “unlawful activity” includes illegal gambling, which can include sports betting. The courts have determined that the use of the mail, telephone or telegraph, newspapers, credit cards and tickertapes is sufficient to establish that a defendant “used a facility of interstate commerce” to further an unlawful activity in violation of the Travel Act. Obviously, as Internet gambling transactions involve the use of a credit card, these transactions can also come under the regulation of the Act.

#### 3.1.3. Case Law Involving the Wire and Travel Acts

Because most cases contesting illegal gambling activities are brought under both the Wire and Travel Acts, the following cases will be used to illustrate how these laws have been applied to Internet gambling.

*United States v. Cohen* (2001) illustrates how the government has used the Wire Act to prosecute those involved in Internet gambling operations. Jay Cohen ran one of the most lucrative online sports book-making sites in the late 1990s before he was convicted of violating the Wire Act. In 1996, Cohen, along with several business partners, started a business called World Sports Entertainment (WSE). WSE accepted bets on American sporting events through both the Internet and over the phone. WSE successfully targeted American customers through several media such as radio, television, and newspaper. Clearly these attempts at targeting were successful as WSE was able to attract 1,600 American customers within the first year. Prior to allowing customers to place bets, WSE required them to open an account with WSE and wire at least \$300 to a bank in Antigua to open that account. After opening the account, customers contacted WSE via the Internet or phone to place bets.

The FBI began investigating Cohen and WSE during late 1997 and early 1998. FBI agents contacted WSE by both phone and Internet to place bets after they had opened accounts. In March 1998, Cohen was arrested and charged with conspiracy to violate and actually violating the Wire Act. After a jury trial found him guilty of violating the Wire Act, he was sentenced to twenty-one months in prison (*United States v. Cohen*, 2001, p. 70).

During the late 1990s as Internet gambling became more popular, states began to notice that their residents were engaging in this behavior and wanted to prevent this from occurring. In 1998, the state of New York sued World Interactive Gaming Corporation (WIGC) and Golden Chips Casino, Inc. (GCC) to enjoin them from operating within New York or offering New York residents the opportunity to gamble over the Internet while located in New York (*Vacco v. World Interactive Gaming Corp.*, 1999).

In *Vacco*, the main issue the court needed to determine was whether a state could enjoin a foreign corporation that was “legally licensed to operate a casino offshore from offering gambling to Internet users in New York” (*Vacco v. World Interactive Gaming Corp.*, 1999, p. 846). WIGC operated its offices in New York and was incorporated in Delaware. WIGC owned GCC, which was an Antigua subsidiary corporation licensed to operate a land-based casino in Antigua. GCC then purchased computer servers and developed software that allowed users to gamble over the Internet from computers located all over the world. GCC promoted its Internet casino over the Internet and through a gambling magazine that was targeted to people in the United States.

In order to gamble with WIGC, customers were required to register for an account. When registering for an account, a customer was required to submit a permanent address in a state that allowed land-based gambling. Anyone who entered a state that did not allow land-based gambling was prohibited from creating an account. However, users could get around the system by going back to the registration page and entering an address in a state such as Nevada, which allows land-based gambling. The plaintiffs claimed that because it was so easy to circumvent the system, the defendants did not make a good faith effort at preventing New York residents from engaging in online gambling. The defendants claimed that the transactions occurred offshore and that there were no state or federal laws that regulated internet gambling and applied to their conduct (*Vacco*, 1999, p. 848).

The court disagreed with the defendants’ argument and found that its activity not only violated New York state statutes, but also the Wire and Travel Acts (*Vacco*, 1999, p. 851). As the court explained, the Wire Act prohibits people from using a “telephone facility” to receive bets or send gambling information while engaged in interstate or foreign commerce (*Vacco*, p. 852). The Internet is accessed through a telephone wire, which implicated the Wire Act in this case. The Travel Act then prevents anyone from using any facility to promote or manage any illegal activity or distribute the proceeds of any illegal activity (p. 846). The defendants here used a facility in Antigua and New York to both promote and manage the illegal activity of gambling as well as distributing the proceeds from the illegal gambling operation. Therefore, their conduct violated both federal laws.

As these cases demonstrate, state and federal authorities have been

able to sue individuals who engage in internet gambling claiming that their behavior is illegal gambling under both the Wire and Travel Acts. In 2006, the federal government went further enacting specific legislation meant to deal with internet gambling.

### 3.2. Federal Regulation of Internet Gambling

Although the United States Congress has repeatedly expressed concern over the negative impact that gambling can have on American society, it is clear that this impact could be much worse if Internet gambling is not strictly regulated. Internet gambling can exacerbate some of the problems associated with gambling, especially underage gambling and gambling addictions. Because of the anonymity that the Internet provides, it is often difficult for owners of internet gambling sites to determine whether players are of legal gambling age. In addition, as the internet has grown in popularity, it has become more and more accessible and therefore, it is easier and easier to engage in internet gambling activities. Therefore, the United States Congress has determined that it has a strong interest in regulating internet gambling in order to ensure that that all users are of legal age, to prevent illegal gambling, and to prevent excessive gambling that may lead to addictive behavior (GAO, 2002, 2-11). Congress' first step in regulating Internet gambling was taken when it enacted the Unlawful Internet Gambling Enforcement Act of 2006.

#### 3.2.1. Unlawful Internet Gambling Enforcement Act of 2006

In general, the Unlawful Internet Gambling Enforcement Act of 2006 prohibits the transfer of funds from a financial institution, such as a bank or credit card company, to an internet gambling website (31 U.S.C. §5361, et. seq. 2008). However, the provisions of the law are extensive.

According to Congress, the Unlawful Internet Gambling Enforcement Act was enacted for several reasons. Initially, Congress recognized the difficulty in regulating Internet gamblers because this form of gambling is funded through the "personal use of payment system instruments, credit cards, and wire transfers" (31 U.S.C. §5361(1), 2008). In addition, in 1999 the National Gambling Impact Study Commission recommended that Congress pass some legislation that would "prohibit wire transfers to Internet gambling sites or the banks which represent such sites" (31 U.S.C. §5361(2)). Moreover, Congress recognized that "Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry" and that "[n]ew mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet" 31 U.S.C. §5361 (3-4)).

Of particular importance to Internet gamblers, the Act defines a bet or wager as

- A the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;
- B the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);
- C any scheme of a type described in [The Professional and Amateur Sports Protection Act of 1992];
- D any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; (31. U.S.C. §5362(1), 2008).

The term "unlawful internet gambling" then means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made (31. U.S.C. §5362(10)(A), 2008).

As an exercise of the congressional power under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, the Unlawful Internet Gambling Enforcement Act regulates only activities that take place as part of interstate commerce, or commercial activity between different states. In this way, states are left to create their own independent regulations.

The law does not make it illegal for a person to participate in Internet gambling. Instead, in order to regulate Internet gambling activities, the law focuses on financial institutions and Internet service providers and prohibits the acceptance of funds from bettors by operators of most online gambling websites as it provides

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling-

- 1 credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
- 2 an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
- 3 any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
- 4 the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person (31 U.S.C. §5363, 2008).

The Act then calls for financial institutions to adopt procedures and policies designed to block the flow of prohibited funding to the operators of the affected online gambling websites (31 U.S.C. §5364, 2008), and gives federal and state attorneys general the power to seek civil remedies to help enforce the other provisions of the Act (31 U.S.C. §5365, 2008). In addition, anyone who violates the Act can be subject to criminal penalties including fines and imprisonment up to 5 years (31 U.S.C. §5366, 2008).

Interestingly, the law exempts participation in fantasy sports online. Such activity, defined as

ix participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in [the Professional and Amateur Sports Protection Act of 1992] and that meets the following conditions:

- I All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
- II All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
- III No winning outcome is based-
  - aa on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
  - bb solely on any single performance of an individual athlete in any single real-world sporting or other event (31 U.S.C. §5362(I)(E)(ix), 2008).

is specifically excluded from the Act's definition of a covered bet or wager.

The provisions of the Act are then enforced by certain provisions

of the Code of Federal Regulations. These Code provisions focus on setting forth ways to monitor financial institutions and other organizations who come under the Act (12 C.F.R. 233 (2008)). As part of the Code related to banks and banking, the provisions set forth regulations for financial institutions and ways to monitor the payment systems prohibited by the Act.

Overall the impact of this Act is still to be seen. Immediately after its passage, many Internet gambling sites stopped taking bets from United States gamblers using American financial institutions. However, the application of the law to gambling and gamblers is less clear as there has been little litigation involving the Act.

### 3.2.2. Case Law Involving the Unlawful Internet Gambling Enforcement Act

Although there have not been many cases brought under this new law, a few cases have tested the waters to determine how the law will be enforced.

In 2008, Interactive Media Entertainment & Gaming (Interactive Media), a non-profit group that collects and disseminates information on internet gambling, claimed that the Unlawful Internet Gambling Enforcement Act was unconstitutional and moved to enjoin the Act from being enforced (*Interactive Media Entm't & Gaming Ass'n v. Gonzales*, 2008). Interactive Media claimed that the Act violated the First Amendment by burdening its freedom to express itself about internet gambling in certain ways. The New Jersey District Court held that the Act does not burden any group's expressive association freedoms because it does not prevent the group from expressing its views on Internet gambling (*Interactive Media Entm't & Gaming Ass'n*, p. \*22). In fact, nothing in the Act prevents the plaintiffs from continuing to promote internet gambling. As the court explained, "the plaintiff and its members remain free to promote Internet gambling; nothing in the challenged statute implicates the plaintiff's expressive activities in this regard (p. \*22).

Interactive Media also claimed that the Act also violated its rights to be free from regulations impacting commercial speech because it criminalizes the transfer of funds. The court did not agree as it found that the Act criminalizes only the acceptance of money in connection with illegal internet gambling, and the acceptance of money is not speech (*Interactive Media Entm't & Gaming Ass'n*, p. \*27).

Interactive Media also claimed that the Act is both "overbroad [and] void for vagueness" (*Interactive Media Entm't & Gaming Ass'n*, 2008, p. \*27). The overbroad claim failed because the overbreadth doctrine is relevant only to constitutionally protected conduct and the financial transactions included in the Act are not protected speech; and therefore, are not considered protected conduct. The Act does not deal with constitutionally protected conduct, and therefore, the Act is not covered by the overbreadth doctrine and cannot be considered overbroad. Similarly, the Act is not void on vagueness grounds. Although the Act may cause operators of an internet gambling business to incur additional costs because they have to ensure that the wagers made are not illegal, it is not vague. As the court explained, the Act clearly outlines what conduct is considered illegal and what actions businesses need to take to ensure they are not violating the Act (p. \*28).

Finally, Interactive Media claimed the Act violated the Tenth Amendment by taking away the rights of the states to regulate gambling. The court dismissed the Tenth Amendment claim for lack of standing because private individuals lack standing to bring Tenth Amendment claims (*Interactive Media Entm't & Gaming Ass'n*, p. \*35). However, because the statute regulates interstate commerce, even if Interactive Media did have standing, it would be considered a proper exercise of Congress's interstate commerce powers.

Another recent case focused on whether online fantasy sports leagues do not violate the Unlawful Internet Gambling Act (*Humphrey v. Viacom*, 2007). In *Humphrey*, the plaintiff tried to sue to recover under a Qui Tam statute, claiming that the people involved in fantasy sports leagues were making bets. Qui Tam statutes are derived from an old English statute that allows gamblers to recover their losses. The Qui Tam statute permits gamblers to recover the losses incurred while playing "cards, dice, billiards...or by betting on [a]

sport or pastime" (*Humphrey*, pp. \*7). The defendant ran a fantasy sports league where participants paid a fee to join the league and use services that came along with it, such as real-time data. The entrance fee also included services to manage the fantasy league, such as the ability to draft players as well as trade. At the end of the fantasy league season, winners were awarded prizes that had been announced in advance and did not have any correlation to the amount of people that registered.

The court rejected the plaintiff's claim and went on to explain that when there is a specific entry fee, prizes are announced in advance, and these prizes have no correlation to the entry fees, the entry fee to the fantasy league will not be considered a bet (*Humphrey*, 2007, pp. \*18-20). The court also pointed to the Unlawful Internet Gambling Act, which specifically excludes these types of fantasy sports leagues from its definition of bets or wagers.

So far these are the only United States court decisions that have discussed the application of the Unlawful Internet Gambling Act. Presumably as the provisions of the Act are given fuller effect more litigation will follow in the future.

### 3.3. Recent Internet Gambling Initiatives

Although Congress passed the Unlawful Internet Gambling Enforcement Act in 2006, the House of Representatives has introduced several additional bills related to internet gambling since that time. These bills have focused on further analysis of the problem of Internet gambling, finding ways to tax the proceeds of Internet gambling activities, licensing operators of Internet gambling websites, and

- **The Internet Gambling Regulation and Enforcement Act of 2007** (H.R. 2046, 2007), would require those involved in running an Internet gambling operation to file an application with the Director of the Financial Crimes Enforcement Network to be licensed to operate an Internet gambling facility. The gambling operators must provide their financial statements, a detailed explanation of the corporate structure of the Internet gambling business, and agree to abide by all of the laws of the United States related to Internet gambling. The Director would determine whether to grant a license based on the financial information provided, business experience, and background checks on any directors and executives of the company. Once licensed, the operators must agree to put into place safeguards to ensure that responsible gambling takes place. The House and Energy Commerce referred this proposed bill to the Subcommittee on Commerce, Trade, and Consumer Protection on April 30, 2007.
- **The Internet Gambling Study Act** (H.R. 2140, 2007), would require the National Research Council of the National Academy of Sciences to conduct a comprehensive study of Internet gambling. This study would include an analysis of the existing legal framework that governs such activities and transactions and the impact of the Unlawful Internet Gambling Enforcement Act on Internet gambling in the United States.
- **The Internet Gambling Regulation and Tax Enforcement Act of 2007** (H.R. 2607, 2007), would amend the Internal Revenue Code in an attempt to help regulate Internet gambling. The bill would require Internet gambling operators to become licensed and pay a fee that is equal to 2% of all funds deposited with the operator for purposes of placing bets. The fee would have to be paid within thirty days of the deposit, and all fees would be deposited into the general fund of the Treasury. The bill was referred to the House Committee on Ways and Means on June 7, 2007.
- **The Internet Gambling Regulation and Tax Enforcement of 2008** (H.R. 5523, 2008), would amend the Internal Revenue Code to impose an Internet gambling license fee on online operators, require them to file returns identifying themselves and the individuals placing wagers with them, withhold a tax on annual Internet gambling winnings of more than \$5,000, impose a 30% tax on the Internet gambling winnings of nonresident aliens, and impose an excise tax on wagers on any individual who places a wager with an unlicensed Internet gambling operator. The Bill was referred to the House Committee on Ways and Means in March of 2008.

- **The Investing in our Human Resources Act of 2008** (H.R. 6501, 2008), includes a provision requiring the Secretary of Health and Human Services to establish a national Safe Internet Gambling Practices Program focusing on the promotion of responsible Internet gambling behavior and the awareness of unsafe Internet gambling practices. On July 15, 2008, the bill was referred to the Committee on Ways and Means and the Committee on Education and Labor.
- **The Unlawful Internet Gambling Enforcement Clarification and Implementation Act of 2008** (H.R. 6663, 2008), would further clarify the implementation of the Unlawful Internet Gambling Enforcement Act of 2006. Specifically, this bill would force the United States Attorney General's office to focus prosecutorial efforts on persons who offer Internet sports betting in the United States, or those who process payments for illegal Internet sports betting in the United States. On July 30, 2008, the bill was referred to the Committee on Financial Services and the Committee on the Judiciary.

Although to date none of these bills has passed, they demonstrate the continuing focus that federal legislators have on the problem of Internet gambling.

### 3.4. Summary of Federal Legislation

Overall, through the Wire, Travel and Unlawful Internet Gambling Enforcement Acts, the United States Congress has set up a scheme that makes it very difficult for any private individual to participate in gambling on the Internet, including sports gambling. Even though the actual practice of online gambling is perhaps not illegal (at least under the Unlawful Internet Gambling Enforcement Act), the regulations imposed on gambling in general, and the regulations imposed on financial institutions and Internet service providers, make it difficult to see how a United States citizen can engage in any legal form of online gambling. And the latest federal law in 2006 has not ended the discussion as Congress has continued to review and debate further federal regulations in the intervening years.

Of course, as with all legislative regulation of gambling within the United States the analysis must now shift to an analysis of these regulations by individual states.

### 4. State Specific Regulation of Internet Gambling

Prior to the passing of the Unlawful Internet Gambling Enforcement Act, several states passed laws specific to internet gambling. Currently, Illinois, Indiana, Louisiana, Montana, Nevada, Oregon, South Dakota, Washington, and Wisconsin have passed laws related specifically to Internet gambling. These states have used a variety of measures to prohibit internet gambling.

For instance, Louisiana, Oregon, and South Dakota have all enacted specific statutory provisions that deal with "Internet gambling" or "Gambling by computer." For example, in its general statute that criminalizes gambling, Louisiana defines prohibited "Gambling by computer" as

the intentional conducting, or directly assisting in the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit when accessing the Internet, World Wide Web, or any part thereof by way of any computer, computer system, computer network, computer software, or any server (La. Rev. Stat. Ann. §14:90.3, 2008)

Similar statutes can be found in Oregon and South Dakota (Or. Rev. Stat. §167.109, 2007; S.D. Codified Laws §22-25A, et seq., 2008). In fact, chapter 22-25A of the South Dakota statutes focuses exclusively on "Internet gambling" and provides that no one in the state can engage in or establish a website that conducts Internet gambling activities (S.D. Codified Laws §22-25A- 7-8, 2008).

Other states have created specific provisions that legalize some forms of licensed gambling activities. The Montana legislature has found that

The legislature finds that for the purpose of ensuring the proper gambling environment in this state it is necessary and desirable to adopt a public policy regarding public gambling activities in Montana. The legislature therefore declares it is necessary to:

- create and maintain a uniform regulatory climate that assures players, owners, tourists, citizens, and others that the gambling industry in this state is fair and is not influenced by corrupt persons, organizations, or practices;
- protect legal public gambling activities from unscrupulous players and vendors and detrimental influences;
- protect the public from unscrupulous proprietors and operators of gambling establishments, games, and devices;
- protect the state and local governments from those who would conduct illegal gambling activities that deprive those governments of their tax revenues;
- protect the health, safety, and welfare of all citizens of this state, including those who do not gamble, by regulating gambling activities; and
- promote programs necessary to provide assistance to those who are adversely affected by legalized gambling, including compulsive gamblers and their families (Mont. Code Ann., §23-5-110, 2007).

Within its definition of regulated gambling it then defines Internet gambling as

"Internet gambling", by whatever name known, includes but is not limited to the conduct of any legal or illegal gambling enterprise through the use of communications technology that allows a person using money, paper checks, electronic checks, electronic transfers of money, credit cards, debit cards, or any other instrumentality to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes, or other similar information (Mont. Code Ann. §23-5-112, 2007)

Interestingly, the state of Nevada, one of the few states where gambling is legal within the United States, has made Internet gambling illegal. However, it has left itself room to allow Internet gambling in the future (Nev. Rev. Stat. §463.750, 2007). This statute states that the Nevada Gaming Commission will not allow the licensing of an Internet gambling operation until the Commission until the Commission has determined that Internet gambling operations can be operated in compliance with applicable laws and they are secure and reliable. However, if the Commission comes to that conclusion it is possible for Internet gambling to be legal in the state of Nevada in the future.

Overall, the regulation of Internet gambling at the state level is a relatively new phenomenon with states now including specific definitions of this type of gambling activity within their legislation. Unlike federal legislation, most of the state laws specifically target and criminalize the actual activity of Internet gambling. Therefore, because few states allow for any form of legalized gambling, coupling these laws with the federal laws already discussed, leads to an overall scheme that prohibits virtually any form of Internet gambling within the United States.

### 5. Conclusion

The participation of American citizens in Internet gambling continues to grow. While Congress and the states have put forth extensive regulations attempting to regulate this activity, the nature of the Internet leads to problems with enforcement. As a result while most states have outlawed Internet gambling by individuals, Congress has instead focused on financial institutions and service providers. As with any new legislation focused on the Internet, the impact of this legislation at both the federal and state level is still too difficult to assess. Instead, gambling activities on the Internet continue to proliferate. And with much illegal gambling focused on sports, the problem of sports gambling on the Internet will continue into the foreseeable future.

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# Gambling and Collegiate Athletics

by Adam Epstein and Bridget Niland\*

## Introduction

As collegiate athletics has become a major part of the American sports scene, concerns over internal and external gambling influences have led to private rules and public laws that attempt to regulate such activity. College sport, similar to its professional counterpart, must constantly work to control egregious actions by those involved in sports gambling that could influence the outcome of the game. Anti-gambling rules and governmental laws are designed to curb various types of cheating, especially those linked to sports gambling in collegiate athletics.

The National Collegiate Athletic Association (NCAA) governs most of the intercollegiate sports in the United States and has responded to numerous gambling scandals over the years by enacting rules (i.e., bylaws) designed to punish violators which fall under its jurisdiction. Additionally, there have been numerous state and federal laws that have been enacted to curtail gamblers influencing the outcome of collegiate sports events. If the NCAA did not address and aggressively pursue individuals or groups who surreptitiously yet effectively influence who wins or who loses a sporting event, the public-at-large would lose faith in the college sports product. Fans, alumni, and others, would not know whether the game at-hand is played on an even field, or whether it is played in favor of one team over the other. This would simply ruin the integrity of college sports.

This contribution explores the intercollegiate sports gambling landscape. Section One introduces the popularity of gambling in the United States and specifically addresses the rise in sports gambling and the role college sports play in this new phenomena. Section Two focuses on the NCAA; more specifically, its governance structure, regulatory culture, anti-sports gambling regulations and the enforcement of those regulations. Section Four provides a summary of notable college sports gambling cases and the NCAA sanctions that resulted. Finally, Sections Five and Six discuss other policies and regulations that have attempted to curtail gambling on collegiate sports, including federal and state legislation.

## 1. Collegiate Sports Gambling

Gambling in general, including sports gambling, is a popular form of recreation in the United States and an increasingly popular pastime for youth and college-age adults. Revenue from all forms of gambling in the United States topped \$90 billion in 2006 (American Gaming Association, 2008). Because of the tremendous revenue that gambling generates, governments at all levels within the United States have relaxed laws that once outlawed such wagering. For example, in the decade between 1985 and 1995, 48 of 50 states revised laws that prohibited gambling to allow limited legalized gaming, including regulated casino-style games and state-run lotteries (Dunstan, 1997; Eadington, 1996). As of 2007, Hawaii and Utah were the only states that prohibit any form of gambling within their borders (Prah, 2007).

Although gambling on sports (professional or amateur) remains illegal in all states but Nevada and Oregon, an estimated \$80 to \$380

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billion is illegally bet on sporting events in the United States each year (Kindt & Asmar, 2002; Weinberg, 2003). Gambling on collegiate or amateur sports is permitted only in Nevada, where it is estimated that \$2.5 billion is annually wagered on college sports, \$197 million of which is attributed to bets surrounding the NCAA's Division I men's basketball tournament (Armour, 2007; Weinberg, 2003). In addition, illegal gambling on the NCAA tournament through informal office or neighborhood betting pools is estimated at \$6 billion (McCarthy, 2007a). Further evidence as to the pervasiveness of collegiate sports gambling is the "Latest Line" (i.e., the latest point spread on college basketball and football contests), which is published in daily newspapers throughout the United States and on the Internet (Grady & Clement, 2005). Despite its popularity, the NCAA's position on sports gambling is quite clear: anyone involved in intercollegiate athletics is prohibited from participating in virtually all forms of sports gambling regardless of its legality (NCAA, 2004, p.5).

## 2. The NCAA

The Indianapolis, Indiana based NCAA is a tax-exempt, voluntary amateur athletic association composed of 1,162 members. Its membership includes four-year collegiate institutions and athletic conferences located throughout the United States (NCAA, n.d.b.). There are approximately 380,000 student-athletes who participate in the NCAA's three divisions of competition (Divisions I, II, III) (NCAA, n.d.k.). The NCAA administers 23 sports, 88 championships (41 men's, 44 women's, 3 mixed) and approximately 49,000 student-athletes compete in these championships each year (NCAA, n.d.k.). The NCAA has a multi-tiered, federated governance structure with more than 125 committees, both association-wide and division-specific (NCAA, n.d.b.). Association-wide committees are composed of representatives from member schools and conferences in each of the NCAA's three divisions (NCAA, n.d.a.). Committees are responsible for addressing a variety of issues ranging from eligibility requirements, drug-testing policies and procedures, recruiting rules and other competitive health and safety rules including a firm stance against sports gambling (also referred to as sports wagering or gaming) (Sawyer, Bodey & Judge, 2008).

Each NCAA Division also has its own governance structure with its own committees that have adopted regulatory rules known as "Bylaws," which are codified in the respective Division's annual publication known as the NCAA Manual. NCAA Division I includes the most prominent schools and conferences. Division I is separated into three sub-divisions based on football sponsorship. The Football Bowl Subdivision, formerly known as Division I-A, includes approximately 119 Division I schools that sponsor the most publicized football programs and offer the largest number of athletic scholarships (NCAA, n.d.k.). The remaining Division I schools either sponsor lesser funded football programs that compete in the Football Championship Subdivision (formerly known as Division I-AA) or do not sponsor football as an intercollegiate sport. Divisions II and III fund intercollegiate athletics programs at an even lesser amount than Division I members (NCAA, n.d.l.).

Although sponsorship of a football program is optional, all Division I schools sponsor a men's basketball program (NCAA, n.d.c., Bylaw 20.9-(e)). The NCAA's annual "March Madness" basketball tournament is one of the most celebrated and well-organized athletics events in the United States. "March Madness" has evolved into an American passion that engulfs students of all ages, student-athletes, alumni, retirees and general rank-and-file employees throughout the United States. Office parlay cards and other gambling sheets grab significant attention of millions of persons, and no other NCAA event draws as much interest, as bets placed on the outcome of the tournament bracket appear in almost every major newspaper in the United States ("NCAA's Gambling Madness," 2008).

The lucrative and speculative nature of sports competition and the need to maintain its voluntary, non-profit amateur status, require the NCAA to take a harsh stance toward influences that could unfairly taint the outcomes of its events or the integrity of its sports programs (Ban on Amateur Sports Gambling, 2001). Specifically, incidents of

gambling, game-fixing (i.e., "point shaving") and sports bribery led the NCAA to adopt regulations prohibiting any form of sports wagering connected to its events or the athletes and administrators who fall under its jurisdiction (Byers, 1998). The following section traces the creation of these regulations and present-day application.

## 3. NCAA Sports Gambling Regulations

The NCAA first discussed the perils of sports gambling at its 1939 convention when it created its unethical conduct legislation, now known as Bylaw 10 of the Division I Manual (NCAA, 1939). Express NCAA legislation on this issue was not adopted until 1983 with subsequent modifications added in 1997, 2000 and 2006. The 1983 legislation codified a long-standing rule interpretation that gambling on intercollegiate athletic events by student-athletes, coaches, and athletics administrators, constituted unethical conduct (NCAA, 1983, Proposal No. 134). In 1996, the NCAA expanded its prohibition on sports gambling to include wagers made on professional sports (NCAA, 1996, Proposal No. 15). Then, in 2006, language was added to address the concern over Internet gambling and to clarify the scope of individuals considered to be included in the athletics' department staff (NCAA, n.d.e., Proposal No. 2006-17-A).

### 3.1. NCAA Manual Provisions

Below are the relevant portions of Bylaw 10 as published in the 2007-08 Division I NCAA Manual. Identical legislation exists in NCAA Divisions II and III. These provisions can be found in the latest version of the NCAA Manual which can be accessed online on the NCAA's website, at <http://www.ncaa.org/> within the "Legislation & Governance" area under "Rules and Bylaws."

Provisions from NCAA Bylaw, Article 10: Ethical Conduct

10.02 Definitions and Applications.

10.02.1 Sports Wagering. Sports wagering includes placing, accepting or soliciting a wager (on a staff member's or student-athlete's own behalf or on the behalf of others) of any type with any individual or organization on any intercollegiate, amateur or professional team or contest. Examples of sports wagering include, but are not limited to, the use of a bookmaker or parlay card; Internet sports wagering; auctions in which bids are placed on teams, individuals or contests; and pools or fantasy leagues in which an entry fee is required and there is an opportunity to win a prize.

10.02.2 Wager. A wager is any agreement in which an individual or entity agrees to give up an item of value (e.g., cash, shirt, dinner) in exchange for the possibility of gaining another item of value.

10.3 Sports Wagering Activities

The following individuals shall not knowingly participate in sports wagering activities or provide information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur or professional athletics competition:

- (a) Staff members of an institution's athletics department;
- (b) Nonathletics department staff members who have responsibilities within or over the athletics department (e.g., chancellor or president, faculty athletics representative, individual to whom athletics reports);
- (c) Staff members of a conference office; and
- (d) Student-athletes.

10.3.1 Scope of Application.

The prohibition against sports wagering applies to any institutional practice or any competition (intercollegiate, amateur or professional) in a sport in which the Association conducts championship competition, in bowl subdivision football and in emerging sports for women.

10.3.1.1 Exception.

The provisions of Bylaw 10.3 are not applicable to traditional wagers between institutions (e.g., traditional rivalry) or in conjunction with particular contests (e.g., bowl games).

Items wagered must be representative of the involved institutions or the states in which they are located.

10.3.2. Sanctions. The following sanctions for violations of Bylaw 10.3 shall apply:

- (a) A student-athlete who engages in activities designed to influence the outcome of an intercollegiate contest or in an effort to affect win-loss margins (“point shaving”) or who participates in any sports wagering activity involving the student-athlete’s institution shall permanently lose all remaining regular-season and postseason eligibility in all sports.
- (b) A student-athlete who participates in any sports wagering activity through the Internet, a bookmaker or a parlay card shall be ineligible for all regular-season and postseason competition for a minimum of a period of one year from the date of the institution’s determination that a violation occurred and shall be charged with the loss of a minimum of one season of eligibility. If the student-athlete is determined to have been involved in a later violation of any portion of Bylaw 10.3, the student-athlete shall permanently lose all remaining regular-season and postseason eligibility in all sports.

10.4. Disciplinary Action

Prospective or enrolled student-athletes found in violation of the provisions of this regulation shall be ineligible for further intercollegiate competition, subject to appeal to the Committee on Student-Athlete Reinstatement for restoration of eligibility. (See Bylaw 10.3.2 for sanctions of student-athletes involved in violations of 10.3.) Institutional staff members found in violation of the provisions of this regulation shall be subject to disciplinary or corrective action as set forth in Bylaw 19.5.2.2 of the NCAA enforcement procedures, whether such violations occurred at the certifying institution or during the individual’s previous employment at another member institution.

Applied collectively, these relatively recent NCAA bylaws prohibit college and university staffmembers affiliated with athletic departments from wagering on professional and amateur sports gambling. In sum, the current NCAA rules render it impermissible to: (a) provide information to individuals who are involved in organized gambling activities; (b) solicit a bet on any intercollegiate team or to accept a bet on any team representing the school; (c) accept or solicit a bet on an intercollegiate competition through any method utilized by organized gambling (NCAA, n.d.c., Bylaw 10.3).

Bylaw 10.02 and its subparts define “wagering” and the NCAA has interpreted the provision to prohibit activities such as bets among friends who wager a non-material item (e.g., dinner, clothing), and the re-sale of ticket options to college or professional sports contents (NCAA, n.d.f.). However, the provision does not apply to wagers on sports not sponsored by the NCAA such as horseracing, nor does it universally apply to fantasy leagues or bracket pools (NCAA, n.d.d., Proposal No. 2006-17-B). In the case of fantasy leagues or bracket pools, a 10.02.1 violation only occurs in instances in which both an entry fee is required and a prize is awarded (NCAA, n.d.i.)

Bylaw 10.3 re-enforces the wagering prohibition and also makes it an NCAA rules violation to aid any individual involved in such sports wagering by providing them with information or performing actions that further their gambling efforts. This portion of the bylaw was adopted to address incidences such as point-shaving. Bylaw 10.3.1 and 10.02.1 and other provisions regulating gambling conduct also apply to membership conference staff, coaches and, of course, student-athletes. Interestingly, they also apply to the chancellor or president of an NCAA institution and faculty members associated with the athletics department (NCAA, n.d.c., Bylaw 10.02.1).

Prior to 1999, the penalties for violating provisions such as 10.3.1 were applied haphazardly and did not appear to be deterring student-athletes from gambling on college or professional sports. Accordingly, the NCAA tightened the penalties for sports gambling by adopting

Bylaw 10.4, which adds specific penalties for student-athletes found in violation of the rules (NCAA, n.d.d.). Most notable is that a student-athlete will lose NCAA eligibility permanently if they are involved in a point-shaving scheme of any sort. Those who are found to have bet or accepted bets generally on intercollegiate or professional athletics by utilizing organized gambling methods are ineligible for intercollegiate competition for a minimum of one year and lose one season of competition. Bylaw 10.4 reiterates the penalties against student-athletes for unethical conduct (including gambling) and clarifies that campus administrators found in violation of the gambling regulations are subject to the penalties listed in Bylaw 19.5.2.2, which include public censure, institutional probation and even termination of employment (NCAA, n.d.c.)

The NCAA bylaws discussed above have little meaning without a mechanism through which they can be enforced. This mechanism was established in 1952, with the creation of the NCAA’s enforcement program (NCAA, n.d.h.). The following section explains the current NCAA enforcement process and its role in the Association’s handling of allegations of sports gambling on member campuses.

### 3.2. NCAA Enforcement Process

The initial rationale behind the enforcement program was to create cooperative undertaking involving member institutions and conferences working together through the NCAA for an improved administration of intercollegiate athletics (NCAA, n.d.h.). The NCAA Enforcement staff seeks and processes information related to “major” and “secondary” violations of NCAA legislation (Rogers & Ryan, 2007).

According to NCAA Bylaw 19.02.2.1, secondary violations are actions that are “isolated or inadvertent in nature” and at best provide “only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit” (NCAA, n.d.c.). Individuals or institutions found to have committed a secondary violation will receive only minor penalties as determined by committee composed of individuals from the membership and assisted by NCAA staff (NCAA, n.d.h.).

An example of a secondary sports gambling violation is the 2005 case involving five men’s track and field student-athletes at Tulane University (NCAA, n.d.j.). According to NCAA reports, the student-athletes agreed to participate in a professional football pool during the 2004-05 academic year in violation of Article 10 (NCAA, n.d.j.; NCAA, n.d.e.). The pool was run by a non-student-athlete. Tulane officials discovered the violation after a track and field coach saw one of the betting sheets. The institution’s investigation revealed that although each of the five student-athletes had prepared a betting sheet, no money had exchanged hands and that the student-athletes were unaware that the NCAA’s anti-sports gambling rules included both professional and college sports. Because of the one-time occurrence, limited nature of the gambling, and apparent lack of knowledge of the NCAA anti-gambling rules, NCAA staff determined that the violations were secondary. As a result, rather than be deemed permanently ineligible, the student-athletes were eventually reinstated for competition after performing community service (NCAA, n.d.j.). Had the investigation revealed that large amounts of money had been exchanged, or that there were significant numbers of student-athletes participating in the pool, the NCAA would have likely deemed the violations “major” (NCAA, n.d.h.).

As defined in NCAA Bylaw 19.02.2.2, major violations are generally defined as all other violations, but specifically include “violations that provide an extensive recruiting or competitive advantage” (NCAA, n.d.c.). Investigations of alleged major violations commence upon the NCAA’s receipt of credible information that a rule infraction has taken place. Sources of information vary from formal letters to anonymous phone calls (Rogers & Ryan, 2007). Once the veracity of the source is confirmed, the NCAA forwards a notice of inquiry to the institution alerting the school that it is under investigation. If it has not already done so, the institution begins its own investigation into the allegations. Information from all investigations is evaluated by the NCAA enforcement staff and if the staff believes a major vio-

lation has occurred it will issue a notice of allegations to the institution. The notice of allegations notifies all involved parties of the violations of NCAA legislation that the enforcement staff believes occurred. The institution and others named in the document may respond to the enforcement staff's allegations. Once all parties have responded, a hearing date is set before the Committee on Infractions (NCAA, n.d.h.).

A notable example of a major violation in the NCAA sports gambling context is the infractions case involving University of Washington (UW) football coach Rick Neuheisel. In April 2002, a confidential source contacted the NCAA enforcement staff and reported that Neuheisel, a former college quarterback at the University of California at Los Angeles (UCLA), bet close to \$15,000 in a "March Madness" basketball gambling pool (Merron, 2006). The NCAA enforcement staff investigated the allegations by interviewing the confidential source, Neuheisel, and other athletics department staff at UW. A notice of inquiry was issued and the institution and conference also conducted investigations. Based on the findings of those initial investigations, Neuheisel was suspended and officially relieved of his duties as head coach. In February 2004, the NCAA sent a notice of allegations to Neuheisel. Upon receipt of the notice of allegation UW terminated Neuheisel's lucrative contract citing that his violation of NCAA Bylaw 10.3 gave it cause to do so. The case was sent to the Committee on Infractions for adjudication (NCAA, n.d.g.). The next section discusses the authority and procedures of that NCAA Committee.

### 3.3. NCAA Committee on Infractions

As noted above, after a notice of allegations is issued to an NCAA member institution, the matter is forwarded to the NCAA Committee on Infractions (COI) for adjudication which may include the finding of penalties against the institution and the student-athletes or staff members involved (Connell, Green-Harris & Ledbetter, 2005). NCAA Division I Bylaw 19.1.1 details the structure and duties of the NCAA Division I COI (NCAA, n.d.d.). The COI is composed of ten individuals from member institutions appointed by the Division I Management Council. Two to three COI members must come from the public and have some legal experience. The COI reviews cases both on the written record and through a formal hearing process, which includes hearing testimony from the parties involved. After the hearing, the COI deliberates and then issues factual findings and if necessary imposes penalties against any of the entities or individuals it finds were involved in the infractions (Rogers & Ryan, 2007).

In coach Rick Neuheisel's case, the COI ultimately agreed with UW and held that he violated existing NCAA gambling regulations by participating in the gambling pool (Suggs, 2005). In its issued opinion, however, the COI stated that although the former head coach did violate NCAA gambling rules through his participation in a gambling pool, it did not find that he knowingly violated NCAA gambling legislation (NCAA, n.d.g.). The COI made this finding based on information indicating that an athletics department staff member had sent Neuheisel an email with erroneous information regarding the permissibility of participating in college basketball pools. The COI believed Neuheisel's testimony that he was misled and that his participation in the pool was, in fact, permissible under NCAA rules based upon the erroneous email. Neuheisel filed a lawsuit against UW for wrongful termination of his employment agreement and argued that his termination was unwarranted (Suggs, 2005). In the end, Neuheisel settled his claim for \$4.5 million (Suggs; NCAA, n.d.g.).

## 4. Notable NCAA Gambling Incidents

The Tulane University and Rick Neuheisel cases above are just two of a litany of examples of student-athletes and coaches gambling on sport. The following list represents some of the other more notable gambling incidents that occurred at colleges and universities around the United States and were the impetus for the NCAA's present day policies related to sports gambling. In considering these incidents it is

important to note that the NCAA did not adopt specific regulations prohibiting sports gambling or involvement in sports gambling until 1983. Prior to that date gambling on college sports was treated as a violation of the Association's general Unethical Conduct provision (NCAA, 1983).

### 4.1. Brooklyn College (1945)

Although rumors of gambling on college sports date back to an 1876 regatta, the first known case occurred in 1945 when two Brooklyn College basketball student-athletes admitted that they accepted over \$1,000 to intentionally throw a game against the University of Akron (Crowley, 2006; Thelin, 1996). The two student-athletes were never arrested but eventually their testimony implicated three other teammates and led to the convictions of two men who had solicited their participation in the scheme. The game between Brooklyn and Akron was never played (Udovicic, 1998). Shortly before the criminal trial concluded, the New York State Legislature adopted legislation that made participating in a scheme to limit a team's margin of victory (point-shaving) a crime and expanded the application of illegal sports gambling to include amateur basketball (Goldstein, 2003a).

### 4.2. New York City Sports Wagering (1951)

Heralded as one of the biggest betting scandals in college basketball history, the City College of New York (City) and others in the area including Manhattan College, Long Island University and Bradley University (Peoria, Illinois) were implicated in a point-fixing ring involving six other schools, more than 30 players and members of organized crime. It began when a former Manhattan College player attempted to bribe a then current player to exceed the point margin with St. Francis College of Brooklyn (Goldstein, 2003b). The player reported the incident to his coach who then went to the President of Manhattan College with the details. A sting was set-up and the former Manhattan College player and another were arrested for gambling activity that included both the 1949-50 and 1950-51 seasons (Rosen, 1999).

The problem grew more pervasive a few weeks later when three City College of New York (CCNY) student-athletes were arrested for taking bribes and fixing the point spread in a game against Temple University (Philadelphia). A few days later basketball players from Long Island University (LIU) were also arrested for taking similar actions. In July of that year, the scandal moved out of the New York City region with the arrest of five players from Bradley University who admitted to taking bribes to "hold down the scores against St. Joseph's University and Oregon State University" (Goldstein, 2003b). It was not until October of that year, however, that the national scope of the gambling problem was revealed with the implication of point fixing at the University of Kentucky, which at that time was one of the nation's most prominent and successful basketball programs. As for the New York City schools, CCNY, LIU and Manhattan College all had their basketball programs disbanded. Both were re-established but never returned to the successes of the 1940's era (Rosen, 1999).

### 4.3. University of Kentucky (1952)

In 1951, the University of Kentucky (UK) won the NCAA basketball championship. One year later, the same district attorney who prosecuted the New York City gambling incidents uncovered a point-shaving scheme that had been in operation since the late 1940's (Kentucky basketball, n.d.). The UK scheme involved three members of the men's basketball team who were paid cash by a former UK football student-athlete and some of his associates to exceed the point spread in various contests. The scheme evolved with new UK players taking the place of those who had graduated and gone on to careers in professional basketball. The NCAA reacted by canceling the school's 1952-53 season, the first time the rather novice athletic association took such an extreme action (Marron, 2006).

### 4.4. The 1961 Scandals

Another far reaching point-fixing scandal was exposed in 1961, once again by the New York City District Attorney's office. This one would

eventually implicate 476 basketball student-athletes at 27 schools between the years 1957 and 1961. Orchestrated mostly by organized crime members in New York City with the help of college players who had grown-up in the area, this scheme included bribes and attempted bribes to both college basketball and football players. Although it led to convictions of some organized crime members, it caused St. Joseph University (Pennsylvania) to relinquish its third place finish at the previous NCAA tournament, and it negatively impacted the professional careers of over a dozen prominent college players (Goldstein, 2003c).

#### 4.5. Boston College (1978)

More than a decade passed before another gambling scandal erupted in college athletics. This time it was at Boston College, an NCAA institution that had escaped involvement in previous sports gambling incidents (Goldstein, 2003d). During the 1978-79 season, a Boston College basketball student-athlete was approached by a New York City crime family to fix nine games through point-shaving (McCarthy, 2007b). The student-athlete, who solicited help from two other Boston College basketball student-athlete teammates, assisted the perpetrators in earning between \$75,000 and \$480,000 (Goldstein; McCarthy, 2007b). Each of the student-athletes reportedly earned \$10,000 for their involvement (McCarthy, 2007b). The scheme was eventually discovered and the Boston College student-athlete who orchestrated the point-fixing received a ten-year prison sentence for his involvement, but investigators did pursue charges against the other student-athletes (Grady & Clement, 2005). The NCAA did not impose sanctions on Boston College or its men's basketball program (NCAA, n.d.g.).

#### 4.6. Tulane University (1985)

In 1985, four Tulane basketball student-athletes were arrested and indicted on five criminal counts involving point-shaving (NCAA, n.d.g.). According to the indictment, at least one of the student-athletes accepted up to \$8,550 for manipulating point spreads and a total of five players were implicated in the scheme (Goldstein, 2003d). Charges were later dropped against the one student-athlete whose case made it to trial, but Tulane was subject to an NCAA investigation that included allegations of violations of Bylaw 10.3. Tulane eventually chose to take its own corrective action by terminating its men's basketball program for four years rather than risk even harsher institutional penalties from the COI (NCAA, n.d.g.).

#### 4.7. Universities of Florida and Arkansas (1989)

Two Southeastern Conference schools had to address student-athlete gambling in 1989. In those separate cases, four University of Florida football student-athletes and several University of Arkansas student-athletes were caught betting on football games and were suspended from participation in intercollegiate athletics (Zimbalist, 1999). Neither case resulted in criminal charges or major NCAA sanctions; however, the NCAA determined that the student-athletes had violated Bylaw 10.3 and each was rendered ineligible to compete for the remainder of the 1989-90 academic year (NCAA, n.d.e.).

#### 4.8. Maine (1992)

In 1992, the University of Maine suspended 19 athletes from the football and basketball teams for operating a professional and college sports gambling ring that reportedly involved bets from \$25.00 to \$1,150.00 (NCAA, n.d.e.). Thirteen members of the schools baseball team were also involved in sports gambling activities. Around the same time, another Maine college was implicated in a sports gambling scandal. Division II Bryant College suspended five basketball players who had built up \$54,000 in gambling debts, and a former player and student were arrested and charged with bookmaking (Rhoden, 1992). The NCAA deemed all the infractions as "secondary" violations of Bylaw 10.3 and the student-athletes were eventually reinstated for competition (NCAA, n.d.e.).

#### 4.9. Northwestern University (1994-1998)

In 1995, three Northwestern basketball players were accused of accept-

ing money from a former University of Notre Dame football player to affect the outcome of the game involving Penn State University, the University of Wisconsin, and the University of Michigan (Berkow, 1998). The former Notre Dame student-athlete and two of the three Northwestern players were indicted and convicted. The heaviest jail sentence of two months in prison was handed to a former player from Notre Dame who had been involved in other incidences of illegal gambling (Bartlett & Steele, 2000). Two of the Northwestern student-athletes were sentenced to one month in federal prison and both were suspended from the team (NCAA, 2004). It was the second suspension for one of those players who, along with a Northwestern football student-athlete, had admitted gambling on college football games the previous fall. The NCAA did not impose any major sanctions on the school, but it deemed the student-athletes ineligible to compete for violating Bylaw 10.3 (NCAA, n.d.e.).

Another gambling incident involving this Chicago-area university involved two Northwestern football student-athletes who pled guilty to a federal perjury charge stemming from the fixing of football games (NCAA, n.d.h.). One student-athlete admitted that he had fumbled intentionally in a game against the University of Iowa to win a bet of \$400 and had won \$500 on an Ohio State game in which he had played. The student-athlete admitted to betting on a total of five games and was subsequently penalized per NCAA rules (Slavin, 2002).

#### 4.10. University of Maryland (1995)

Five football players and one basketball player were suspended after the six bet on college sports (NCAA, n.d.j.). One of the five was the starting quarterback on the school's football team who allegedly bragged to others that he had won \$8,000 on the 1993 NCAA basketball tournament. The NCAA determined that all five had violated Bylaw 10.3 and NCAA rules required that four of the football players be withheld from one regularly scheduled game. The fifth football student-athlete was given an eight-game suspension (Maisel, 1995). The lone basketball student-athlete had to forfeit playing in the first 20 games of the 1995-96 season, but no formal NCAA investigation of the Maryland athletics program resulted (NCAA, n.d.d.).

#### 4.11. Boston College (1996)

Three Boston College football players bet against their team, and ten others were allegedly involved in betting on both professional and college football and baseball contests ("Organized crime," 1997). The team's head football coach reported the gambling activity to the appropriate university officials after he heard that some of his players may have bet against their own team when it played against Syracuse University (Merron, 2006). In all, 13 players were suspended and six were permanently removed from the team. The NCAA determined that seven of the student-athletes violated Bylaw 10.3, but no other NCAA sanctions resulted from the incident (NCAA, n.d.e.).

#### 4.12. Arizona State University (1997)

This gambling incident was revealed when bookmakers in Nevada discovered an odd betting pattern and alerted the Federal Bureau of Investigation (FBI) (NCAA, n.d.f). FBI surveillance discovered that more than \$1 million dollars in bets were being wagered on Arizona State University (ASU) games (McCallum & Herbst, 1997). An investigation revealed that the starting point-guard at ASU, who was in debt to a student bookie for other gambling debts, enlisted a teammate to help in a point-shaving plan (NCAA, 2004). The complete federal investigation of Arizona State's 1993-1994 basketball season led to the two student-athletes admitting that they took money for their role in the scheme and both pled guilty to charges of conspiracy to commit sports bribery. One of the student-athletes was sentenced to two months in jail, levied an \$ 8,000 fine, three years of probation, and six months of home detention. The student bookie and the second student-athlete were also convicted but received lesser sentences (NCAA, 2004).

#### 4.13. University of Florida (2001)

An investigation by the Florida State Attorney General's office re-

led that a star University of Florida basketball student-athlete was linked to gambling on college sports. Several witnesses, including UF basketball players, told state investigators that the former "Mr. Basketball" (the honor bestowed to the best high school player) for the state of Florida had openly discussed his sports gambling (Jones & Handel, 2002). The student-athlete was declared ineligible, admitted that he violated NCAA rules and voluntarily left the team, though he would later recant his admissions (Gustafson, 2002).

#### 4.14. Florida State University (2003)

In 2003, a former Florida State University quarterback was accused of gambling on college and professional games (Drape, 2003). The player was eventually charged with one misdemeanor count of gambling. Two other people involved in the scheme, including a student equipment manager, were charged with one felony count of bookmaking. The quarterback was removed from the team and later pled no contest to gambling and unrelated theft charges and was sentenced to probation. He did not return to college athletics but did play professional football for various teams in the National Football League and Arena Football League (Maske, 2005).

#### 4.15. Ohio University (2007)

In 2007, Ohio University (OU) officials discovered that five baseball student-athletes had violated various elements of NCAA Bylaw 10.3. First, a senior pitcher was charged with accepting professional sports wagers. Later, two unnamed players suspected of placing bets were suspended from the team. A fourth student-athlete (who was no longer on the team) was charged with bookmaking. None of the students were alleged to have placed wagers on OU sports, the Bobcat baseball team or other student-athletes, nor was there any evidence of efforts to shave points or otherwise improperly influence the outcome of OU games. The three players were declared ineligible by the NCAA (Arkley, 2008).

#### 4.16. University of Toledo (2007)

Suspicious betting patterns and unusual gambling wagers related to the University of Toledo football caused Las Vegas Sports Consultants, Inc. to alert state authorities to potential gambling activities at the school (Gillispie, 2007). Subsequent investigations revealed that a Toledo football player and a gambler from the Detroit, Michigan area had schemed to point-shave in several games during the 2005 season (McCarthy, 2007b). The Toledo player was removed from the team for his involvement and did not return to college athletics. He was charged criminally as well, though the case was later dropped by investigators (Gillispie, 2007). The NCAA visited the Toledo campus but declined to pursue a formal investigation into the gambling activity (NCAA n.d.d.).

#### 4.17. Others

The cases noted above are those that received at least minor coverage in the news media. A common theme among those cases is that offenders were student-athletes in the sports of men's basketball or football. A review of NCAA data demonstrates that gambling activity is by no means limited to those two revenue producing sports or to NCAA student-athletes. Between the years 2003 and 2008, there were 27 other reported cases of NCAA rule violations by student-athletes, coaches and administrators who had gambled on college or professional sports. Student-athletes in such sports as soccer, track and field, tennis and golf have been found in violation of NCAA gambling rules as well. Other gamblers held positions from head coach, to video coordinator to athletics director. Wagers by both student-athletes and administrators ranged from as little as \$5.00 to the \$1,000 range. NCAA officials frequently cite this depth and variety in violations when they adopt additional anti-sports gambling regulations or push for stricter legislation on sports wagering by the federal government (NCAA, n.d.i.).

### 5. Additional Considerations

In 2005, the NCAA released data from a 2004 study that surveyed over 21,000 male and female student-athletes among its three divi-

sions (NCAA, 2003). The data revealed that 69% of male student-athletes reported participating in gambling activities and 35% reported participating in gambling activities that directly violated NCAA rules (NCAA; Huang, Jacobs, Derevensky, Gupta & Paskus, 2007). A second NCAA study on the issue was commissioned in 2007 and its results are pending (NCAA, n.d.i.). A 2000 University of Michigan study presented similar findings regarding the gambling habits of college athletic officials. In that study, 40% of those surveyed reported gambling on sports (Vollano & Gragg, 2000).

In light of the 2004 study and that the stricter legislation was not in and of itself curbing illegal sports gambling among its members, the NCAA created additional non-legislative policies that restrict activities associated with gambling (NCAA, n.d.h.). For example, the NCAA Division I Men's Basketball Championship may not be conducted in states where sports gambling is permitted. This includes the states of Nevada and Oregon, although Oregon permits only limited gambling on professional sports. NCAA policy further prohibits its committees from conducting meetings or formal social activities in casinos and the NCAA asks that its corporate sponsors not engage in promotions connected to the outcome of sporting competitions. The NCAA also performs background checks on the officials it hires to referee the "March Madness" tournament and requires gambling to be addressed at its annual training of those referees (Timanus, 2007; Ban on Amateur Sports Gambling, 2001).

The NCAA also has created staff positions at the national level to combat college sports gambling. For example, the NCAA established a governmental relations office based in Washington, D.C., to monitor Congressional bills and to influence legislation related to many intercollegiate athletics issues, including gambling on NCAA sports (Stoldt, Dittmore & Branvold, 2006). In addition, the NCAA has created a sole, multi-faceted unit which is called the "Agents, Amateurlism and Gambling" department within its Indianapolis headquarters. The department was created to insure that the NCAA addressed its biggest concerns (sports agents, amateurlism and gambling) all in one since it believes that sports agents and sports gambling pose two of the greatest threats to the integrity of the NCAA's product: amateur college sport. The NCAA maintains that even the slightest infiltration of gambling influences, both external and internal, could damage the purity of its college sports. This department is headed by one director who oversees a staff of five individuals, and the staff investigates allegations of sports gambling at NCAA member institutions. The NCAA also sponsors educational programs that provide assistance to college campus administrators to conduct sports wagering workshops, broadcasts of anti-sports wagering public service announcements during the championship games aired by broadcast and cable television. It produces a booklet in partnership with the National Endowment for Financial Education entitled "Don't Bet On It," aimed at educating students about the dangers of sports wagering engages in research in the area of youth gambling and campus gambling (NCAA, 2004). Additionally, a recent educational endeavor entitled "When Gambling Takes Control of the Game" was aimed at educating high school student-athletes of the addictiveness and dangers involved in sports gambling (Funderburk, 2007).

#### 5.1. Exceptions to NCAA Rules/Bylaws

There are a few notable exceptions to the NCAA gambling provisions. First, as noted above the NCAA Bylaws do not apply to horse-racing since there is no corresponding NCAA sport. Also, the rules do not apply to non-monetary wagers made between teams in light of tradition in the sport (e.g., losers give-up jerseys in rowing), or to "friendly wagers" made during the course of purely recreational sports.

#### 5.2. Governmental Regulation

Although the NCAA has taken a proactive position regarding the prohibition of sports wagering within its membership, the federal and state governments have also attempted to legislate anti-gambling prohibitions nationwide. Sports gambling regulation (and gambling in general) falls under the government's ability to protect the health, safety and welfare of its citizens under its "police power." Additionally,



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regulation of gambling activities, can generate millions of dollars in revenue for individual states that may use these revenues improve and fund road rehabilitation projects, the educational system, and so on. Though federal laws such as the Wire Communications Act of 1961 (18 U.S.C. §1084, 2008), the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) (18 U.S.C. §1961, et seq., 2008), and the Bribery in Sporting Contests Act of 1979 (18 U.S.C. §224, 2008) emerged in the last several decades, newer attempts to regulate sports gambling related to NCAA, high school and Olympic sports have modified the sports wagering landscape to a certain degree. The following sections outline a few attempts (some successful, some not) to regulate gambling directly or indirectly related to intercollegiate athletics. The NCAA has fully supported much of the legislation.

#### 5.2.1. Professional and Amateur Sports Protection Act (PASPA)

In 1992, President George H. W. Bush signed the Professional and Amateur Sports Protection Act of 1992 (PASPA) into law (28 U.S.C. §3701, et. seq., 2008) in order to “to stop the spread of state-authorized gambling and to protect the integrity of sporting events” (Roberts, 1997). Nevada, the only state at that time that had legalized sports gambling, was granted immunity from the Act, which makes it unlawful for a governmental entity, or a person acting pursuant to the law of such an entity, to operate, sponsor, advertise, promote, license, or authorize a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive game in which amateur, Olympic or professional athletes participate. The states of Delaware, Montana and Oregon are also exempt from the Act but only Nevada and Oregon actually operate sports betting. The Act also exempts pari-mutuel betting (horse racing) and jai alai games.

#### 5.2.2. Student Athlete Protection Act

In 2000, the Student Athlete Protection Act was introduced as a bill which attempted to prohibit high school and college sports gambling in all states including states where such gambling was permitted prior to 1991 (H.R. 3575, 2000). This Act, if signed into law, would have removed the exemption that Nevada received under PASPA related to high school and college games, including the Olympics. Although sponsored by Representative Thomas Osborne (Nebraska), who prior to being elected to Congress served as the head football coach at the University of Nebraska, this bill never became law as Congress failed to vote on it prior to its session expiring.

#### 5.2.3. Amateur Sports Integrity Act

Another attempt to close the “Nevada Loophole,” with support from the NCAA, was known as the Amateur Sports Integrity Act (S. 1002, 2003). The Act served many purposes, but one of the most significant was to modify the impact of PASPA by preventing any state (including Nevada) from allowing legal wagers on high school or college sports. Senator John McCain (Arizona) sponsored this bill and it received substantial coverage by the media, but similar to the Student-Athlete Protection Act, the bill never became law as it failed to be voted on before the legislative session expired.

### 5.3. Internet Issues

Sports wagering has expanded, of course, to the Internet. Concerns over sports gambling on the Internet continue to be addressed at the state and federal levels. For example, in 2006 Washington state made online gambling a class C felony (RCW §9.46.240, 2008; Skolnik & Ho, 2006). The NCAA has expressed considerable concern over the integrity of its college sports product in this regard although regulation, enforcement or prohibition of Internet gambling may prove to be a struggle and unmanageable (Werner, 2008).

#### 5.3.1. Unlawful Internet Gambling Enforcement Act (2006)

In October 2006, President George W. Bush signed a bill into law which made it much more difficult to send money to Internet gambling websites. This law now prevents credit card companies from processing online and illegal gambling activities. The Unlawful

Internet Gambling Enforcement Act (31 U.S.C. §§ 5361-5367, 2008) was actually included in the SAFE Port Act, which is designed to assist in the prevention of terrorist attacks on the United States related to shipping containers that enter U.S. ports (Pub.L. 109-347, 2006). The SAFE Port Act attempts to prevent online gamblers from using credit cards, checks and other electronic funds transfers in order to gamble. Any Internet casino that attempts to accept credit card payments, Internet bank transfers or any other illegal gambling payments should be blocked from doing so under this law. The Act places significant roadblocks in the path of people who have become accustomed to easy access to online sports books.

As technology advances at a record pace, regulation of Internet gambling and enforcement of prohibitions will likely remain problematic for state and federal governments and NCAA officials.

### 6. Conclusion

As the largest and most influential amateur sports organization in the United States, the NCAA has a legitimate interest in protecting its college sports product from unscrupulous influences. One of the most important issues related to protecting the integrity of college sports is to attempt to prevent participants from affecting the outcome of a sports contest in order to increase or decrease the odds of a successful gambling wager. The NCAA has had to address numerous gambling scandals throughout its first century and, as a direct result, the organization has imposed serious sanctions for violations of its Bylaws found in the NCAA Manual. Though it is impossible to prevent all forms of gambling on college sports, particularly with the advent of the Internet, the NCAA has worked with federal and state governments to enact, modify or influence legislation which protects the honesty of the sports contests which fall under its purview. In the end, the NCAA's position is quite clear that betting on college sports is unacceptable for any student-athlete, coach or administrator affiliated with its intercollegiate membership.

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# Gambling and Professional Athletics

by Anita Moorman\*

## Introduction

The relationship between gambling and professional sports in the United States can be traced back to the Black Sox scandal of 1919 after eight Chicago White Sox baseball players were indicted for fixing the 1919 World Series (Udovicic, 1998). While none of the players were convicted of the game fixing allegations, they were all banned from Major League Baseball (MLB). Consequently, Major League Baseball became the first professional sports league to prohibit gambling in some form. Other sports experienced similar scandals.

"War is Declared on Golf Gamblers" was the headline in the *New York Times* on May 9, 1920, in response to rampant gambling on golf tournaments that led the United States Golf Association to condemn pool-selling, bookmaking, and individual wagering on tournaments as against the best interests of the game ("War is declared," 1920). Eventually, almost every major professional sports league would confront gambling scandals (Standen, 2006) and even aggressively lobby for legislation prohibiting sports betting in any form (McKelvey, 2004). Major League Baseball, the National Basketball Association (NBA), and the National Football League (NFL) collectively pay millions of dollars to lobbying firms which specialize in issues involving internet gambling and/or sports betting (King, 2008). However, despite these efforts, gambling scandals continue to emerge in professional sport.

During 2007, gambling scandals involving National Basketball Association referee, Tim Donaghy ("Donaghy bet on games," 2008) and alleged match fixing by the fourth ranked men's professional tennis player, Nikolay Davydenko (Assael, 2008; Clarey, 2007) have once again intensified efforts by governing bodies to monitor and prevent gambling activities.

Most professional sports leagues have endured gambling scandals and thereafter experienced a common evolution. First, the awakening phase - where the league becomes aware of the existence of gambling in the sport due to a scandal and the perceived threat gambling poses to the integrity and credibility of the sport. Second, the prohibition phase, when the league decries all things related to gambling and wagering, and invests league commissioners or professional associations with broad powers to prohibit all forms of gambling and wagering. And third, the partnership phase, when the leagues recognize that gaming industry is growing, accepted, and perhaps impossible to regulate, thus the leagues relax some rules to attempt to balance the shift in attitudes about gaming with the threats still posed by business relationships with gambling enterprises.

The presence of gambling in sport is most commonly decried as a threat to the integrity of sport (Fecteau, 2003; Ostertag, 1992). Fueled

by the fact that historically almost all forms of gambling were illegal and also viewed as immoral, gambling that was occurring was being driven by organized crime or other criminal interests. As the amount of money being wagered on sports gambling continued to rise, so did fears that corrupting influences would try to affect the outcomes of sports contests thereby damaging the reputation and integrity of the sport. It is estimated that Americans illegally wager between \$80-380 billion annually on sporting events (Levinson, 2006).

Professional sports leagues have vehemently opposed any form of gambling connected to the outcome of a sports contest, even state lotteries tied to sports contests. In 1977, the National Football League sued the State of Delaware to prevent the state from conducting an NFL themed sport lottery. The NFL's suit alleged trademark infringement by the state lottery. However, the federal district court held that the lottery could continue so long as the lottery tickets and other promotional materials contained sufficient disclaimers that made it clear the NFL had no affiliation with the lottery (*NFL v. Delaware*, 1977).

More recently, as Congress considered passage of the Professional and Amateur Sports Protection Act of 1992 (PASPA), commissioners from three of the four major professional sports leagues in the United States testified about the threat gambling posed to the integrity of their respective sports and urged Congress to impose a federal ban on sports betting of any kind. MLB Commissioner Fay Vincent testified "one remembers that the Office of the Commissioner of Baseball was created in direct response to the 1919 Black Sox. Scandal. Protecting

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the integrity of the game is our primary job” (McKelvey, 2004). NBA Commissioner David Stern also emphasized integrity of the game in his testimony and stated “sports betting places athletes and games under a cloud of suspicion . . .” (McKelvey). NFL Commissioner Paul Tagliabue further testified “legalized sports gambling sends a regrettable message to our young people” (McKelvey). Congress did respond with a federal ban on state lotteries that employed a wagering scheme related to the outcome of sports contests (28 U.S.C. §3701, et. seq., 1992). Four states which had already approved sports wagering were exempted from the PASPA; although only two of those, Nevada and Oregon, still allow wagering on sporting events (Levinson, 2006).

This chapter will review current policies and practices among each of the four major professional sports leagues in the United States relative to gambling. It will also compare a variety of practices in individual professional sport such as golf and tennis that address concerns regarding gambling activities.

## **1. Analysis Of Professional Sports Leagues Regulation Of Gambling, Wagering, And Betting Activities**

For each of the leagues, their policies and rules will be categorized into rules affecting internal operations and rules regarding external relationships. Regulations of internal operations primarily relate to the relationship between the players and the league. Regulations affecting external relationships primarily relate to the leagues advertising, promotional, and sponsorship activities, thus controlling the advertising partners and business relationships with the league, teams, and players.

### **1.1. Internal Operations**

Internally, professional sports leagues define the rights and duties of the league, teams, and players with respect to gambling. None of the professional sports leagues regulate gambling activities beyond those associated with the sport in question. In other words, an NBA gambling restriction may prohibit a NBA player from placing a bet on his team or another team in the NBA, but would not prevent that player from engaging in otherwise lawful sports betting and wagering. And many professional athletes readily admit to participating in a variety of gambling activities. For example, Charles Barkley recently stated he has been gambling for 20 years and acknowledged a \$400,000 gambling debt to a Las Vegas casino and that he had lost millions of dollars throughout his career (Ritter, 2008). His admission is not uncommon among professional athletes. Professional golfer John Daly’s gambling losses over the course of his career have been reported to exceed \$50 million (“Daly’s gambling losses,” 2006).

Internal gambling restrictions apply almost exclusively to the players, managers, officials, and owners betting in their sport. Regulations may empower the Commissioner to act in the best interests of the sport or to preserve the integrity of the sport by either adopting prohibitions against gambling and other forms of wagering or punishing those who violate the prohibitions. Another type of internal regulation involves provisions inserted into the Collective Bargaining Agreements (CBA) between the players unions and the league to acknowledge the authority of the Commissioner to act to preserve the integrity of the game vis a vis gambling. Additional limitations may be imposed upon players either in the Standard Player Contract, Mandatory training programs, or Club Rules.

#### *1.1.1. Office of the commissioner.*

The Commissioners of three of the four major professional sport leagues are vested with authority to act in the best interests of the sport or to preserve the integrity of the sport in terms of creating rules and or enforcing rules regarding gambling. For example, when MLB created the office of the Commissioner following the 1919 World Series scandal and selected Judge Keenesaw Mountain Landis as the first commissioner of baseball, one of his first actions as commissioner was to impose a lifetime ban on the eight White Sox players involved in the scandal. The National Basketball Association acted similarly in 1951 when Commissioner Maurice Podoloff prohibited

NBA players from betting on and fixing team games following an indictment of two player/owners. The National Football League Commissioner also relied upon competitive integrity arguments to support its prohibitions against player betting (Standen, 2006).

Specifically, for MLB the Major League Constitution provides in Section 2: “The functions of the Commissioner shall include ... to investigate ... any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball ...” (MLB, 2006). Section 3 then authorizes the MLB Commissioner to take punitive action against any Major League Club, owner, officers, employees, or players for conduct not in the best interest of baseball. Lastly, Section 4 which limits the Commissioner’s authority to act unilaterally on some matters, expressly excludes any limits on the Commissioner’s authority to act on matters involving the “integrity of, or public confidence in, the national game of Baseball” (MLB). The Commissioner has used this authority on a number of occasions most notably when then Commissioner A. Bartlett Giamatti imposed a lifetime suspension on Pete Rose for engaging in conduct not in the best interests of baseball. Rose had violated Major League Rule 21, which forbids players, coaches, and managers from betting on Major League Baseball games in connection with which they have a duty to perform (Office of the Commissioner of Baseball, 1989). Since Rose bet on the Reds while he was the manager of the Reds, he had a duty to perform as manager which was compromised when he began betting on the outcomes of those games.

The NFL Commissioner, Pete Rozelle, exercised similar authority in 1963 when he indefinitely suspended Green Bay half-back Paul Hornung and Detroit defensive tackle Alex Karras for placing bets on their own teams and on other NFL games. He also fined five other Detroit players \$2,000 each for betting on one game in which they did not participate (NFL, 2008). Article VIII of the Constitution and Bylaws of the National Football League (1999) addresses the selection and authority of the NFL Commissioner. Section 8.13(A) empowers the Commissioner generally to suspend and fine owners, players, coaches, and officials for “conduct detrimental to the welfare of the League or professional football”. Section 8.13(C) specifically addresses gambling and wagering and provides the Commissioner with broad authority as follows:

“[w]henever the Commissioner, after notice and hearing, determines that a person employed by or connected with the League or any member club ... has bet money or any other thing of value on the outcome or score of any game or games played in the League or has had knowledge of or has received an offer, directly or indirectly, to control, fix, or bet money or other consideration on the outcome or score of a professional football game and has failed to report the same ... the Commissioner shall have the complete and unrestricted authority to enforce any or all of the following penalties”.

The penalties available to the NFL Commissioner include an indefinite suspension, a lifetime ban from the League, cancellation of player contracts, forced stock sale, fines, cancellation or forfeiture of interests in a team, assignment of stadium leases, assignment of players on the Selection or Reserve lists, and other punishments determined by the Commissioner (NFL, 1999, Section 8.13(C)(1)-(9)).

The NBA Constitution, Article 35 addresses the Commissioner’s authority to regulate “misconduct” by players (NBA, 1989). This section requires each team to incorporate the misconduct provisions into each player contract. Article 35 authorizes the Commissioner to act in response to alleged gambling or wagering in a number of ways. First, sub-section (b) expressly permits the Commissioner to dismiss and perpetually disqualify any player who is found guilty of offering, agreeing, conspiring, aiding or attempting to cause any game of basketball to result otherwise than on its merits. However, the NBA Commissioner may only exercise this authority after a hearing. Sub-section (c) authorizes the NBA Commissioner to impose fines or suspend players or both for any act or conduct that is “prejudicial to or against the best interests of the Association or the game of basketball” (NBA). This sub-section does not require a hearing specifically. However, Section 35 has yet another sub-section dealing expressly

with allegations of gambling by players. Sub-section (f) provides as follows:

Any Player who, directly or indirectly, wagers money or anything of value on the outcome of any game played by a Team in the league operated by the Association shall, on being charged with such wagering, be given an opportunity to answer such charges after due notice, and the decision of the Commissioner shall be final, binding and conclusive and unappealable. The penalty for such offense shall be within the absolute and sole discretion of the Commissioner and may include a fine, suspension, expulsion and/or perpetual disqualification from further association with the Association or any of its Members (NBA, 1989).

Despite the NBA Commissioner's broad power to act in the best interests of the game in sub-section (c), it is more likely that the specific language in sub-section (f) would control the Commissioner's decision making regarding allegations of player gambling.

#### 1.1.2. *Collective bargaining agreements.*

As discussed above, most of the Constitutions or Bylaws of the major professional sports leagues require the clubs and players to agree to certain terms and conditions. This agreement will be included in the respective Collective Bargaining Agreement which binds all the players. Collective Bargaining Agreements for each of the leagues address gambling in a variety of ways. For example, the NFL CBA provides that a player may be disciplined for conduct detrimental to the integrity of the game. Major League Baseball expressly exempts issues involving integrity of the game from the CBA grievance process thereby permitting the Commissioner to act independently. The NBA CBA mandates gambling awareness training programs. And the NHL CBA requires players to abide by club rules and incorporates the Standard Club Rules by reference. Those rules will be discussed in the following section. Each of the CBA's will be discussed in greater detail below.

Major League Baseball's CBA does not expressly prohibit gambling, but it does require players to abide by the MLB Constitution and rules, including Rule 21(d) related to betting and discussed in detail in the following section. The CBA does however provide that a

'Grievance' shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball ... In the event a matter filed as a Grievance in accordance with the procedure hereinafter provided in Section B gives rise to issues involving the integrity of, or public confidence in, the game of baseball, the Commissioner may, at any stage of its processing, order that the matter be withdrawn from such procedure and thereafter be processed in accordance with the procedure provided above in this subparagraph (b). The order of the Commissioner withdrawing such matter shall constitute a final determination of the procedure to be followed for the exclusive and complete disposition of such matter, and such order shall have the same effect as a Grievance decision of the Arbitration Panel (Major League Baseball and the Major League Baseball Players Association, 2006).

This provision in the CBA would presumably make it quite difficult for a player to avail himself of the grievance protections commonly seen in salary, trade, and other disciplinary disputes if the matter would rise to the level of preserving the integrity of the game. Historically since MLB has treated matters involving allegations of gambling as involving the integrity of the game, it is reasonable to assume it would continue to do so even though it has not amended its constitution to expressly identify gambling or betting as practices that undermine the integrity of the game of baseball.

The National Football League's CBA, Article XI, Section 1 addressing League Discipline provides as follows:

Notwithstanding anything stated in Article IX (Non-Injury Grievance):

(a) All disputes involving a fine or suspension imposed upon a player for conduct on the playing field other than as described in Subsection (b) below, or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or

public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within twenty (20) days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner.

...  
(c) On receipt of a notice of appeal under subsection (a) or (b) above, the Commissioner will designate a time and place for a hearing to be commenced within ten (10) days thereafter, at which he or his designee (other than the person appointed in (b) above) will preside. The Commissioner will consult with the Executive Director of the NFLPA concerning the person to serve each season as the Commissioner's designee. The hearing may be by telephone conference call, if the player so requests. As soon as practicable following the conclusion of such hearing, the Commissioner will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement with respect to that dispute. ... (National Football League Players Association and National Football League Management Council, 2002).

This provision of the NFL CBA clearly authorizes the Commissioner to impose fines or suspensions for conduct detrimental to the integrity of the game of professional football. The NFL Standard Player Contract, discussed below, contains an express definition of what conduct may be deemed detrimental to the League and the game of professional football. Gambling is identified as conduct deemed detrimental to the game of professional football.

The National Basketball Association CBA does not expressly prohibit gambling, but does address gambling in a few different ways. First, it stipulates the form of the Standard Player Contract which contains a section on Conduct (including betting) discussed more fully below. The CBA also addresses player conduct in Article VI which provides as follows:

Section 4. Mandatory Programs.

- (a) NBA players shall be required to attend and participate in educational and life skills programs designated as "mandatory programs" by the NBA and the Players Association. Such "mandatory programs," which shall be jointly administered by the NBA and the Players Association, shall include . . . Team Awareness Meetings (which shall cover . . . gambling awareness), and such other programs as the NBA and the Players Association shall jointly designate as mandatory.
- (b) When a player, without proper and reasonable excuse, fails or refuses to attend a "mandatory program," he shall be fined \$20,000 by the NBA; provided, however, that if the player misses the Rookie Transition Program, he shall be suspended for five (5) games (National Basketball Association and National Basketball Players Association, 2005).

Next, the NBA CBA contains Article XXXI: Grievance and Arbitration Procedure and Special Procedures with Respect to Disputes Involving Player Discipline. Article XXXI, Section 8 provides:

Special Procedures with Respect to Player Discipline

- (a) A dispute involving . . . (ii) action taken by the Commissioner (or his designee) (A) concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and (B) resulting in a financial impact on the player of \$50,000 or less, shall not give rise to a Grievance, shall not be subject to a hearing before, or resolution by, the Grievance Arbitrator, and shall not be determined by arbitration; but instead shall be processed exclusively as an "Appeal" before the Commissioner (or his designee) as follows:
- (i) Within twenty (20) days following written notification of the action taken by the Commissioner (or his designee), a player affected thereby or the Players Association may appeal in writing to the Commissioner.

- (2) Upon the written request of the Players Association, the Commissioner shall designate a time and place for hearing as soon as is reasonably practicable following his receipt of the notice of appeal.
- (3) As soon as reasonably practicable, but not later than twenty (20) days, following the conclusion of such hearing, the Commissioner shall render a written decision, which decision shall constitute full, final and complete disposition of the dispute, and shall be binding upon the player(s) and Team(s) involved and the parties to this Agreement.
- (4) In the event such appeal involves a fine and/or suspension imposed by the Commissioner's designee, the Commissioner, as a consequence of such appeal and hearing, shall have authority only to affirm or reduce such fine and/or suspension, and shall not have authority to increase such fine and/or suspension.
- (b) A dispute involving ... (ii) an action taken by the Commissioner (or his designee) that (A) concerns the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and (B) results in a financial impact on the player of **more than \$50,000**, shall be processed and determined in the same manner as a Grievance under Sections 2-6 above; provided, however, that the Grievance Arbitrator shall apply an "arbitrary and capricious" standard of review.

...

(d) In the event a matter filed as a Grievance in accordance with the provisions of this Article gives rise to issues involving the integrity of, or public confidence in, the game of basketball, and the financial impact on the player of the action being grieved is \$50,000 or less, the Commissioner may, at any stage of its processing, order that the matter be withdrawn from such processing and thereafter be processed in accordance with the appeal procedure provided in Section 8(a) above (National Basketball Association and National Basketball Players Association, 2005).

Lastly, the NBA CBA contains Anti-Collusion Provisions in Article XIV which are directed toward collusive action between NBA teams or their employees/agents which would interfere with contract negotiations and player trades. Section 2 of the CBA describes a number of collective actions that would NOT violate the anti-collusion provisions including any action taken by the NBA League Office to exclude from the League, suspend or discipline any player for reasons involving gambling, drugs, or the commission of a crime. It would appear that the NBA is concerned that if the League and the teams act collectively to regulate athletes involved in gambling, drugs, or criminal activity, that that collective act may inadvertently trigger the Anti-Collusion Provisions of the CBA. Thus, those types of collective actions were exempted from the Anti-Collusion provisions. Interestingly, the CBA is not specific about identifying gambling as conduct for which players will be disciplined, instead it is implied in the integrity of the game provisions and incorporated by reference to the NBA Constitution, Section 35, within the standard player contract (National Basketball Association and National Basketball Players Association, 2005).

The National Hockey League's (NHL) CBA, Section 30.7, incorporates Exhibit 14 to the CBA, the Standard Club Rules for players. Section 30.7 provides:

- (a) Each Club may require its Players to abide by some or all of the rules set forth in the "Standard Club Rules" annexed hereto as Exhibit 14.
- (b) Each Player must be given written notice of the specific rules in the Standard Club Rules that the Club intends to apply for the upcoming season. Such notice must be given by no later than the first day of Training Camp for each applicable Playing Season (or, for a Player who later joins the Club, within three (3) days of his arrival). In each case, receipt of such Club rules must be acknowledged by each Player in writing (NHL, 2005).

Of the four major professional sports leagues, the National Hockey League has the least aggressive policies toward gambling. Interestingly, as mentioned earlier, while the other three leagues even actively lobby

for legislation to prevent sports gambling, the NHL's lobbying expenditures are instead limited to issues of television rights, performance enhancing drugs, and eminent domain (King, 2008).

### 1.1.3. Standard player contracts

An extension of the Collective Bargaining Agreements and the League Constitution and Bylaws is the standard player contract. The League Constitution will require that a standard player contract be created and adopted. The players association and the league will negotiate the terms of the standard player contract. And each of the major professional sports leagues have either included language in the standard player contract or incorporated such language from the CBA related to gambling, wagering, or betting. In addition to including express prohibitions on gambling, some player contracts will also prohibit any conduct that is detrimental to the integrity of the sport or not in the best interest of the sport. The inclusion of gambling prohibitions and the "best interests" or loyalty language in the Standard Player Contract are consistent elements among the various leagues efforts to manage player gambling and betting. Key provisions from each leagues standard player contract will be summarized below.

The NFL Standard Player Contract contains several general restrictions on player conduct as well as loyalty provisions. First, Section 2 provides

Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game (NFL, 2002).

Next, Section 11 states "If at any time, in the sole judgment of Club ... Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract" (NFL). Section 14, "Rules" states that the "Player will comply with and be bound by all reasonable Club rules and regulations in effect during the term of this contract which are not inconsistent with the provisions of this contract or of any collective bargaining agreement in existence during the term of this contract" (NFL). But by far the most direct and unambiguous prohibition on gambling is contained in Section 15 which provides as follows:

INTEGRITY OF GAME. Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity . . . or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract (NFL).

As is presented below, the NFL prohibitions on gambling are the most comprehensive and clear of the major professional sports leagues. They not only expressly prohibit numerous gambling activities including bribes, fixing games, or even associating with gamblers or gambling activities, but further expressly acknowledge gambling as a threat to the integrity of the league.

The MLB Uniform Player Contract does not expressly identify gambling as a prohibited activity or a threat to the integrity of the game as is evidenced in the NFL Standard Player Contract. Instead, MLB incorporates those restrictions by reference to the Major League Constitution and Major League Rules. The Uniform Player Contract also includes a Loyalty Clause by which the player agrees to "conform to high standards of personal conduct, fair play, and good sportsmanship" (MLB, 2006). The Uniform Player Contract further provides:

The Club is, along with other Major League Clubs, signatory to

the Major League Constitution and has subscribed to the Major League Rules. . .

9(a) The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Constitution, and the Major League Rules, or other rules or regulations in effect on the date of this Uniform Player's Contract ... (MLB).

These provisions would bind the player to Section 2 and 3 of the Major League Constitution discussed previously and League Rule 21(D) discussed below. In addition, the general loyalty clause could also be construed to apply to gambling activities.

The NBA Uniform Player Contract contains a loyalty clause whereby the player agrees "to give his best services, as well as loyalty, to the Team, and to play basketball only for the Team . . . ; and (iv) not to do anything that is materially detrimental or materially prejudicial to the best interest of the Team of the League" (NBA, 2005). However, the NBA Uniform Player Contract also provides express prohibitions on gambling similar to the express provisions utilized by the NFL. The NBA Uniform Player Contract, Section 5, Conduct provides:

(a) The Player agrees to observe and comply with all Team rules, as maintained or promulgated in accordance with the CBA, at all times whether on or off the playing floor. Subject to the provisions of the CBA, such rules shall be part of this Contract as fully as if herein written and shall be binding upon the Player.

...

(c) For any violation of Team rules, any breach of any provision of this Contract, or for any conduct impairing the faithful and thorough discharge of the duties incumbent upon the Player, the Team may reasonably impose fines and/or suspensions on the Player in accordance with the terms of the CBA.

...

(e) *The Player agrees that if the Commissioner, in his sole judgment, shall find that the Player has bet, or has offered or attempted to bet, money or anything of value on the outcome of any game participated in by any team which is a member of the NBA, the Commissioner shall have the power in his sole discretion to suspend the Player indefinitely or to expel him as a player for any member of the NBA, and the Commissioner's finding and decision shall be final, binding, conclusive, and unappealable.* (emphasis added) (NBA, 2005).

The NBA Uniform Player Contract does not go quite as far as the NFL contract and specifically identify gambling as a threat to the integrity of the league, but it does grant the Commissioner considerable authority to respond to violations of the Conduct provisions.

In the NHL Standard Player Contract the player agrees to play to the "best of his ability" (National Hockey League and the National Hockey League Players Association, 2005). The Standard Player Contract also includes a loyalty clause wherein the player agrees "to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interests of the Club, the League or professional hockey generally" (National Hockey League and the National Hockey League Players Association). Section Four of the Standard Player Contract also mandates compliance with Club rules and states:

The Club may from time to time during the continuance of the SPC establish reasonable rules governing the conduct and conditioning of the Player, and such reasonable rules shall for a part of the SPC . . . For violation of any such rules or for any conduct impairing the thorough and faithful discharge of the duties incumbent upon the Player, the Club may impose a reasonable fine upon the Player . . . . The Club may also suspend the Player for violation of any such rules (National Hockey League and the National Hockey League Players Association).

Section 18 further provides that the Club and the Player agree to be bound by the League Rules and the Collective Bargaining Agreement.

The Standard Player Contract also contains one express provision that may encompass gambling activities, although the provision is not

as clear and direct as represented in the NFL or NBA player contracts. The NHL Standard Player Contract, Section 9, provides "it is mutually agreed that the Club will not pay, and the Player will not accept from any person, any bonus or anything of value for winning or otherwise attempting to affect the outcome of any particular game or series of games except as authorized by the League By-laws" (National Hockey League and the National Hockey League Players Association, 2005). While this provision may be applicable in the event a player received a bribe or other incentive to affect the outcome of a game, it has most commonly been applied to restrict performance bonuses for players from the Club. It would likely not apply in a situation where a player had merely bet on another NHL game in which he did not participate; or arguably even if one in which he did participate it was not intended to affect the outcome of the game. Notably, neither the NHL CBA nor the Standard Player Contract acknowledge the inherent threat gambling poses to the integrity of the game, nor does the CBA authorize the Commissioner to discipline players to preserve the integrity of the game.

### 1.1.3. Club Rules

A final mechanism for regulating gambling activities by professional athletes is found in the Team or Club rules. As mentioned in the previous section, a number of the leagues' standard player contracts mandate compliance with league, team, and club rules. Thus, some of the leagues have recognized and approved team or club rules regarding gambling activities.

For example, every clubhouse in MLB and minor league baseball posts MLB Rule 21(d) in its locker rooms (L. Masteralexis, personal communication, February 18, 2008; M.L.B., n.d.). Rule 21(d) reads as follows:

(d) **BETTING ON BALL GAMES.** Any player, umpire, or club official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has no duty to perform shall be declared ineligible for one year. Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has a duty to perform shall be declared permanently ineligible. (M.L.B., n.d.).

The NHL has also adopted uniform club rules including Standard Club Rule 2 which provides "Gambling on any NHL Game is prohibited" (National Hockey League, 2005b). The notes included with the NHL Standard Club Rules indicate that a "first offense" of any club rules may only be punished by imposing a \$250 fine; and any subsequent fine is limited to \$500 in native currency. At the end of the season, the fines accumulated by a player are donated to a charity of the player's choice. Of course, as mentioned in the previous section, the National Hockey League CBA does not acknowledge the inherent threat gambling poses to the integrity of the game, nor does the CBA authorize the Commissioner to discipline players to preserve the integrity of the game. Even the portions of the CBA that do vest the Commissioner with authority to discipline players for off-ice conduct are subject to numerous procedural and hearing requirements before a player can be suspended or fined.

Thus, while the gambling prohibition in Standard Club Rule 2 is clear and direct, the punishment for violating the rule is minimal in contrast to the penalties typically available in the other major professional sports leagues. Overall, the NHL's gambling restrictions are less rigorous than the other three major leagues. This could explain why the gambling scandal involving Phoenix Coyotes assistant coach, Rick Tocchet, did not result in a significant suspension for violating NHL gambling policies. Tocchet operated a gambling ring together with two other men which handled approximately \$1.7 million in bets during the six week before the Super Bowl (Associated Press, 2006). Authorities reported that up to a dozen NHL players may have placed bets through Tocchet's operation. In addition, Wayne Gretzky's wife was also a reported to have placed bets with Tocchet. All parties involved in that scandal including other coaches, players, and Wayne Gretzky's wife were adamant that they never bet on hockey. Deputy

Commissioner, Bill Daly, said that there was no evidence any betting on NHL games had occurred (Associated Press, 2006). The NHL commissioner, Gary Bettman, did suspend Tocchet three months after Tocchet pled guilty to promoting gambling and conspiracy to promote gambling and sentenced to two years probation. Tocchet took a leave of absence following the filing of charges against him in 2006. The NHL conducted an internal investigation and determined his role was not as involved as initially reported and reinstated Tocchet as the Coyotes assistant coach in February, 2008 following his probation and his three month suspension (Associated Press, 2008). Tocchet recently accepted a coaching position with the Tampa Bay Lightning.

Both the NHL and MLB's club rules are direct and specific prohibitions of betting and/or gambling. Neither the NBA nor the NFL seems to regulate gambling activities through club or team rules, instead relying more heavily on the Standard Player Contract and Commissioner's authority. However, despite the club rules in the NHL and MLB neither are as powerful as the NFL's Section 15 which ties gambling directly to integrity of the sport and vest the Commissioner with authority to discipline. Of the four major professional sports leagues, the NFL is clearly the most aggressive and vigilant in its prohibitions against gambling.

### 1.2. External Relationships

While internal league gambling restrictions have been strengthened, external policies defining permitted advertising relationships have been relaxed to permit professional sport clubs to pursue partnerships with gaming enterprises to increase club revenues. McKelvey (2004) examined the evolution of rules used by the major sports leagues to regulate advertising and promotional activities of the league and the teams. Initially, all leagues refused any advertising or promotional relationships with gaming enterprises. This ban included state lotteries. The National Football League even sued the State of Delaware to prevent the state from conducting a state lottery using results or scores from NFL games (*N.F.L. v. Governor of the State of Delaware*, 1977). The NBA and NHL both filed similar legal challenges to state run lotteries (McKelvey; Standen 2006). However, over time, each of the leagues, except the National Football League, relaxed these restrictions slightly to permit limited associations between sport teams and gaming enterprises.

For example, in 1985, Major League Baseball began relaxing restrictions on advertising to allow clubs to accept advertising from federal, state, or local lotteries so long as the advertising did not include or use Club names, logos, announcers, or personnel (McKelvey, 2004). Official sponsorship relationships were still prohibited. Presently, MLB rules allow clubs to enter into advertising, sponsorships, and promotional agreements that may include Club names, logos, announcers, personnel or mascots. However, the lottery game or promotion may not be contingent upon the outcome of the event. Essentially, lotteries may advertise with Club names and logos, but may not put a club name or logo on the actual lottery ticket. Lotteries may also distribute lottery tickets inside stadiums, purchase advertising inside the stadium; and sponsor other game promotions (McKelvey). Sports themed lottery games continue to grow in popularity fueled partly by the growing acceptance of the partnerships between the lottery and the local sports team.

With regard to casinos or other legalized gambling entities, MLB clubs may permit advertising, sponsorships, and promotional activities. No advertisements, sponsorship materials, or promotional materials may use the Club name or logos or be identified in any way with the club or MLB, except that both the casino and the club may include logos together on giveaway items involved in a promotional event. Thus, if a casino wished to purchase advertising on a billboard inside the stadium it may do so, so long as the club or MBL logos are not displayed as part of the advertisement. However, if the casino wished to sponsor a promotional event and giveaway a neck tie to attendees, the neck tie or other promotional item could include both the casino's logo and the Club's name or logo.

The National Basketball Association and the National Hockey

League have also relaxed restrictions on advertising and sponsorship relationships between teams and lotteries or casinos. The NBA and WNBA were the first professional sports leagues to license the use of team logos to state lotteries. The licensing agreement also permits the sale of lottery tickets inside NBA and WNBA venues and free distribution of lottery tickets to fans as promotional items (McKelvey, 2004). Additionally, NBA Commissioner David Stern approved the purchase of a WNBA team by the Mohegan Sun Resort and Casino in 2003. The National Hockey League also entered into a licensing agreement with a state lottery licensing company which began offering scratch off games with cash prizes as well as team merchandise and tickets as prizes. Teams are permitted to sell and or distribute free lottery tickets in fans in the arena. The NHL Calgary Flames even applied to the Alberta Gambling and Liquor Commissions to build a casino inside the publicly owned arena (McKelvey). For the past three years, the Calgary Flames have sponsored a Celebrity poker tournament to raise funds for the Flames Foundation for Life. The poker tournament was held at Deerfoot Inn and Casino with Calgary Flames players, coaches, and management participating in the sold out event (Calgary Flames Limited Partnership, 2008).

Contrary to the fairly rapid expansion of advertising and sponsorship arrangements between professional sport teams and state lotteries or casinos, the National Football League continues to restrict these relationships. The NFL only permits teams to accept generic advertising that does not use team names or logos or anything that could resemble a sponsorship. Even this limited opportunity is restricted to state and city lotteries, state or city off-track betting facilities, and horse or dog racing tracks. No advertising can be accepted from casinos (McKelvey, 2004). Distribution of lottery tickets in stadium or as giveaway items is not permitted in NFL stadiums, nor can the teams accept advertising even from approved lotteries if the lottery game is sport themed. The NFL has even refused advertising from the Las Vegas Convention and Visitors Authority (McKelvey).

### 2. Emerging Issues For Other Professional Sports Organizations

A number of other professional sport organizations have also adopted rules and regulations to curb or limit gambling activities. Recent allegations of match fixing buckled the ATP Tour in the fall of 2007. The International Tennis Federation, the ATP, the WTA Tour, and the four Grand Slam events convened an independent panel which reviewed 73 matches held over the past 5 years (Lehourites, 2008; Clarey, 2007). Of those 73 matches, 45 were subject to further review. The panel produced a report of its findings which also concluded that some players were vulnerable to corrupt approaches from people outside tennis (Lehourites).

The ATP Tour created a task force to develop uniform rules regarding wagering, match fixing, and collusion that all the sport organizations governing professional and amateur tennis could then adopt. It was reported that the USTA, WTA and Grand Slam Series would adopt similar rules in an effort to establish a uniform anti-corruption program (Lehourites, 2008; "Rules are sought," 2007). The 2008 ATP Tour rules contain detailed provisions related to wagering and collusion applicable to tournament organizers, owners, ATP employees and agents, and players. With regard to ATP tournament organizers, owners, employees, and agents, Section 7.01(H) provides:

No ATP or Challenger Series Tournament, ATP member or any person who directly or indirectly has a controlling ownership interest therein or who is the Designated Representative (as defined in the ATP By-Laws) or Tournament Director or other employee or agent of an ATP or Challenger Series Tournament or ATP member (excluding employees or agents who do not have executive or material management authority) shall engage in any form of gambling or wagering in connection with any ATP or Challenger Series Tournament (ATP, 2008).

The ATP Tour has also adopted a formal anti-collusion program which is spelled out in detail in Section 7.05, Article C. Section 7.05(C) identifies the following punishable offenses.

Commission of any offense set forth in Article C or D of this Program or any other violation of the provisions of this Program shall constitute a "Corruption Offense" for all purposes of this Program.

### 1) Wagering.

- a) No Player nor any of his Player Support Personnel shall, directly or indirectly, wager or attempt to wager money or anything else of value or enter into any form of financial speculation (collectively, “Wager”) on the outcome or any other aspect of any Event.
- b) No Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, induce, entice, persuade, encourage or facilitate any other person to Wager on the outcome or any other aspect of any Event.

### 2) Corruption.

- a) No Player nor any of his Player Support Personnel shall, directly or indirectly, contrive or attempt to contrive, or be a party to any effort to contrive or attempt to contrive, the outcome or any other aspect of any Event.
- b) Without limiting the requirements set forth above under “Best Efforts”, no Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, induce, entice, persuade, encourage or facilitate any Player to not use his best efforts in any Event.
- c) No Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, request, receive, accept or agree to receive or accept any Consideration, either (i) with the intention of influencing the Player’s efforts in any Event, or (ii) that could otherwise bring the Player or the game of tennis into disrepute.
- d) No Player nor any of his Player Support Personnel shall, directly or indirectly, offer, promise, provide or agree to provide any Consideration to any Other Player, whether the Other Player is an opponent of such Player or otherwise, either (i) with the intention of influencing the Other Player’s efforts in any Event, or (ii) that could otherwise bring the Player, the Other Player or the game of tennis into disrepute.
- e) No Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, request, receive, accept or agree to receive or accept any money, benefit or other consideration (whether financial or otherwise) (collectively, “Consideration”), for the provision of any information concerning the weather, players, court conditions, status, outcome or any other aspect of any Event (other than the provision of information to a reputable media organization not affiliated with Wagering for disclosure to the general public).
- f) No Player nor any of his Player Support Personnel shall, directly or indirectly, offer, promise, provide or agree to provide any Consideration to any other Player (an “Other Player”), whether the Other Player is an opponent of such Player or otherwise, for the provision of any information concerning the weather, players, court conditions, status, outcome or any other aspect of any Event.
- g) No Player nor any of his Player Support Personnel shall, directly or indirectly, offer compensation to the Tournament in exchange for a Wild Card (ATP, 2008).

Shortly after adoption of the new Anti-Corruption policy, the ATP suspended two players for betting on matches and reinforced its commitment to rigorous enforcement of the betting ban (Tomickova, 2008; Townend, 2008). The ATP Tour rules also restrict tournament organizers and owners from entering into advertising relationships with any companies associated with gambling (ATP, Section 7.02(J)(1)(b)(viii), 2008).

Despite the “War on Gambling” announced in 1920, and in contrast to current efforts seen in professional tennis, the United States Golf Association (USGA) expressly permits gambling and wagering; and seems to recognize it as a common aspect of the game of golf. USGA rules address gambling primarily as a threat to amateurism, rather than to the integrity of the sport. The USGA rules warns that “An *amateur golfer* must not take any action, including actions relating to golf gambling, that is contrary to the purpose and spirit of the *Rules*” (USGA, Rule 7-2, 2008). However, the USGA has also adopted a Policy on Gambling which provides “there is a distinction between playing for prize money (Rule 3-1), gambling or wagering

that is contrary to the purpose and spirit of the *Rules* (Rule 7-2), and forms of gambling or wagering that do not, of themselves, breach the *Rules*” (USGA). The USGA Policy on Gambling identifies acceptable and unacceptable forms of gambling.

### Acceptable Forms of Gambling

There is no objection to informal gambling or wagering among individual golfers or teams of golfers when it is incidental to the game. It is not practicable to define informal gambling or wagering precisely, but features that would be consistent with such gambling or wagering include:

- the players in general know each other;
- participation in the gambling or wagering is optional and is limited to the players;
- the sole source of all money won by the players is advanced by the players; and
- the amount of money involved is not generally considered to be excessive.

Therefore, informal gambling or wagering is acceptable provided the primary purpose is the playing of the game for enjoyment, not for financial gain.

### Unacceptable Forms of Gambling

Other forms of gambling or wagering where there is a requirement for players to participate (e.g. compulsory sweepstakes) or that have the potential to involve considerable sums of money (e.g. calcuttas and auction sweepstakes - where players or teams are sold by auction) are not approved.

Otherwise, it is difficult to define unacceptable forms of gambling or wagering precisely, but features that would be consistent with such gambling or wagering include:

- participation in the gambling or wagering is open to non-players; and
- the amount of money involved is generally considered to be excessive.

An *amateur golfer’s* participation in gambling or wagering that is not approved may be considered contrary to the purpose and spirit of the *Rules* (Rule 7-2) and may endanger his Amateur Status. Furthermore, organized events designed or promoted to create cash prizes are not permitted. Golfers participating in such events without first irrevocably waiving their right to prize money are deemed to be playing for prize money, in breach of Rule 3-1.

Note: The Rules of Amateur Status do not apply to betting or gambling by *amateur golfers* on the results of a competition limited to or specifically organized for professional golfers (USGA).

The final note seems to condone gambling by amateur’s if they are wagering on the results of a professional golf competition. The rules are silent as to any restrictions imposed on professional golfers to avoid gambling and wagering on golf matches. However, considering that sports betting is illegal in every state except Nevada, it is not clear why the USGA does not have rules or policies similar to other professional sports leagues or organizations discouraging or even prohibiting gambling by the athletes, amateurs and professional alike.

The PGA prohibits players from having a financial interest in the performances of other players or their winnings so that the tournament prize pool is not compromised. Thus players can not split purses. Players are also prohibited from gambling on the premises where a PGA Tour event is being played subject to a two-year suspension for a violation of the anti-gambling rule (Weiler & Roberts, 2004). However, it is commonly known that players bet against each other during practice rounds prior to tournaments (Standen, 2006).

The LPGA Tour is even less restrictive than the PGA Tour. Tour professional Laura Davies admits to gambling on sports of all kinds and was even given permission by the LPGA to sign a one year endorsement contract with a Venezuela-based internet betting parlor that offers wagering opportunities on LPGA events (Diaz, 2001). The LPGA Commissioner was hesitant to approve the relationship, but

determined that since the LPGA had held events in Las Vegas and Atlantic City sponsored by casinos, it would not be able to ban players from accepting similar partnerships. A similar deal was offered to John Daly, but PGA Tour officials recommended he avoid the partnership even though the PGA Tour permits players to endorse resorts that also have casinos or gambling entities so long as the player only promotes the resort side of the company. Endorsing gambling activities directly is prohibited by the PGA Tour, but not the LPGA Tour (Diaz, 2001).

### 3. Conclusion

The major professional sports leagues employ a variety of techniques to regulate and restrict gambling. These techniques are largely directed toward the players and restrict players from gambling on the sport in which they play. The leagues are in a position to impose restrictions through the use of league rules, terms contained in the respective collective bargaining agreements and/or the standard player contract, and even club rules. Penalties for violating the various rules or policies can range from a minimal fine to an indefinite suspension. Three of the four major sports leagues also aggressively oppose internet gambling and sports betting. But while the leagues oppose internet gambling and sports betting, the need for new revenue streams has produced a growing number of commercial partnerships between sports teams and state lotteries; and even a few partnerships with casinos. The leagues are walking a fine line to balance the threat unregulated gambling can and has posed to the integrity of the sport.

Governing bodies for a number of other professional sports also restrict gambling by players but not as vigilantly as the major professional sport leagues. The ATP Tour has recently implemented comprehensive rules prohibiting gambling that also carry severe penalties, but only after encountering serious allegations of match fixing during 2007. The USGA, PGA, and LPGA lag well behind the ATP Tour and WTA in regulating gambling activities.

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# Gaming and Sports Facility Financing

by W.S. Miller\*

## 1. The historical connection between gaming and professional sport

Throughout their history, North American sports leagues have traditionally attempted to build up significant firewalls between themselves and any type of gaming operations.

With regard to issues such as ownership, leagues have traditionally been fairly strict about ensuring that their members do not have ties to gaming operations. For example, in 1980, Major League Baseball (MLB) rejected the sale of the Chicago White Sox to Edward J. DeBartolo, Sr. reportedly because of his ownership of three horse racing tracks in (Durso, 1980). This conservative, zero-tolerance approach was also seen again early in 2008 when the National Football League (NFL) forced Tilman Fertitta to sell his minority stake in the Houston Texans because he is the Chairman of Landry's Restaurants, Inc. which had recently acquired the Golden Nugget Casino in Las Vegas, Nevada (Manfull, 2008).

Sponsorships are another area where sports organizations placed stringent prohibitions against the connection between themselves and gaming entities. Early this decade, Major League Baseball's San Diego Padres were reportedly told by the league that they could not sell the naming rights to their new facility to the Sycuan Band of the Kumeyaay Nation because of the tribe's gaming interests. This occurred despite the fact that the tribe was allowed to be the presenting sponsor of the team's 2000 season (Rodriguez, 2000).

The placement of teams has also been an area where sports organizations have traditionally tried to avoid any connections with gaming interests. In the mid-1990s, the expansion of the National Basketball Association (NBA) into the Toronto, Ontario market was threatened because the province offered a sports lottery game that featured NBA teams (Grange, 2007). The issue was resolved when the province pulled the league's games from the lottery (Grange). In addition, various league executives and observers have stated that Las Vegas has never secured a major league team despite demographics that are comparable to other major league cities because of that city's significant gaming presence (Kulin, 2006).

This contribution will discuss how this firewall between gaming interests and professional sports in the United States is slowly going away because of the need for the professional sports industry to tap into the large revenues generated by gaming for items such as sponsorships, advertising, potential owners, and most importantly, the development of new sports facilities. Section two covers how sports

facilities have traditionally been financed in the United States. Section three discusses the issues facing professional sports that are leading to the changing position toward gaming. Section four shows examples of how the professional sports industry is reducing its anti-gaming position. Section five illustrates how gaming revenues could be used to finance sports facilities. Finally, section six looks to the future and what might happen in this developing relationship.

An item of note is that references to the gaming industry throughout this contribution will, in fact, be referred to as gaming. North American sports league have tended to use the term gaming, or occasionally entertainment, when referring to potential business or marketing partners that have connections to the gaming industry. The term gambling is often used by the industry and the media when there is a violation of the rules prohibiting a connection between the sports and gaming industry.

## 2. Historical Financing of Sports Facilities

In contrast to the relatively consistent position of sports organizations toward gaming over the years, the financing of professional sports facilities in North America has seen many changes throughout the history of the industry.

In the early 20th century it was common for sports teams to finance and construct their own facilities. Iconic former baseball stadiums such as the original Comiskey Park, Ebbets Field, Forbes Field, Shibe Park, New York's Polo Grounds and Sportsman's Park were all constructed using private financing. (Comiskey Park, n.d.; Ebbets Field, n.d.; Forbes Field, n.d.; Shibe Park, n.d.; Polo Grounds, n.d.; Sportsman's Park, n.d.) Existing baseball icons such as Fenway Park and Wrigley Field were also privately financed (Fenway Park, n.d.; Wrigley Field, n.d.).

This began to change in the 1950s as the era of franchise free agency began. In 1953, Major League Baseball's Boston Braves sold Braves Field, the team's privately financed facility in Boston, and moved to a new publicly-funded multi-purpose stadium in Milwaukee, Wisconsin (Braves Field, n.d.) Later that decade, the Brooklyn Dodgers and New York Giants sold their privately funded facilities in New York and moved to new publicly-funded stadiums constructed for their use in California (Forbes Field, n.d.; Polo Grounds, n.d.).

The trend accelerated from the 1960s into the early 1990s and extended to virtually all professional sports. Facilities such as Oriole Park at Camden Yards, Giants Stadium, the Hubert H. Humphrey Metrodome, the Louisiana Superdome and the RCA Dome were all built with public funds (Oriole Park at Camden Yards, n.d.; Giants Stadium, n.d.; Hubert H. Humphrey Metrodome, n.d.; Louisiana Superdome, n.d.; RCA Dome, n.d.). Perhaps more importantly for the sports franchises, the leasing arrangements with the teams allowed them to retain a significant portion, if not all, of the revenues generated from their events (Miller & Anderson, 2001).

However, in the 1990s, the industry experienced another shift as taxpayers and governmental entities around the country were less willing to pay the full and ever-increasing costs for new sports stadiums and arenas. In Milwaukee, voters staged a recall election and removed a state senator from political office because of his vote in support of a 0.5 percent sales tax increase that would help fund a new home for Major League Baseball's Milwaukee Brewers (Stephenson, 2001). Ironically, this effort occurred in the same market that helped start the trend toward public financing of professional sports stadiums in the 1950s.

## 3. The Perfect Storm

At the same time as the aforementioned events were occurring on the

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facility development and financing side, professional sports leagues and franchise owners were faced with significantly higher labor costs due to players securing free agency and other benefits through the courts and collective bargaining processes. New owners also faced increasing capital costs upon acquiring their new teams because franchise acquisition and expansion fees have increased dramatically over the past two decades.

Simply put, professional sports leagues and franchises started facing a perfect storm in the 1990s, of higher labor costs, higher facility development and operational expenses, and a growing unwillingness of taxpayers and governments to pay for sports facilities, that continues to this day.

#### **4. The Changing Mindset Toward Gaming**

In light of the aforementioned perfect storm, sports leagues and franchises needed to look for new sources of revenue that would meet their growing needs. As a result, the once-seemingly impenetrable firewall between sports and gaming appears to be breaking down.

##### **4.1 Sponsorship and Advertising**

The first and most obvious area in which the wall between professional sports and gaming started to breakdown is in the area of sponsorships and advertising.

###### *4.1.1 General Sponsorships and Advertising*

Teams in all four major leagues now have gaming interests as sponsors. Teams such as the Arizona Cardinals, Arizona Diamondbacks, Phoenix Suns, San Diego Chargers and San Diego Padres have Indian tribes with gaming interests as sponsors (Boeck, 2008). Major League Baseball's Chicago White Sox, Florida Marlins, Los Angeles Dodgers and San Francisco Giants have also had gaming interests as sponsors during the past decade (Johnson, 2000). The former Montreal Expos, who were owned by Major League Baseball at the time, had Golden-Palace.com as a sponsor of the team's radio broadcasts in 2003 ("Expos Broadcasts," 2003).

The NFL, which has consistently been the most opposed to the establishment of any link between itself and gaming of the four major sports, allowed the Fort McDowell Yavapai Nation, a tribe with gaming interests in Arizona, to contribute \$1 million toward the Arizona Super Bowl Host Committee for Super Bowl XLII in 2008. (Boeck, 2008).

Even the National Collegiate Athletic Association (NCAA), which has been staunchly opposed to any connection between sports and gaming, now allows its member schools to pursue sponsorship agreements with entities that have gaming connections. In October 2007, the University of Minnesota announced an agreement in which the Shakopee Mdewakanton Sioux Community in which the tribe will donate \$12.5 million to the school in a deal which will result in the tribe securing naming and design rights for the main entrance of the school's new 50,000-seat football stadium. Ten million dollars of the agreement will go toward facility construction with the remaining \$2.5 to be used for scholarships. The tribe announced it will install native shrubbery, educational kiosks, statues, benches and a pond at the \$288 million facility (Estrada & Shelman, 2007).

In February 2008, the University of New Mexico entered into a \$2.5 million agreement with the Laguna Pueblo tribe that named the tribe's Route 66 Casino Hotel as the exclusive gaming sponsor of New Mexico athletics. The University of Arizona and University of Nevada also have sponsorship agreements with Indian gaming tribes. ("New Mexico," 2008).

###### *4.1.2. Naming Rights*

In what is traditionally the biggest sponsorship a North American sports organization can secure, facility naming rights, there has also been an apparent loosening of the restrictions in some leagues to allow teams to enter into agreements with gaming-related entities.

###### **4.1.2.1. Atlanta Braves**

In 2008, Major League Baseball's Atlanta Braves entered into a multi-

year, "eight-figure" sponsorship agreement with the Mississippi Band of Choctaw Indians that saw the premium seating level of Turner Field, the team's home stadium, renamed as The Golden Moon Casino Level. The tribe operates two casinos and is over 300 miles from Atlanta. In addition to the naming rights, the deal also includes stadium banner ads, club level signage, electronic signage and program advertising (Manasso, 2008).

###### **4.1.2.2. Fresno Grizzlies**

In 2003, the Pacific Coast League's Fresno Grizzlies ended a sponsorship agreement with the Table Mountain Casino because of concerns about certain activities in the agreement potentially violating the industry's guidelines established by Minor League Baseball (Hostetter, 2003).

In 2006, Chukchansi Gold Resort & Casino entered into a 15-year, \$16 million agreement to rename the Grizzlies' home as Chukchansi Park. The deal included \$1 million paid up front and \$1 million annual payments (Robison, 2006). It also allows Chukchansi the use of three luxury suites and to use the facility for other entertainment events (Clough, 2006). It is important to note that team officials indicated that the deal would be marketed as being for a resort destination and not a gaming establishment (Robison, 2006).

###### *4.1.3. Lottery Games*

In contrast to their previously strong opposition to such connections, professional sports leagues, such as the National Basketball Association, National Hockey League and Major League Baseball, now maintain official corporate partnerships with state and provincial lotteries and the suppliers with work with them. These efforts include sponsorships, advertising and the direct licensing of team logos for games.

For example, in 2006, Major League Baseball owners unanimously approved a five-year deal between the league and Scientific Games, Inc., a lottery ticket provider for states around the country. The deal allowed Scientific Games to use MLB team logos on scratch-off lottery games around the country (Shea, 2007). Since the deal was struck, the logos of 27 Major League Baseball teams have been used on the scratch-off lottery tickets in 22 different states (Wangness, 2008).

The Massachusetts Lottery paid \$225,000 to become a sponsor of a tour throughout the Commonwealth of Massachusetts for the Red Sox 2004 World Series trophy, the first won by the team since 1918. Ironically, in light of later agreements entered into by the league, an MLB spokesperson said at the time of the deal that the league had no problem with the sponsorship "as long as it does not include the sales of [lottery] tickets" (Kreda, 2005).

Since the trophy tour sponsorship and the aforementioned Scientific Games agreement, the Massachusetts Lottery and the Red Sox have combined to issue team-branded lottery tickets for the 2006-2008 seasons. The 2008 version is a \$20 scratch-off ticket that awards a \$10 million top prize, 20 \$1 million prizes and 100 Red Sox road trips (Wangness, 2008). Previous versions included season tickets, facility tours, game tickets, spring training trips and game-used merchandise. (Talcott, 2006).

#### **4.2 Team Ownership and Placement**

Another area in which the North American professional sports leagues are loosening the previously impenetrable firewall between their industry and gaming interests is team ownership. As noted earlier, leagues often would reject potential owners or a market if there was a slight connection to gaming. As seen below, this position is clearly changing as well.

###### *4.2.1. ITT*

Arguably, the move of professional sports leagues toward allowing gaming interests to own sports franchises occurred in 1994 when ITT Corporation, an owner of three Nevada casinos at the time, acquired a partial ownership of Madison Square Garden and in the process acquired 50% ownership stakes in both the National Basketball

Association's New York Knicks and National Hockey League's New York Rangers (Chass, 1998). Both leagues approved the transactions provided that ITT remove wagering on their respective leagues at the sports books in the casinos owned by the entity (Finder, 2004).

#### 4.2.2. *The Ilitches*

Marian Ilitch is the owner and operator of the MotorCity Casino in Detroit, Michigan (Chass, 2006). In conjunction with her husband, Mike, the Ilitches jointly own the National Hockey League's Detroit Red Wings franchise. The league told the *New York Times* that it had no problem with the arrangement because the casino does not have a sports book (Chass, 1998).

To illustrate the conflicting and complicated approaches taken by different professional sports leagues in the United States with regard to gaming, in contrast to the position taken by the NHL, Mike Ilitch is listed as the sole owner of Major League Baseball's Detroit Tigers franchise. (Chass, 2006). Despite the team fact that the team's media guide listed her as an owner of the team for five years prior to her obtaining an interest in the MotorCity Casino, his wife Marian has not been listed as having any affiliation with the Tigers organization since she acquired an interest in the gaming operation (Chass, 2006).

#### 4.2.3. *The Maloofs*

In 1999, with the ITT transaction having seemingly laid out a blueprint for future transactions in the NBA, the Maloof family paid a reported \$260 million for a controlling interest in the Sacramento Kings and the team's home arena, Arco Arena (Grover, 2000). The acquisition marked a re-entry into the game for the family who previously owned the Houston Rockets in the early 1980s before entering the casino business (Chass, 1998). The Maloofs, who now operate the Palms Casino in Las Vegas, do not offer wagering on NBA games at the sports book located in the casino (Chan, 2002). There are obvious ties between the two entities. For example, in October 2000, Kings players and cheerleaders appeared at the groundbreaking of the Palms (Voisin, 2000). The casino has been a sponsor of the team and had signage and television commercials on team broadcasts. The Palms has also offered Kings' season-ticket holders special hotel packages (Chan, 2002). As part of their ownership of the Kings, the Maloofs also own the WNBA's Sacramento Monarchs franchise (Grover, 2000).

#### 4.2.4. *Connecticut Sun*

In 2003, the Mohegan Tribe acquired the Women's National Basketball Association's Orlando Miracle franchise for a reported \$10 million and relocated the renamed Connecticut Sun to its Mohegan Sun Arena in Uncasville, Connecticut (Greenberg, 2003). The 10,000-seat arena is located inside of the casino complex (Boeck, 2007). Under state law, Sun employees are not allowed to gamble at the casino because they are employees of the gaming entity (Goodman, 2003). The Tribe does not operate a sports book at the facility. ("WNBA Arrives," 2003). The team and facility do undertake some cross-promotion efforts but there are restrictions put in place by the league to create some separation between the gaming and sports activities (Hiestand, 2003).

#### 4.2.5. *Las Vegas 51s*

In early 2008, Major League Baseball approved the sale of the Pacific Coast League's Las Vegas 51s franchise to Stevens Baseball Group (Dewey, 2008). The transaction is significant because it appears to be one of the first allowing gaming related-interests to own a baseball franchise. The Stevens family owns a stake in both Riviera and Golden Gate casinos in Las Vegas (Spillman, 2008). In enhancing the ties between his properties, Stevens announced plans for a new 51s promotion in which every time the team scores 10 runs at a home game, everyone will receive a free shrimp cocktail at the Golden Gate Casino (Dewey).

#### 4.2.6. *2007 NBA All-Star Game*

Another significant move toward breaking down the gaming/sports firewall occurred in February 2007 when the National Basketball

Association hosted its annual All-Star Game at the Thomas & Mack Center in Las Vegas. As part of its bid for the game, the city agreed to remove the game from all of the sports books in the city (Juliano, 2007). The game continued a developing effort by the city to be associated with the game as it also hosts the NBA summer league and various USA Basketball events on a periodic basis (DuPree, 2007).

#### 4.2.7. *Las Vegas*

Owners in three of the four major sports leagues (MLB, NBA & NHL) have expressed interest in possibly moving to Las Vegas over the past several years (Kulin, 2006). The NBA has stated that the removal of the league from the city's sports books would be a key element to a successful attempt at luring the league which has drawn opposition from gaming executives (Robbins, 2007). The NHL has publicly expressed more openness on the sports book issue than other major professional sports leagues should a team consider a move to Las Vegas. (Robbins, 2007).

### 5. Facility Financing and Gaming

The final, and arguably most lucrative, firewall that could be removed between gaming interests and professional sports organizations is in the area of facility financing. As noted later in this section, there have been instances of state-sanctioned gaming revenues being used to finance sports facilities already. However, in light of the aforementioned needs for additional facilities and the revenue to build them, it is likely that we will see the use of gaming revenues in general as a much more likely option for North American sports facilities in the 21st century with private gaming interests also becoming involved in the sports facility financing process.

In light of how the gaming industry is set up and regulated in North America, there are three likely methods that could be utilized to have gaming interests fund sports facilities, through the state or province, via Indian tribal gaming, or through private interests. This section explores each of these options.

#### 5.1 State/Province

The state/province method is the one that has seen the most extensive use to date in terms of using gaming revenues to fund professional sports facilities with four major league buildings opened to date and a new National Hockey League arena on the way.

This method has likely been the most utilized because it has given professional sports organizations cover when questioned by the media and public about the gaming/sports connection because, in essence, the governmental body acts as a protective intermediary layer between the gaming and sports interests.

Under the state/province method, the financing structure is rather straightforward. The governmental body collects revenues from the gaming entity. It then funnels all or a portion of those revenues toward the financing of the professional sports facility project. From a league/team perspective, ideally these gaming revenues would be mixed with other types of funding to reduce the direct appearance of the gaming entity funding the sports facility. However, as we have seen earlier, it appears that this "stigma" is becoming less of an issue for most professional sports organizations.

In terms of collection, states or provinces can collect the gaming revenues from one of three sources, lotteries, private operations or Indian gaming.

##### 5.1.1. *Lotteries*

The main method using state/province gaming funding to finance professional sports facilities has been through the collection of lottery funds. The financing structure is again rather straightforward. The state/province can either create new, dedicated sports games, or it can siphon off revenues from existing games and then forward on those revenues to the entity that is financing the proposed facility. In essence, the lottery serves as a voluntary tax that participants pay toward the new arena or stadium.

In light of the extensive use seen to date, with two examples being in the notoriously gaming-averse National Football League, it is pos-

sible that lotteries could become a larger piece of the financing puzzle for sports facilities in the future as the leagues and teams are clearly on board with the concept.

However, there are some political and social risks involved with the lottery-based approach. First, many lotteries are created in an effort to benefit schools or other noteworthy general public benefits. The creation of new games or use of existing revenues could reduce those general social benefits and create significant backlash for professional sports organizations. Second, as seen below, to date, lotteries have only been a small part, not a significant piece of the financing puzzle for most sports facilities. The question remains whether they would be a stable, efficient method of financing an entire stadium or arena on an industry-wide basis. The following sections detail the four successful uses of lotteries to fund professional sports facilities to date.

#### 5.1.1.1. Baltimore Orioles

The first professional sports facility to be funded with state lottery proceeds was Oriole Park at Camden Yards, the home of Major League Baseball's Baltimore Orioles. The financing plan consisted of the Maryland Lottery offering four new games annually that were designed to be solely for the use of the Maryland Stadium Authority, the builder and operator of Oriole Park at Camden Yards (Jasperse, 1995). The \$210 million facility was virtually entirely paid for from lottery proceeds with the team paying a reported \$9 million toward the facility which was used for the development of skyboxes. (National Sports Law Institute, 2007a). In its 2007 fiscal year, the Maryland Lottery paid out \$21 million to the Maryland Stadium Authority for the financing of Oriole Park and other sports facilities in the state (Maryland Lottery, 2008).

#### 5.1.1.2. Baltimore Ravens

Utilizing a similar financing approach as seen for its neighbor, Oriole Park at Camden Yards, M&T Bank Stadium, the home of the National Football League's Baltimore Ravens, opened in 1998 at a reported cost of \$229 million. The State of Maryland covered approximately \$200 million of the facility cost through the use of Maryland Lottery proceeds (National Sports Law Institute, 2007b). In its 2007 fiscal year, the Maryland Lottery paid out \$21 million to the Maryland Stadium Authority for the financing of M&T Bank Stadium and other sports facilities in the state (Maryland Lottery, 2008).

#### 5.1.1.3. Seattle Mariners

Opened in 1999 at a reported cost of \$517 million, Safeco Field, the home of Major League's Baseball's Seattle Mariners, is partially being financed by the sale of sports-themed lottery scratch-off tickets (National Sports Law Institute, 2007a). The initial legislation required that the games be sports-themed with two to four games being created annually (Safeco Field, n.d.). The Washington Lottery was required to provide a \$3 million revenue stream to the facility in 1999 with a four percent annual increase after that for the life of the twenty-year bonds (Postman, 2000).

#### 5.1.1.4. Seattle Seahawks

Again utilizing an approach similar to that of its neighbor, Safeco Field, Qwest Field, the home of the National Football League's Seattle Seahawks, opened in 2002 at a reported cost of \$360 million. Washington Lottery is contributing a reported \$127 million toward the project (National Sports Law Institute, 2007b). In contrast to the Safeco Field legislation, the Washington Lottery can use any type of lottery game it sees fit in order to pay off the Qwest Field obligation. The lottery was required to contribute \$6 million to the project starting in 2002 with a four percent annual increase. (Postman, 2000).

#### 5.1.2. Private Gaming Entity Payments

Under United States law, individual states have the right to control and license gaming within their borders. This right also includes the ability for the state to generate revenue from the granting of those licenses to private entities. As a result, it is legally possible for states to initially license the development of private gaming operations or

increase the number of private gaming licenses offered for the purpose of funding or partially funding a professional sports facility.

Such an approach could obviously face significant political and social hurdles in order to secure the approval of the professional league that the team plays in. While granting the leagues and the teams a degree of separation away from the gaming entity, it might not be the most preferred method of funding from the league and team perspective because of those same social and political issues. However, as more governmental bodies begin to suggest the use of gaming revenues to fund professional sports facilities, this is becoming an option that leagues will undoubtedly have to strongly consider moving forward.

#### 5.1.2.1. Pittsburgh Penguins

In September 2007, the Commonwealth of Pennsylvania and the National Hockey League's Pittsburgh Penguins completed an agreement designed to keep the team in the Steel City. The deal calls for the Commonwealth to build the team a new \$290 million arena that is currently scheduled for a 2010 opening (Belko, 2007).

The new facility will be paid for through a bond issue that will be repaid through three revenue streams. First, the team will pay rent in an amount of \$3.6 million to \$4.3 million depending upon the amount of parking facilities constructed for the arena (Belko, 2007). Second, the Commonwealth will contribute \$7.5 million annually from a new Gaming Economic Development and Tourism Fund which was created after Pennsylvania allowed an expansion of slot machine gaming (Stark, 2007). Finally, the individual selected by the Commonwealth to operate the Pittsburgh-area casino, Don Barden, will contribute an additional \$7.5 million annually toward the repayment of the arena bonds (Belko). Thus, \$15 million of the revenues used to pay back the bonds every year will be coming directly from private gaming payments made to the Commonwealth of Pennsylvania.

As Allegheny County Executive Dan Onorato told the *Pittsburgh Post-Gazette* at the time of the lease signing, "The Penguins are here because of gaming. Let's be clear about that" (Belko, 2007). In addition to the Barden proposal, the other casino license bidders had also made commitments to help fund the new Penguins' arena if they were selected by the Commonwealth (Belko & Rotstein, 2007).

#### 5.1.3. Indian Gaming

In contrast to private gaming, any gaming efforts undertaken by Indian tribes are highly regulated by the United States government under the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. §2701, 2008). As discussed in the next section, the IGRA contains a variety of restrictions on whether tribes can offer gaming, the types of gaming they can offer and what they can do with the proceeds.

However, as was the case with private gaming, the IGRA does allow states to collect some revenues from the tribes who are engaged in gaming under the Act. While the tribes are regulated in how they can use these revenues, states have few restrictions imposed upon them. The next section will discuss how states can secure and use potential revenues from Indian gaming in an effort to finance and construct a professional sports facility.

#### 5.2 Indian Gaming

Gaming operations owned by Native American tribes have experienced explosive growth over the past three decades. In 1975, the first tribe started a bingo game to raise funds for a tribal fire department and raised \$150 during their first night of operation (McAuliffe, 1996). In 2006, the 225 tribes engaged in gaming generated \$25.7 billion in revenues through their various operations (National Indian Gaming Association, 2008).

Perhaps most importantly for professional sports leagues, several of these tribes have expressed a willingness to branch out from gaming and invest in professional sports teams and facilities. Over the past twelve years, ten Indian tribes have expressed public interest in working on eight different proposed major league sports facility projects. (Miller & LeBlanc, 2008). This is not surprising as the combination

makes sense from a business standpoint and could, if structured properly, prove beneficial for all of the participants.

However, there are social and legal issues that would have to be addressed before such efforts were undertaken on a large-scale basis. The first issue would be the same as that faced by other gaming operations, overcoming the social stigma of gaming and building in fire-wall protections to ensure the safety of sport in the minds of the public. The second issue would be a legal one, to create a financing structure that satisfies all of the requirements of the Indian Gaming Regulatory Act (25 U.S.C. §2701, 2008).

The Indian Gaming Regulatory Act was passed by the United States Congress in 1988 in hopes of providing a standardized financial and regulatory structure for tribes and states across the country. The Act imposes strict restrictions on tribes who wish to participate in gaming operations and on what the tribes can do with any revenues generated from such operations.

For the purposes of developing professional sports facilities under the Act, the Indian gaming and professional sports industries would likely be looking at one of the following four approaches: taxation, tribal-state compacts, partnership agreements or direct ownership. Each of these approaches is discussed in more detail below.

#### 5.2.1. Taxation

One of the traditional ways of generating revenues for the purpose of financing a professional sports facility has been through taxation. However, this does not appear to be a strong possibility for Indian gaming revenues under current law.

First, the IGRA specifically prohibits such taxation by states under federal law. (25 U.S.C. §2710(d)(4), 2008). Second, courts have taken the position that the imposition of fees can also be considered a tax, and therefore banned under the Act. In the case of *Cabazon Band of Mission Indians v. Wilson* (1994), the United States Court of Appeals for the Ninth Circuit prohibited the State of California from collecting from the tribes a standard, uniform licensing fee that the state imposed upon any entity showing simulcast horse racing from tracks around the country.

In light of the language of the IGRA and the *Cabazon* ruling, it is unlikely that taxation will be a viable option for using Indian gaming revenues to fund professional sports facilities.

#### 5.2.2. Tribal-State Compacts

Under the IGRA, Indian tribes and states are required to enter into contracts that are known as tribal-state gaming compacts in order to permit the tribe to conduct certain types of high-stakes gaming at their operations, including; slot machines, black jack and lotteries (25 U.S.C. §2703(8) & §2710(d), 2008).

The Act does not permit the states to require that the tribes make payments beyond what are deemed to be reasonably necessary for the state to regulate the tribe's gaming operations in the state in order to secure a tribal-state compact. However, tribes are allowed to make voluntary payments to the state in order to accelerate the approval process and maintain good relations with the state (25 U.S.C. §2710(d)(3)(C)). Once the state receives these revenues, it can spend those revenues in a wide variety of ways.

As such, this creates an opening for the use of Indian gaming revenues to be utilized to fund sports facilities. In essence, it would undertake the same structure as the state-regulated approaches discussed in the last section. The state would collect the gaming revenue from the tribe as part of the tribal-state gaming compact process and then direct those monies to be utilized for the financing of a professional sports facility.

##### 5.2.2.1. Detroit Tigers

In 1995, the State of Michigan utilized \$55 million from its Michigan Strategic Fund to help pay for Comerica Park, the newly proposed home of Major League Baseball's Detroit Tigers. The Michigan Strategic Fund was initially funded by revenues from oil and natural gas leases held by the state. However, after its inception, the state also began adding the eight percent of casino slot machine and electronic

machine revenues it received from Indian gaming compacts to the fund (Lane, 1995). The \$300 million facility opened in 2000 (National Sports Law Institute, 2007a).

##### 5.2.2.2. Resch Center

In 2001, the State of Wisconsin provided \$1.5 million in funding that it received from tribal-state gaming compacts to Brown County as partial funding for the Resch Center, a new 11,000-seat, \$47 million arena in the Green Bay market (Hildebrand, 2001). The facility is home to the Green Bay Blizzard of Arena Football 2 (Green Bay Blizzard, n.d.).

#### 5.2.3. Traditional Business Agreements

Under the IGRA, gaming tribes are allowed to reinvest their gaming proceeds in a wide variety of business agreements provided they are related to economic development for the tribe (25 U.S.C. §2710(b)(2)(B)(iii), 2008).

It is easy to envision a wide variety of business scenarios that could occur under this relatively open-ended structure that benefit the tribes and the financing of a professional sports facility. For example, facility or team naming rights, large sponsorship or advertising agreements, retail outlets and other similar ventures, could be created. The tribe could conceivably even build an entire stadium or arena on or near their reservation lands and strike a lease agreement with a major league professional sports team to play at the facility. These developments could provide the tribe with additional non-gaming-related economic development while providing another piece of the financing puzzle for a professional sports organization.

##### 5.2.3.1. Norwich Navigators

In 1995, the Mashnantucket Pequot tribe, owner and operator of the nearby Foxwoods casino, contributed a reported \$500,000 toward the construction of Thomas J. Dodd Stadium, the new home of the Class-AA Eastern League's Norwich Navigators. The money was utilized to build eighteen skyboxes at the facility. The tribe reportedly obtained the use of two of those skyboxes and a picnic area at the ballpark (Horgan, 1995).

##### 5.2.3.2. Mohegan Wolves

In 2002 and 2003, the Mohegan Sun Arena was the home arena for Arena Football 2's Mohegan Wolves franchise (Mohegan Wolves, n.d.). The Mohegan Tribe leased the facility, which had a capacity of 7,500 for indoor football, to the expansion franchise. At the time of the initial announcement of the franchise, the league stated that the fact that the casino was not funding the team and that there was not a sports book at the facility were reasons for the league's approval of the arrangement (Holtz, 2001).

##### 5.2.3.3. New Yankee Stadium

The new Yankee Stadium which is scheduled to open in 2009 will feature two partnerships between the team and Indian gaming tribes. The Mohegan Tribe has a three-year agreement to operate The Batters Eye, a 322-person sports bar at the facility that will also host non-game day functions (Roura, 2008) The Seminole Tribe of Florida will also have a presence at the facility through its subsidiary Hard Rock Café chain. The facility will feature both a Hard Rock Café and a restaurant known as NYY Steak ("Seminole Tribe," 2008).

#### 5.2.4. Direct Ownership

Operating under the same concept as the previous section, the IGRA allows gaming tribes to reinvest their gaming proceeds into a variety of business ventures provided that they are utilized for the economic development of the tribe (25 U.S.C. §2710(b)(2)(B)(iii), 2008).

It appears that under virtually all circumstances, constructing a new stadium or arena and then acquiring ownership of a professional sports franchise to serve as a tenant for that facility would satisfy the requirements of the Act.

##### 5.2.4.1. Connecticut Sun

As discussed earlier in this contribution, in 2003, the Mohegan Tribe

acquired complete ownership of the WNBA's former Orlando Miracle franchise for a reported \$10 million and moved the team to its wholly-owned Mohegan Sun Arena in Uncasville, Connecticut (Greenberg, 2003). The arena is located inside of the overall Mohegan Sun gaming and entertainment complex, which has 300,000 square feet of gaming space (Adams, 2003). The team's players and front office staff are all employees of the casino and are restricted from taking part in gaming activities at the facility (Goodman, 2003).

### 5.3 Direct Private Gaming Interest Ownership & Leasing

The final and perhaps most lucrative approach for utilizing gaming revenues to fund professional sports facilities would be direct agreements between private gaming interests and sports organizations.

The structure would be rather simple. The privately-owned gaming entity would construct the sports stadium or arena and then either acquire a professional sports franchise or strike a lease agreement with such a team to play at its facility. Such an approach would simply eliminate the intermediary function that state and local governments played in the earlier approaches we discussed.

In many respects, we have already seen such a structure implemented in a league affiliated with one of the major professional sports leagues. As discussed in the last section, the WNBA's Connecticut Sun are owned by the Mohegan Tribe and play their home games in Mohegan Sun Arena, which was built by the gaming tribe as part of a larger sports, entertainment and gaming complex in Uncasville, Connecticut.

The reasons for professional sports leagues and organizations to embrace this concept are obvious. Gaming interests are looking for new ways to attract patrons and sports offer a natural attraction for potential customers. On the sports side, they are looking for new ways to fund ever-more expensive sports facilities along with securing potential new fans. In fact, it can be argued that both industries are moving away from their roots and moving further toward the entertainment business with each passing year.

Despite the fact that most sports organizations increasingly accept the associations with gaming interests described earlier in this contribution, the direct linking of gaming interests to the funding of sports facilities will not be an easy one. To be sure, this is not because of a lack of interest on either side or because it would be difficult to accomplish contractually. The main issue will be crossing the public perception and media-driven hurdles that still exist in this country.

In an effort to quell some of these perceptions, sports organizations will likely have to address a few issues. First, the decision will have to be made as to whether the gaming and sports activities will be in the same location. Second, firewalls will likely have to be put in place to satisfy the public. Finally, legal and collective bargaining issues will also have to be taken care of. For example, would revenues generated by gaming at a sporting event have to be shared with players under traditional revenue sharing terms in collective bargaining agreements?

While there are substantial hurdles in place for direct relations between private gaming interests and professional sports organizations, the potential benefits and obvious synergies between the two industries make it likely that this will be one of the key issues that leagues face in the early part of the 21st century.

#### 5.3.1. Orleans Arena

The Orleans Hotel and Casino in Las Vegas, Nevada is also home of the 9,500-seat Orleans Arena (Coast Casinos, n.d.). The facility is owned by Boyd Gaming Corporation which has sixteen casino entertainment properties in Illinois, Indiana, Louisiana, Mississippi, Nevada and New Jersey (Company history, n.d.).

The arena, located approximately one mile from the Las Vegas Strip, has been the home of the East Coast Hockey League's Las Vegas Wranglers franchise since 2003 (Las Vegas Wranglers, 2008). From 2003 to 2007, the facility also housed the Arena Football League's Las Vegas Gladiators franchise (Las Vegas Gladiators, n.d.). Both the Wranglers and Gladiators were owned by private ownership groups who leased the facility from Boyd Gaming.

#### 5.3.2. Calgary Flames

In 2003, the National Hockey League's Calgary Flames announced plans to pursue a casino license with the idea of placing the gaming facility inside of the Pengrowth Saddledome, the team's home arena. The proposed facility would have cost \$25 million to build and generated an estimated \$6 million in annual revenue. According to published reports, the NHL supported the proposal because the proposed gaming venue was not going to contain a sports book ("Hockey's Slot," 2003). The proposal would have required a major renovation of the arena in order to create a self-contained area for the gaming operations (Goodman, 2003). As of 2008, the team had not secured a license for the purpose of conducting gaming at the Saddledome.

#### 5.3.3. Pittsburgh Penguins

In late 2005, the National Hockey League's Pittsburgh Penguins announced that they were working with Isle of Capri Casinos, Inc. on a proposal for a new arena in Pittsburgh. If granted a gaming license by the Commonwealth of Pennsylvania, Isle of Capri was going to provide funding for the proposed \$290 million arena on a site adjacent to its proposed casino location in the Hill District area of Pittsburgh. The arena would have then been owned by a city-county sports authority and the team would not receive any direct financial revenues from the gaming facility other than the presence of the new arena (Belko, 2005).

In 2006, the two companies also announced that they would donate any profits that the two entities received from the redevelopment of 28 acres of land upon which the team's current facility, Mellon Arena, sits (Belko, 2006).

The overall Isle of Capri proposal received the full support of NHL Commissioner Gary Bettman who told the *Associated Press* in November 2006, "If Isle of Capri gets the license, the building comes in the ground, the Penguins stay in Pittsburgh, where I think they belong, and this thing is over...That is the scenario that best deals with the future of the team in Pittsburgh" (Robinson, 2006).

In late 2006, Isle of Capri was not selected for a gaming license in Pittsburgh and, as discussed earlier in this contribution, the team ended up striking another deal with the Commonwealth for a new arena in 2007 (Rossi, 2006).

## 6. Conclusion

Over the past 150 years, North American professional sports organizations and gaming have maintained a distant relationship. In light of the problems that gambling caused the sports industry in its early years and at various points throughout the 20th century, it is somewhat understandable that the sports organizations have tried to erect firewalls between themselves and gaming. However, both the sports and gaming industries have undergone significant change and evolution over the past two decades.

Legalized gaming has become a highly regulated industry whether it is conducted by private interests or Indian tribes with gaming operations. Whether it is federal regulation of Indian gaming through the Indian Gaming Regulatory Act or individual states monitoring private gaming interests, the industry has a much different perception in the minds of most people as compared to only a few decades ago.

There has also been a growing acceptance of gaming operations by the American public. Indian gaming, state lotteries and state sanctioning of private gaming have grown exponentially over the past two decades. As NBA Commissioner David Stern told the *Seattle Times* in 2003, "America made the bet, and they bet on gambling. We're talking about state-sponsored and state-produced gambling, where they routinely use state resources to drive their citizens to gambling. Anyone who doesn't think that isn't living in America (Greenberg, 2003).

The sports industry has also undergone dramatic changes. In an effort to draw more fans, the games have shifted away from being mere sports events to becoming entertainment experiences. Increased operating expenses have also necessarily led many sports organizations to look for new ways of generating revenue and reconsider old prohibitions and stigmas associated with previously taboo revenue streams.

As we look ahead in the 21st century, it seems inevitable that the growing closeness between sports and gaming interests will continue. As industry executive Mike Dietz told the *Detroit News* regarding the growing connection between baseball and gaming, "Everything costs more - to field a team, to give fans what they want. There are a lot of bills to pay and a lot of reasons to be open-minded about new sources of revenue... Baseball has gotten wise and smart about how to extract revenues out of things other than baseball (Shea, 2007). This same argument can be extended to the other professional sports leagues as well and we are already starting to see this change take shape. The minor leagues are starting to embrace the concept with advertising, ownership and even facilities being paid for through gaming revenues. The major leagues are finally starting to come on board as well. As noted earlier, gaming sponsors and advertisers are becoming commonplace for teams in all of the major leagues besides the National Football League. The barriers to gaming interests taking full or partial ownership in sports franchises is also diminishing. The strict prohibitions from decades ago have been replaced by a more flexible "gaming is allowed, but sports books are not" approach in most leagues.

The final frontier is also breaking down as we see gaming entities begin to pay for the construction of new major league stadiums and arenas around the continent. Minor league organizations have already begun to embrace the concept. Included in this group is the WNBA, an affiliate of the National Basketball Association. Many forget that some major league stadiums have already been paid for in near-total or partially through state-approved or sanctioned gaming. Facilities such as Oriole Park at Camden Yards, M&T Bank Stadium, Comerica Park, Qwest Field and Safeco Field owe their very existence to gaming revenues. The near future is likely to see private gaming interests or an Indian tribe with gaming interests construct and operate a facility with a major league tenant much as Orleans Arena and Mohegan Sun Arena are operated on the minor league level.

To be sure, there will be some public uproar and media backlash but the marriage is inevitable. In fact, if Isle of Capri had secured a gaming license in the Commonwealth of Pennsylvania in 2007, the new home of the NHL's Penguins would have been solely constructed through private gaming revenues. The evolution, and likely future stance of the industry on the marriage between gaming interests and the financing of professional sports facilities, can be seen in NHL Commissioner Gary Bettman's quote to the Pittsburgh Post-Gazette about the Penguins and governmental officials working with gaming interests to secure a new home for the team

It's the way Allegheny County and the State (sic) of Pennsylvania want to finance an arena. The county and state had no problem publicly funding a football stadium and a separate baseball stadium. It's really a question of how the local authorities see fit to accomplish that goal. Gambling has become so persuasive, through lotteries and legalized casinos. Our issue really relates to whether or not there's a sports book. If there's no sports book, I don't think it's presented much of an issue for any of our leagues. I don't think we want them [slot machines] on the concourse. But the fact of the matter is that there are lots of multipurpose facilities adjacent to operations that do other things (Kovacevic, 2004).

As Commissioner Bettman's quote indicates, while the use of gaming revenues to fund sports facilities is an issue over which the professional sports leagues will obviously have a say, it is one in which the league's needs for facility capital and the stance of local governments trending toward the use of gaming revenues to fund professional sports facilities is likely to overcome any longstanding objections held by most of the leagues against such usage provided direct sports gaming is not included.

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# Sports Betting in Canada

by Garry J. Smith\*

## Introduction

Sports betting pre-dated the arrival of Europeans in Canada as First Nation peoples wagered on the outcome of toboggan, snowshoe, and canoe races as well as archery, spear throwing and running events. Not only were these contests forms of entertainment for the spectator/betters, they were a way to sharpen essential survival skills (Belanger, 2006).

The history of Canadian gambling legislation can be separated into three relatively distinct eras: the colonial period (1497-1867), Confederation to modern times (1867-1969) and gambling expansion (1970-present).

*Colonial Period (1497-1867)* - Canada was discovered in 1497 by Giovanni Caboto, an Italian sailing under the British flag; however, shortly thereafter, a French colonizing expedition led by Jacques Cartier established settlements in Canada. Sovereignty over Canada was claimed by England in 1553 despite the existence of "New France" communities. Because the population of early Canada was so sparse and scattered, legislation in general, let alone specific gambling laws was a low priority.

British and French interests collided as a result of fur trade competition and, exacerbated by the Seven Year's War in Europe, hostilities in Canada between English and French colonials culminated with a British victory in the 1759 Plains of Abraham battle. The ensuing Quebec Act (1774) proscribed English criminal law and French civil law, thus initial Canadian gambling legislation was derived from English precedent but applied to Francophones as well. Early gambling legislation centered on the prohibition of dice games, unlawful gaming houses and restricted participation in gambling by certain classes of people (e.g., artificers and servants) (Robinson, 1983).

*Confederation to Modern Times* - Confederation occurred in 1867, however British gambling law still applied with several new twists, including: (1) lotteries being forbidden because they had fallen into disfavor in England, (2) the concept of amnesty for informers was introduced; to wit, "found ins" at an illegal gaming house could escape a criminal charge by testifying against the house keeper, and (3) the term "wager" was replaced by the word "bet" and the term "betting house" was introduced (Robinson, 1983).

The *Indian Act* of 1876 placed First Nations under federal government control for the purpose of their assimilation into the mainstream culture. Harsh measures such as residential schools and the reserve system were designed to break down First Nation traditions. Falling by the wayside in this process, were "historic gaming practices" which the federal government considered to be "illegal and immoral" (Belanger, 2006, 38). Most First Nation games as well as any form of wagering by indigenous peoples were outlawed.

In 1892 the first *Criminal Code of Canada* codified existing criminal law, including crimes related to gambling. Criminal Code gambling provisions dealt with definitions of a "common gaming house" and a "common betting house" and listed indictable offences for keeping a "disorderly house" (the term encompassed bawdy, gaming and betting houses); gambling in public conveyances; bookmaking; buying, selling and distributing lottery products; keeping a cock-pit; and cheating at play (Robinson, 1983). Betting on a sports event by itself was not a crime as long as a betting transaction fee was not charged; the activity was however, illegal, if done through a bookmaker.

The following observations can be made about these early gambling provisions: (1) Canadian gambling laws relied heavily on English statutes, some dating back as far as 1541 (Robinson, 1983); (2) gambling was clearly seen as a moral issue; and (3) despite official sanctions against gambling, the activity thrived.

After 1892, Canadian gambling legislation remained relatively constant for 75 years. The only changes pertaining to sports betting involved horse racing and occurred in the early 1900s; for example, in 1909-10 a Special Committee of the House of Commons was established to inquire into the feasibility of legalizing horse race betting. In 1910 on-track betting at incorporated race tracks was permitted. In 1917 an Order-in-Council suspended horse race betting on the grounds that it was incommensurate with the war effort. And, in 1920 the suspension of racetrack betting was lifted and the sport re-emerged using a pari-mutuel wagering system (Campbell, Hartnagel & Smith, 2005).

The only legal forms of sports betting in Canada up until the early 1970s were horse racing, friendly wagers on the outcome of popular athletic events such as boxing matches, hockey or football games or on ones self in games of physical skill such as pool, golf, bowling and darts. Although betting on sports with a bookmaker was illegal, it was a commonplace activity among young males in the larger urban centres (Morton, 2003).

Sports betting was almost exclusively a male preserve because (1) males had easy access to the public spaces where illegal gambling took place (e.g. pool halls, taverns, barber shops); (2) their interest in sports or race horses, ostensibly gave them a degree of expertise in picking winners (Morton, 2003); and (3) sports betting was seen as a test of character; that is, a sphere of activity where valued masculine traits such as decision making, boldness and 'coolness' could be displayed (Lyman & Scott, 1970; Smith & Paley, 2001).

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The Irish Sweepstakes was another popular, albeit outlawed, gambling format that involved buying tickets on the results of Irish horse races (prizes often exceeded \$100,000), the proceeds of which went to support Irish hospitals. Started in 1930 and run three times annually, the Irish Sweepstakes was in effect, a lottery featuring two draws; round one involved a selection of the fortunate few who moved on to round two whereby the remaining ticket numbers were matched with a horse running in the Irish Sweeps Derby. Prizes were allotted based on the horses' order of finish. Although barred in Canada, Irish Sweepstakes tickets were bought by both males and females and members of all social strata. In 1938 an estimated "one-third of Torontonians bought Irish Sweepstakes tickets, priced between \$2.50 and \$3.00 each" (Morton, 2003, 54). Local distributors sold the contraband tickets smuggled in from Ireland for a commission of two free tickets for every twelve sold (Webb, 1968). Ultimately, competition from the growth of international state lotteries caused the demise of the Irish Sweepstakes in the late 1980s.

The Canadian approach to gambling in the first half of the 20<sup>th</sup> century was characterized as "unofficial tolerance and official condemnation" (Morton, 2003). This mind set facilitated the practice of sports betting through bookmakers. Illegal sports betting flourished because it was seen as a traditional part of male sporting culture and the police and judiciary generally treated bookmaking as a petty vice that warranted only a minor penalty.

The main opposition to sports betting in this era came from anti-gambling moralists; the wives of players who lost their pay cheques and thus could not support their families; employers who saw sports gambling as a distraction that lowered job productivity; and, for brief periods, the general public, whenever a scandal broke that involved bookmakers bribing police, politicians or public officials (Morton, 2003).

*Gambling expansion* — in 1969 an omnibus bill passed in parliament that that amended several sections of the *Criminal Code*; including legalizing lottery schemes and permitting charity sponsored gambling under provincial license (Campbell & Smith, 1998). These changes led to the establishment of lotteries in every province and territory and a separate federal government lottery whose proceeds helped underwrite the 1976 Montreal Olympics. By the end of the 1970s, intense competition for lottery dollars spurred provincial lottery corporations to join forces in an effort to remove the federal government from the business.

A second watershed *Criminal Code amendment* in 1985 formalized an agreement between the federal and provincial governments. It stipulated that for abandoning its lottery operations, the federal government would receive \$100 million over three years to help fund the 1988 Calgary Winter Olympics and an annual disbursement of \$24 million (adjusted annually for inflation) from the provinces based on a proportion of lottery sales. Despite the radical shift from federal to provincial government authority over gambling, there was no public consultation on the matter; indeed, the lotteries bill was expedited through parliament (Osborne, 1989; Goldlist & Clements, 2008). The 1985 amendment created provincial monopolies over gambling and led to widespread profusion of the activity (Brodeur & Oullet, 2004). Patrick (2000) contended that the 1985 amendment allowed the provinces to purchase their gambling monopolies for a \$100 million payment to the federal government.

### History of Legal Canadian Sports Lottery Schemes

Despite these significant amendments to the *Criminal Code* gambling provisions, the law against bookmaking remained intact. However, if run or licensed by a government (federal or provincial), parlay or pool style sports betting was considered a lottery product and thus permissible. A variety of sports lotteries were tried throughout the 1970s and 1980s but failed to attract sufficient public interest. It was not until 1990 that a workable sports lottery formula was devised. Following is a time-line of government sanctioned sports lotteries:

- In 1971 Manitoba instituted a short-lived sports pool based on the results of NHL games.
- In 1972 the *Quebec quarte* was launched; to win, the bettor had to

choose race horses correctly either in order of finish (higher odds) or in any order (lower odds). This was a pure luck game because neither the horses in the field nor the numbers they wore in the race were known to bettors in advance; in a ten horse field there are 5,040 possible permutations. Like all government sanctioned lottery schemes, the winners' share of net revenues was miserly (48%); track and horse owners received 25%; leaving 27% for Loto Quebec. This game was dropped after several years because it achieved less than half the projected gross revenues of \$1 million per week (Labrosse, 1985).

- Loto-Quebec introduced hockey pools in 1981-82, despite protests from the National Hockey League claiming unauthorized use of the league's copyrighted logo, schedule and team names. The game, which offered one chance in 1,190 of winning \$500, lacked public support and was quickly abandoned by Loto-Quebec.
- In the fall of 1982 Loto-Quebec launched *Hockey-Select*, the first game based on predicting the outcome of sporting events. *Hockey-Select* required bettors to forecast the results of thirteen hockey games played during one week, by picking the winning team or tied games. This was a new game to the extent that, in theory, player knowledge could improve one's chances for success. However, since only 45% of the wagering pool was paid out in first, second and third prizes to players who had correctly chosen the results of 11 to 13 games, the effect of player skill was negligible. *Hockey-Select* was removed from the market in the spring of 1983 after sales dropped to less than \$20,000 per week.
- The Canadian Sports Pool Corporation, created by the federal government in the fall of 1983, began offering a game called *Sport Select Baseball* in May, 1984. Plagued by competition from provincial lotteries, objections from the major leagues of baseball and public indifference, the scheme lasted 19 weeks. *Sport Select Baseball* produced only one winner and ran a \$45 million deficit (Labrosse, 1985).
- In the winter of 1990 the Western Canada Lottery Corporation conducted a ten week pilot project with a game called *Power Play* which consisted of four separate contests based on the outcomes and scoring statistics of National Hockey League games (Smith, 1992). The game was offered in a few strategic locations (major malls in urban centres) and contestants played for free, but could win lottery corporation merchandise such as sports bags, hats and T-shirts. The purpose of the pilot project was to determine the viability of the sports lottery scheme; that is, its appeal to sports fans, the comprehensibility of the format, and to what extent, if any, there was public opposition. These questions were apparently answered satisfactorily as a revised version of *Power Play*, named *Sport Select*, was introduced in October, 1990. Initially, *Sport Select* offered consumers a choice of two games: *Excel* and *Pro-Line*. *Excel* required players to pick the winners of fifteen NHL games; for making the correct choices winners received \$1,000 on a \$2 bet. This game proved to be a dismal failure, likely because players soon realized that the odds of successfully completing a fifteen game parlay were astronomically higher than the meager payouts warranted. Lagging sales of the *Excel* game caused Western Canada Lottery Corporation officials to terminate the game in March of 1991. *Pro-Line* was a more popular sports betting format as players could wager anywhere from \$2 to \$100 on the results of at least 3, and up to 6, professional sports events (Smith, 1992). At first, only NHL games were listed; however, Canadian and American pro football soon followed and major league baseball became part of the package in April, 1991.
- The success of *Pro-Line* in western Canada led other provincial and regional lottery corporations to introduce similar sports betting formats. Over the years new games emerged such as *Over/Under*, *Point Spread* and *Double Play* and sports such as basketball, soccer, tennis, auto racing and golf were added to the betting menu.

### What Exists Now

Currently, Canadian sports lotteries make up a small portion of provincial government lottery proceeds (for example, in Alberta,

sports lottery play accounts for only 8% of all lottery revenues). The market penetration of sports lotteries is limited to the extent that between 2.4% and 6% of the adult population (depending on the province) played a Canadian sports lottery in the previous year and the games attract mainly 18 to 44 year old males (Canadian Gambling Digest, 2003-2004). Based on the most recent Alberta Gaming and Liquor Commission data, the following two tables show player demographics and sports lottery sales trends over the last four years. (These figures are from one province, Alberta; however, it can reasonably be surmised that sports lottery data from the other provinces is not significantly different).

**Table 1**  
**Sport Lottery Player Demographics**

- % of population that has ever played (7%)
- Gender of players (male 83%) (female 17%)
- Age of players (18-24=18%), (25-34=27%), (35-44=23%), (45-54=17%), (55-64=5%), (65+=2%)

**Table 2**  
**Sports Lottery Sales and Payout Figures (province of Alberta)**

Gross Sales	% returned as prizes
Fiscal 2002=\$37,422 (millions)	57%
Fiscal 2003=\$41,831	57%
Fiscal 2004=\$42,189 <sup>#</sup>	56%
Fiscal 2005=\$32,216 <sup>##</sup>	53%

# Double Play game introduced in Feb. 2004

## NHL lockout in 2004/2005 decreased betting volume

### Understanding Canadian Sports Lotteries

In analyzing the variables that affect winning or losing in playing Canadian sports lotteries, some background information is provided on how the games are played. Described below are the basic rules for three of the more popular Canadian sports lottery formats:

*Pro-Line*-players pick anywhere from 3 to 6 games from a game list (available through lottery ticket outlets, daily newspapers or lottery corporation websites), wagering a minimum of \$2 to a maximum of \$100 (the maximum bet allowed by some lottery corporations is only \$25). For each game played, bettors choose between three possible outcomes; (a) a home team win, (b) a visitor team win or (c) a tie (the definition of a tie varies depending on the sport). The odds for each outcome are posted on the game list and the expected prize amount for a winning bet is shown on the purchased ticket. For example, a successful \$10 bet on three games with odds of 2.50, 1.70 and 3.55 would produce a win of \$150.90 (2.50 x 1.70 x 3.55 x 10). To win, all selections must be correct.

*Point Spread*-is a two outcome game (either a visiting or home team win against a posted point spread) whereby players can select between two and 12 games. Prizes are awarded for all correct picks or for picking winners in 9 of 10, 10 of 11, 10 of 12 or 11 of 12 games. The prize amount is determined by three factors; the amount bet, the number of games selected and the sport wagered on (the outcomes of hockey and baseball games are seen as easier to predict than either basketball or football games, hence the payout is slightly higher for the latter two sports).

*Over/Under*-is also a two outcome format (players choose whether the total score of both teams in an individual game will be over or under a posted number) and players choose from two up to 10 games. Again, all selections must be correct to win.

Table 3 indicates payout ratios for *Point Spread* bets according to the number of games played for baseball or hockey wagers and applies to *Over/Under* bets on two up to ten games:

**Table 3**  
**Canadian Sports Lottery Payout Ratios for Two Outcome Parlay Games (*Point Spread & Over/Under*)**

- 2 correct pays 2 x wager
- 3 correct pays 4 x wager
- 4 correct pays 8 x wager
- 5 correct pays 15 x wager
- 6 correct pays 30 x wager
- 7 correct pays 50 x wager
- 8 correct pays 90 x wager
- 9 correct pays 150 x wager
- 10 correct pays 200 x wager
- 11 correct pays 400 x wager
- 12 correct pays 500 x wager
- 9/10 correct pays 10 x wager
- 10/11 correct pays 15 x wager
- 10/12 correct pays 5 x wager
- 11/12 correct pays 20 x wager

### Factors Affecting Prize Amounts and the Ability to Predict Game Outcomes

Based on the previously outlined rules, the contents of Table 4 demonstrate why the odds against winning these games are so formidable and why sports knowledge is not enough to regularly overcome these unfair odds. In the case of two outcome games (*Point Spread* and *Over/Under*), the payouts are much lower than what the true odds of winning the parlay<sup>1</sup> are. For example, the odds of winning a two game parlay (in a 50/50 betting proposition) are one in four (1/2 x 1/2), yet the official payout is only twice the wager; in effect, an exorbitant fee is charged the consumer to play the game. Players face a double bind, in that, the more games they wager on, the less likelihood of successfully completing the parlay and the more the payout diminishes in comparison to the true odds. Table 4 contains standard lottery corporation payouts on various parlay bets in comparison with the true odds of winning the parlay.

**Table 4**  
**Two Outcome Parlay Payouts Versus the True Odds**

# of games bet	Lottery payout	True odds
2	2 to 1	4 to 1
3	4 to 1	8 to 1
4	8 to 1	16 to 1
5	15 to 1	32 to 1
6	30 to 1	64 to 1
7	50 to 1	128 to 1
8	90 to 1	256 to 1
9	150 to 1	512 to 1
10	200 to 1	1,024 to 1

In addition to offering one-sided odds, lottery corporations impose payout limitations when the aggregate amount of prizes won on any day exceeds \$2 million on *Pro-Line* or \$1 million on *Over/Under*. In other words, if the aggregate win exceeds these amounts, winners receive a lower than expected pro-rated payout. This arbitrary limit on payouts cushions lottery corporations from excessive losses.

*Pro-Line* is more complicated to assess because of the three possible game results; game outcomes are weighted according to what lottery corporation odds makers think is their probability of occurrence. For example, a heavy favorite might be listed at odds of 1.10 (which would

1 A parlay is defined as "a bet on two or more teams whereby any money wagered and won on the first bet is placed on the second bet and, if there are more than

two bets, that process is repeated on all bets. If any bet loses, the player gets no return. All bets are placed at the same time" [Reizner & Mendelsohn, 1983].

contribute minimally to the prize payout), whereas a serious underdog, listed at odds of 5.00 would significantly increase the prize payout, and, because ties occur less often than wins do, and are therefore harder to predict, the odds are typically higher on tie games.

The tie possibility in *Pro-Line* provides lottery corporations with a powerful edge over the player, because the odds against successfully completing the parlay increase dramatically. Also, because of the expansive way that ties are defined; for example, a tie in football is any result decided by three points or less, either way; whereas a tie in basketball is any result decided by five points or less, either way. Picking winners against the odds or a point spread is difficult enough by itself, let alone considering the possibility of ties. The three possible outcomes substantially decreases the amount of skill that can be applied to forecasting game results, thus relegating the selection exercise close to the realm of pure luck.

In Nevada sports books a tie game is an actual tie game (not several points either way) and considered a “wash” or a “push,” that is, players get their money back. Similarly, when a tie game is part of a parlay bet, the tie game is removed from the parlay without penalty and the success or failure of the bet rests on the outcome of the remaining games (Lang, 1992, 21).

### The Role of Skill and Luck in Canadian Sports Lottery Play

One way to comprehend the overwhelming difficulty in succeeding in Canadian sports lottery play is to compare sports lottery payout percentages with other government sanctioned betting formats and other sports gambling outlets such as betting with an illegal bookmaker, a legal sports book in Nevada or an online bookmaker. Payout percentage is the key factor in determining the probability of beating a game in the long run. Payout percentage is the ratio of the amount paid out in prizes compared with the total amount wagered. Listed in Table 5 in descending order are the approximate payout percentages of popular Canadian legal gambling formats (the word approximate is used because payout percentages may vary somewhat by region).

**Table 5**  
**Payout Percentages of Legal Gambling Formats**

Horse racing	80%*
Casino games (not including slot machines)	78%**
Pull tickets	74%
Video lottery terminals/slot machines	70%
Bingo	65%
Sports lotteries	57%
6/49 type lotteries	45%
Raffles	43%

\* (In the case of horse racing, straight win, place or show wagers offer better odds than do so-called exotic wagers (daily doubles, exactas, trifectas, perfectas, etc.).

\*\* (In the case of casinos, each game has different odds; for example, certain blackjack, craps, roulette or baccarat bets have a smaller house edge than do games such as three card or Caribbean poker).

As depicted in Table 5, all legal gambling formats are weighted against players “beating the house,” some, more so than others. Except for raffles and 6/49 lotteries, Canadian sports lotteries keep the highest percentage of dollars wagered. Many of the formats higher on the payout percentage ladder (for example, bingo, electronic machine gambling and some casino games) are pure luck games, while sports betting supposedly allows for an element of skill (it is certainly marketed as though this was the case); however, with lottery corporations retaining 43% of the sports wagering dollar, no amount of skill can routinely neutralize the government’s advantage. It is important to note that the 43% hold percentage is based on sports lottery play over an entire year and does not mean that consumers face these onerous odds on every bet.

The profit margin extracted by Canadian sports lotteries is extreme in comparison to that earned by legal and illegal bookmakers. For example, Nevada’s legal sportsbooks make do on a profit margin of about 5%, while the commission for illegal bookmakers and Internet sports betting operations typically ranges between 5% and 10%. In addition to providing more favorable payout percentages, bookmak-

ers are able to provide client services that are unmatched by government run sports lotteries, such as extending credit, telephone wagering, individual game bets, future and proposition bets. These services, which are valued by sports gamblers, are not offered by government run sports lotteries. Moreover, unlike Canadian sports lotteries, Nevada sportsbooks do not impose arbitrary loss limits to protect their profits.

Ironically, parlay betting in Nevada is considered a “sucker play” for two reasons (Rombola, 1984; Manteris, 1991): (1) the poor payout percentages offered compared with individual game bets and (2) the fact that players can win a majority of their picks and still lose; for example, a player who selects four teams correctly in a five game parlay has an 80% win ratio but still loses the bet. Despite the obvious drawbacks of parlay betting in general, the parlay payout percentages in Nevada are significantly better than those offered by Canadian sports lotteries. Typical parlay bet payouts in Nevada are 6 to 1 on three games, 11 to 1 on four games, 20 to 1 on five games and 500 to 1 on ten games (Manteris, 1991).

Facing Nevada sportsbook odds a player needs to win 52.38% of the time to break even against the standard 11 to 10 odds on individual game bets. A win ratio in the 58% to 60% range is considered excellent; nevertheless, despite the more rewarding Nevada odds, the point spreads and betting lines are so precise, that even under these circumstances, only a small percentage of those who try, can earn a livelihood through sports betting (Banker & Klein, 1986).

### Sports Pools and Fantasy Sports Leagues

Other popular legal sports betting formats in Canada are sports pools and fantasy sports leagues. There are generally two types of sports pools; those licensed by provincial governments and run by charities as a fundraiser and those privately organized. In the first instance, because many tickets or pool sheets are sold, prizes are large, even though the charity takes a hefty bite (usually at least 50%) of the proceeds. Obviously the odds of winning are poor and the games usually entirely luck based. An example of a charity sponsored sports pool is a “Grey Cup” (the Canadian Football League championship game featuring the top teams from the east and west) raffle. Tickets are sold for \$2 on the outcome of the game; each ticket lists a score (e.g. west 21 east 14), those with the correct quarter or half time scores receive lesser prizes and the game winning score a larger prize. Most participants play because of the low cost and to support the charity, not because they are avid sports fans.

Privately organized pools are legal providing the entire entry fee funds are paid back to winning bettors and no money is charged for a handling or administration fee. Prizes are smaller in these games because there are fewer participants, but the odds of winning are better and there can be an element of skill involved. Typical of these private games are National Football League (NFL) pools and National Hockey League (NHL) play-off drafts: In both instances an entry fee is charged; in an NFL pool players try to pick the winners of each weekends slate of games against a posted point spread, with money paid out to weekly and year end winners. Participants in an NHL play-off draft select players from amongst the 16 play-off teams (usually 10 to 12 players) and the outcome is based on the NHL players scoring statistics. The skill involved is in choosing players that will accumulate points and in picking players from teams that advance to the final round.

Fantasy sports leagues are a new gambling format, but growing at a rapid rate (Bernhard & Eade, 2005). The sports most likely to attract fantasy league wagering are major league baseball, the National Football League (NFL), the National Basketball Association (NBA) and to a lesser extent the National Hockey League (NHL). Common features of these leagues are (1) a sizable entry fee, (2) a draft, whereby players from the real leagues are selected to make up a participant’s fantasy team, (3) a Commissioner to administer the league rules, settle disputes, arrange for league standings to be posted, etc. and (4) access to appropriate technology (e.g., computer, the Internet, cell phone, BlackBerry), as much of the league business, is conducted via these media.

Winners are those who accumulate the most points over the professional league season based upon certain statistical categories (for example, in football, touchdowns, pass receptions, rushing yards and so forth). Most leagues allow for injured players to be replaced and permit player trades.

The primary attractions of fantasy sports leagues as outlined by Bernhard and Eade (2005) include:

- Role-playing-the opportunity to vicariously participate as the general manager of a professional sports team.
- Intellectual challenge-by knowing which of the many variables to attend to and which to discard, players can display their analytical prowess.
- Social networks-players enjoy the competition, bantering and camaraderie among league members and often develop enduring friendships based on their fantasy league involvement.
- The chance to win money-some leagues have hefty entrance fees and hence offer sizable pots to the winner.

The potential downsides to fantasy sports league participation include: (1) A major commitment of time and money (seasons last for six or more months and devoted players spend hours poring over box scores, watching games on TV and contemplating trade possibilities; activities that can detract from family life and work productivity).(2) While fantasy sports leaguers rarely become problem gamblers, many become jaded about professional sports; for example showing disdain for underperforming players and (in their minds) biased referees and not caring about the final result of a game, only the numbers generated by their players.

There is no way of accurately knowing how many Canadians partake in these activities; however, provincial studies of citizens' gambling patterns and behaviors typically show that about 10% of the population report having bet on sports events in the previous year and 2% claim they do it on a weekly basis (Ipsos Reid, 2008). The sports gambler profile from the most recent study in British Columbia is that of a younger (under the age of 35) male, who is somewhat more likely than the average British Columbian to be a problem gambler (Ipsos Reid, 2008).

## Illegal Sports Gambling

### Bookmaking

Bookmaking flourishes in the present era of liberalized legal gambling because of a growing public tolerance for minor vices or so-called victim-less crimes and the fact illegal sports betting offers odds advantages vis-à-vis legal sports lotteries, superior service and convenience, and more attractive wagering propositions. Governments face a dilemma in terms of responding to bookmaking; essentially they have three options (prohibit and strictly enforce, prohibit and loosely enforce or legalize); each creates its own set of social and public policy consequences (Smith, 1990).

Many Canadian law enforcement agencies have adopted a policy of benign prohibition toward bookmaking because:

- The broad expansion of legal gambling formats has dissolved public moral sanctions against bookmaking and made Canadians largely indifferent to the activity.
- In a time of fiscal cutbacks, law enforcement agencies have placed a lower priority on what are perceived to be minor crimes and this policy has caused a reduction in resources for the vice or morality details that deal with illegal gambling.
- Within the scaled-down vice/morality units, public pressure has dictated that prostitution and child pornography, rather than illegal gambling, be the main investigative targets.
- And, bookmaking investigations are prohibitive because of the unfavorable cost/benefit ratio; that is, the considerable time and manpower required to secure a gambling conviction is unwarranted when the judicial system penalties are so lenient.

Another approach to monitoring illegal gambling in Canada has been the formation of joint forces operations (JFOs). These are units made up provincial and municipal police (Ontario) or government regula-

tors, Royal Canadian Mounted Police (RCMP) and municipal police (Alberta) that specialize in illegal gambling enforcement. Despite well trained staff and excellent resources (government paid salaries, vehicles, office space, etc.), JFOs are hard pressed to make a dent in bookmaking operations because of the sheer volume of activity; the bookmakers use of the latest communications technology; and the lack of strong deterrents (rarely is jail time given for illegal gambling offenses). Harvey (2005) noted that bookmaking brings in mega dollars and estimated that "there are over 1,000 bookmakers operating in Toronto alone." Because of these factors, bookmaking in Canada is a low risk criminal activity.

Despite the seemingly innocuous nature of illegal sports betting, police warn about the adverse side effects of the activity such as *organized crime involvement* (most Canadian bookmakers are "small time guys with only a few clientele; however, if they get too big they will get a call saying you are now working for organized crime-for a slice of the profits the organized crime group will offer protection") (Harvey, 2005); *loan sharking* problems can occur when a sports gambler who has been extended credit is unable to pay off the debt; getting money to pay the loan shark may lead to committing crimes such as *shoplifting and selling stolen property*, and failure to pay the debt promptly can lead to *assault and home invasion*.

A common rationale for a government to legalize a new gambling format is that "it will reduce illegal gambling and will divert illegal gambling revenues into the public purse" (Smith & Wynne, 1999, 17). This has not been the case with the introduction of legal sports gambling in Canada, in fact, the opposite has occurred; bookmaking has proliferated and continues to be associated with organized crime activity that provides working capital that allows diversification into other criminal enterprises as well as legitimate businesses (Rosecrance, 1988).

### Internet Sports Betting

The Internet was first used by the general public for the business of gambling in 1995, when lottery tickets were sold for the International Lottery in Liechtenstein (Williams & Wood, 2007a). Since then, online gambling has become a major international industry featuring over 2,500 Internet websites and generating an estimated \$12 billion in revenue in 2005 (Wood & Williams, 2007a). Sports betting accounted for more than half of Internet gambling profits in 2001 (American Gaming Association, 2006). Most of the early Internet gambling sites were located offshore in Caribbean and Central American countries and not affiliated with established land-based gambling companies.

Canadian law dictates that only provincial governments and licensed charities can run gambling operations. Provincial governments can operate computer-based lottery schemes (this includes Internet gambling) but cannot license others to do so and cannot take bets from out of province residents unless the other province permits it. Moreover, any gambling format offered on the Internet would have to be legal in Canada, thus eliminating single event sports betting-a popular form of online gambling that is illegal in Canada (Lipton, 2002).

At present, it is unclear whether Canadian courts have the legal authority to prosecute offshore Internet sports betting operations that cater to Canadian clients. And, so far, there is no indication that the law is interested in penalizing Canadian sports bettors who utilize online services.

Currently, the Atlantic and British Columbia Lottery Corporations sell lottery products (including Sport Select) online to residents of their provinces. And, because horseracing is under federal jurisdiction, Canadian racetracks are allowed to accept bets placed online. A contentious and unresolved issue pertains to certain Canadian First Nation bands serving as hosting sites for all forms of online gambling. Notwithstanding the *Criminal Code* gambling provisions, the Kahnawake First Nation near Montreal, claiming jurisdiction as a "sovereign nation," has been leasing server space to Internet gambling operations since 1999 and making a profit of \$2 million annually. Both Canada's Attorney General (Rex & Jackson, (2008) and Quebec's Minister of Public Security (Lipton, 2002) have called the Kahnawake operation illegal, yet no legal action has been taken.

Given the Kahnawake First Nation's success with hosting online gambling, several other First Nations have shown interest in setting up similar operations (Rex & Jackson, 2008).

Up until the early 2000s the prevalence of Internet gambling in the general population was well below 2%; however the most recent Canada-wide estimate is 2.3% (Wood, Williams & Lawton, 2007). Of those who reported gambling on the Internet, only 6.2% said that sports betting was their preferred game (Wood & Williams, 2007b). This is a surprising finding given that Internet sports gambling sites offer much better odds and services (e.g., single event sports betting, proposition bets and higher maximum bets) than the legal Sport Select game discussed earlier, and is legal, whereas betting with a local bookmaker is not. Reasons for this incongruity may include sports bettors (1) not trusting Internet gambling providers; (2) not knowing about the better odds and services offered by online sites; (3) not knowing or caring about Sport Select's inferior odds and services or (4) preferring to play Sport Select because it is legal and offered by the provincial government.

### Future Prospects for Canadian Sports Betting

Ontario gambling advocates (mainly border casino interests and politicians from those regions) are lobbying for single event sports betting. In theory, this proposed change would be welcomed by avid sports bettors because it should result in more appealing betting opportunities and better payouts on winning bets. The difficulty will be in getting provincial governments to provide a betting format that offers fair odds and consumer friendly services (Smith, 1990).

Ostensibly, the availability of single event sports betting would bolster casino attendance by drawing more American players (single event sports betting is illegal in every American state except Nevada) and Canadian players who have become disillusioned with the Sport Select game. Proponents of the idea, estimate that \$700 million was wagered online by Canadians last year and that \$100 million alone was bet on the Super Bowl in North America (Pearson, 2008).

The problem with this proposal is that the *Criminal Code of Canada* would need amending and all provinces would have to agree with the change. This would be a tall order given that Canada is already near the gambling saturation point in the minds of many citizens; while perhaps feasible in Ontario border communities, the idea is unlikely to have the same traction in the rest of the country; and there could be objections from Canadian professional sports teams who would want compensation for the use of their logos and schedules.

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# Sports Betting and the Law in Japan

by Takuya Yamazaki and Yuki Mabuchi\*

## The current situation concerning the introduction of sports gambling (soccer betting) into Japan

With sports betting in Japan, the situation at present is that “Toto” (soccer betting) is the only form of gambling being promoted.

Soccer betting, the sole form of sports gambling in this country, commenced nationwide from the start of the 2001 J-League season, and is now in its 8<sup>th</sup> consecutive year of operation. Participants (gamblers) get the chance to personally predict the results of the J-League games. Also with tickets priced from just 100 yen per bet, it is both reasonably priced and convenient. Furthermore, the media coverage of the recently introduced 1 billion yen jackpot has resulted in ticket sales successfully passing the 60 billion yen mark in the jackpot’s inaugural year.

However, after witnessing the successful start in soccer betting ticket sales, revenues since 2002 have been declining year upon year. In fact sales in 2006 were just 130 billion yen, falling to a quarter of the level of that reached in the inaugural year<sup>1</sup>. There has been much negative opinion expressed as to whether soccer betting should continue. Since September 2006, a new way to bet on soccer game results, called “Big” was established. This is where a computer predicts all the results randomly, and if the better gets a win and carry over (this is the situation when there is no better who correctly predicted all results, the prize money is then carried over for the next round of betting), the highest prize money that can be won is 6 billion yen.

Since its launch “Big” has triggered new interest in Japanese soccer betting. In 2007 Big posted 50 billion yen in sales for 2007, and then went on to make history in 2008 (December’s sale total is still to be counted) by achieving a figure of 90 billion by the end of November.

The objective of this type of Japanese soccer betting is to assist in the promotion of sport. However, on the other hand there have been criminal laws introduced to regulate this area, in particular laws intended for the public management of gambling. Basically, the objective of these laws is not to divert the existing funds devoted to the promotion of sport, but to ensure that a new system can be brought forward to guarantee that such funds are managed appropriately. To raise capital for the above mentioned system special laws were brought in to authorise public gambling, as gambling in general is prohibited by the Japanese criminal law. Another reason behind the introduction of Toto was to provide funding for projects which the government itself could not supply.

Below, for the purpose of presenting a more detailed understanding of the Japanese soccer betting system, there is an analysis of how the criminal law regulates gambling, or more specifically, the sale of betting tickets. There is also an examination on how gambling, particularly the system for betting ticket sales, is approved by special laws.

## The Law System Governing Betting and the Lottery in Japan

Gambling, that is to say, the wagering of one’s assets, is akin to relying on the result of extrinsic circumstances<sup>2</sup>. Furthermore, the actual act of gambling is, in essence, putting other peoples’ assets at risk. These ideas pose a threat to the custom of which the prosperous Japanese economy is based on, namely that of working hard to maintain a good livelihood. The criminal law system in Japan recognizes these concepts and that incidental to gambling comes the risk of theft and corruption in society. Therefore, strict regulations have been laid down to prevent and defend against such criminal activity<sup>3</sup>.

Private gambling and lotteries in Japan are basically prohibited by chapter 2 section 23 of the Fundamental Japanese Criminal Law. More specifically: article 185 covers gambling; article 186 covers habitual gambling, the creation of gambling groups, colluding to profit

from gambling and gambling locations; and article 187 covers the sale of lottery tickets.

Articles 185, 186 and 187 are now covered below:

Firstly, article 185 - anyone caught gambling can be sentenced to either a small fine or a penalty of up to 500,000 yen. However, this law is not only limited to people who gamble things for pleasure, it also regulates situations where 2 or more people together try to profit illicitly from influencing the outcome of a betting game. This law covers all types of items which are gambled (please note however, that items such as food, drink and tobacco, which are wagered for insignificant amounts are not criminalised under the Fundamental Japanese Criminal Law).

Secondly, article 186. Provision (1) - habitual gamblers, if caught can be imprisoned for up to 3 years. Provision (2) - people who run gambling houses, form groups to plot gambling tactics or start betting rings, if caught, can be sentenced to between 3 months and 5 years in prison. Paragraph 1 of article 186 covers the gambling situations stipulated in article 185, but those of a more serious nature. Paragraph 2 of article 186 covers situations where people, although not gambling personally, open gambling houses or become so called “bookies”.

Finally, article 187. Provision (1) - people, who sell lottery tickets illicitly, if caught, can be sentenced to a maximum of two years in prison and/or a penalty of up to 1,500,000 yen. Provision (2) - people, who act as a broker (even they do not gain commissions) from illicit lottery ticket sales, if caught, can be subject to a maximum of 12 months in jail and/or a fine of up to 1 million yen. Provision (3) - this covers situations where people who have not committed offences under provisions (1) and (2) but who have traded lottery tickets, can be given a small financial penalty and/or a fine of up to 200,000 yen. Paragraph 1 of article 187 aims to prevent situations where people have attempted to influence the outcome of lotteries through issuing manipulated tickets, selling tickets or even actually drawing them in a lottery. Paragraph 2 of article 187 aims to prevent cases where, although not selling or purchasing tickets directly, people act as brokers in the illicit trading of tickets. Paragraph 3 of article 187 covers situations where people illicitly transfer or assign lottery tickets.

As considered above, in Japan every private act of gambling or sale of lottery tickets is strictly prohibited by the criminal law. However, after the Second World War, publicly run gambling was allowed, under the auspices of the Japanese government, and is recognized by special laws for the promotion of regional economies, industry and manufacturing<sup>4</sup>. The types of public run gambling authorized are as follows: Horseracing; Bike Racing (now referred to as Keirin); Motorbike Racing; Motorboat Racing; the Lottery; Loto; and Scratch Cards.

In the next few chapters, there will be an analysis of the various types of public run gambling. This analysis will cover the legal regulations, criminal sanctions, management, use of proceeds, the methods of betting and the objectives behind public run gambling.

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1 <http://www.naash.go.jp/sinko/data.html> 2008年12月3日調べ).

2 2004) 刑法第2版第3刷, p.426. 東京大学出版 Mitsue Kimura, Japanese Criminal Law (2004 - 3rd volume of the 2nd edition), p.426, Tokyo University Publication

3 1991) [補正] p.479-480 An Exposition of Lectures on the Criminal Law (1991 3rd edition - amended), p.479-480, Seibundo

4 2007, p.52. Kenji Saito, Sports Promotion (An Introduction to Sports Law - 2nd edition - 2007), p.52, Fumai Shobou

## The Special Laws which Govern Public Gambling Horse Racing

The law governing horse racing in Japan is the Horse Racing Act 1948 (now referred to as the HRA) (Showa Period 23rd year, law number 158).

As stipulated in horse racing law, the institutions charged with controlling horse racing matters are the Japan Racing Association (now referred to as the JRA) and the Prefectural Governments of Japan (now referred to as the Prefectural Governments) (article 1 of the HRA). However, the Minister of Public Management, Home Affairs, Posts and Telecommunications (now referred to as the Home Affairs Minister) and the Minister of Agriculture, Forestry and Fisheries (now referred to as the Agriculture Minister), through consultation, are responsible for administering special fiscal matters for particular economic zones, including municipalities (now referred to as the Municipalities) (article 1 paragraph 2 of the HRA).

The JRA has responsibility for enacting national horse racing matters. The National Racing Association (now referred to as the NRA) is the body charged with administering horse racing matters on a regional level for the Prefectural Governments and the Municipalities (article 1 paragraph 5 of the HRA).

The horse racing regulatory authority for both the JRA and NAR is the Ministry of Agriculture, Forestry and Fisheries of Japan (now referred to as the MAFF) (article 25 of the HRA). However the MAFF has granted the responsibility for ensuring that horse racing meetings are properly regulated [including: the registration of horse owners (article 13 of the HRA), horses (article 14 of the HRA), and the licensing of trainers and jockeys, these requirements are stipulated in a MAFF Supplementary Order], on a national level to the JRA and on a regional level to the NAR (article 22 of the HRA). Please note that the NRA was also established to ensure that regional horse racing matters are administered smoothly and fairly, alongside promoting improvements in horse breeding and livestock maintenance (article 23 paragraph 10 of the HRA)<sup>5</sup>.

Regarding the sale of horse racing tickets for the JRA, the only parties permitted to do this are the JRA, and also Prefectural Governments and private individuals (article 5 paragraph 1 of the HRA and article 3 paragraph 1 of the HRA [Supplementary Provision]) which are specifically entrusted by the JRA (article 3 paragraph 2 of the HRA).

For NAR horse racing tickets, these can only be sold by parties entrusted by the appropriate regional governing bodies to handle NAR matters (article 21 of the HRA). These bodies include Prefectural Governments, Municipalities, the JRA, the NRA and private individuals (article 22 of the HRA and article 17 bis 3 paragraph 1 of the HRA [Supplementary Provision]).

The amount of winnings returned to successful betters differs according to the administering horse racing institution. Out of the total proceeds gained from ticket sales, the amount the JRA returns to successful betters fluctuates between 73.8 and 82%. The amount of winnings returned by the NAR is 75% of the total ticket sales<sup>6</sup>.

Furthermore, both the JRA and NAR are obliged by Japanese income tax law to record the amount of income tax payable from the betters' total winnings, and then inform the relevant tax authorities, who will in turn make the necessary deductions.

Regarding the sale of horse racing tickets, an important issue is tackling illegal sales practices. The organizations directly authorized to sell JRA horse race tickets are the JRA, relevant Prefectural Governments and Municipalities. Further to this, organizations which are entrusted with either the JRA's or the local public agencies' horse racing administrative powers, can also sell tickets. In fact there are strict penalties, with up to 5 years in prison and/or a maximum fine of 5,000,000 yen (article 30 paragraph 1 of the HRA) for any other unauthorized bodies who illegally sell counterfeit horse race tickets (article 1 paragraph 6 of the HRA).

In 2004 Japanese horse racing law was revised, when placing bets by telephone or the over internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign horse race tickets (article 28 of the HRA). There are also five different ways in which a bet can be wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (article 5 of the HRA). Bets can be placed either at the race course, at specialist betting shops (article 2 [Supplementary Provision] and article 17 bis 3 of the HRA), by phone or over the internet.

However, the law recognizes that horse racing has a certain social responsibility to uphold, in managing its practices and preventing the illegal sale and assignment of horse racing tickets (article 29 of the HRA). Consequently, anybody found to have acted in direct contravention of the law, or through using (or conspiring) to use other illegal methods to purchase tickets, will, dependent upon the severity of the offence, be subject to a fine or/and imprisonment (articles 30 to 34 [inclusive] of the HRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns of the horse racing industry are to be utilized. Saying that, in the case of the JRA, there is nothing laid out in law for specifying the manner in which these funds should be used. Nevertheless in the case of the NAR, it is defined how the particular regional administration body uses the revenue at their disposal (article 23 paragraph 9 of the HRA)<sup>7</sup>. Certain policies and issues often cited for support include: promoting improvements in horse breeding and livestock maintenance; advancing social welfare; upgrading medical care; developing education and culture; promoting sport; and creating more effective natural disaster recovery services.

## Keirin (Bike Racing)

The law governing keirin in Japan is the Bicycle Racing Act 1948 (BRA) (Showa Period 23rd year, law number 209).

As stipulated in keirin law, the institutions charged with controlling keirin matters are the Prefectural Governments and Municipalities decided by the Home Affairs Minister. Prior to making such decisions the Minister will take into account specific regional economic and population issues. Furthermore, these authorities which want to hold keirin meetings should, if they can, try to fulfill various objectives, including advancing improvements in bicycle (and other machine) technology and rationalising related manufacturing industries. Alongside this, the authorities should also promote physical education and other projects which will benefit society and regional economies (article 1 paragraph 1 of the BRA).

The keirin regulatory authority is the Ministry of Economy, Trade and Industry (from now referred to as the METI) (article 50 of the BRA). However the METI has granted the JKA (an incorporated foundation) responsibility for ensuring that keirin meetings are properly regulated<sup>8</sup>. The JKA's duties are to make sure the riders, referees and various types of bikes are registered, licensed and meet the specific standards required for racing (these requirements are stipulated in a METI Supplementary Order). (Please note that the JKA will be covered in the next chapter, along with motorbike racing).

5 2002, 11月号, p.42  
Narayuki Iwashiro, The Current Situation and the Challenges Facing State Run Sports Contests (State Run Sports Gambling) from the Viewpoint of Regional Economies (Reference Magazine - November 2002 edition), p.42.  
6 公営競技問題研究会 (1977) 公営競技の現状と問題点-公営ギャンブルのありて(その1)-, p.11, 公営競技問題研究会 The Research Group for the Improvement of State Run Sports Contests in Japan, The Present Situation and Ways to Improve the Running of State Gambling, (1997, 1st volume), p.11, The Research Group for the Improvement of

State Run Sports Contests in Japan  
7 岩城成幸 (2002) 公営競技 (公営ギャンブル) の現状と課題-地方財政の視点から-, 「レファレンス」 11月号, p.38  
Narayuki Iwashiro, The Current Situation and the Challenges Facing State Run Sports Contests (State Run Sports Gambling) from the Viewpoint of Regional Economies (Reference Magazine - November 2002 edition), p.38  
8 財団法人JKAについて (財団法人JKA <http://www.keirin-autorace.or.jp/about/index.html> 2008年12月6日調べ) About the JKA (Incorporated Foundation) <http://www.keirin-autorace.or.jp/about/index.html> 6 December 2008

Regarding the sale of keirin tickets, an important issue is tackling illegal sales practices. Therefore, only parties entrusted with the keirin administration authorities' powers (article 3 of the BRA) are approved for this purpose (article 8 of the BRA). These authorized parties comprise regional public agencies, the Japan Association of Bike Racing and private individuals.

In fact there are strict penalties, with up to 5 years in prison and/or a maximum fine of 5,000,000 yen (article 56 paragraph 1 of the BRA) for any other unauthorized bodies who illegally sell counterfeit keirin tickets (article 1 paragraph 5 of the BRA)

In 2007 Japanese keirin law was revised, when placing bets by telephone or the over internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign keirin tickets (article 9 of the BRA). There are also five different ways in which a bet can be wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (article 11 of the BRA). Bets can be placed either at the race arena, at specialist betting shops (article 5 of the BRA), by phone or over the internet.

The amount of winnings returned to successful betters by the keirin administration authorities, out of the total proceeds gained from ticket sales, is 75%<sup>9</sup>. Furthermore, these authorities are obliged by Japanese income tax law to record the amount of income tax payable from the betters' total winnings, and then inform the relevant tax authorities, who will in turn make the necessary deductions.

In February 2008 the Hiratsuka Keirin Arena introduced a new kind of betting ticket called "Chariloto". An interesting point to note in relation to "Chariloto", is that the total amount of prize money, following a carry over, was 1.2 billion yen, the largest amount ever seen in Japanese public run gambling history<sup>10</sup>.

However, the law recognizes that keirin has a certain social responsibility to uphold, in managing its practices and preventing the illegal sale and assignment of keirin tickets (article 10 of the BRA). Consequently, anybody found to have acted in direct contravention of the law, or through using (or conspiring) to use other illegal methods to purchase tickets, will, dependent upon the severity of the offence, be subject to imprisonment or a criminal fine (articles 56 - 69 [inclusive] of the BRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns of the keirin industry are to be utilized. The appropriate keirin administration authority can decide on how best to use the revenue at their disposal (article 22 BRA). Policies and issues often cited for support include: advancing technical innovation in bicycles (and other machines); rationalising manufacturing industries; advancing social welfare; upgrading medical care; developing education and culture; and promoting physical education and other programs beneficial to society.

On top of that, it is stipulated in keirin law, that after every race meeting the JKA must receive a set subsidy from the relevant keirin administration authority. A certain percentage of this subsidy is to be applied in funding projects for the advancement of the public good (article 24 paragraph 6 of the BRA), and should not be utilized for anything other than those purposes (article 29 paragraph 2 of the BRA).

## Motorbike Racing

The law governing motorbike racing in Japan is the Motorbike Racing Act 1950 (MRA) (Showa Period 25<sup>TH</sup> year, law number 208).

In motorbike racing law, the Diet is responsible for deciding, by resolution, the authorities charged with administering motorbike racing matters. These institutions: are the Prefectural Governments, Osaka City; Kyoto City; Yokohama City; Nagoya City; Kobe City; each of the wards of Tokyo Metropolis where a relevant association is established; and municipalities where a motorbike racing track is currently in existence (article 3 paragraph 1 of the MRA).

These authorities which want to hold motorbike meetings should, if they can, try to fulfill various objectives, including advancing improvements in motorbike (and other machine) technology and

rationalising related manufacturing industries. Alongside this, the authorities should rationalize related manufacturing industries, whilst also promoting physical education and other projects which will benefit society and regional economies (article 1 of the MRA).

The motorbike racing regulatory authority is the METI (article 54 of the MRA). However, as with the keirin system, the METI has granted the JKA responsibility for ensuring motorbike race meetings are properly regulated (article 11 of the MRA)<sup>11</sup>. The JKA's duties are to make sure the riders, referees and various types of bikes are registered, licensed and meet the specific standards required for racing (these requirements are stipulated in a METI Supplementary Order).

Regarding the sale of motorbike racing tickets, an important issue is tackling illegal sales practices. Therefore, only parties entrusted with the motorbike racing administration authorities' powers (article 12 of the MRA) are authorized for this purpose (article 5 of the MRA). These authorized parties comprise regional public agencies, the East Japan Association of Motorbike Racing and private individuals. In fact there are strict penalties, with up to 5 years in prison or a maximum fine of 5,000,000 yen (article 61 paragraph 1 of the MRA) for any other unauthorized bodies who illegally sell counterfeit motorbike racing tickets (article 3 paragraph 2 of the MRA).

In 2007 Japanese motorbike racing law was revised, when placing bets by telephone or the over internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign motorbike tickets (article 13 of the MRA). There are also five different ways in which a bet can be wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (article 15 of the MRA). Bets can be placed either at the race arena, at specialist betting shops (article 8 of the MRA), by phone or over the internet.

The amount of winnings returned to successful betters by the motorbike racing administration authorities, out of the total proceeds gained from ticket sales, is 75%<sup>12</sup>. Furthermore, these authorities are obliged by Japanese income tax law to record the amount of income tax payable from the gambler's total winnings, and then inform the relevant tax authorities, who will in turn make the necessary deductions.

However, the law recognizes that motorbike racing has a certain social responsibility to uphold, in managing its practices and preventing the illegal sale and assignment of motorbike racing tickets (article 14 of the MRA). Consequently, anybody found to have acted in direct contravention of the law, or through using (or conspiring) to use other illegal methods to purchase tickets, will, dependent upon the severity of the offence, be subject to imprisonment or a criminal fine (articles 61 - 74 [inclusive] of the MRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns from the motorbike racing industry are utilized. It is defined in law how the appropriate motorbike administration authority must use the revenue at their disposal (article 26 MRA). Policies and issues often cited for support include: advancing technical innovation in motorbikes (and other related machines); rationalizing related manufacturing industries; advancing social welfare; upgrading medical care; developing educa-

9 公営競技問題研究会 (1977) 公営競技の現状と問題点-公営ギャンブルのあり方について (その1)

一、p.II、公営競技問題研究会  
The Research Group for the Improvement of State Run Sports

Contests in Japan,  
The Present Situation and Ways to Improve the Running of State Gambling, (1997, 1st volume), p.II, The Research Group for the Improvement of State Run Sports Contests in Japan.

10 <http://www.chariloto.com/html/chariloto/Chariloto> (Keirin Betting - Chariloto - The Official Website) <http://www.chariloto.com/html/chariloto/> (6/12/2008)

11 JKA JKA)

<http://www.keirin-autorace.or.jp/about/index.html> 2008年12月6日調べ  
About the JKA (Juridical Foundation)  
[www.keirin-autorace.or.jp/about/index.html](http://www.keirin-autorace.or.jp/about/index.html) 6 December 2008

12 公営競技問題研究会 (1977) 公営競技の現状と問題点-公営ギャンブルのあり方について (その1)

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The Research Group for the Improvement of State Run Sports Contests in Japan,  
The Present Situation and Ways to Improve the Running of State Gambling, (1997, 1st volume), p.II, The Research Group for the Improvement of State Run Sports Contests in Japan

tion and culture; and promoting physical education and other programs beneficial to society.

On top of that, as is also the case with keirin, it is stipulated in motorbike racing law, that after every race meeting the JKA must receive a set subsidy from the relevant motorbike racing administration authority. A certain percentage of this subsidy is to be applied in funding projects for the advancement of the public good and should not be utilized for anything other than these purposes (article 33 paragraph 2 of the MRA).

### Motorboat Racing

The law governing motorboat racing in Japan is the Motorboat Racing Act 1951 (MboatRA) (Showa Period 26<sup>th</sup> year, law number 242).

In motorboat racing law, the Diet is responsible for deciding, by resolution, the authorities charged with administering motorboat racing matters. To this end, the Home Affairs Minister should take account of the special economic and political circumstances of each particular municipality or administrative division (article 2 paragraph 1 of the MboatRA).

The motorboat racing administration authorities should try, if they can, to fulfill various objectives: including advancing improvements in technology for boats, boat engines and related parts; and also the export of such products and expertise. Alongside this, the authorities should: promote manufacturing programs; support projects to prevent accidents at sea and also support marine industry projects; whilst also promoting physical education, tourist activity and other projects which will benefit society and regional economies. There should also be an effort to improve the maritime facilities around Japan's coastline which will, in turn, have a positive effect on tourism (article 1 of the MboatRA).

The motorboat racing regulatory authority is the Ministry of Land, Infrastructure, Transport and Tourism (now referred to as the MLIT) (article 57 of the MboatRA). The MLIT has granted the Foundation of Japan Motorboat Racing Association (now referred to as the JMRA) has granted responsibility for ensuring motorboat race meetings are properly regulated (article 7 of the MboatRA)<sup>13</sup>. The JMRA's duties are to make sure the referees, drivers and various types of boats and inspectors are registered, licensed and meet the specific standards required for racing.

Regarding the sale of motorboat racing tickets, an important issue is tackling illegal sales practices. Therefore, only parties entrusted with the motorboat racing administration authorities' powers (article 3 of the MboatRA) are authorized for this purpose (article 10 of the MboatRA). These authorized parties comprise regional public agencies, JMRA and private individuals. In fact there are strict penalties, with up to 5 years in prison and/or a maximum fine of 5,000,000 yen (article 65 paragraph 1 of the MboatRA), for any other unauthorized bodies who illegally sell counterfeit motorboat tickets (article 2 paragraph 5 of the MboatRA).

In 2007 Japanese motorboat racing law was revised, when placing bets by telephone or the over internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign motorboat racing tickets (article 12 of the MboatRA). There are also five different ways in which a bet can be wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a

place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (article 5 of the MboatRA). Bets can be made either at the race place, at specialist betting shops (article 8 of the MRA), by phone or over the internet.

The amount of winnings returned to successful betters by the motorboat racing administration authorities, out of the total proceeds gained from ticket sales, is 75%<sup>14</sup>. Furthermore, these authorities are obliged by Japanese income tax law to record the amount of income tax payable from the gambler's total winnings, and then inform the relevant tax authorities, who will in turn make the necessary deductions.

However, the law recognizes that motorbike racing has a certain social responsibility to uphold, in managing its practices and preventing the illegal sale and assignment of motorboat tickets (article 11 of the MboatRA). Consequently, anybody found to have acted in direct contravention of the law, or through using (or conspiring) to use other illegal methods to purchase tickets, will, dependent upon the severity of the offence, be subject to imprisonment or a criminal fine (articles 65 - 78 [inclusive] of the MboatRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns from the motorboat racing industry are utilized. It is stipulated by law how the appropriate motorboat administration authority must use the revenue at their disposal (article 31 MboatRA). Policies and issues often cited for support include: advancing technical innovation in motorboats; rationalizing related manufacturing industries; advancing social welfare; upgrading medical care; developing education and culture; and promoting physical education and other programs beneficial to society.

On top of that, it is stipulated in motorboat racing law, that after every race meeting the JMRA must receive a set subsidy from the relevant motorboat racing administration authority. A certain percentage of this subsidy is to be applied in funding projects for the advancement of the tourist industry and the public good, and should not be utilized for anything other than these purposes (article 33 paragraph 2 of the MboatRA)<sup>15</sup>.

### The Japanese Lottery

The law governing the lottery and other gambling games in Japan is the "Law on Identification Card Attached to Prize Money 1948" (now referred to as LPMor Lottery Law) (Showa Period 23rd year, law number 242).

The objective of the LPM, is through lottery ticket sales to provide revenue for local government finance funds. In order to achieve this target, the current purchasing power of the public should be monitored, so that lottery ticket sales respond in line with demand in the present market conditions (article 1 of the LPM).

In Lottery Law, the institutions charged with controlling lottery ticket sales are the Prefectural Governments; and self governing cities and specific cities with particular economic or geographic (war damage) requirements (now referred to as the lottery administration authorities) (article 4 paragraph 1 of the LPM). The latter are selected by the Home Affairs Minister.

The authorisation granted to the administration authorities to oversee lottery sales, is for a number of purposes. These include funding public utility improvement schemes and other projects which benefit society. Furthermore, there are cases where it is necessary to set money aside for projects decided by ministerial decree, and also for supporting regional matters which require emergency public management (article 4 paragraph 1 of the LPM).

The lottery regulatory authority is the Ministry of Internal Affairs and Communication (now referred to as the MIC) (article 4 paragraph 2 of the LPM). The MIC considers applications made by administrative regions and cities who seek approval to be able to sell lottery tickets. These applicants need to present their plans for how they will use capital raised from lottery sales to fund public projects, in order to receive the necessary MIC approval.

The relevant governors and mayors from the lottery administration authorities (approved by the Home Affairs Minister) may draw up plans for how they intend to deliver the various lottery schemes, look-

13 法人概要 (財団法人日本モーターボート競走会)  
<http://mbkyosokai.jp/company/index.html> (2008年12月6日調べ)

Summary of the Foundation of the Japan Motorboat Racing Association  
<http://mbkyosokai.jp/company/index.html> (6 December 2008)

14 公営競技問題研究会 (1977) 公営競技の現状と問題点 - 公営ギャンブルのあり方について (その1) - , p.11, 公営競技問題研究会  
The Research Group for the Improvement of State Run Sports Contests in Japan, The Present Situation and Ways to

Improve the Running of State Gambling, (1997, 1st volume), p.11, The Research Group for the Improvement of State Run Sports Contests in Japan

15 岩城成幸 (2002) 公営競技 (公営ギャンブル) の現状と課題 - 地方財政の視点から - , 「レファレンス」 11月号, p.43  
Narayuki Iwashiro, The Current Situation and the Challenges Facing State Run Sports Contests (State Run Sports Gambling) from the Viewpoint of Regional Economies (Reference Magazine - November 2002 edition), p.43

ing particularly at establishing sales and payment facilities. In line with government decrees, the authorities must also apply to banks who they will entrust with carrying out lottery related financial matters. These type of duties include: the clerical work of preparing the lottery tickets; selling tickets; and paying out winnings (article 6 of the LPM).

Altogether there are 3 types of lotteries: the general lottery; scratch cards; and the number selection lottery (now referred to as Loto)<sup>16</sup>.

Lottery tickets can be bought by various means - at banks entrusted by the administration authorities, at kiosk around the cities, by mail order and also over the internet.

Presently, the highest prize on the General Lottery is 300 hundred million yen. 200 million yen for first prize and 50 million yen each for numbers before and after the first prize. For Loto, ever since the carry over system has been introduced, as Loto 6, the highest prize available is 400 million yen. Please note, and there is no income tax liability on the prize money earned from the Lottery.(article 13 of the LMA).

In Japan, unlike with the above mentioned publicly run sports contests and the below mentioned Toto, there are no age based purchasing restrictions for lottery tickets. Furthermore, people affiliated with the lottery, either directly (e.g. a kiosk seller) or indirectly (e.g. a family member of an employee of a lottery administration authority), can also buy tickets.

Nevertheless, the resale of lottery tickets is prohibited (article 6 paragraph 7 of the LMA). Anybody found in violation of this law, could be subject to up to 10 years imprisonment and/or a maximum penalty of 1 million yen (article 18 paragraph 1 of the LMA). Additionally, any act of selling, purchasing, receiving commissions from and/or dealing in foreign lottery tickets whilst being in Japanese jurisdiction is considered an offence punishable by criminal sanctions under article 187 of the (Basic) Japanese Criminal Law<sup>17</sup>.

Following on from what has been discussed above, special Japanese laws recognize and authorize various types of publicly run gambling. The objective of putting each of these public gambling initiatives into effect, is to provide financial support for local public organizations, and also to promote specific industries. It is often said that because Japan was poverty stricken after the Second World War, it introduced publicly run gambling, as a last resort, to stimulate an economic recovery.

However, the introduction of the sixth form of publicly run gambling, soccer betting, is against a completely different economic background for the current generation, with Japan being the world's second strongest economy. In fact this particular initiative has separate objectives and ways for which the funding raised should be utilized. In the next chapter there will be analysis of the legal, economic and management issues surrounding soccer betting in Japan.

### Soccer Betting as a Means of Promoting Sport

The law governing soccer betting is the "Act on Sports Promotion Voring 1998" (now referred to as SPV) (Heisei period 10th year, law number 63).

As stipulated by the SPV, the Ministry of Education, Culture, Sports, Science and Technology (now referred to as the MEXT) is the regulatory authority for soccer betting. Furthermore, the main objectives of the MEXT under the SPV, are to ensure the necessary funds are raised for sports promotion, and to confirm that any initiative it sets up is effectively administered.

Soccer is the only sport to be utilized for sport promotion betting initiatives under the SPV. To this end the Japan Professional Soccer League (now referred to as the J-League) (article 24 paragraph 1 of the SPV and the Ministry of Education Newsletter number 56) was set up to run various soccer competitions. These comprise the J-League, the J-League Cup and the Emperor's Cup. However, please note that other soccer competitions are excluded from the afore-mentioned initiatives, including the Japan Football League (amateur), local leagues and even foreign soccer leagues.

The sole authority charged with administering sports promotion through betting under the SPV, is the National Association for the Advancement of Sports and Health (now referred to as the NAASH) (article 3 of the SPV).

By order of MEXT, NAASH will select certain J-League games on which betting can take place. After the game, any better in possession of a winning ticket, in line with the rules stipulated by MEXT, will receive a payout of their relevant winnings (article 2 of the SPV).

Currently there are six soccer betting games in Japan. The first type of game is the Toto series (comprising three games - Toto, Mini Toto and Toto Goal), where you can personally predict the results of matches. The Big series (comprising three games - Big, Big 1000 and Mini Big) is the second type of game, where a computer randomly predicts match results. There is no obligation on NAASH, as the soccer betting administrative authority, to deal with income tax issues (article 16 of the SPV).

The maximum payout for Toto is 200 million yen, which is only possible when a carry over occurs. For Big the maximum payout is 600 million yen, again, this is only possible when there is a carry over.

Soccer betting tickets can be purchased either online, at convenience stores or from specially licensed betting shops. However, as stipulated by article 9 paragraph 10 of the SPV the following parties cannot purchase or receive transfers of soccer betting tickets: people under 19; government officials working in promoting other sports; NAASH staff; J-League members of staff; and all the J-League club employees, representatives, directors, players, J-League match referees and commissioners. Criminal sanctions such as imprisonment or fines (articles 32 and 42 of the SPV) can be imposed on any of the above mentioned parties in breach of the SPV law. Furthermore, people found using (or conspiring to use) systems other than those defined by SPV for acquiring soccer betting tickets, can also be subject to such punishment.

Once the winnings and administration expenses have been deducted from the total amount of revenue received from soccer betting ticket sales, it is divided into three parts for distribution. The first third is utilized to fund the following initiatives: promoting education, sport and culture for the Japanese youth; preserving of the environment; advancing international relations; and maintaining the national treasures of Japan (article 22 of the NAASH)<sup>18</sup>.

The remaining two thirds of the revenue are each used mainly to finance sport promotion projects by local authorities or sports organizations through the following projects, or to be used as funds needed for international level sports event hosted by Japan (as stated in the MEXT orders) (article 21 paragraphs 1 and 2 of the SPV).

The projects are as follows:

- to establish an institution (including facilities) as a base to promote sport in the regions;
- to establish an institution as a base to improve the level of competitiveness in sport, both nationally and internationally;
- projects to promote sport at sports lessons, competitions, and other sport events using the institution described in (2); and
- to train new and improve the quality of the current sports coaches

Additionally, the proceeds from the soccer betting initiative can be invested in the "Sports Promotion Fund" established by the Japanese government allocating 25 billion yen in a budgetary measure in 1990 (article 21 paragraph 4 of the SPV). The objective of this fund is to assist the sports organizations in hosting major events, and also to in create world respected athletes and coaches<sup>19</sup>.

As analyzed above, from the proceeds of the soccer betting system Japan has set out to accomplish dual objectives. The first is to improve

16 宝くじは今・・・ (財団法人日本宝くじ協会)

<http://www.jla-takarakuji.or.jp/nov1.html#> 2008年12月3日調べ

The Lottery is Now (Foundation of the Japanese Lottery Association)

<http://www.jla-takarakuji.or.jp/nov1.html#5> (3 December 2008)

17 宝くじに関するトラブル (財団法人日本宝くじ協会) <http://www.jla-takarakuji.or.jp/trouble.html> 2008年12月3日調べ

Trouble with the Lottery (Foundation of

the Japanese Lottery Association)

<http://www.jla-takarakuji.or.jp/trouble.html> (3 December 2008)

18 <http://www.naash.go.jp/toto/what.html> 2008年12月4日

The Purpose for which the Proceeds of Sports Promotion Betting are Used (National Agency for the Advancement of Sport and Health) <http://www.naash.go.jp/toto/what.html> (4 December 2008)

Japan's level of competitiveness in world sport. The second is to promote sport as an essential life habit throughout the nation. At the start of this paper, it was stated that the proceeds of the soccer betting initiative had been falling year upon year. For instance, in 2002 the amount raised for Japanese sport totaled 5.7 billion yen, however in 2007 the figure raised was a mere 80 million yen in comparison. Consequently, this lack of constant funding meant that some sporting projects were inevitably cancelled or cut back. On top of this, various funds for the promotion of sport had to be privately guaranteed<sup>20</sup>.

However, in 2008 the soccer betting game, Big, has brought some fresh inspiration to the scheme. By November the amount raised for sporting projects run by the Sport fund has been estimated to be in the region of 850 million yen. It is thought when the figures are calculated in 2009 the total sales proceeds from soccer betting in 2008 will have reached a historic high of over 90 billion yen<sup>21</sup>.

- 19 <http://www.naash.go.jp/sinko/kikin/gaiyou.html><http://www.naash.go.jp/toto/what.html> 2008年12月4日調べ  
A Summary of the Activities that were given Sports Promotion Grants (National Agency for the Advancement of Sport and Health) [www.naash.go.jp/sinko/kikin/gaiyou.html](http://www.naash.go.jp/sinko/kikin/gaiyou.html) (4 December 2008)
- 20 [http://www.mext.go.jp/b\\_menu/shingi/chukyo/chukyos/gijiroku/002/08110404/001.htm](http://www.mext.go.jp/b_menu/shingi/chukyo/chukyos/gijiroku/002/08110404/001.htm) 2008年12月5日調べ  
The Debate on the Way the Proceeds from Sports Promotion Betting Ought to be Given as Grants/Support (15th MEXT Special Sports Betting Promotion Conference on Distributing

- Sports Promotion Betting Resources/Funds)  
[http://www.mext.go.jp/b\\_menu/shingi/chukyo/chukyos/gijiroku/002/08110404/001.htm](http://www.mext.go.jp/b_menu/shingi/chukyo/chukyos/gijiroku/002/08110404/001.htm) (5 December 2008)
- 21 [www.mext.go.jp/b\\_menu/shingi/chukyo/chukyos/gijiroku/002/08110403/001.pdf](http://www.mext.go.jp/b_menu/shingi/chukyo/chukyos/gijiroku/002/08110403/001.pdf) 2008年12月5日調べ  
The Movement/Variation in Sports Promotion Betting Grants (14th MEXT Special Sports Betting Promotion Conference on Distributing Sports Promotion Betting Resources/Funds)  
[http://www.mext.go.jp/b\\_menu/shingi/chukyo/chukyos/gijiroku/002/08110403/001.pdf](http://www.mext.go.jp/b_menu/shingi/chukyo/chukyos/gijiroku/002/08110403/001.pdf) (5 December 2008)

# Sport and Competition Law: an Interesting Twosome

by Marjan Olfers\*

“I again saw under the sun that the race is not to the swift nor the battle to the strong, and neither is bread to the wise, nor wealth to the discerning, nor favour to men of ability; for time and chance overtake them all.”

*Ecclesiastes 9 verse 11*

Not that long ago, at the end of the twentieth century, competition law made its entry into the world of sport. Sports regulations have been placed in a (European) competition law framework ever since because of conflicts between players or athletes and the association, between the clubs and the association, between the association and emerging other associations, or between the association and third parties such as broadcasting licence holders, etc. In 1999 the European Commission had to handle more than 50 sport-related complaints. Competition law is being used as an instrument to settle disputes in favour of the individual's own interests, the club's interests, or those of a third party (such as broadcasting licence holders), which are often diametrically opposed to the interests of the collective, the sports organization as a whole (chapter 16). Casting a side-glance at the development of applying competition law to sports regulations in the United States, one may assume that the trend to interfere using competition law will continue for the time being.

Central to this research was the tension between sports regulations and European competition law. In that context the research was aimed at determining whether sports regulations have their own sphere, and, if so, how this sphere is defined in relation to European competition law.

The key question was researched from two important angles:

- The uniqueness of sport. Referred to in this study also as the basic principles of sport or the intrinsic value of sport;
- Sport's beneficial function to society. Referred to in this study also as the extrinsic value of sport.

## The uniqueness of sport

To find an answer to the central question in this doctoral thesis, a profound understanding of sport is necessary. For there is no authoritative definition (par. 1.5), the basic characteristics of this phenomenon

have been researched. Sport is a (visible) form of competition or rivalry (par. 1.2 and 1.5). Sport has its own rules, making the game recognizable throughout the world (par. 1.3). The conditions of the (usually physical) contest in sport are identical to the extent possible, the ultimate goal being to produce a winner (par. 1.5). Collectively, these characteristics distinguish sport from various other social phenomena (par. 1.6).

Subsequently, in the second chapter, sport in an organized form was researched. Sport developed in clubs and associations (par. 2.2 and 2.3). The sports organization governed by private law is distinguished by a monopolistic structure (see par. 2.3). The association is the umbrella organization that stipulates when, where, and under which rules the product, the game or the competition, is realized. Sports regulations that have a direct relationship to the basic characteristics form part of this “uniqueness” of sport (par. 2.4). In addition, there are numerous sports regulations regarding the structure of the sports organization and sports regulations guarding the “integrity” of sport and the sports organization, for example through disciplinary rules (see par. 2.4.4).

## Sport as a phenomenon placed in a favourable social framework

In the third chapter the social framework of sport was researched. Sport's importance to society is, *inter alia*, evidenced by the Declarations to the Treaty of Amsterdam and Nice (par 3.2.1., 3.2.2), the European Constitution [*Europese Grondwet*] (par, 3.2.3), and the Treaty of Lisbon (par. 3.2.3). Not only is sport viewed as a means to improve health, the educational, social, cultural, and recreational dimension is also continuously emphasized by governments or by institutions such as the European Commission. Due to the Community administration's one-sided attention for the benefits of sport to society, sport is being propagated as a play for pleasure, not for gain, which can be reduced to the original “amateurism” of De Coubertin (par. 3.4). The one-sided approach to idealistic, virtuous goals does not do justice to the phenomenon of sport. After all, top-level sport still is very much part of the phenomenon of sport and of society as a whole, in which top-level sport, for that matter, also has important functions (par. 3.6).

## Delineation of jurisdiction

In the second part, in chapter 4, aspects of delineation of jurisdiction were researched. If the Treaty of Lisbon should enter into force, the

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and conclusions of her PhD of the same title, which she defended at the Free University on 29 January 2009.

Union, for the first time, through an article in the Treaty about sport, will have the authority to support, coordinate, or supplement actions taken by the Member States with regard to sport. The responsibility for the social functions of sport in society still lies principally with the Member States and the sports organizations (par. 4.2.3 and 4.2.4). Sports organizations governed by private law cannot escape application of European law (par. 4.2.5). As is shown in par. 4.2.5, the EC Treaty is mainly aimed at economic integration. In order for European law to apply trade between states must be affected (chapter 5). In the United States, federal law applies only if interstate commerce is involved. It had opted for the intrinsic approach (by emphasizing the uniqueness) of the phenomenon of sport at first, which led to the exclusion of baseball from the application of federal law as no cross-border economic activity could be demonstrated (no interstate commerce, chapter 5.3). This angle, however, does not do justice to the concept of sport, as sport is part of society and, therefore, cannot evade the economy.

Sport evolves from a game into an economic activity (chapter 6). The question then arises how “amateurism” fits into European law (chapter 7). Amateurism is not a legal concept. The concept of economic activity is strongly interwoven with the concepts of “worker” and “service provider” under the EC Treaty (see par. 8.2 and 8.3). A purely extrinsic approach taking only the economic aspects into consideration (just like a purely intrinsic approach), fails to do justice to the concept of sport. After all, such a one-sided approach denies the fact that sport has non-economic basic characteristics.

#### **Application of the free movement regulations to sports regulations**

Applying European law to sport and to sports organizations does not automatically mean that the law has no consideration for the unique characteristics of sport. In the third part the application of the free movement principles to sport was researched. The Court of Justice of the EC has applied the free movement regulations to nationality clauses (chapter 9), selection criteria (chapter 10), and transfer periods (chapter 11). Nationality clauses with regard to national matches and selection criteria do not contravene the free movement regulations for reasons that lie in sport only.

#### **Competition law and the sports organization**

In the fourth part competition law in relation to the sports organization was researched. In the United States competition policy is influenced by the idea that market interference must be kept to a minimum, even if this leads to powerful companies and the downfall of others (chapter 13). Gradually, Europe seems to accept a competition policy predominantly aimed at economic effects (par. 13.3.1). The European Community strives for “workable competition” and has a multi-goal approach, as evidenced by article 2 of the EC Treaty.

Competition law (articles 81 and 82 of the EC Treaty), is aimed at the market behaviour of undertakings (chapter 14). An undertaking is any entity engaged in an economic activity (par. 14.1). A sportsman (a self-employed person, par. 14.2) as well as a club or an organizer (par. 14.3.3) can constitute an undertaking (par. 14.3.3). The association is an undertaking or an association of undertakings (par. 14.3.4). In sport, rivalry, the match or the competition, is the “product” (par. 15.2). Sport has a natural tendency towards winning and the sports organization towards a monopolistic structure (par 15.3 and 15.4). Ultimately only one association per branch of sport and per district can organize a quality competition. The sports organization has a position of economic strength (chapter 16). Problems may arise within the sports organization because top-class players, athletes or clubs find that their interests are not adequately represented, and problems with third parties may arise because no other interest grouping offering the same quality product (the competition) is available to them. Subdividing the association into several, competing, associations does not provide a solution (chapter 17). In the United States, the NFL was regarded as the most efficient, effective and lucrative form of a sports organization (par. 17.3). Even if several associations compete with each other in the same branch of sport, sport always tends to produce only one winner and the structure again tends towards a monopoly. This is

because the “one-winner principle” is a basic principle, and because the underlying notion of rivalry is founded on the distinction based on nationality (par. 17.4).

In the United States, it has been debated that a sports organization has to be seen as “one entity” (single entity-theory) when it regards the application of competition law, see chapter 18. In the application of antitrust law, therefore, they assume that clubs cannot determine market behaviour as separate entities, but that they are mutually dependent because the competition is a joint effort. The cartel ban of” article 81 EC Treaty, which refers to separate undertakings, does not apply in that case. However, a sports organization may not abuse that dominant position. Europe has adopted a reticent attitude with respect to the one-undertaking concept (par. 18.4). The single-entity concept has some validity where safeguarding the basic principles is concerned. After all, the entire organization pursues this identical objective (par. 18.6). Also the single-entity concept, or the necessity of cooperation, has some validity where the exploitation of the competition is concerned, the sale of television rights, for example, because clubs will never be able to realize the product (the competition) individually (chapter 39).

#### **Sports regulations and competition law**

Central to part five was the question whether sports regulations have the nature, object, or effect of restricting competition, or should be considered abuse. In the application of the free movement regulations to sports regulations, the Court of Justice of the EC sought a link with “non economic reasons or objectives” connected to sport itself. In a thorough analysis of competition, this quest does not solve anything. The sports activity itself does not change substantially in case of an economic activity (see chapter 1). It may well be that sports regulations were established for purely economic reasons and cause an economic effect on the market. Again, a purely intrinsic approach of sports regulations unjustly wrenches sport away from the economic reality (par. 19.4). This analysis, therefore, is not useful in competition law. Central to a competition analysis should be the competition limitations that cause negative market effects with regard to prices, production, innovation, or diversity and quality of the products, or the possible abuse by the collective. Whether sports regulations have or may have such negative consequences depends on the economic context. Therefore not only the nature of the agreement or the decision the sports regulations were based on should be considered, but also the joint market force of the parties, other structural factors, and the effect of the sports regulations.

In chapter 19 a number of concepts shielding sports regulations from competition law were discussed (par. 19.3). Researched successively were: the rule of reason in competition law (par. 19.3.2), the application of the concept of ancillary restraints (par. 19.3.3), and the “Wouters exception” (par. 19.3.4). The Wouters exception concerns overriding reasons in the general interest; and it entails that regulations have to be appropriate to achieve their objective and not be unnecessarily restrictive. The Court of Justice of the EC has applied the Wouters exception in the Meca Medina case, which involved the association’s anti-doping rules (par. 19.4.3).<sup>1</sup>

At the moment no rational standard exists that determines when participants in an interest grouping may or may not collaborate. This creates legal uncertainty. I personally believe that a competition standard can, and must, be found in efficiency considerations. The fact is that only efficiency considerations do justice to the competition law framework, equally so where sport or sports organizations are concerned.

#### **The delineation of sport (regulations): a basis for immunity**

“Efficiencies” can be found in the distinctive characteristics and, therefore, in the basic principles of sport, since there would be no exploitable product without such basic principles. This certainly applies to the rules of the game, as the scope of the rules in sport is defined beforehand (chapter 1). Competition law should not interfere in this hard core, as there can be no sports activity without rules

<sup>1</sup> Case C-519/04.

of play, and hence no exploitation either (see chapter 20). In addition, the sports organization creates rules that go beyond regulating this hard core, and tries to find rules that shape and safeguard other basic principles. Besides the rules of play, rivalry, the contest under - to the extent possible - identical conditions, the comparison of achievements, and the appointment of a winner, are typical of sport (chapter 1) and, therefore, distinctive of the product "sport." If this product is realized in cooperation, the distinctive character of the *contest market* (where the product is realized) makes that clubs and individuals do not compete economically. Regulations pertaining to the contest market allow for economic competition and enhance the economic competition on the exploitation market, which benefits the end users. Even if there were a restriction of competition on a part of the market, for instance because the regulations restrict access to the market, the regulations even then boost competition in a larger part of the market: the exploitation market. Because of the tendency to continually enhance performance, and because rivalry and the comparison of achievements are part of the product, of the match, or of the competition, all participants contribute to this product and to an efficient sports organization. Besides defining regulations (par. 2.4.1. and 2.5) there are the fundamental rules of competition; rules common to every sports organization (par. 2.4.3) irrespective of the question whether there is an economic activity. Selection criteria for playing sport within the interest grouping are required, for instance (chapter 21). Selection allows the best to compete with each other, resulting in a small group of top-level players within the sports organization and ultimately in one winner. These rules cannot be removed from a complex of regulations without jeopardizing the existence of the interest grouping. Where an economic activity within the meaning of the EC Treaty is concerned, this pertains to rules regarding competitive market behaviour which an undertaking can also afford in a normally functioning market. We see the same normal competition behaviour with regard to the achievements of the undertaking (club or sportsman). Competition law intervention is not necessary.

Sports regulations directly related to the basic principles of sport are, under a rational competition policy, considered effective and efficient. After all, regulations required primarily to realize a totally legitimate product indeed enhance competition rather than limit it. Sports regulations that pertain to the "contest market" and only affect the behaviour of participants to the contest match in fact have the same effect as competition law: safeguarding competition.

Furthermore, the underlying notion of rivalry is typical to sport (chapters 9 and 23). The interpretation of this principle varies in time and place; the ancient Greek had a different interpretation than we have in this day and age (2.4.2). The identification from time immemorial with the village or the school has shifted via the city and the region to the country of origin, making international matches between national teams possible. Nowadays, the position of sport in the city or the country is *crucial* for the bond and identification with the team or the sportsman. Interpreting the concept of rivalry through a distinction based on nationality has become an independent part of both the *perception of sport* and the *structure of the sports organization*.

An uneasy tension exists between conflict situations that can be reduced to a difference in nationality and the fundamental rights. Community law attempts to safeguard through the non-discrimination principle and the rules of free competition. In Europe we face the question whether a bond with a country is inherent in sport, or whether this alleged uniqueness should be abandoned in order to create mobility between Member States. Another, more supranational oriented approach would neither mean the end of sport, nor the end of the sports organization. This is because it is in essence a perception- or extrinsic characteristic; the underlying rivalry also exists without a distinction based on nationality laid down in sports regulations and the sports structure. In other words: the underlying rivalry is the basic principle. Presently, this principle is expressed by the distinction based on nationality.

Whether Europe heads, or remains headed, for a different form of integration because of the current nationally oriented perception of

sport, or whether Europe heads for a more radical form of European integration also in sport, is ultimately a social-political choice.

If Europe opts for an historic, political, and social compromise, and if it respects the national competitions, the conclusion is justified that not only the national perception of sport is typical of sport, but also that the law is reticent to interfere in all sorts of issues involving discrimination on grounds of nationality. With regard to competition law this means that regulations pertaining to a distinction based on nationality support rivalry and are, therefore, efficient. Reticence is also needed with regard to the move of a club to another Member State (chapter 26), allowing players to play for the national team (chapter 24), and the participation of a club in any other than the national competition (chapter 26), as long as this principle, the underlying notion of *national* rivalry, is considered inherent in sport. Should Europe not opt for the above, the dynamics of the market and the correcting effect of competition law probably will not end all sport, but it will bring about a different perception of sport.

If Europe opts for consciously enforcing the fundamental right of non-discrimination and competition regulations, another sports structure will emerge. The power of the national associations will diminish with the creation of a supranational competition. The free market will allow clubs and sportsmen to opt for participation in a quality competition, as any competition sooner or later always tends to attract the best sportsmen. True European unification of national sports markets will be reached when Europe participates in international contest matches, comparable to participation by the United States. Abandoning the nationality clauses as a basis for the underlying rivalry is particularly important to the perception of sport and its position in society.

### **"General-interest" objectives: a basis for immunity**

#### **I Safety- and other objectives**

In addition to its task of safeguarding the basic principles of sport, the sports organization attempts to safeguard objective, generally accepted, and undisputed general-interest objectives not specifically related to sport, such as providing safety guarantees when issuing licences to sports facilities (30.4). During ticket sales the sports organization is allowed to take measures that limit competition, if the objective is to prevent supporters' violence (chapter 42). Whether the requirements of suitability and proportionality in relation to this objectively justified general interest have been met will be tested every time.

#### **II Quality criteria, integrity criteria, and disciplinary rules**

Such rules also apply in other professional organizations and in that sense they are not specific to sport. But sport does have its own interpretation of these rules and has, for example, its own integrity rules which are specific to the applicable norms within the sports organization (chapter 31). For instance, it is generally accepted that the use of doping in sport is a violation of a norm. Anti-doping rules and other rules pertaining to integrity can be justified by maintaining that these rules contribute to the economic interests of the sports organization because they regard an objectively accepted norm which is enforced by the sports organization, for which there are sufficient economic "efficiencies" in the market (chapter 31). Just like rules prohibiting certain misconduct, anti-doping rules contribute to the value of the product and trust in the sports organization, and they fit in with market objectives. In this case, efficiency considerations in a competition law argument, without reverting to the Wouters ruling, do justice to the nature and the objective of these rules.

#### **III Virtuous objectives, amateurism**

Considering the laborious delineation of the virtuous functions of sport in relation to the economic sports activity, difficulties are foreseeable as soon as it does regard an economically tinted sports regulation that also pursues an economic objective, but that is nonetheless connected to certain non-economic interests in such a way that, again, a choice must be made: either competition law prevails, or a basis for immunity must somehow be found. In the United States, the characterization of amateur sport as a specific and distinctive product

is the basis for such immunity. Amateur regulations are necessary to realize this distinctive product (chapter 32).

European judicial authorities are forced to make a choice between the general interest pursued by competition law, and the non-economic interest pursued by the amateur regulations. It is likely that not every conceivable, socially beneficial function will prevail as a mandatory requirement of general interest above the interest of integration and market forces.

It remains difficult to discern which general-interest objective is justifiable and which general-interest objective must yield to the process of market integration and the safeguarding of consumer welfare. This no longer concerns a legal/economic context, but a political/social one of which the legal basis and the outcome are unclear and uncertain beforehand. The choice between competition law objectives and such general-interest objectives not based in treaty provisions is to be avoided to the extent possible because of its subjective experience framework. Besides, except for the basic principles of sport, it remains to be seen whether market forces form a real threat to the virtuous values of sport. After all, recreational sport will always exist and is not threatened by market objectives, because there is no economic activity within the meaning of the EC Treaty and therefore no "undertaking" within the meaning of the EC Treaty (see chapters 7.4, 8.5 and 14).

TV Recognized sport-specific general-interest objectives based on case law The Court of Justice of the EC has, in a number of cases, recognized general-interest objectives specific to the sports sector and in practice tests if the requirements of necessity and proportionality are met. This test usually has a political dimension. This regards defined grounds for justification such as a) maintaining a financial and competitive balance between clubs and b) supporting the search and the training of young players.

*Re a.* Whilst "maintaining a financial and competitive balance" has been recognized, the Court of Justice of the EC has de facto negated this interest by considering rules of transfer neither necessary nor proportional (chapter 34.6), and by designating this justification ground with regard to television rights without subsequently assigning any value to it (39.6). As soon as money becomes a determinative factor in sport, the disruption of the financial and competitive balance automatically becomes a point of discussion. For a product to be as attractive as possible it is essential that the teams are well matched. Only the club with ample financial resources has access to the best means to enhance its sport achievements.

One club will have more sponsor monies, box-office receipts, income from merchandising, or government support than the other. Such income is intended for the clubs; they do not have to redistribute it. Can this be considered unfair, too? Bribing referees and unjustly disallowing goals are considered unfair. Tampering with a cricket ball to influence the outcome of the match is considered unfair. When dealing with a balanced financial force field, however, "unfair" becomes a different concept, perceived by each club in a different way. When is this justification ground valid and when is the argument not justified? The beauty of sport happens to be that the outcome of a game, no matter how much money is pumped into it, is never certain. Even the best and most expensive players do not necessarily make up the winning team. In the World Cup Soccer tournaments there are always teams that, to everyone's surprise, make it to the quarter-finals or even semi-finals. A possible redistribution of income is also difficult in practice, because the larger clubs will always feel that clubs contributing to the value of the competition the most are, for that reason, entitled to a larger part of the income. Furthermore, redistribution of income from international tournaments will always lead to an imbalance in the national competition if only a limited number of clubs participate in this international competition.

Now that the Court of Justice of the EC has embraced this justification ground, Europe should examine the redistribution agreements accurately and effectively. The European Commission and the Court of Justice of the EC have not taken their responsibility in this respect. This justification ground seems to carry little or no weight in regulations, but reasons for this are insufficiently given.

*Re b.* Both the specificity to sport and the basis for immunity are not clear. There is no specific other interest in "supporting the search and the training of young players" that does not exist in any other line of business where employers try to recruit talented employees.

It is unwise to shield employers in sport specifically from the application of competition law for this reason, as they do not distinguish themselves from other employers who have to make exactly the same efforts to recover recruitment and training investments, and offer attractive employment conditions.

Rather than a matter of solid legal grounds, the justification grounds under a. and b. seem to embody the wishes and desires of the sports organization. In this way the Court of Justice of the EC has entered the realm of sport without ascertaining the effects and consequences. Furthermore, the justification grounds have caused a further politicizing of the phenomenon of sport, because these wishes and interests have also been adopted in the politics of the European Institutions.

### Considerations regarding the (future) structure of sport

The monopolistic organization has an incredible amount of power in many different markets and market segments. From this angle, the monopolistic organization poses a considerable threat to the public interest. Certain activities are best performed by the association. For instance, establishing and guarding defining rules (par. 2.4.1) and fundamental competition roles (par. 2.4.3). Organization rules (par. 2.4.4), too, are best established by the association. In all the cases above-mentioned, clubs and/or sportsmen are not in a position to establish such roles, because they are biased and will put their own interests before those of the interest grouping as a whole. The advisability of an independent third party is, therefore, implied in the basic principles of sport on the one hand, and in the requirements set by the organization on the other. There are other activities that are best regulated by the clubs or the sportsmen themselves. Clubs can regulate all kinds of activities in and around the stadium, such as ticket sales, merchandising, club sponsorship, etc. They can also attract new players, trainers, and coaches; purchase and manage the facilities, etc. A sportsman is in charge of hiring a good coach, selecting his training facilities, etc.

There are numerous other activities that are regulated by the association, although one can question the efficiency of this arrangement. One example is the association's supervision over the player's job mobility in team sport (see part 6, especially chapter 37). This regards association regulations such as remuneration schemes imposed on players through stipulations in the standard contracts. Sport can easily function without these kinds of regulations. In the absence of such regulations, provisions of labour law will apply. Sports regulations pertaining to labour conditions are integral to labour law. On an European level social dialogue between representatives of employers and employees can solve issues related to the sports labour market. The collective exploitation of media rights is another example of regulation by the association (chapter 39). Collectivity is a consequence of the interdependence of clubs in the realization of a competition, and is in my view not based on an agreement between competitors. To avoid problems of exclusion, the association needs to offer the rights to the market in a public, non-discriminating way for a limited, exclusive period.

Is it possible to structure sport in a different way in order to achieve that a better allocation of resources without jeopardizing the basic principles? Liberalization means that the sports organization as a private monopoly will, mandatorily, come under the control of one or more market parties other than the association. For instance, by separating the association's organizing/commercial function from its duty of guarding the association's intrinsic sphere of activity. The association in that case, *inter alia*, ensures the safeguarding of the basic principles of sport and in that respect executes its duty to regulate, monitor, supervise, and enforce. Several competing, private organizations subsequently end up with fragments of the organizing/commercial function?<sup>2</sup>

The association's tendency to exclude or exploit is indeed diminish-

ing because the association's own commercial interests are declining, but it will become more difficult for the association to guarantee the uniformity of the game and of the organization of competitions, as well as to monitor the quality of the competition. In spite of all competition considerations, the tendency in sport to organize "the best tournament" generating the most public attention will prevail, because it is in such tournaments that the best teams/sportsmen participate (see chapter 17.) It is the winner of the Tour de France who is the most widely known to the general public. The same goes for tennis; winning Wimbledon is more important than winning the ABN-AMRO tennis tournament in Rotterdam Sport is and will always be all about producing an "overall" winner. It is a fact that at present there is no "liberalization" of the sports sector and any reform will, therefore, have to come from within the sports organization.

Such reform forces emerge when a split-off is imminent, also as a consequence of market dynamics. (The imminence of) a new association often results in an huge boost of efficiency, in which interests are reassessed within the existing structure of the sports organization. Possible competition of a newcomer will motivate the association to reform and innovate. This will usually result in a better representation of the professional interests of those sportsmen and clubs who are the most important to the association because of their popularity. The question remains whether the imminence of a new association and the effects of competition law will yield the most desirable result. The essence is that forcing participation may be harmful to mutual rela-

tions. Law should be a last resort. It is far more important to communicate that interests need to be represented well and balanced within the sports organization. A good dialogue between interested parties in order to avoid conflicts.

The (imminent) arrival of a new association, either from a market or sport point of view, does not pose a problem as long as the basic principles of sport remain unchanged. However, a permanent division of the sports organization into several, competing, national and international associations is not desirable and is contrary to the essential basic principles of sport because of the need to declare only one winner and the underlying notion of national rivalry (chapter 17). History has shown that only one organization can produce the best product in a particular region, and that that organization will dominate the market.

<sup>2</sup> An example of a structural change is allowing a market party to organize a tournament following a public, transparent, bidding process. After acquiring a tournament, the organizer/promoter can conclude agreements with participating clubs that are eligible for participation in accordance with the association's selection system. In these contracts the division of revenues from the sale of television rights could be arranged. An annual

ranking takes place internationally. At the beginning of the year, each professional club has zero points. The team with the highest score after participation in several tournaments, is the (inter)national champion. During the year a number of ("competing") tournaments are organized. The club's ranking determines whether the club is eligible to compete in quality tournaments. The ranking can take place in several ways.



**The Conference Steering Committee, jointly with the Moscow State Academy of Law (MSAL), the Ministry of Sports, Tourism and Youth Policy of the Russian Federation, the Russian Football Union, the Olympic Committee of Russia, the Russian Association of Labor Law and Social Services, the Russian Association of Sports Law, and the Association of Lawyers of Russia, kindly invite you to take part in the Third International theoretical and practical conference**

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The Conference materials will be published in the digest (please observe the following text requirements: number of pages - maximum 10, typed in Microsoft Word, at 1.5-space, 14-point type Times New Roman, with 2 cm borders). Your report theme should correspond to the theme of the conference.

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# New Legislation on Sport in Russia

by Denis I. Rogachev\*

Sports law is one of the newest, complex branches of the Russian law system.

The field saw rapid development, when, on 30 March, 2008, a new version of the Law On Physical Culture and Sport entered into force (hereinafter, the Law on Sport) and, at the same time, a new chapter of the RF Labour Code on regulation of labour by athletes and trainers. Another example of a successful start to reforming sports legislation is the Federal Law of 1 December, 2007 on the organisation and hosting of the XXII Olympic Winter games and the XI Winter Paralympics in 2014 in the town of Sochi, the development of the city of Sochi as a mountainous-terrain climate resort, and the passage of amendments to certain legislative acts of the Russian Federation.

Society and the legal science community have paid a great deal of attention to the preparation of the above documents, as sport has long been an important component of life in human society, a positive factor for public health and, undoubtedly, the largest form of spectator entertainment.

## Sport as a Unique Socio-Economic Phenomenon

One of the key aims of passing the new law on sport was to establish the special status of sport, as independent of other fields of human activity.

Article 2 of the law on sport offers a legal definition of sport. Sport is a field of social and cultural activity, as an aggregate of various different sports, which has come to take the form of competitions and special practice to prepare a person for such competitions.

Moreover, one of the most important amendments to the law on sport, proposed by the RFU and based on the principles of FIFA and UEFA, is the eleventh principle of the Russian legislation on physical culture and sport, established by one of the legal foundations that are present throughout the entire system of legislation: facilitating the development of all sports (types of sport) and components of sport, in view of the uniqueness of sport, its social and educational functions, as well as its unique structure, based on voluntary participation by subjects of sport.

The legal term "sport" includes all of the features of another legal term: "type of sport" (Article 2 of the Law on Sport), as well as possessing the following attributes, which are given additional emphasis by legislators: competitiveness (the link to competitions and preparation for competitions) and the link between the aggregate of types of sport and social/cultural activities.

It is clear that law-makers have, with justification, expanded the field of sport, crossing the line that demarcates cultural activities. In a number of cases, sport clearly possesses other attributes, and is an example of business relations (entrepreneurial activity), scientific, educational activities, etc. In this connection, the law-makers should be supported in their effort to somewhat 'divorce' the terms sport and physical culture, and to avoid turning one into a subset of the other. Each of the phenomena identified in the title of the new law has its own potential, its own characteristics for regulation, and its own unique development dynamic. Nevertheless, the terms mentioned above also coincide, or overlap, as sport also has the attributes of physical culture, although the manifestations of sport are more varied (not just a field of culture) and physical culture, in turn, does not necessarily have such a property as competitiveness.

In this connection, the list of principles in the legislation on physical culture and sport is of interest (Article 3 of the Law on Sport):

- 1) ensuring the right of every person to unhindered access to physical culture and sport, as necessary conditions of development of personal physical, intellectual and moral capabilities, the right to physical culture and sport classes for all categories of citizens and population groups;

- 2) unity of the set of legal regulations in the field of physical culture and sport across the entire territory of the Russian Federation;
- 3) the combination of state regulation of relations in the field of physical culture and sport, with self-regulation of such relations between subjects of physical culture and sport;
- 4) establishment of state guarantees of the rights of citizens in the field of physical culture and sport;
- 5) a ban on discrimination and violence in the field of physical culture and sport;
- 6) ensuring safety for the life and health of persons engaged in physical culture and sport, as well as participants and spectators of physical culture events and sporting events;
- 7) observing international agreements of the Russian Federation in the field of physical culture and sport;
- 8) facilitating the development of physical culture and sport among the disabled, persons with health limitations and other population groups that required enhanced social protection;
- 9) interactions by the federal agency for executive authority, performing the functions of implementing state policy, regulatory and legal regulation, rendering state services (including countering the use of doping) and management of state property in the field of physical culture and sport (hereafter, the federal agency of executive authority in the field of physical culture and sport), agencies of executive authority of the constituent members of the Russian Federation and agencies of local self-government, with sports federations;
- 10) the continuity and succession of physical education for citizens, belonging to various age groups;
- 11) facilitating the development of all sports (types of sport) and components of sport, considering the uniqueness of sport, its social and educational functions, and the attributes of its structure, based on the independent activities of its subjects.

## Managing the List of Subjects of Physical Culture and Sport in the Russian Federation

Article 5 of the law on sport contains an updated list of subjects of physical culture and sport in the Russian Federation.

Subjects of physical culture and sport in the Russian Federation include:

- 1) physical culture and sport organisations, including physical culture and sport societies, technical sporting societies, sports clubs, sports training centres, sports federations, and public and state organisations that organise competitions in applied military and applied service sports;
- 2) educational establishments performing activities in the field of physical culture and sport;
- 3) defence-sector technical sport organisations;
- 4) science organisations performing research in the field of physical culture and sport;
- 5) the Russian Olympic Committee;
- 6) the Russian Paralympic Committee;
- 7) the Russian Deaf Olympics Committee;
- 8) the Russian Special Olympics;
- 9) the federal agency of executive authority in the field of physical education and sport, agencies of executive authority of constituent members of the Russian Federation, agencies of local self-government, and bodies subordinate to these agencies;
- 10) federal agencies of executive authority, performing management of the development of applied military and applied service sports;

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- 11) professional unions in the field of physical culture and sport;
- 12) citizens engaged in physical culture, athletes and their collectives (sport teams), sport referees, trainers and other specialists in the field of physical culture and sport, in accordance with the list of such specialists, approved by the federal agency of executive authority in the field of physical culture and sport.

Attention should primarily be paid to the fact that the above article contains an exhaustive list of the subjects of physical culture and sport in the Russian Federation. This 'closed-list policy', aimed at designating the subjects, to whom Russian legislation on physical culture and sport applies, in our opinion, is not entirely ideal. For example, as was indicated above, it is not clear whether a number of legal entities are to be regarded as subjects of physical culture and sport, where their activity in this field is not their main activity (the mass media, sponsors of sporting events, public student and youth organisations, public organisations for the disabled, veterans, etc.). Even greater uncertainty arose with respect to such a subject as spectators at physical culture or sports events; these are defined in paragraph 6 of Article 3 of the law on sport as subjects, the life and health of whom must be protected to the same standard as for athletes. Article 5 of the law on sport does not include a single word about spectators, and it hardly appears possible to classify them as physical culture and sport organisations, or as some form of specialist in the field of physical culture and sport, in compliance with the corresponding list. Another challenging question is that of how to classify such subjects of physical culture and sport as volunteers (persons assisting the organisers of sports events, free of charge), which are such a common feature of major sporting events. We are confident that one can easily list other examples of persons who do not have a place on the inauspiciously short list of subjects of physical culture and sport in the Russian Federation. We believe that international sport organisations, which are responsible for managing individual sports (FIFA, IIHF, etc.), and other international organisations, active in the field of physical culture and sport (the IOC, WADA, the Court of Arbitration for Sport in Lausanne, etc.) are worthy of a separate mention in the article.

The first subjects of physical culture and sport to be given a definition are physical culture and sport organisations. It is worth noting here the unfortunately imprecise phrasing, governing what is to be considered a physical culture and sport organisation, as it is extremely difficult to establish whether activities are performed by separate legal entities (individual entrepreneurs) specifically in the field of physical culture and sport, and specifically as their main activity. Article 10 of the law on sport, which is especially dedicated to physical culture and sport organisations, does in fact give no substantial response to the question of what unique characteristics these organisations have.

The answer to this question is partly contained in Article 5 of the law on sport, which classifies physical culture and sport organisations as subjects of physical culture and sport in the Russian Federation, and offers examples of such organisations: physical culture and sport societies, technical sport societies, sports clubs, sports training centres, sport federations, and public and state organisations that organise competitions in applied military and applied service sports.

It is clearly that this list is not exhaustive. For example, this list should also include sports leagues, sports agencies (agents), owners of sports facilities, various expert organisations in the field of sport, etc. Moreover, it is not entirely clear from the definition how to treat subjects, for whom activities in the field of physical culture and sport are not their main activity. For example, an employer who creates a sports team within his organisation, in the form of a subdivision, whilst continuing to produce goods or render services as his main form of activity; also, sports-oriented mass media (a TV channel, radio broadcaster, newspaper, magazine and individual journalists, accredited to cover sports events); or organisations in the so-called sports industry (manufacture of sports inventory and equipment, construction of sports facilities, etc.), the state corporation Olympstroy, etc. After all such organisations, which are unlikely to be covered by the term under discussion, are not mentioned in Article 5 of the law on sport

and, therefore, the answer to the question of whether they are subjects of physical culture and sport in the Russian Federation is not unambiguous.

Of particular concern is the mention, in this term and in Article 5 of the law, of international sport organisations (as a rule, international sport federations for various sports). Apparently, they are also understood to be physical culture and sport organisations - otherwise Russian legislation on physical culture and sport cannot influence their rights and obligations, applicable in the context of their performance of activities on Russian territory, and such a gap would be an unacceptable error.

### The Organisation and Hosting of Competitions

In the law, one of the subjects mentioned most frequently is *organiser of physical culture events or sports events*. This is a legal or physical entity, on the initiative of whom a physical culture event or sporting event is conducted, and (or) which performs organisational, financial and other support for the preparation and hosting of such an event. Moreover, this term is, to all intents and purposes, split into two components, located in different parts of the law on sport. The above definition continues in part 1 of Article 20 of the law. It is clear that in isolation from other attributes, possessed by the organiser and laid out in Article 20, the definition under review here becomes too conditional, while the actual content of the definition becomes too sparse. For example, the use in the definition of the separating conjunction "or" means that one can consider to be an organiser only that party, who has demonstrated the initiative to host an event - for example, by announcing this in the mass media. In this connection, only a systematic interpretation makes it possible to formulate more precisely the desired concept. It would appear to be more beneficial to consider the organiser of a physical culture event or sporting event the legal or physical entity, which is the official initiator of such an event, and which assumes responsibility for its organisation and hosting, in compliance with the requirements of national legislation in the country where it is to be hosted, and possessing, on this same basis, commercial and other rights to the given event, as well as the right to suspend, postpone and halt such an event. However, the symbiosis of the paragraph discussed here and Article 20, on the whole, should nevertheless to be considered sufficient for the framework regulation of the organisation of corresponding events. Moreover, as flows from Article 20 of the law, the organiser of a sport competition is given a special authority: to develop and approve the regulations (provisions) for the competition and establish the conditions for hosting the event, which define the criteria for granting access to participants, the criteria for the sports result they achieve, procedures for financing the event, competition safety measures, measures to prevent the use at the competition of doping substances and methods, criteria for granting access to spectators and the mass media, and the rules for behaviour at the event, as well as the conditions for the potential deputation of hosting the event, and other necessary conditions.

It is clear that the authors of the law assumed Federal Law No. 54-FZ On assemblies, meetings, demonstrations, processions and pickets, which was passed on 19 June, 2004, to be a legislative model for the organiser of a public event. This is a justified analogy, with a very understandable transformation, plus the necessary commercial component.

Of greatest and specific interest here is the organisation of the sporting competition. A *sporting competition* (according to Article 2 of the law on sport) is a competition between athletes or teams of athletes in various sports (sporting disciplines) for the purposes of identifying the best participant in a competition, conducted according to rules (regulations) approved by the organiser.

A sports competition is a form of sports event, the main form of sports activity and one of the central categories in the new law on sport. It is at sporting competitions that sportsmen and other participants perform, and a significant portion of the new law on sport is dedicated to allocating the authority to organise and host such events.

Part 6 of Article 20 of the law on sport once more confirms the thesis regarding the regulation of sports competitions: the organisation

and hosting of physical culture events or sports competitions are performed in compliance with the rules (regulations) on such a physical culture event or sport competition, as are approved by the organiser. Moreover, it is clear that such regulations must contain certain minimal requirements for the regulation of a competition, in order to be recognised.

In the sociology of sport, it has been suggested that a competition is to be considered a sport competition, if it does not take place in a regular life situation, but in artificially-created situations that meet certain rules, including rules banning certain activities, and in the presence of referees, assessing some or other abilities of competitors; this is a 'game' or 'humanistic' competition<sup>1</sup>. Compared to this definition, the legal term contains a reminder, not infrequent in the text of the law, that competitions may be conducted only in sports (sporting disciplines), i.e. the types of sport recognised by the state, and entered into the corresponding registry. A 'quasi-sport' competition cannot be called a sport competition, and the state will not apply to such events special requirements or concessions, as are established in legislation on physical culture and sport, tax legislation, etc. From the sociological definition of sport, it is possible to adopt as a legal instruction the provision of a sport referee for a competition, otherwise the competition will not have the attribute of objectivity when stating the sport result. It would appear that referring is mandatory for all competitions in sport today. Some authors propose that the goal should be considered to be not the identification of the best participant, but the achievement of sport results. We do not consider this to be fundamental for the given term, as the best participant is identified on the basis of the sport result that he has achieved.

The organisers of a physical culture event or a sport event possess the exclusive rights to the use of the title of such an event, as well as the associated logo, etc. The right to placement of advertisements for goods, works and services where a physical culture event or sports event is held belongs exclusively to the organisers of such an event. The right to choose the manufacturers of sports outfits, sports equipment and inventory used at physical culture events or sports events belongs exclusively to the organisers of such an event.

The use by third-parties of the titles of physical culture events and (or) sports events, word combinations generated using these, and the logos and symbols of such events, is on the basis of agreements, concluded in written form with the organisers of physical culture events and (or) sport events, with the exception of cases where such titles, word combinations generated on their basis, and the logos and symbols of such events are used for informational purposes or in connection with the realisation of rights by third parties, who have acquired the rights to cover physical culture events and (or) sports events in the mass media. In the mass media, the accurate and unaltered titles of physical culture events or sporting events, as approved by the organisers, are to be used, and such titles are not considered to be advertising.

The organisers of physical culture events and (or) sporting events retain the exclusive rights to coverage of such events by the broadcasting of images and (or) sound from events by any means and (or) with the aid of any technologies, as well as by means of making recordings of such broadcasts and (or) photographic recordings of events.

The rights to coverage of physical culture events and (or) sports events may be used by third parties only on the basis of permissions from the organisers of physical culture events and (or) sporting events or agreements in written form on the acquisition by third parties of these rights from organisers of such events.

### **Sport Federations: Central Subjects of the Management of Sports**

Many lawyers note that the status of sport federations occupies a key position in the law on sport. According to Article 2 of the law on sport, a sport federation is a public organisation, which is created on the basis of membership, and the goals of which are the development of one or several types of sport, their promotion, organisation, as well as the hosting of sports events and the training of athletes, who are the members of selected sports teams.

Sport federations, by virtue of paragraph 1 of Article 5 of the law on sport, are classified as a form of physical culture and sport organisa-

tion. In turn, with respect to the territory of their activities sports federations, in compliance with Articles 13 and 14 of the law on sport, are divided into local, regional and all-Russian. Sport federations in the law on sport are allocated a large number of provisions in the law. It is no coincidence that one of the principles of legislation on physical culture and sport in Article 3 of the law is determined to be interaction between sport federations and federal agencies of executive authority in the field of physical culture and sport, agencies of executive authority of constituent members of the Russian Federation, and agencies of local self-administration. Also worth noting is the fact that sport federations retain, in addition to all the properties established by the law commented upon here, the status of public organisations, as established by the 1995 Federal Law On Public Associations. The activities of all-Russian sport federations are also regulated by Articles 15-18 of the law on sport, and other articles of the same law.

For each sport, only one public organisation can be accredited as an all-Russian sport federation on the territory of the Russian Federation. The procedure for the Russian Federation to grant state accreditation to public organisations to extend the status of all-Russian sport federations is determined by the federal agency of executive authority appropriately authorised by the Government of the Russian Federation, taking into account the opinion of the Russian Olympic Committee. From the moment such state accreditation is issued, the public organisation acquires the status of an all-Russian sport federation. Moreover, the above state accreditation is issued for a period of four years.

In order to receive state accreditation and acquire the status of an all-Russian sport federation, the corresponding public organisation, in addition to the observation of other state requirements, must meet the following conditions:

- 1) the official name of the organisation must meet the requirements established by legislation of the Russian Federation on public associations, and must contain an indication of the form of legal organisation (public organisation), the territorial locus of its activities (all-Russia), as well as the sport or types of sport, for the purposes of developing which the organisation was created;
- 2) the members of the organisation, in addition to any other members, must include regional sport federations, that have been created and perform their activities on the territory of more than one half of the constituent members of the Russian Federation, and which are accredited by the corresponding agencies of executive authority of constituent members of the Russian Federation. For the purposes of determining the territorial locus of activities of an all-Russian sport federation, the structural subdivisions and (or) accredited regional sports federations which have membership therein, are taken into consideration.

In connection with the complexity of types of sport, the development of which is performed, and in connection with other factors, in the manner determined by the federal agency of executive authority authorised by the Government of the Russian Federation, taking into account the opinion of the Russian Olympic Committee, the receipt of state accreditation and the status of a public organisation are possible for an all-Russian sport federation, the members of which are accredited regional sport federations conducting activities on the territories of fewer than half of the constituent members of the Russian Federation.

Use of the word combination 'all-Russian sport federation' may only be used in the names of legal entities by public organisations after they acquire the status of all-Russian sport federations. An all-Russian sport federation has the right to use in its name the word 'union' or the word 'association', where such a word does not indicate the organisational and legal status of the body.

The charter of an all-Russian sport federation may exclude the possibility of membership by physical persons.

<sup>1</sup> V. I. Stolyarov. *Sotsiologiya fizicheskoi kultury i sporta: Uchebnik. (The sociology of physical culture and sport: a text-*

*book. Pub.: Fizicheskaya kultura, Moscow, 2005, pp. 161*

The members of all-Russian sport federations, in compliance with their charters, may include sport clubs, regardless of their organisational and legal status and associations of the same, conducting their activities primarily in the corresponding sport or sports. The list of types of sport, for the development of which all-Russian sport federations are created and conduct activities, with the possible membership of sport clubs and their associations, indicated in this section, is approved by the federal agency of executive authority in the field of physical culture and sport, taking into account the opinion of the Russia Olympic Committee.

At least seventy-five percent of the total number of votes of members of an all-Russian sport federation in the highest managerial body of the given all-Russian sport federation must be held by accredited regional sport federations that are the members of the given federation.

The all-Russian sport federations have the right, in the manner established by law, to:

- 1) organise and conduct, for the corresponding sport, championships, *pervenstvos* [championships] and Russia Cups, develop and approve provisions (regulations) governing such competitions, award them with the status of champions, winners of *pervenstvos* [championships], holders of Russia Cups, as well as delegating for a period of no more than three years the right to host such competitions to other physical culture and sport organisations, created in the form of non-commercial organisations;
- 2) hold all the rights for the use of the logos and symbols of selected sports teams in the corresponding sports, with the exception of the state symbology of the Russian Federation;
- 3) perform certification of trainers and sports referees in the corresponding sports, and control their activities;
- 4) select and represent athletes, trainers and sports referees for the corresponding sports, for the allocation of titles and qualifications by international sport organisations;
- 5) develop, taking into account the rules approved by international sport federations, rules for the corresponding types of sport, as well as approving the rules establishing rights and obligations, including sports sanctions, for subjects of physical culture and sport recognizing such rules;
- 6) perform the formation and training of sport teams of the Russian Federation in the corresponding types of sport, for participation in international sport competitions, and send them for participation in such competitions;
- 7) establish restrictions for participation in all-Russian official sport competitions in the corresponding sports for athletes, who do not have the right to play for selected sport teams of the Russian Federation in compliance with the provisions of international sport organisations hosting the corresponding international competitions;
- 8) participate in the formation of a Single Calendar for planning interregional, all-Russian and international physical culture events and sport events;
- 9) organise and conduct interregional, all-Russian and international official sport events in the corresponding types of sport;
- 10) make proposals for the inclusion of sport disciplines in the all-Russian registry of sports;
- 11) enter international sport organisations, acquire the rights and bear the obligations, corresponding to the status of members of international sports organisations, if such rights and obligations do not contradict the legislation of the Russian Federation;
- 12) receive financial and other support, provided for the development

2 It is clear that sport clubs hiring athletes under labour contracts do not, mandatorily or as a high priority, pursue the goal of generating profit from subsequent participation in professional sport. This is demonstrated by the large number of sport clubs, created in the form of non-profit organisations, and the fact that the last decades allow us to talk of profes-

sional sport in Russia as a form of activity that genuinely requires, as a rule, constant financial infusions from the club founders, or long-term loans. Professional sport in our country has, as yet, only reached the developmental stage of a form of commerce, although the degree of commercialisation is higher now in our country than ever before.

of the corresponding sports, from various sources not outlawed by the legislation of the Russian Federation;

- 13) exercise other rights in compliance with the legislation of the Russian Federation.

### Professional Sport

According to the law on sport, professional sport is a part of sport, aimed at the organisation and hosting of sport competitions, for the participation in which and for preparation for which, being their main activity, athletes receive compensation from the organisers of such competitions, and (or) wages;

During the development of the law on sport, deputies came to the conclusion that there is a need to reinforce in the text of the 2007 Law on Sport, the concept of “professional sport” (this term was not in the edition passed at first reading) and eliminate the absurdities of the past legal term, which effectively only covered one aspect of professionalism in this important and colossal part of sport - the aspect of compensation of the athlete’s work. The rigid linking of professional sport to entrepreneurial activity has also become a thing of the past<sup>2</sup>, as well as the aspect of being oriented to spectators, which is not exclusively inherent to this subset of sport. In other words, there is sufficient coverage of the characteristics of a team (‘game’) sport, where labour relations are typical (between a club and the athlete), as well as the characteristics of individual sport (tennis, figure skating, etc.), where civil-law relations, as a rule, arise, specifically with the organisers of tournaments. Moreover, the developers of this law understood that in each type of sport, altered or very different criteria may be applied for classifying an athlete as a professional (for example, in boxing this could be the number of rounds and the characteristics of the outfit, in figure skating the possibility to participate in paid shows, in football the receipt of a wage, exceeding the wage for participation by an athlete in competitions, etc.). This has led, so far, to a compromise regarding the portrayal of professional sport in the text of the law: it was decided not to give a legal definition of the professional athlete, and to exclude from the text of the RF Labour Code the term “professional athlete”. Due to the importance and complexity of professional sport as a social and economic phenomenon, in coming years one can expect attempts to either pass a separate law to regulate this sphere of activity, or the inclusion into the law discussed here, of a new chapter on professional sport.

After all, the term under discussion here is ‘suspended in a vacuum’ - it turns out to have no reinforcement by subsequent norms in the law on sport. Mentions of this part of sport in Articles 6 and 8 (on fostering of professional sport by the RF and constituent members of the RF) cannot be considered to satisfactorily regulate such public relations. Nevertheless, it should be remembered that the group of questions relating to the labour of athletes, who participate in professional sport in return for a wage, is regulated by a new chapter in the RF Labour Code (54.1), which came into force simultaneously with the law on sport. The renewed authorities of all-Russian sport federations, laid out in Article 16 of the law on sport, also facilitate the further organisation of professional sport. Effectively, the law on sport delegated the regulation of professional sport to the participants of such relations themselves and, where necessary, to all-Russian sport federations (limiting the number of league players, certification of sport referees, etc.). However, on the level of Russian legislation, the status of other participants of relations pertaining to professional sport remains wholly unregulated, for example: sports leagues, sports agents, subjects ensuring safety at professional competitions, etc. These are the prospects for regulation in this field.

### Labour by Athletes and Trainers

The issue of which branch is appropriate to regulate labour by professional athletes has been highly complex, as a result of the continuing discussion about which branch of law should regulate the labour of athletes. Moreover, the ‘battle’ between labour and civil law is complicated by the dualism between two sets of regulations, each of which bear directly upon the labour of athletes: legal acts of international and national sport federations, on the one hand, and the legislation of the RF, on the other.



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At the current time, there are three basic positions in the approaches to resolving this problem.

There are 'labourists', who insist on the preservation of the situation, whereby the labour of athletes can be regulated only by labour law, as was indicated in the 1999 law on sport.

A second group of sports lawyers could be called the 'civilists'; these consider that the relations of professional athletes with sports clubs must be regulated only by the norms of civil law, in part referring to the experience of the Anglo-Saxon system of law, and the fact that no one institution of labour law can adequately operate in professional sport. Some lawyers propose recognising the absence of any labour function among athletes and, given the unique characteristics of sport, the absence of receiving profit as the main motivation for their labour. For this reason, they propose regulation of the activities of professional athletes in a very different way: analogously to the activities of lawyers and notaries, providing them with special tax concessions by means of a separate law.

There is another group of lawyers, who hold a compromise position; they want to allow the regulation of the labour of athletes as part of a synthesis, either using labour contracts or civil-law agreements, as alternative options. However, it has to be recognised that amongst this last group, too, there are differing degrees of compromise. Some lawyers give priority to civil law and consider that this option will be more advantageous for professional sport in the higher sports divisions, while leaving the opportunity for low-paid athletes to sign labour contracts. Others note, with some justification, that the sporting activity of athletes in the primarily individual sports (tennis, track-and-field athletics, swimming, etc.) can hardly be regulated by a labour contract.

Thus, the state has resolved that in professional sport the most advantageous path is to use labour contracts, rather than civil-law agreements. The former offer the maximum, tangible social protection to an athlete, as an economically active, employed citizen exercising his right to work.

After all, one of the central problems of professional sport is the legal status of professional athletes who, until recently, were regulated by the law insignificantly, ineffectively and with contradictions. Such regulation concerns the difficult and hazardous work of tens of thousands of people under public scrutiny (for example, approximately 4,000 professional footballers). Their labour activity as athletes is extremely intensive, sometimes brief (as a rule, it is only at a young age), it is complicated by restrictions on opportunities to receive quality professional education, an enhanced load on the athlete's health, etc.

First, Article 2 of the 2007 Law on Sport stipulates the following terms of the RF Labour Code, which are important to understand:

athlete [*sportsman*]: a physical person engaged in a selected sport or types of sport, and playing at sport competitions;

trainer: a physical person possessing the corresponding secondary professional education or higher professional education and hosting educational and training events for athletes, as well as managing their competitive activities to achieve sport results.

In Article 348<sup>1</sup> of the RF Labour Code, "General Provisions", the provisions of the 2007 Law on Sport are virtually repeated, with respect to the definition of those categories of employee, who are subject to the provisions of this new chapter. In essence there is an assumed 'two-in-one' status of the labour functions of the athlete-employee, that can be seen to run through the entire text of the chapter:

- 1) preparation for sports competitions and
- 2) participation in sports competitions in a specific sport or sports.

This also has an effect on the resolution of the issues of sporting disqualification of an athlete, etc.

It is worth noting that the legal status of an athlete is heterogeneous, and is not limited exclusively to the provisions of labour law. This can be seen in the example of Article 24 of the 2007 Law on Sport, which covers the rights and obligations of the athlete (any athlete, not necessarily one who has signed a labour contract):

Athletes have the right to:

- 1) select types of sport;
- 2) participate in sport competitions in the selected sports in the manner, established by the rules of these sports and the provisions (regulations) on sport competitions;
- 3) the receipt of sporting ranks and sporting titles upon meeting the requirements and criteria of the Single all-Russian Sport Classification;
- 4) the conclusion of labour contracts in the manner, established by labour legislation;
- 5) assistance to all-Russian sport federations in the selected sports, to protect the rights and legal interests of athletes in international sport organisations;
- 6) exercise other rights in compliance with the legislation of the Russian Federation.

Athletes must:

- 1) meet safety requirements during participation in physical culture and sporting events, educational and training events, and when located at sports facilities;
- 2) not use doping substances and (or) methods, and in the established manner undergo mandatory doping control;
- 3) observe ethical norms in the field of sport;
- 4) observe the provisions (regulations) on physical culture events and sport competitions in which they participate, and the requirements of the organisers of such events and competitions;
- 5) meet sanitary and hygiene requirements, medical requirements, regularly undergo medical examinations for the purposes of ensuring the health and safety of sport activities;
- 6) fulfil other obligations in compliance with the legislation of the Russian Federation.

Effectively, an athlete already has a significant segment of the rights and obligations, established not by labour legislation, but by legislation on physical culture and sport, as well as the so-called "sport regulatory law".

Why do the legal acts of the organisers of sport events and the acts of all-Russian sport federations influence the regulation of labour by athletes and trainers? This phenomenon is manifest in several different ways:

1. The above acts directly regulate the competitive activity itself, i.e. the necessary actions by employees to achieve the necessary sporting result (the rules of the game and competition regulations);
2. The above acts reinforce the criteria for granting access to participate in certain competitions, which undoubtedly also has an effect on the labour relations of the athlete and the trainer (citizenship, age and gender requirements, deadlines and other criteria for application, etc.);
3. The above acts determine the calendars of sport competitions, the locations where they are to take place, the requirements for mandatory after-match or other interviews given to the mass media, requirements for observation by the participants of sponsorship contracts, contracts for TV coverage of the events, etc.;
4. The above acts may impose sports sanctions on athletes and trainers, that can exclude their subsequent participation in competitions or imply fines, payable by them or by their employer;
5. The above acts may also regulate extra-competition activity by athletes and trainers, for example, requiring observation of doping control procedures implemented by authorised persons in the [athlete's] home, or entering into negotiations on club transfers only with licensed sport agents.

In the light of the indicated importance for the athlete of a set of norms, directly regulating his participation in sport competitions, we can welcome the norm in Article 348<sup>2</sup> of the RF Labour Code, which states that employers are bound, both upon hiring, and during the period of validity of a labour contract, to ensure that athletes and trainers read, and sign to indicate having read, the norms established by the all-Russian sport federations, the rules for the corresponding

sports, the provisions (regulations) on sport competitions, the terms of employer contracts with sponsors (partners), with advertisers, organisers of sports events and all-Russian sport federations in that part, that directly concerns the labour activities of athletes and trainers.

As regards the contents of the labour contract, in compliance with part 3 of Article 3482 of the RF Labour Code, in addition to the terms, established by the second part of Article 57 of the RF Labour Code, the terms subject to mandatory inclusion in the labour contract with athletes are terms on the following:

- the obligation of the employer to ensure the hosting of educational and training events and the participation of the athlete in sports competitions, under the supervision of the trainer (trainers);
- the obligation of the athlete to observe the sport regime established by the employer, and fulfil the plan for preparation for sport competitions;
- the obligation of the athlete to participate in sport competitions only under the instruction of the employer;
- the obligation of the athlete not to use substances (doping) and (or) methods banned in the sport (hereafter: doping substances and (or) methods), and to undergo doping control;
- the provision, by the employer, of life and health insurance to the athlete, as well as medical insurance, for the purposes of the athlete receiving additional medical and other services in addition to the established, mandatory medical insurance programs, indicating the terms of these forms of insurance.

Several aspects of the above norms are worth noting.

The newly-introduced obligation of the employer to ensure that educational and training events are conducted, and that the athlete participates in sports competitions under the supervision of the trainer (trainers), in principle meets one of the main obligations of the employer to provide the employee with work, as stipulated by the labour contract (Article 22 of the RF Labour Code). However, a clarification was introduced on mandatory supervision by a trainer, that plays a crucial role in ensuring the quality performance by an athlete of his labour functions.

The obligation of the athlete to observe the sport regime may prompt questions regarding the enforcement of the law, as Russian legislation does not define the concept of such a regime. It is clear that the sport regime covers not only the athlete's working hours, but it is also likely that such a regime may be described in the text of the labour contract or in the local acts of an employer, and contain some restrictions for the athlete (diet, maintaining a weight category, performing physical exercise at home, a ban on smoking, consuming alcohol, and even a ban on intimate relations, for example, in the period of training and selection or on competition days). Violation of the sport regime could apparently become the basis for disciplinary liability to be applied against an athlete, or exclusion from training, or, which happens far more often, demotion of an athlete, or his gradual removal from active sports activities (removal from player list, not placing him in the main team, etc.).

The obligation introduced here to participate in sports competitions on the instruction of the employer only is connected with the support of a legitimate 'sport monopoly' by the club, over a player, which is observed in almost all team sports. This is a prerequisite for an honest game and the principles of competition organisation. This is also reflected in the special Article 3487 of the RF Labour Code, on the unique characteristics of labour by an employee combining the labour of athlete and trainer. However, the logic behind the obligation thus introduced also implies that an athlete should not be allowed to participate in competitions which could potentially be hazardous for him (and, therefore, for the future success of the club) (for example, extreme sports or even the same sport as with his employer but, e.g., in amateur competitions - town, district, corporate, etc. competitions). This rule has an exception, indicated in Article 3486 of the RF Labour Code, "The selection of athletes and trainers for the national sport teams of the Russian Federation", where the employer is bound to release an athlete to participate in the corresponding sport events

of the national sport team of the Russian Federation (for example, the Olympic Games, the World or European championship, etc.).

The obligation introduced here, for an athlete not to use substances (doping) and (or) methods banned in the sport, to undergo doping control, as well as the obligation of a trainer to take measures to prevent the use by an athlete (athletes) of doping substances and (or) methods flows from the international documents ratified by the Russian Federation: the Anti-Doping Convention ETS No. 135 (Strasbourg, 16 November, 1989) and the International Convention Against Doping in Sport (Paris, 19 October, 2005).

The enforcement of a new obligation promises to be highly challenging: the provision, by the employer, of life and health insurance to the athlete, as well as medical insurance, for the purposes of the athlete receiving additional medical and other services in addition to the established, mandatory medical insurance programs, indicating the terms of these forms of insurance.

This undoubtedly useful and necessary norm introduces three additional types of insurance for athletes. The hazardous and traumatic labour of athletes, when his life and health may be on the line, now requires mandatory, additional expenses by the employer, for the insurance indicated (after all, the injured person must have an opportunity to return to the sport after the trauma, or to finish his or her sporting career in dignity). A problem is possible in determining the terms of these types of insurance. The minimum levels of compensation are not determined in the legislation, and this means that the only remaining hope is the understanding, by the employers, of the real need for additional insurance, as well as for the possible establishment of the minimum levels of such insurance by all-Russian sport federations, which would allow various approaches to the application of this new obligation for employers in the various sports, divisions, sport disciplines, and would make it possible to stage-by-stage and progressively raise the bar for the additional insurance of athletes, which is as yet unfamiliar to the Russian environment.

A significant innovation is the long-awaited introduction of preliminary and periodical medical examinations of athletes at the expense of the employer.

The solution concerning temporary transfers from club to club is also of interest. During the final drafting of the bill, the corresponding article was subjected to criticism, including the statement of opinions that the curious option of "renting" athletes is unnecessary.

From a sports viewpoint, temporary, so-called "renting" of athletes is justified, and even necessary for the following reasons:

- 1) The number of athletes participating on the side of a team in a competition is, as a rule, limited, and this depends on the type of sport, or the division. For example, in Russian football, 60 people can play for one team (may be announced) in the Premier League or 35 in the second division, etc. Athletes who do not get onto the list effectively lose the possibility to perform their labour function - to play. By moving to a different club under rental terms, an athlete gains playing practice and the opportunity to demonstrate their skills, to improve their sportsmanship, to earn a larger wage (in the form of bonuses), whilst actually remaining an employee of the previous club (retains a guarantee of re-hire).
- 2) Young footballers, especially in well-known clubs, rarely receive an opportunity to demonstrate their talents, and therefore renting is the best option for their development as athletes.
- 3) By releasing a player for "rent", a sport club gains the opportunity to see the player in new conditions, and if the player can demonstrate his skills well, he can be taken back into the team, where he is placed in the main team.
- 4) "Poor" clubs, which do not have the opportunity to effect expensive transfers, gain the opportunity to invite young, high-quality and ambitious players, inexpensively. After all, the cost of the "rent" is far less than that of a full-fledged transfer.

Temporary "rental" of athletes is recognised by the international and national sports community, and it would be unacceptable to ignore it when tackling the complex issue of regulating the labour of athletes in Russia.

The new chapter of the RF Labour Code ‘fills the gap’, with respect to the possible justifications for dismissal of an athlete—these now include sport disqualification. It should be remembered that according to paragraph 14 of Article 2 in the 2007 Law on Sport, “sport disqualification of an athlete” implies the cessation of participation by an athlete in sport competitions, which is executed by the relevant all-Russian sport federation, due to violation of sports rules, the provisions (regulations) of sport competitions, due to the use of substances (doping) and (or) methods banned in a sport, due to violation of norms, approved by the international sport organisations, and norms adopted by the all-Russian sport federations.

It should be emphasised that the new chapter of the RF Labour Code also contains a large volume of legislative innovations, which were widely anticipated.

For example, several articles offer special protection to underage athletes, of each gender.

A guarantee is clearly and unambiguously stated, determining that the employee must, at his own expense, provide athletes and trainers with sports outfits, sports equipment and inventory, and other material and technical resources necessary to perform their work, and to maintain this outfit, equipment, inventory and other resources in a state that is fit for use.

The introduction of additional leave for athletes, as well as a guarantee that, in the case of a sports injury, the athlete will continue to receive wages, in full, during the period of therapy. Collective contracts, agreements, local legislative acts and labour contracts may stipulate the terms of additional guarantees and compensation for athletes and trainers, including:

- the performance of recovery measures to improve the health of the athlete;
- guarantees, extended to the athlete in case of his sports disqualification;
- the volume and procedure for payment of additional compensation in connection with moving to work in a different locality;

- on the provision of catering at the expense of the employer;
- on social and domestic services;
- on the provision of accommodation for the athlete, trainer and their family members for the duration of the labour contract;
- on compensation of travelling expenses;
- on additional medical services;
- on additional monetary payments to the athlete in cases of temporary disability or complete loss of the ability to work during the period of validity of the labour contract;
- on the employer covering the cost of the athlete’s education, in educational institutions;
- on additional pension insurance.

Finally, two additional justifications were introduced for terminating the employment of athletes, including by extended disqualification; the period of advance warning prior to unsolicited dismissal by an athlete has been extended to one month, and the right of the parties has been extended, to negotiate a payment in the case of unsolicited dismissal by an athlete without legitimate reasons.

It appears that this payment is not fully regulated by the text of the new chapter in the RF Labour Code. We believe that it makes sense to reduce the volume of this payment to a sum, not exceeding the average wage of the athlete, received from that employer, for a period of six months. However, a systematic interpretation of the Law on amendments and additions to the RF Labour Code No. 13-FZ and the 2007 Law on Sport suggests that it would be acceptable for the appropriate all-Russian sport federations to establish, in future, similar limitations for the clubs in their purview. It is clear that examples of legitimate reasons for unsolicited dismissal will be listed in their regulations, in order to establish the possibility of effecting such a payment in favour of the employer.



*Michael Gerlinger at the 8th Asser/Clingendael International Sports Lecture, The Hague, 19 February 2009, on “Good Governance in Sport in a European Legal Perspective”*



*Samuli Miettinen at the 8th Asser/Clingendael International Sports Lecture*



*Denis I. Rogachev, Mikhail Prokopets and Ian Blackshaw at the 8th Asser/Clingendael International Sports Lecture*

# Basics on Professional Football in Russia

by Mikhail Prokopets\*

## Introduction

The Russian Football Championship is undergoing rapid development. The standard of Russian football is constantly rising. Both the Russian national team and clubs have recently achieved major successes in the international arena (bronze medals for the national team at the Euro, wins by Zenit and CSKA at the UEFA Cup and the European Supercup). The Russian championship is universally recognised as now being strong enough to draw level with the four leading European championships (England, Germany, Italy and Spain) and has reached or exceeded the levels of the championships in the Netherlands, Belgium, and even France. Like any other rapidly developing field, Russian football is inevitably encountering a large number of challenges, and I will be able to cover only a handful of these in today's talk.

At the current time, almost nothing is known outside of Russia about the structure, unique characteristics and problems of Russian football, while there is more than enough information available about the other championships. Let us try to fill in the gaps.

In this talk, I would like to touch on problems in the structure of football competitions, problems faced by the Russian premier league, and problems related to TV broadcasting and the activities of agents.

## Structure

The current structure of Russian football can be illustrated by the following outline:

### Outline

The Russian Football Union (RFS), as a member of FIFA and UEFA, and in compliance with their internal rules and regulations, performs the general supervision and management of Russian football. The RFS was founded and acts as a non-profit organisation and an all-Russia public organisation, and has its members almost in all of the 83 constituent members of the Russian Federation.

For the immediate organisation and implementation of competitions, three separate legal entities have been created: the Russian Premier League (RFPL), the Professional Football League (PFL) and the Amateur Football League (AFL). All these organisations are founded as non-profit organisations, and have their own personnel, separate from that of the RFS, and are directly responsible for organising and holding competitions.

The RFPL was created in the form of a non-profit partnership, and brings together all clubs playing in the Russian championship premier league (the highest league), which are members of the organisation, while the management of clubs is implemented by the League Board, which takes all the key decisions with respect to the activities of the RFPL.

In essence, the clubs themselves take the key decisions (for example, regarding the number of league players, the number of teams playing, the sale of championship broadcasting rights, and the distribution of monies received) with respect to important aspects of the league's activities, and it is important to note that this takes place in a fairly efficient and rapid fashion, due to the small number of clubs.

Sixteen clubs play in the RFPL, the last two of which leave the RFPL at the end of the season.

It is worth noting that the RFPL has a limit on the number of league players: no more than 6 league players can be located on the field at any one time.

The Professional Football League (PFL) Association was founded in order to organise and host championships for the first and second divisions.

It brings together first-division clubs (22 teams) and second-division clubs (80 teams). The second division consists of five zones, into which teams are moved based on their geographical location. Five zone winners are entered into the first division, and the five teams left at the bottom of the league are moved into the amateur league.

The PFL also has a limit on the number of league players: in the first division, no more than two league players can be on the field at one time. In the second division, no league players may play at all.

Unfortunately, the crisis impacted all of Russian football very heavily in 2008, and especially PFL clubs. FC Khimki, an RFPL club, was almost declared bankrupt, and only desperate demonstrations by players helped to find the money to finance the club, at the last moment.

At PFL the situation, sadly, is even worse. The number of active clubs will most probably be cut in 2009 from 22 to 18, as about 5 different PFL clubs have already declared bankruptcy, and several others are on the verge of bankruptcy. Second-division clubs that were invited to replace bankrupted clubs sometimes do not wish to play in the first division, due to the high membership fees and the high cost of travel.

It is worth noting that football is not profitable in Russia for any club in the premier league, and all the more so for PFL clubs. The serious problems faced by clubs are primarily related to the fact that the majority of clubs have municipal funding, and during the crisis the state has heavily cut funding for professional sports, which has led to the bankruptcy of many clubs. Unfortunately, RF legislation does not yet stipulate concessions and privileges with respect to sponsors of sports teams, and for this reason it is not beneficial to commercial entities to fund them.

The relations between the RFS and leagues take the form of agent contracts, according to which the RFS transfers to the PFL and the RFPL the right to organise and host football competitions.

Nevertheless, overall control over RFS competitions also includes, amongst other rights:

- the right to confirm the results of competitions;
- the right to organise refereeing;
- organisation of the work of committees (such as the disciplinary committee, the committee for licensing agents, the dispute resolution chamber, etc.).

In addition, the RFS is responsible for the Russian national team and 14 other football teams, hosting the Russia Cup, beach football, mini-football, women's football, football for the handicapped and veterans' football.

## RFPL

I would like to say a few words about the RFPL league, which is responsible for hosting the premier league championship.

In November of 2007, a general meeting of the RFPL elected Sergei Pryadkin to be RFPL President for a term of 3 years.

This date is noteworthy, because previously the president was elected for a term of 1 year, and the president had to be the head of a club with RFPL membership. This meant there were two significant drawbacks: first, the club that provided the president received an unofficial advantage in the form of administrative resources; and second, the term of office was so short that as soon as a new president had come to terms with the status quo, his term was already coming to an end. Incidentally, the main goal of the league was to start earning money

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for the clubs, and previous presidents were not always successful at achieving this goal.

With respect to the business side of football, Russia as yet lags far behind her European colleagues. According to estimates taken from open sources, the aggregate income of the leading six professional European football leagues (including the RFPL) at the end of 2007 amounted to approximately 11 billion USD.

The main income flows are:

- a) sales of broadcasting rights for national championship matches within the country and the sale of international rights (up to 65% of total income);
- b) title and commercial sponsorship (20-25%).

Meanwhile, the income of the RFPL comes from sponsorship (52%) and the sale of broadcasting rights (47%). Income from other commercial sources is insignificantly small, and amounts to less than 1%.

To understand the current situation, it is important, and of some interest, to compare data on the income from the sale of TV broadcasting rights and the volume of advertising markets in 2007 (in US dollars).

Country	TV Income	Size of advertising market	Proportion (%)
UK	2.06 billion	25.8 billion	7.9
Spain	0.90 billion	8.8 billion	10.2
Italy	1.50 billion	11.1 billion	13.5
France	0.90 billion	13.3 billion	6.7
Germany	0.63 billion	21.8 billion	2.9
Russia	0.015 billion	9.5 billion	0.15

### Sponsorship

The total sponsorship in the European leagues amounted to approximately 330 million EUR in 2008.

For example, the English Premier League renewed a sponsorship agreement with the Barclay's banking group, which expired at the end of the 2006/07 season, for another three years. The contract sum was 65.8 million GBP (approx. 100 million EUR), compared to the current volume of 57 million EUR for three seasons.

In Russia, the proportion of sponsorship, as a percentage, amounts to approximately half of the income of the Premier League, which fails to correspond to the development trends seen in the European market. In absolute terms, the sum is very small - 24 million USD, which is several times smaller than similar sponsorship contracts of the leading European leagues. The main sponsors of the RFPL are Russian companies (Rosgosstrakh, Megafon, TNK and Baltika).

Western companies are mainly represented by their Russian subsidiaries (Pepsi and Nike). The parent companies of these sponsors are not yet rushing to invest larger sums in Russian football. However, negotiations are in full swing to increase the cost of those sponsorship agreements that are due to expire in 2008.

### Income Distribution

In the English Premier League, income derived from the sale of rights and sponsorship is distributed on the basis of a resolution of the clubs' general meeting. Some of the funds are allocated to the Professional Footballers' Association.

The remaining funds (the vast majority of the income) are divided into three categories (50% equally between all the Premier League teams, 25% depending on the position held, and 25% depending on the number of broadcasts of that club's games).

The Russian Championship assumes the English model for distribu-

tion of income from the sale of rights. The only changes are to the percentage relationships (40% equally between 16 teams in the current championship, 40% between 14 teams and depending on the position held in the previous championship, and 20% depending on the number of broadcasts on the Perviy Kanal TV channel in the current season).

The sums received by Russian football clubs from TV broadcasting are very small, and cannot significantly influence clubs' budgets. This is primarily due to the fact that, just a few years ago, football was broadcast free, via public-access TV, and many TV viewers are still reluctant to switch to paid channels and pay for something that they believe they have the right to watch for free.

Moreover, the low cost of the contract is also influenced by the lack of competition amongst cable channels. Russia essentially has just one high-standard cable channel, NTV+.

### The Near-Term Plans of the RFPL (2008-2010)

The near-term (2-4 years) plans of the RFPL are fairly ambitious. First, the RFPL is expected to increase incomes for clubs, given that the league does not currently utilise many commercial opportunities.

#### Changing the tournament format:

Currently, RFPL competitions are run on the spring-fall system, which does not match the European calendar, and creates serious problems for our clubs when participating in European cups. In the last few years, there have been discussions about switching to the European calendar, i.e. fall-spring. Most likely, the change will be implemented over the coming 2-4 years.

#### Commercial development:

It is planned to increase the annual income of the League from the sale of commercial rights to 90-100 million USD (or 70-80 million USD, given a poor economic situation).

The main goal in the second stage (2010-2012) is to increase the annual income of the Premier League to reach 200-250 million USD (or 150-200 million USD, given a poor economic situation).

#### Attendance of the premier league is very small, compared to European levels:

The average attendance of the Russian Championship in 2007 was 13,500, and rose to 15,000 in 2008.

#### Stadia:

Currently, only one stadium in Russia meets the highest category, "A", and can host the finals of international tournaments. This is Luzhniki (the Champions League final was held here in 2008). Also praiseworthy are Lokomotiv and Arena-Khimki stadia, which were built to European standards. Stadia are now being built by PFC CSKA and FC Zenit, while FC Dinamo is reconstructing its stadium.

### Strengths and Weaknesses of the Russian Business Model

#### Strengths include:

- TV and commercial rights are sold by the League centrally, which is the dominant trend in the leading European championships;
- a good showing by the Russian team at Euro 2008 drew the attention of potential sponsors to the Russian Championship, and provided the stimulus to raise the level of play, boosting viewer interest and, therefore, TV broadcast ratings.

#### Weaknesses include:

- the Russian Championship is not held in a single system, together with the European championships;
- it is impossible to secure sponsorship from beer producers and sweepstakes (Russian legislation forbids placement of advertisements for beer and gambling at stadia and on TV);
- the absence of competition on the paid TV market makes it impossible to significantly increase the price of rights for Russian TV channels;
- the absence of any other well-developed commercial products, that could be sold on the Russian and international markets.

The RFPL is currently considering several other, additional business development ideas, such as:

- merchandising and licensed products;
- attracting additional income sources by consolidating rights and assets on a non-exclusive basis, and the transfer of marketing and commercial rights by clubs within the RFPL;
- image and marketing rights to players, and their use for the commercial benefit of the league (on a non-exclusive basis);
- the transfer of rights to the use of images, the brand and logotypes of the club for centralised packaging of sponsor proposals, and development of additional football product opportunities;
- analysis and identification of new football products and services, currently in demand on the market.

#### Options for new products and services:

- creating a "football bar" for supporters, using existing federal chains and attracting new partners. Such bars can be used for holding football sweepstakes, and as points-of-sale for accessories and licensed products, and it will be possible to utilise such premises for the benefit of RFPL's official suppliers;
- organise a common system for the sale of football accessories at stadia and at specialist outlets (engaging a partner). Development of a product range, distribution system and control system.

#### Football agents

I would like to explain why I chose football agents as one of the problems to be discussed today. The fact is, that on 1 January 2009, a new set of rules came into force in Russia on the activities of agents, based on a new, 2008, edition of the FIFA rules. In addition, there has been a very lively discussion in football circles recently, in which football agents have been given numerous bad qualities, which they do not actually possess. In Russian football today, agents are being accused of a great deal: for example, that they act as intermediaries for bribing players and judges, that they serve as instruments for money-laundering by club owners, and that they fail to perform their immediate duties - helping football players progress in their careers.

Nevertheless, I would like to highlight several nuances, which distinguish the RFS rules from those of FIFA and the European rules and regulations on agent activities.

First, in compliance with RF legislation, for RF citizens to be employed abroad, they require a licence. That is to say, agents may secure employment for players in Russia, having no more than a FIFA

licence. However, in order to secure employment for a football player abroad, it is necessary to have a licence issued by the relevant immigration service.

Second, fairly severe sanctions have been requested, and introduced, with respect to football agents, footballers and clubs who violate these rules. There are around 20 different sanctions, and the maximum fine is 1,000,000 RUB.

FIFA's new rule, concerning limitation of the period of validity of an agent's licence to 5 years, was found by some to be perplexing and even disagreeable. Many consider this limitation to be unnecessary.

Third, the RFS has established limits on the compensation received by agents from a footballer: 10% for adult footballers and 3% for footballers under 16. Although many agents say that they do not take compensation from minor players, the RFS considered it necessary to reinforce this on paper.

Another new requirement stipulates that the RFS must be provided with a document, signed by the footballer, confirming the receipt of a hard copy of his agent contract. This rule appeared after frequent complaints from footballers that agents were not issuing them with copies of their contracts.

Another new rule relates to the relatives of footballers and their lawyers; although the RFS rules do not apply to them, they can now, if they wish, communicate with the RFS about their clients.

Following the example of England, the RFS also introduced registration of foreign agents operating in Russia. This took place after the RFS began to receive complaints concerning some foreign agents. Now, every such agent must register with the RFS. Otherwise, notification about a violation will be forwarded to the relevant national association, with a request to impose sanctions.

In addition, the RFS now has the possibility to exercise fairly rigid control over the activities of agents. At any moment, the RFS has the right to request any information from agents concerning their activities, including financial activities. This new rule, too, failed to meet with agents' approval.

In conclusion, it can be stated that although the activities of certain agents does give grounds to suspect they may be playing a dishonest game and possibly be violating the rules of FIFA and the RFS, it must also be understood that this is only one side of the problem. Many, if not all, agent violations would be impossible without the collusion of dishonest managers and club staff. After all, any deal reflects the will of two sides, and to heap the blame onto the agents alone would be tantamount to turning a blind eye to the problem.



## Sports Law Course at the University of Peloponnese - Sparta, Greece

At the University of Peloponnese in Greece ([www.uop.gr](http://www.uop.gr)) there are many different faculties. One of them is the Faculty of Human Movement and Quality of Life Sciences having the city of Sparta in Greece as its seat (3 Lisandrou Str, 23100-Sparta, Greece). In this Faculty of the University of Peloponnese, operates the Department of Sports Organization and Management. The goal of the Department of Sports Organization and Management is:

- To cultivate and promote science through research in the fields of sports, economy and administration, giving emphasis in the domain of sports entities.
- To provide to the students education in the fields of economic management and administration of sports entities (private and public) as well as service administration (private companies, educational and cultural organizations, local government, tourism and entertainment, health and non - profit and non - governmental organizations).
- To provide to the students the necessary means to achieve a successful scientific and professional career at a national and international level.

*continued on page 135*

# The Rules of Natural Justice: What Are They and Why Are They Important in Sports Disciplinary Cases?\*

by Ian Blackshaw

## Introductory Remarks

When sports governing bodies deal with disciplinary cases in which sports persons have infringed their rules and regulations, for example, on doping, they are, in effect and legally speaking, exercising a form of private justice. In other words, they are acting judicially, that is, in the same way as a judge in court proceedings. As such, they are required by the general law to act fairly and properly. In other words, not arbitrarily, but in accordance with standard norms of behaviour that have been established and followed in the past. These basic norms of judicial behaviour have come to be known as 'the rules of natural justice'. And the rules are designed to provide a minimum of legal protection for all those appearing before bodies exercising an adjudicative function. However, the rules have been extended to administrative decisions, for example those affecting property rights (see *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180).

In this Paper, we will explain what the 'rules of natural justice' are and how they are applied in practice, with some examples from actual sporting cases; and we will also discuss their importance and significance in a sporting context and the legal and practical consequences which might flow from any failure to respect and uphold them.

We will begin by defining the 'rules of natural justice' and giving some sporting examples of them.

## The 'Rules of Natural Justice'

There are two main rules: the so-called 'rule against bias'; and the 'right to a fair hearing'.

### *The 'rule against bias'*

This rule is encapsulated in the Latin tag: '*nemo iudex in sua causa*'. In other words: 'no one may be a judge in his own cause'.

A sporting example of the application of this basic rule may be found in the case of *Revie v Football Association* [1979] The Times, 14 December, in which members of the Football Association disciplinary tribunal, who had criticised the former England manager, Don Revie, before a hearing, were disqualified on the basis of a likelihood of bias. As this case demonstrates, there need not be *actual* bias, but a *risk* of bias will be sufficient to satisfy this rule and call into question the decision made.

Of course, anyone with a financial interest in the outcome of a disciplinary matter will have a 'conflict of interests' and may not sit as a member of the deciding body, because clearly he/she would not be able to satisfy or conform to the 'rule against bias' in such circumstances.

Again, sports governing bodies have a tendency to include many of their officials as members of their disciplinary bodies/tribunals; and this can contribute to a finding by the Courts of bias in such cases, as occurred in the *Don Revie* case mentioned above.

### *The 'right to a fair hearing'*

This rule is encapsulated in the Latin tag: '*audi alteram partem*'. In other words: 'let the party be heard'.

A sporting example of the application of this basic rule may be found in the case of *Russell v Duke of Norfolk* [1949] 1 All ER 109. Mr Russell brought a legal action in the High Court claiming that he had been found guilty by the Stewards of the Jockey Club of misconduct

(the doping of a horse) and become a disqualified person (had his licence withdrawn) without an inquiry being conducted in accordance with the requirements of natural justice, in particular the right to be heard. The Court dismissed this claim holding that the inquiry conducted by the Stewards was fair.

Russell appealed to the Court of Appeal, which upheld the High Court ruling. However, Lord Denning took a different point of view, arguing that where the withdrawal of a licence was coupled with a disqualification from any kind of involvement in racing for life, this was a much more serious matter and had this to say on the subject of Russell not being allowed to attend and put forward his point of view and defend himself at the inquiry (at p 119):

"Common justice therefore requires that before any man be found guilty of an offence carrying such consequences, there should be an inquiry at which he has the opportunity of being heard.... It is very different from a mere dismissal of a servant or withdrawal of a licence, or even expulsion from a club."

In practice, the 'right to a fair hearing' will require:

- prior notice of a decision;
- consultation and written representation;
- a duty to give adequate notice of a disciplinary;
- an oral hearing;
- the right to call and cross examine witnesses;
- legal representation; and
- the requirement to give reasons.

It is quite amazing, in practice, how many sports bodies fail to give reasons for their decisions which may have far reaching sporting and financial consequences!

## Case Study: Jones v WRFU

The case of *Jones v Welsh Rugby Football Union* [1997] The Times, 6 March, merits particular study because it provides an object lesson in how not to organise and conduct disciplinary proceedings of sports bodies.

In this case, Mark Jones played for Ebbw Vale Rugby Football Club, and was sent off for fighting during the club's game against Swansea in November 1996. Jones appeared before the WRFU Disciplinary Committee for the purpose of explaining his conduct and commenting on the referee's report. He was denied legal representation, but due to a severe speech impediment, he was allowed to be represented by an official of the Ebbw Vale Club. The Club representative was, in fact, a QC, but his only function was to speak in place of Jones and not to act as his advocate.

The standard WRFU procedure applied, under which the player's representative commented on the referee's report, and the referee also commented and was also questioned by the Disciplinary Committee. However, the Committee refused Jones' request that his representative be allowed to comment on the video of the incident, in order that it might be demonstrated that Jones was acting in self-defence. The Committee also refused to allow Jones' representative to cross-examine the referee. The Committee viewed the video of the incident in private, and again refused Jones or his representative the right to comment on it. As a result of the hearing, the Disciplinary Committee decided that the referee had been correct in sending Jones off and imposed a thirty days' suspension on him. The Constitution of the WRFU granted power in relation to disciplinary matters to the

\* Paper presented on 16 May 2009 at a meeting of the Judicial Commission of

British Swimming in Birmingham, United Kingdom.

Committee. These rules had the effect of conferring on the Committee complete discretion in relation to the manner and form of its hearings.

Jones and his Club, Ebbw Vale, proceeding by writ, sought a declaration by the High Court that the decision to suspend was invalid, and an order obliging the WRFU to refrain from the imposition of the suspension until the completion of a new disciplinary process. Jones argued that any order should amend the disciplinary process in such a way as to allow him legal representation, to call and question witnesses and to compel the Committee to examine or review evidence in his presence, giving him the right to make submissions relating to it.

The Judge granted an interlocutory injunction preventing the imposition of the suspension prior to the final resolution of the issue. In the judgement, the Judge agreed it was arguable that, in refusing to vary its procedure, not on the basis of any rules but on the grounds of custom and practice, the Committee acted in a manner lacking in fairness. In this case, the Judge felt that it was arguable that Jones had effectively been denied the right to defend himself properly.

Following this interlocutory decision, the WRFU was keen that the matter should be resolved as speedily as possible. In response to the judgement, the WRFU implemented changes to its rules, granting a player or his representative the right to question the referee and to call and cross-examine witnesses. The amendments to the rules also required video evidence to be viewed in the presence of all the parties and provided that players' requests for legal representation should be treated on their merits, in conformity with the judgement of Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591. In that case, Lord Denning, on the subject of how proceedings of a private tribunal, referred to and regarded, legally speaking, as a 'domestic tribunal', were to be conducted, famously had the following to say at p 605:

*"In many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done, in them, by a good layman than by a bad lawyer..... But I must emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule."*

In other words, there are limits to informality in such proceedings, especially where informality gets in the way of a party otherwise receiving a fair hearing or 'trial'.

### Consequences of Failing to Observe the 'Rules of Natural Justice'

If a sports body fails to observe the 'rules of natural justice', the party affected by such conduct can challenge the decision in the ordinary courts; and, if the challenge is upheld, have the decision quashed. Such legal action can result in adverse publicity for the sports body concerned and tarnish its reputation. After all, sport is essentially a matter of fair play - as much off the field of play as on it!

Sports bodies, generally speaking, do not like outside interference in the exercise of their affairs and functions, preferring to settle their disputes with their members 'within the family of sport', that is, confidentially and outside the courts system and within their own 'judicial' bodies/tribunals under a system of private justice as laid down in their statutes and regulations dealing with disputes and disciplinary matters.

Furthermore, court proceedings, generally speaking, are to be avoided by sports bodies, because they are slow, inflexible and technical, not private or confidential and also costly compared with alternative forms of dispute resolution, such as arbitration and mediation, the latter particularly lending itself to the settlement of sports-related disputes (see the author's forthcoming Book, entitled, 'Sport Mediation and Arbitration' to be published by the TMC Asser Press, The Hague, The Netherlands, in June 2009).

### Concluding Remarks

The 'rules of natural justice' ensure that persons appearing before bodies exercising judicial type functions, including sports governing bodies acting, for example, in disciplinary cases, are treated fairly and receive a fair 'trial'. So that justice is done and seen to be done!

Cases such as *Jones v WRFU* clearly show the 'rules of natural justice' can be extremely useful in helping sports governing bodies, when exercising their regulatory functions, to avoid acting unfairly and having their decisions challenged before the courts and, if found wanting, overruled.

Generally speaking, the English Courts, as noted above, are reluctant to intervene in sports disputes, but, as Lord Denning has pointed out in *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591 at p 606:

*"The long and the short of it is that if the court sees that a domestic tribunal is proposing to proceed in a manner contrary to natural justice, it can intervene to stop it."*

You have been warned!

*continued from page 133*

- To organize postgraduate studies providing specialized knowledge of a high level in the fields and knowledge domains of the Department.
- To contribute to the development of greek sports, in respect with its management and administration
- To provide specialized knowledge of Organization and Management to company and organization employees and executives in the form of certified seminars.
- To contribute to the social and cultural life of the prefecture of Laconia and the periphery of Peloponnese in general.
- To organize postgraduate studies that promote the education of scientists specialized in the specific knowledge domains of the Department.
- To promote science and research especially in the fields of protection of social civil rights, as they are defined in the framework of the E.U., the enhancement of the social state structures, the prevention and security in combination with social growth, the continuous education, the adult education and the design of new social and educational policies and institutions.

The Courses concerning Sports Law taught in our department are:

1. SPORTS LAW COURSE
2. SPORT GOVERNANCE COURSE
3. SPORTS INTERNAL MARKET AND COMPETITION RULES COURSE

These courses are taught by Assistant Professor of sports law Marios Papaloukas.

*www.papaloukas.gr, email: mpapalouka@gmail.com*

# “Champions chapuza”: the Huntelaar Case

by Robert Siekmann

Over the past few weeks, the Spanish media have held forth long and loud on the topic of “Champions chapuza”. Total media attention seems to be monopolised by a single question: how can a major club such as Real Madrid overlook article 17 of the UEFA Champions League regulations, resulting in it apparently being impossible to register both K-J. Huntelaar and L. Diarra at the same time for the remainder of that competition?

On the other hand, as far as I know, the media have not spent much time (to say the least) examining the background to the problem: if article 17 of the aforementioned regulations really does prevent these two players being registered simultaneously, for the reason that they have already played this season in the UEFA Cup for their respective former employers (Portsmouth FC and Ajax Amsterdam), is such a ban legal?

This is the question that we will attempt to answer here.

To recap, a summary of article 17 states that each club is allowed to modify its list of players registered for UEFA competitions in January by registering three new players, only one of whom may have already played in a UEFA competition that season for another club and provided further that that player *“has not been fielded in the same competition for another club”* or *“for another club that is currently in the same competition”*.

UEFA also adds, *“if the player’s new club is playing in the UEFA Cup, his former club must not have played in the UEFA Cup at any point in the current season”*.

First of all, one would have to agree that this wording could have been better written and that - as a result - it could be understood in good faith as meaning that this restriction applies only to those players who have played for another club in the same competition, in this case in the UEFA Champions League.

In any event, the rules of Swiss law relative to interpreting contracts (since UEFA regulations have to be considered as such, whereas they are certainly not a law) allows us to head reasonably in this direction.

Next, and more fundamentally, if this wording says what UEFA wants it to say (i.e. “Real Madrid has to choose: Diarra or Huntelaar”), we believe that such a restriction or obstacle is in breach of several fundamental principles of Community law, as interpreted by the European Court of Justice (referred to as “EJC” below).

In fact, within the European Union, all businesses (and football clubs in particular) and all workers (particularly footballers) benefit from the right of the free circulation of workers (article 39 of the EC Treaty), the right to the free provision of services (article 49 EC) and the right to exercise their business activities against a background of free competition (articles 81 and 82 EC).

Having said that, it cannot be disputed that article 17 of the UEFA regulations places restrictions, obstacles and constraints on these freedoms: only three new players may be registered and only one of them may have played European matches previously (and furthermore, provided that it is in a different competition).

Are restrictions such as these compatible with Community law?

In the first place, we can cut straight to an argument hammered ceaselessly until recently by the international federations and the IOC: by virtue of a claimed “sporting exception”, all of the standards used to organise sporting competitions - including the article 17 we have already mentioned - would be “purely sporting rules” and, as such, would miraculously escape the scope of European Law.

In its Meca-Medina verdict on 17th July 2006, the EJC unequivocally rejected this argument, judging that even the anti-doping rules of the IOC fall within the scope of Community law, which in this case mean the law on competition.

Then, in this same ruling, the EJC indicated to the sporting regulators that they do not lose all freedom of action for all that: restrictions or obstacles to certain Community freedoms will nevertheless be considered as “justified” when the rule applying this restriction has a necessary objective and that the restriction in question “is inherent and proportionate to the pursuit of that objective”.

In other words: there is no question of a blank cheque in favour of the sporting regulators; it is only on a case-by-case basis, after a detailed and practical investigation, that a particular rule may be stated to be in compliance with Meca-Medina case law, or not.

So what about this famous article 17 of the UEFA regulations? Does it pass the “Meca-Medina” test?

Apparently, according to UEFA, the aim of the restrictions imposed by article 17 is to guarantee a competitive balance between the various teams taking part in UEFA competitions, the Champions League and the UEFA Cup, by preventing one team from strengthening its playing ranks excessively and weakening another team excessively.

We will start from the hypothesis that such an objective is both noble and necessary. Which means that we will restrict ourselves to examining whether the restrictions provided for under the rule are essential for achieving that objective (i.e. inference) and whether they are proportionate.

But a straightforward example enables us to understand that not only are these restrictions not essential, they are totally useless, because they in no way guarantee that the stated objective will be achieved!

Indeed, there is nothing in article 17 that prevents Real Madrid from strengthening its playing squad by signing the three best players playing in South America, while nothing prevents Ajax Amsterdam from weakening its ranks by transferring its three best players (its entire team, in fact) to various European clubs. Hence one team would be strengthened, while another would be weakened - and yet article 17 would have been abided by.

Also, how can it be considered that these restrictions are inherent when they also cover teams already eliminated from the European competitions (for example Portsmouth FC and its former player, L. Diarra), whose competitive balance, by definition, no needs to be protected, as claimed?

Finally, is it not excessive (and hence disproportionate) that a player who played for 30 seconds in July for a club knocked out in the first qualifying round for the Champions League, should see, in January, his cherished dream of being transferred to a top-flight European team, smashed like an egg for the reason that this great club will not sign a player, no matter how excellent, because he can’t qualify for Champions League?

The way we see it, article 17, as currently worded and interpreted by UEFA, has no chance of passing the “Meca-Medina” test. That’s how any ordinary jurisdiction charged with upholding Community law would rule. It is also probably how the Court of Arbitration for Sport would have ruled as a body that cannot and - we believe - would not want to overrule Community law.

Also, while the EJC conceded in its Lehtonen ruling the concept of transfer periods, provided they are reasonable and non-discriminatory, it in no way admitted that the concept of “quotas” (in this case a maximum of 3 players), since this notion conflicts by definition with the essence of Community legal order.

So, “Champions chapuza”, indeed. But the “chapuzero” is not necessarily who you might think!

In a press release dated 27th January 2009, thanking Real Madrid for withdrawing its appeal previously lodged with the Court of Arbitration for Sport, Michel Platini, president of UEFA, said of the arguments put forward by Real Madrid: *“they were raised in good faith and are a good opportunity to discuss within the competent UEFA bodies the question of whether article 17.18 of the current UEFA Champions League regulations may need to be amended for the future seasons”*.

UEFA indeed has every interest to come up with a new version of article 17 as quickly as possible: one that respects Community law. Because the next club or player affected by the current version of the wording may well demonstrate less understanding and altruism than Real Madrid.

# Paragraph 31 of C-519/04 *Meca-Medina* Reversed

by Katarina Pijetlovic\*

In paragraphs 31-33 of *Meca-Medina* judgment the European Court of Justice has set aside the decisions of the Court of First Instance by finding an error in law. It held that:

‘even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity, that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles. However, [...] the Court of First Instance held that the fact that purely sporting rules may have nothing to do with economic activity, with the result that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC. In holding that rules could thus be excluded straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting with regard to the application of Articles 39 EC and 49 EC, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, as set out in paragraph 30 of the present judgment, the Court of First Instance made an error of law.’

Therefore, the rules found to be purely sporting for the purpose of freedom of movement provisions, are not by the virtue of that fact also excluded from the assessment under competition provisions. They have to satisfy the requirements of both set of the Treaty rules separately. The UEFA's Gianni Infantino commented:

‘[...]it is important to recall that the European Court of First Instance reasoned that if a sports rule was “non-economic” in character (and so outside the prohibitions of free movement law) then logically the same rule would be outside the prohibitions of competition law as well. It is submitted that there is a powerful logic to this position, stemming from the fact that the EC Treaty itself only applies to “economic activities” within the meaning of Article 2 (an approach that goes back to *Walrave*). Consequently, if a sports rule is “non-economic” in character the Treaty (i.e. all of it) does not apply and that is the end of the matter. However, in what can only be described as a strange twist, the ECJ held that even if a sports rule has nothing to do with economic activity for the purposes of free movement law, that conclusion did not necessarily mean that the same rule has nothing to do economic activity for the purposes of competition law. In other words, the Court appears to contemplate that a sports rule could be “non-economic” (and outside the scope of free movement law) but could nevertheless infringe Articles 81/82, despite the fact that these latter Treaty provisions are only concerned with the economic relationships of competition. It is very difficult to find logic in this.’

While reflecting the concern of most of the sporting world, this comment is based on legally flawed interpretation of the judgment. The ECJ had merely reminded us that the two sets of provisions protect different freedoms of action and include different elements in analysis and that those differences deserve recognition. In this sense, the rule which is considered purely sporting might not have the effect on economic freedoms of athletes or clubs guaranteed to them under Articles 39, 43 and 49 but it might have such effect on the guarantees related to undistorted competition under Articles 81 and 82; purely internal situation are outside of the scope of internal market rules but may not be outside competition rules; internal market rules are

addressed to states and competition rules to undertakings, *de minimis* doctrine is applicable only in relation to competition, etc. On the other hand, rules and practices emanating from private bodies, such as sporting federations, have been found in breach of provisions freedom of movement provisions (for e.g., in C-415/93 *Bosman* or Case 13/76 *Donà*), and conversely, activities of public bodies have been a subject to the competition provisions (for e.g., in Case 155/73 *Italy v. Sacchi* or C-244/94 *Pêche*). Basic analytical framework is the same for both sets of rules, they both are directly effective and both echo the same underlying Community objectives related to attainment of common market and economic integration.

While it is true that general principles in Part One of the Treaty, and in particular those outlined in Articles 2-5, apply to the entire of the Community activity under the Treaty, it does not mean that their specific reflection is the same in relation to each and every of those activities. Whatever the degree and type of convergence between competition and free movement provisions the reflection of those principles will be different in the course of the enforcement in one of the activities. This is due to the fact that there is no and there cannot be a total convergence in the application of the two sets of rules for they protect different economic freedoms. The core constitutional provisions of the Treaty, such as the reference to ‘economic activities’ within the meaning of Article 2 EC and as interpreted by *Walrave and Koch*, or the principle of subsidiarity in Article 5 EC, are therefore to be taken functionally from provision to provision. This functional approach is dictated *a priori* by the difference in analytical elements, and scope and content of prohibitions, exceptions and protection among articles, but also by the requirements of each article on case-by-case basis. Formalistic application in which the effect of the basic Community principles under one article could determine the outcome of another would deprive those other Treaty articles of their proper function when applied to the certain factual situation.

To give an example, Article 81(1) contains jurisdictional limitation not applicable in the free movement cases. Namely, in Case 5/69 *Völck* the ECJ ruled that Article 81(1) will apply only if restrictions on competition have an appreciable effect on trade between Member States. According to this doctrine, it would be possible that agreements or decisions restricting the numbers of non-national players in semi-professional national league of certain sport escape the condemnation under Article 81(1). However, because the doctrine is virtually unknown in freedom of movement provisions (apart from the *Keck* rule and wholly internal situations), the agreement would impede market access for workers and fall foul of Article 39 EC; determination of the applicability of exceptions and proportionality would follow.

This illustration proves that paragraph 31 of *Meca-Medina* works in reverse as well: The rules of sport bodies that do not fall under competition provisions on the basis of their insignificant effect are within the exclusive competence of the Member States in accordance with the principle of subsidiarity enshrined in Article 5 EC. This core constitutional principle as reflected in the *de minimis* doctrine would remove the agreement or decision from the scope of the Community competence in relation to competition provisions. Nevertheless, this is not to be interpreted so as to give the principle such generic effect of removing the agreement from the scope of all other provisions of the Treaty. Rules of sports bodies would have to satisfy also the specific requirements of Article 39, which is applicable despite the consid-

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erations of scope of the effects, as long as the situation is not wholly internal. So in the *reverse* wording of the Court in paragraph 31 of the judgment:

even if those rules/practices do not constitute restrictions on competition because they concern *de minimis* agreements and, as such, do not fall under Article 81 and are not a subject to Community competence, that fact means neither that the effects of those rules/practices necessarily fall outside the scope of free movement provisions nor that they do not satisfy the specific requirements of those articles, despite the lack of Community competence regarding competition matters in the case at hand.

Hence, the argument by Gianni Infantino is equal to saying that since the Community does not have a competence in the case on the basis of principle of subsidiarity due to the fact that the rules produce

insignificant effect in competition matters, it means that the Community does not have competence in all other matters affected by the rule. Finally, it seems to be of no importance for the application of the articles of the Treaty that the rules are purely sporting and non-economic in character as long as they produce economic effects on those whom they govern. Having said that, it is important to emphasise that the proportionate 'purely sporting rules' with non-economic character but with economic effects are not capable of breaching any of the Treaty articles. So it all comes down to proportionality which seems to be the only factor that the sports governing bodies have to take into consideration to stay on the safe side. This cannot be construed as such intrusion into sporting autonomy to warrant all the complaints from the sporting authorities related to *Meca-Medina* judgment. They are without legal base and thus the concerns are unfounded.



# The UK Central Council for Physical Recreation (CCPR): Protecting the Sporting Landscape

by Tim Lamb\*

## Introduction

CCPR1 is the alliance of some 280 national governing and representative bodies of sport and recreation across the UK, spanning the whole spectrum of the sector, from football to folkdance, from rounders to rugby and includes organisations as diverse as the FA, the LTA, the British Wheel of Yoga and the British Darts Organisation. Its aim is to promote, protect and provide for sport and recreation, acting as an independent voice for around 150,000 clubs and 10 million regular participants across the UK. Our role is to ensure that the views of governing bodies, clubs and participants are represented in Westminster, Whitehall and beyond and that the interests of the sector are upheld and promoted wherever possible. This means taking every opportunity to showcase the good work of sports organisations - national and local alike - up and down the country, and identifying and tackling the bureaucracy and red-tape that often frustrates their efforts.

## What we do in Europe

European sports policy offers as many opportunities as threats to sport in the UK and as the shape of future policy is still evolving it is vital that the UK's voice is heard and that future policy is not dictated by non-national sporting bodies or the European institutions. The needs for sport are specific, but vitally they are specific for each country and for each sport - for example a one-size-fits-all approach based on European football will not be effective for all sports. In fact it would be patently nonsensical.

To ensure that the voice of sport in the UK is heard, CCPR is proactive in European affairs. We are an associate of the EU Sports Office based in Brussels as well as part of our European equivalent, the European Non-Governmental Sports Organisation (ENGSO) - the only sporting body with consultative status at the European Commission. CCPR is also part of the Department for Culture, Media and Sports' (DCMS) working group formed to develop an international strategy for the UK with respect to European policy; a strategy which will defend sport's self-determination and autonomy in the UK.

Following the 2007 White Paper on Sport, the emphasis on sport in the European Union increased dramatically. The paper included

the Action Plan 'Pierre de Coubertin', which was the Commission's blueprint for future policy. Despite the non-ratification of the Treaty, the Commission has not been prevented from effecting its action plan. As of November 2008, the Commission claims to have implemented or to be in the process of implementing nearly 70% of the Action Plan's 53 associated actions. Physical activity guidelines have now been developed by a Commission working group, and another group has been set up to examine anti-doping. A study has been completed to analyse home-grown players, and further studies in 2009 will analyse the roles of players' agents and the financing of grassroots sport. A conference on the fight against racism and violence in sport has already been held, while another to examine controversial proposals for licensing systems for European club sport will be held in 2009.

On top of the Commission's plans, the French presidency of the EU prioritised sport highly during its term of office. It is due to President Sarkozy and Minister for Sport and ex-rugby union coach Bernard Laporte that a desire for tighter financial controls of sports clubs and quotas on foreign sportspeople originated, and the sports ministers' meeting in November in Biarritz aimed to create a common position on these and other proposals.

The Lisbon Treaty, if it is ratified by Ireland, will give the European Union the competence to work directly in the field of sport for the first time. This is not to say that the effect of the European Union has never been felt in sport; the infamous Bosman ruling in 1995 changed the face of professional football forever. You can go as far back as the 1970s to see the influential effect that the European Court of Justice has had on sport. The Walrave ruling of 1974 is the basis on which national sports teams can consist of just nationals against the principle of discrimination on the grounds of nationality, whilst the 1976 *Dona v Mereto* case ruled that quotas on foreign players in the Italian Serie A were unacceptable - a topic still of hot debate 30 years later.

Regardless of the EU's lack of a competence in sport, its influence on the sporting world is huge; primarily where the sporting and economic worlds collide. It is vital for sport that proposals, discussion and legislation at European level take into account sport's unique characteristics and it is for this reason that CCPR is so active in Europe.

## Fiscal and regulatory

Fiscal and regulatory issues are central to sport's ability to flourish. In recent years, we have seen unprecedented investment in sport at elite

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1 CCPR Official website: [www.ccpr.org.uk](http://www.ccpr.org.uk).

and school levels, but at the same time we have seen a large increase in the administrative burden faced by sports clubs from grassroots to elite level. CCPR lobbies Government to make the sporting landscape more favourable to grassroots clubs, widening the base of participation in sport and increasing the quality of sporting provision so that talented sportsmen and women can move through the sporting pyramid to elite level, where they can achieve their full potential.

Issues affecting grassroots clubs are plentiful and often quite surprising. For example increases in water drainage charges are adversely affecting many property-owning clubs, and licence requirements around club bars and music are placing an unwelcome financial and administrative burden on thousands more. In terms of more obvious issues such as funding, currently around 19% of clubs are operating at a deficit with a further 36% only just breaking even. Added to this is the impact of the Olympics - money originally intended to fund grassroots sport has been diverted towards the London 2012 budget. CCPR has therefore developed a Subs for Clubs campaign to allow Community Amateur Sports Clubs (CASCs) to claim Gift Aid on junior membership subscriptions. The cost to the Treasury would be relatively small - around £1.2 million rising to approximately £4.6 million by 2012 - but the value to community sport would be huge, allowing clubs to invest in facilities and improve the quality of the coaching they provide. However, despite cross-party support from many Parliamentarians, the Chancellor of the Exchequer's Pre-Budget Report failed to include this proposal.

One fiscal issue that resonates through all the different levels of sport is VAT. It has been identified by the Finance and Governance Forum - a group of finance and legal heads from across sport - as one of the major issues affecting all national governing bodies in sport. It is a major obstacle to Sport England's work to develop integrated facilities that meet community and curriculum needs through the Government's Building Schools for the Future programme. As with any extra tax, VAT adds to the financial burden on the community clubs who face a fight to survive.

At the elite level, CCPR's work covers the broadcasting of major sporting events. We work to ensure that our members adhere to the spirit of the Listed Events concept in the sale of all their broadcasting rights in respect of those events not covered by the list, ensuring the widest possible coverage whilst securing the best possible financial return for sport. We are also committed to ensuring that our members reinvest a portion of the revenue they generate from the sale of their broadcast rights into grassroots provision.

Intellectual property in sport is an important aspect of CCPR's regulatory work. Many of our larger members have their own legal and regulatory teams with specific expertise in this area. However, CCPR is in a unique position to be able to bring major autonomous sports together to speak with one voice. An example of this is our work on betting in sport - some sports are susceptible to corruption because money can be gambled not only on the outcomes of fixtures but also on specific events or episodes taking place within them. This problem has been exacerbated by the advent of 'in play betting', which allows betting on specific aspects of a fixture or its result after the match has actually begun. CCPR, using its influence in the UK and across Europe, is part of a campaign to oblige gambling companies to pay a financial contribution to national governing bodies, with two justifications: a fair return for the gambling companies' use of the sport's data and intellectual property; and a contribution to the costs that sports incur in maintaining and enhancing the integrity of this event.

## **Countryside and water**

All of CCPR's members need access to a place to practise their sport or activity - whether this is indoors or outdoors, on water, land or even in the air. CCPR's members also seek to ensure that their practices are safe and sustainable. CCPR supports them in both these areas.

CCPR pays close attention to planning and rights of way legislation to ensure that decisions are made which support a physically active lifestyle and the provision of sporting facilities. For instance we are:

- Currently campaigning to secure an exemption for sports clubs from having to pay proposed fees on property improvements
- A member of the Government's school playing fields advisory panel established to minimise the loss of school playing fields
- Supporting our member's work in order to secure better access to countryside and water for the pursuit of healthy activities.

We assist our members in developing good practice in their activities, from welfare through to safety. For example CCPR provides the secretariat to the Adventure Activities Industry Advisory Committee (AAIAC) which is currently developing a non-statutory safety accreditation scheme for providers of outdoor activities.

CCPR is acutely aware that the pursuit of sporting activities now should not threaten other people's enjoyment of these activities in the future. We are therefore taking the lead in the promotion of environmental good practice and have recently achieved British Standards accreditation for our environmental practice, as well as supporting our members to develop their own sustainability policies.

Many outdoor pursuits take place in sensitive areas where public access has to be managed in order to protect its natural or cultural heritage. Yet outdoor enthusiasts and conservationists share many of the same objectives:

- to enjoy the natural environment
- to appreciate our cultural heritage
- to expand their understanding of natural processes
- to protect and improve what they enjoy

CCPR has worked with partners to deliver the Best of Both Worlds website ([www.bobw.co.uk](http://www.bobw.co.uk)) which helps increase opportunities for outdoor sports and recreation, whilst enhancing the enjoyment, appreciation and protection of the sensitive environments in which they take place - demonstrating that you can indeed have the best of both worlds.

## **Conclusion**

In 2008 elite sport has shown that with the right targeted investment and support it can deliver success. But if Britain is to fully realise the benefits afforded by sport and recreation it needs to create the right environment for grassroots sport to flourish too. Success does not simply breed success; clubs need to be nurtured, allowed to develop and grow, and supported throughout their lifetime. They shouldn't be hit by unnecessary costs and administrative burdens, preventing them from providing sport to the community. If sport is to prosper and, for the sake of our ageing and growing population - as well as an unhealthy one - it needs to, then it must be helped to do so, and obstacles should be removed rather than placed in the way. A future without sport and physical activity - whether elite or amateur - is unimaginable, but with many communities facing the closure of sports clubs, it could become a horrible reality.



# Sports Law in the Caribbean: Growth and Development

by J. Tyrone Marcus\*

## 1. Introduction

“20/20 for \$20 million!”

This motto could be heard all around the tropical shores of the Caribbean islands just over six months ago, as the England cricket team prepared to do battle with the Stanford Superstars. Evidently the match was almost aborted after a major sponsorship row arose involving event organiser Sir Allen Stanford and his group and regional telecommunications giants Digicel. The Stanford/Digicel dispute was the latest in a string of sporting disputes which all but confirmed the dire need for sports law in the Caribbean.

## 2. Sponsorship and Branding

Last November saw one of the most high profile sporting disputes in the Caribbean in recent times involving Texan entrepreneur Sir Allen Stanford, the West Indies Cricket Board (WICB) and Digicel, the primary sponsors of the senior West Indies Cricket Team. The dispute, not surprisingly, centred on sponsorship and branding rights as the Stanford Superstars comprised at least 12 players who were either current or past representatives on the West Indies cricket team. This was at the heart of Digicel's case, the company claiming that the team selected was in essence a West Indies team, over whom Digicel exercised sponsorship rights thanks to a five-year contract with the WICB worth almost US\$20 million. The pre-arbitration negotiations were rather interesting with Stanford making a tempting three-limbed offer: payment of Digicel's legal fees, not engaging a rival sponsor and thirdly, awarding Stanford the major branding rights, in particular, on the team kit. Digicel did not entertain the thought and ultimately did not need to since the London Court of International Arbitration ruled in its favour. The key contractual provision under consideration in Digicel's sponsorship agreement was the clause which stated that the contract covered a West Indies team, a team that purports to be a West Indies team or any team that could be reasonably perceived as being a West Indies team! It was quite a statement when the Stanford Superstars came out in their kits with huge frontal Digicel branding while Stanford had to settle for much smaller branding on the sleeves and chest. A victory for official sponsors was won.

## 3. Regulation of Football Agents

The recent decision in Kelvin Jack v. Imageview Management Limited [2009] EWCA CW 65, has the potential to be a watershed ruling in the complex area of regulating football agents. Trinidad and Tobago international goalkeeper, Kelvin Jack, who represented his nation at its historic first appearance at a senior FIFA World Cup in Germany in 2006, won a significant victory for players in their dealings with agents. Lord Justice Jacob in the UK Court of Appeal addressed the critical question whether an undisclosed side deal was a breach of Imageview's duty as an agent. In holding that Jack could recover the fees received by Imageview, the Court issued a clear statement that it will closely monitor and discourage situations where conflicts of interest and compromised integrity may arise. The judgment is destined to shape the jurisprudence of both the European and Caribbean courts.

## 4. Ambush Marketing

The lead up to the International Cricket Council's (ICC) Cricket World Cup 2007 was a pivotal point in Caribbean history. Not only was the event the largest ever sporting show hosted by the region, but it also introduced new and exciting terminology to the sport-loving public: ambush marketing!

Also known as parasitic marketing, this concept refers to the attempt by an individual or organisation to claim an association with a major event and so benefit from the profile and goodwill attached to that event. The only problem is that the ambusher has not paid to gain the prestigious association and the effect is to diminish the investment and reduce the value of the rights of official sponsors, partners and licensees.

The passing of the ICC Cricket World Cup 2007 West Indies Act (popularly called “Sunset Legislation”) in nine host countries brought with it strong protection for brand owners and the event's commercial partners. A Master Rights Agreement worth US\$550 million was added incentive for regional Governments and Opposition parties to support the Act!

The Caribbean now has a useful template for future Anti-Infringement Programmes that may be implemented for upcoming sporting events.

## 5. Team Selection and legitimate expectation

In 2007, the Trinidad and Tobago Olympic Committee was in the unfamiliar position of being a Defendant in a High Court action. The main issue raised in this case was that of eligibility criteria for team selection. Rifle shooter Takoor Sankar claimed that a legitimate expectation was created causing him to believe that he would represent his national team at the Pan Am Games in Rio de Janeiro, Brazil in 2007. Before the court, the National Olympic Committee of Trinidad and Tobago was found to have acted reasonably and with transparency in both its communication to Sankar and in its adherence to selection criteria for the Games in question. There was neither a breach of its own constitution nor that of the Pan American Sporting Organisation (PASO), resulting in a failed claim.

## 6. Anti-Doping

Jamaica's Anti-Doping in Sports Act 2008 could not have come at a better time for the land of reggae. Often called “the sprint factory” Jamaica has astonished the world by consistently producing elite athletes. Names like Merlene Ottey, Veronica Campbell, Asafa Powell and of course Usain Bolt are just a few of the world-class sprinters produced by this nation of 2.5 million people. Yet, a lack of proper doping control facilities and laboratories in the region as a whole has caused onlookers to view with some reservation, and perhaps even suspicion, the prowess of the Caribbean athletes. Indeed, this reality could have taken away from the region's moment in the sun last August at the 2008 Beijing Olympics where in the marquee event, the 100m final, six of the eight finalists were from the Caribbean, including gold-medal winner Bolt and silver medallist Richard Thompson from Trinidad and Tobago. And while there is little reason to doubt the quality and credibility of the Caribbean product, greater strides are needed to keep pace with the global fight for drug-free sport. With few Caribbean nations having a National Anti-Doping Organisation (NADO), there is heavy reliance on the limited resources of the Caribbean RADO (Regional Anti-Doping Organisation) based in Barbados. Slow progress, yes, but progress nonetheless.

## 7. Conclusion

It is noteworthy that a couple of the aforementioned disputes were resolved outside the Caribbean. The time is opportune for the establishment of a Sports Dispute Resolution Centre for the region. Just how urgent the need is could be debated.

Another debate has been going on for many years concerning the birth and evolution of “Sports Law” as against “Sport and the Law.” Whichever designation is eventually accepted matters little. There is a palpable marriage of Sport and Law, and the new couple has found a place to honeymoon in the Caribbean.

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# Hooliganism in Ancient Rome\*

by Steve Cornelius\*\*

## 1. Introduction

The biggest threat to professional football in modern times is not doping, nor is it the extravagant lifestyles and excesses of football players or the exorbitant fees paid to secure the services of individual players. It is also not the economic crisis that plays havoc with economies the world over, nor is it gambling or match-fixing. The biggest threat to football today is the unruly behaviour of fans. Events where fans have verbally abused players, chanted racist slogans and pelted the pitch with all kinds of missiles are legion. And then there is hooliganism. Some fans seem to revel in bloody battles with rival fans and police forces. Hooliganism in particular remains an ugly blemish on the face of the beautiful game.

Ironically, fan behaviour is also the one variable over which football authorities have the least amount of control. Indirect measures of dealing with troublesome fans have to be employed, such as playing matches in empty stadiums or penalising clubs for their fans' unruly behaviour. Football authorities must also rely on state authorities to intervene and maintain some measure of control.

When South Africa entered a bid to host the World Cup, at first unsuccessfully for 2006 and then with success in respect of 2010, the one question on many people's minds were: "What about the hooligans?" And with the Confederations Cup and World Cup approaching rapidly, it is a question which deserves some further attention.

Hooliganism may seem to be a modern phenomenon which is closely associated with the modern sport of football. However, a glance through history shows that it is also a problem faced by the ancient Romans. And since the Romans shaped the world's modern legal order, perhaps the football and state authorities can take some guidance from the way in which the Romans dealt with the problem.

## 2. Background

In Western legal tradition, in particular continental civil law systems based on Roman law, the Roman emperor Justinian I is held in high esteem. It was he who commissioned a series of works which would eventually come to be known as the *Corpus Iuris Civilis*. And if it was not for this monumental work, Roman law would probably not have survived and exerted the vital influence which it eventually did have on our modern civilisation.

However, there is also a dark side to Justinian. Procopius, the Greek historian who lived in the times of Justinian and actually served as legal counsel to Belisarius, one of the leading generals in Justinian's army, tells a tale of corruption, fraud, deceit, oppression, genocide and lawlessness which portrays Justinian in a less than favourable light.

## 3. The Rise of Hooliganism

One aspect of the general lawlessness in the times of Justinian which has significant parallels in modern times, relates to the conduct of spectators at the chariot races. Procopius explains that there were four groups involved in the chariot races, the Blues, Greens, Reds and Whites. The Blues and Greens enjoyed massive support among the people and even Justinian himself was a supporter of the Blues.

Initially, these groupings merely determined where the various supporters would be seated in the hippodrome during the chariot races, but in time the rivalry between the Blues and the Greens became very intense. This eventually led to scuffles between the two groups of supporters that got increasingly violent as time went by, eventually graduating into all-out street brawls in which spectators were often seriously injured or killed. Finally the street brawls got so out of hand that even women became involved and innocent passers by were no longer safe.

The authorities in Byzantium tried in vain to contain the violence and some hooligans were arrested to face torture or execution. In 531

AD, after another series of street brawls, a number of the perpetrators were arrested and sentenced to death. On New Year's Day in 532 AD, the condemned men were being led to their execution when supporters of the two groups, ignoring their rivalry for the moment, attacked the procession and freed the prisoners. A major riot ensued, which became known as the "Nika Revolt" after the rioters' cries of "nika"<sup>1</sup> or "conquer". The crowds congregated in the hippodrome and pronounced Hypatius, nephew of the late emperor Anastasius, emperor.

## 4. The Solution

Initially Justinian prepared to flee Byzantium, but his wife Theodora intervened and convinced Justinian to seize back control of the city. For this purpose, Justinian relied on his trusted generals, Belisarius and Mundus who, like their soldiers, were veterans of the Persian campaign.

Belisarius led a charge on the rioters congregated outside the hippodrome and his soldiers relentlessly struck down anyone in their way. When the crowd noticed the soldiers' advance, they retreated into the hippodrome. Mundus and his troops had in the meantime entered the hippodrome and fought their way through the rioters who were too lightly armed and vastly outclassed by the experienced soldiers. Belisarius entered from the opposite side and the rioters were trapped between two armies which showed no compassion, not standing down until more than 30,000 rioters had fallen by the swords of the soldiers.

Not surprisingly, this massacre proved to be the end of major incidents of hooliganism in Byzantium.

## 5. Conclusion

The Romans may have shaped the world's modern legal order, and the football and state authorities can take guidance from many principles expressed in the magnificent legal works commissioned by Justinian. But I doubt whether his solution to the problem of hooliganism will receive any consideration...

\* This note is based entirely on the accounts given by the Greek historian, Procopius in his treatises *History of the Wars* (*Ἰστορία τῶν Πολέμων* in Greek or *De Bellis* in Latin) and *Secret History* (*Ανέκδοτα* in Greek or *Historia Arcana* in Latin).

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1 *Nika* in Greek

by Ian Blackshaw

## UK Athletes Sports Image Rights Dispute

Top British athletes are to meet with UK Sport and the British Olympic Association (BOA) to try to settle a potential dispute over the use of their valuable image rights. UK Sport wants athletes to sign a contract to be part of a sponsorship scheme to cover a £50m shortfall in the government's £300m funding package in connection with the London Olympics in 2012.

The scheme is designed to bring in private investment and would require athletes to promote its commercial partners. But athletes are concerned that the deal could affect their exploitation of their individual image rights with other companies and firms.

UK Sport has responded to these concerns by claiming that any work required will not compromise private deals; and are hoping to discuss the matter with the athletes and their agents, as soon as possible, to put a stop to any potential row breaking out between them. All 1,400 publicly-funded athletes must agree to the terms to qualify for UK Lottery Grants, but there are believed to be around 80 athletes who are opposing the proposed scheme.

A UK Sport representative has remarked in general:

"The majority of athletes have not had any questions over this, and we are committed to finding resolution with those that have."

Currently, athletes, who receive Lottery Funding, are required to give up three days each year for promotional activities, and UK Sport insists that the new arrangements will not significantly increase those demands.

"The three days we are asking for is on the back of the very substantial public funding being invested in the athletes already, and we would not want to have to consider that investment," he added.

BBC sports news correspondent, Gordon Farquhar, has explained that the deal has been put together to try to fill a shortfall in funding ahead of London 2012 and adds:

"The Team 2012 initiative is designed to bring in private sector investment to plug a £50m funding hole. It's hoped that it will develop into a significant funding stream in the future for elite sport."

But private companies are concerned that the new sponsorship scheme could devalue their deals with the individual athletes that they are sponsoring by putting conflicting pressures on them. In other words, diluting their valuable image rights for which not insignificant sponsorship fees have been paid.

UK Sport hopes that the situation can be clarified and any misun-

derstandings ironed out in an explanatory meeting with the athletes concerned. Furthermore, UK justifies their plan in the following terms:

"Team 2012 is a crucial part of the fundraising for elite sport and it needs everyone involved to get behind it. It is a new approach, and it is not surprising that some higher-profile athletes want a better understanding about what it means for them. But it also offers a real opportunity for sponsors to help support the whole mission through to 2012. It would be disappointing therefore if that meant we did not have a positive response from athletes, and we believe that once the issues about it have been fully discussed there will be a much better understanding."

This spat between top athletes and UK Sport is a classic clash that crops up, from time to time, between the commercialization and exploitation of individual athletes' image rights and the use of them to promote wider group interests - in other words, collective exploitation of their image rights. As usual, it is a balancing act between competing interests and a fair compromise, therefore, needs to be found. It is, in certain respects, analogous to the exploitation of footballers' image rights on an individual basis compared with their exploitation on a team or collective basis. So, perhaps a compromise in the athletes' case can be reached along the lines of clause 4 of the standard English Football Association Premier League Contract of Employment (FAPL Contract), which was introduced at the start of the 2003/04 season to deal with this kind of potential conflicting situation and seems to be providing, in practice, a suitable and workable sharing of the image rights of players in a so-called 'Club Context' (as defined in the clause) and in their individual context. Apart from all these arrangements, footballers are allowed to have their own boot sponsorship agreements and goal keepers their own gloves' deals with sponsors who are not team sponsors and to wear the corresponding branding, which would otherwise conflict with the team branding.

For further information and comment on the detailed provisions of clause 4 of the FAPL Contract and their application, and, in particular, sub-clause 5, which deals with a player's general freedom to conclude individual image rights deals outside the scope of clause 4 generally, see '*Sports Image Rights in Europe*', Ian S Blackshaw & Robert C R Siekmann (Eds), 2005 T M C Asser Press, The Hague, The Netherlands, ISBN 90-6704-195-5, at pp 338 - 343.

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## The 6 + 5 Debate Continues

When the 'supremo' of world football, Sepp Blatter, gets a bee in his bonnet, he is like a dog with a bone that will not let go! And so it is with the 6+5 proposal, designed to safeguard competition in a sporting sense. But the ongoing debate is whether such restrictions prevent competition in an economic and business sense and also fall foul of the freedom of movement of workers provisions of the European Union (EU).

What Blatter is set on doing is to introduce a rule whereby the number of foreign players is limited in a team and this proposal has been overwhelmingly approved by 155 of the member national football associations of FIFA; and the FIFA Executive Committee endorsed the rule in May 2008. Under this rule, at the start of each match, a club must field at least six players who would be eligible for the national team of the country of the club. But there would be no limit on substitutes and no limit on the number of non-national players that clubs can sign. However, the proposal was subsequently - six months later in fact - dismissed as illegal by the European Commission and most EU Governments on the grounds that it

amounts to discrimination in the work place and is also a restriction on the free movement of workers contrary to the provisions of the EC Treaty.

It is interesting to note that - several years before *Bosman* which outlawed restrictions on the free movement of out of contract players - the European Parliament passed a Resolution on 11 April, 1989 approving a Report by Mr Janssen van Raay on behalf of the Committee on Legal Affairs and Citizens' Rights in which it declares in the following unconditional terms:

"... the restriction on the number of foreign players entitled to play for a professional football team to be a proscribed determination on grounds of nationality, a contravention of freedom of movement pursuant to Article 48 of the EEC Treaty and a violation of Article 85 of the EEC Treaty, in so far as nationals of Member States of the European Community are concerned."

However, in a recent and interesting development, the Institute for European Affairs (INEA), which had been commissioned by FIFA to

study the issue, claims in a 191 page Report dated 24 October, 2008 and published on 26 February, 2009, that the idea of restricting foreign players in league games does not fall foul of EU rules on the free movement of workers.

“There is no conflict with European law,” the INEA chairman, Professor Jürgen Gramke, told a press conference in Brussels. He insisted that the Report, although commissioned by FIFA, was entirely independent. “We took no instructions from FIFA [and] INEA accepted this commission on condition that our requirements of complete independence were met.”

The Report states that, under EU law, the “regulatory autonomy” of sporting associations is recognised and supported. “The key aim of the 6+5 rule in the view of the experts is the creation and assurance of sporting competition. The 6+5 rule does not impinge on the core area of the right to freedom of movement. The rule is merely a rule of the game declared in the general interest of sport in order to improve the sporting balance between clubs and associations.”

Of course, the rule may have as its aim a sporting objective, but that *per se* does not exempt it from the application of EU Law in so far as the rule, which it certainly does, involves “an economic activity”. In other words, has economic effects. The EU Law has been consistent on this point since the decision of the European Court of Justice (ECJ) in the case of *Walrave and Koch v. Union Cycliste Internationale* in 1974. In particular, the so-called ‘specificity of sport’ principle recognised by the EU ‘White Paper on Sport’ has been qualified - much to the annoyance of the International Sports Governing Bodies, including FIFA - in two recent landmark rulings by the ECJ: *Meca-Medina* in 2006 and *MOTOE* in 2008. The INEA Report, in my opinion, fails to take the intricacies, nuances and effects of these two rulings sufficiently into account when reaching its conclusion that the FIFA 6+5 rule is not incompatible with EU Law.

Again, the so-called ‘regulatory autonomy’ of sports bodies, claimed by the Report, is not absolute, but is also subject to the qualifying principles established by the above rulings. Of course, the

International Sports Governing Bodies are free to regulate their respective sports, but under and subject to the General Law, including EU Law; to argue otherwise is too simplistic and plainly wrong!

However the Report, to be fair, does recognise that the 6+5 rule may constitute a so-called ‘indirect discrimination’ because “it is not directly based on the nationality of professional players”. Instead it “merely considers entitlement to play for the national team concerned, and any possible indirect discrimination can be defended on the basis of compelling reasons of general interest”. But what are these compelling reasons of general interest? Arguments based solely on a bland general statement that sport should be regarded as being special and treated as such have not proved to be legally sound before the European Commission or the Court!

Furthermore, Professor Gramke argues that the Report’s conclusions justifying the compatibility of the 6+5 rule with EU law can also be applied to other team sports, such as handball, basketball and ice hockey: “It has an important protective function for the whole of international sport, so that sport can remain sport.” Again, the sporting argument!

I would add that I am not the only one to criticise the INEA Report: it has also been criticised by two other leading sports lawyers - one an academic and the other an experienced practitioner - as, respectively, “not being a serious academic study but, rather like the Arnaut Report, merely FIFA propaganda,” and “rather strange!”

A spokesman for FIFA informed the media that the Report would form the basis of fresh talks with Commission officials, including the employment commissioner, Vladimir Spidla. The FIFA President, Sepp Blatter, is determined to see the 6+5 rule in place by the start of the 2012-13 season and the Commission is currently equally determined to block it. In spite of the glowing INEA Report, Blatter, in my opinion, will continue to be up against stiff opposition from the EU and may well find himself ‘off side’.

Watch this space!

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## Pot of Gold: Phelps’ Fall From Grace

The unquestionable hero of the Beijing Olympics, Michael Phelps, who collected eight gold medals for his performances in the swimming pool, has admitted to “regrettable behaviour”, after a notorious UK Sunday newspaper, the ‘News of the World’, that specializes in exposing the rich and famous, published on 1 February, 2009, a photograph of him apparently smoking cannabis.

The picture of Phelps, who is 23, was taken in November 2008 at a party at the University of South Carolina, when he was on a long break from training, and showed him inhaling from a glass pipe, that is normally used for smoking cannabis.

Phelps has apologised to his fans and says that the incident would not be repeated. The US swimmer also confirmed that the photograph was genuine and told an international news agency:

“I engaged in behaviour which was regrettable and demonstrated bad judgment. I’m 23 years old and despite the successes I’ve had in the pool, I acted in a youthful and inappropriate way, not in a manner people have come to expect from me. For this, I am sorry. I promise my fans and the public it will not happen again.”

The US Olympic Committee said in a statement that it was “disappointed” with Phelps’ behaviour, and added:

“Michael is a role model, and he is well aware of the responsibilities and accountability that come with setting a positive example for others, particularly young people,” it said in a statement. In this instance, regrettably, he failed to fulfill those responsibilities.”

USA Swimming, his Governing Body, said that it hoped that “Michael can learn from this incident and move forward in a positive way”.

Also, Travis Tygart, head of America’s anti-doping agency, said Phelps’ participation in a pilot test programme, designed to increase the accuracy of doping tests, could be at risk because of his behaviour, adding:

“For one of the Olympics’ biggest heroes it’s disappointing, and we’ll evaluate whether he remains in that programme.”

Phelps broke seven world records in Beijing, eight American records and eight Olympic records to become the most decorated male Olympian of all time with a total of 16 medals, including 14 golds. And, in January, 2009, he was named the United States Olympic Committee’s sportsman of the year for 2008.

Incidentally, it is not the first time that Phelps has been in trouble; he has previously been involved in drink driving!

So, how has the International Olympic Committee (IOC) reacted to this latest incident? The IOC has accepted Phelps’ apology, and has said that it has no reason to doubt Phelps’ sincerity or commitment to acting as a role model.

Interestingly, the Olympic hero has not said whether, in fact, he had taken drugs. In other words, he has not denied smoking cannabis.

However, this should have no impact on the medals he won at Beijing, as smoking cannabis out of competition is not an offence under swimming’s international doping regulations. Phelps has also escaped punishment by the United States Olympic Committee, who, said the news was disappointing, but they expected him to move on and to set the type of example expected from a great Olympic champion.

But his mistake could still prove rather costly in a financial and business sense, as Phelps is a high-profile athlete with lucrative spon-

sorship deals; and such negative publicity could prejudice those contracts. Most major sponsorship contracts with high profile elite athletes contain so-called 'morality clauses'.

Such provisions need to be precisely defined to avoid them being held to be legally unenforceable on the grounds of vagueness and uncertainty. Thus, if the sports personality behaves in an anti-social, dishonest or illegal manner, for example, tests positive for performance enhancing drugs and is suspended from competition, or, indeed, uses illegal recreational drugs, and if either of these particular contingencies are expressly covered in the contract, such conduct can - and probably should - lead to the termination of the contract at the option of the sponsor.

To introduce precision in the 'morality clause', yet at the same time make it comprehensive and flexible, wording along the following lines could be used:

"The Sports Personality shall, at all times, during the period of this Agreement, act and conduct himself/herself in accordance with the highest standards of disciplined and professional sporting and personal behaviour and shall not do or say anything or authorize there to be done or said anything which, in the reasonable opinion of the Sponsor, is or could be detrimental, whether directly or by association, to the reputation, image or goodwill of the Sponsor, its products and/or services, or any of its associated companies. The Sports Personality shall not, during the term of this Agreement, act or conduct himself/herself in a manner that, in the reasonable opinion of the Sponsor, offends against decency, morality or professionalism or causes the Sponsor, its products and/or services, or any of its associated companies, to be held in public ridicule, disrepute or contempt, nor shall the Sports Personality be involved in any public scandal."

Of course, the term 'associated companies' will need to be defined on a share control basis.

The advantage of such a 'morality clause' is that it lays down objective standards/norms of good behaviour. For, as one English Judge once remarked when morality was invoked in support of a claim: "This is a Court of Law not of Morals!" At the same time, the clause gives the Sponsor the freedom to decide whether or not those standards/norms have been breached and what action to take as a result.

To ensure compliance with a 'morality clause', either a 'stick' or carrot' approach can be taken by the Sponsor. Under the former, a financial penalty will be exacted for any breach. This raises, under English

Law, the 'hoary chestnut' of whether the amount involved is an unenforceable contractual 'penalty' or an enforceable 'liquidated damages' provision. Apart from this, such a provision may be difficult, in practical terms, to enforce as an 'after the fact' type of sanction. On the other hand, it may be better to use the latter approach and award a 'bonus' payment for 'good behaviour'. This should act as an incentive and encourage compliance with the terms of the 'morality clause'. Put the other way round, an attractive 'bonus' payment should act as a disincentive to bad behaviour. Incidentally, express provisions should also be included in the Sponsorship Agreement in respect of any adjustment/reduction of a sponsorship fee based on "inappropriate behaviour" of the Sports Personality; and any dispute between the parties on this subject should be expressly referred to arbitration or mediation by, for example, the Court of Arbitration for Sport.

It is also useful and advisable to supplement a 'morality clause' with a contractual provision requiring that, in the event of any breach, the offending party shall hand over to the Sponsor the management and control of a public relations damage limitation exercise, to enable the Sponsor, as far as and to the extent possible, to mitigate any loss of goodwill or reputation as a result of the breach. Such a campaign would also include a press charm offensive!

Of course, the ultimate sanction for any breach of a 'morality/good behaviour' clause is termination of the contract, which right should be expressly reserved in all cases. It should be noted, however, that this is a right - and not an obligation - and so the Sponsor is free to decide, according to the circumstances of each particular case, whether or not to exercise it. This will often be dictated by purely marketing reasons, especially if the breach occurs during an expensive advertising and promotional campaign, of which the Sponsorship of the athlete concerned is a key element. In other words, sadly, financial rather than ethical considerations are likely to prevail! Another example, perhaps, of the integrity of sport being sacrificed for financial and big business gains.

Judged against the above criteria and considerations, Phelps may well, on this occasion, escape any cancellation of any lucrative sponsorship deals, but probably not a written warning from his Sponsors to ensure, in his own words, that his fall from grace is never repeated. Whether he deserves to 'get away with it' so to speak is another matter! And, on this point, opinions are bound to vary.

But the whole affair certainly goes to prove the old saying that 'heroes often have feet of clay!'

## World Anti Doping Agency Rule on the Whereabouts of Athletes Rule Challenged on Human Rights Grounds

A key weapon in the armory of the World Anti-Doping Agency (WADA) in the war on doping in sport is the subject of a legal challenge that is being mounted on behalf of a group of Belgian athletes in a Belgian Court.

Brussels-based sports lawyer, Kristof de Saedeleer, who is acting for them, claims that the WADA rule that requires elite Olympic athletes and those competing in major sports to make themselves available to drugs testers for one hour a day, between 0600 and 2300, three months in advance breaks European privacy laws, namely, the right to privacy and family life under the provisions of article 8 of the European Convention on Human Rights of 1950. In other words, the whereabouts rule is in breach of the athletes' human rights. The athletes' whereabouts are to be notified online and any changes are to be updated by e-mail or text message. De Saedeleer argues that: "There is no need for all these people to give their whereabouts for the next three months" and that such a rule is "a draconian measure."

Failure to be where an athlete said he/she would be, if the testers come a-calling, counts as a strike. And three strikes in an 18-month period and you are out, with an automatic ban from competition, as

Olympic and World 400m champion Christine Ohuruogu discovered to her cost. Likewise, failure to fill out the form correctly - or failure to provide full details of the athlete's competition and training schedules, three months in advance - also count towards an athlete's three-strike limit.

De Saedeleer is acting on behalf of 65 athletes, cyclists, footballers and volleyball players, who have been brought together by 'Sporta', an organisation that looks after the interests of professional sportsmen and women in Belgium. And the legal challenge is aimed at the Flemish Regional Government, which is responsible for anti-doping in the Dutch-speaking part of Belgium, and is the result of the Government's hard-line imposition of the revised WADA Code, which came into force on 1 January, 2009.

The revised Code, which constitutes a tightening up of the doping testing standards that have been in force since 2004, is the legal framework within which all anti-doping measures in sport operate; and the whereabouts rule is arguably WADA's most potent weapon for catching drugs cheats.

The concept is a simple one: drug-testers must be able to adminis-

ter no-notice, out-of-competition tests anytime and anywhere. This is believed to be the only effective deterrent against drugs cheats. To do this, however, the testers must, of course, be able to locate the athletes and, thus, the whereabouts system is the answer. But is it legal?

De Saedeleer has likened the system “to putting a whole town in prison to catch one criminal”. In other words, in his view, the system is excessive and goes too far. And Bjorn Vlemminckx, a 24-year old striker with the Belgian football club KV Mechelen, one of the athletes concerned about its application, is reported to have said: “We have to inform them of everything.” And adds: “If I want to go to the cinema, I have to update the site to say I’m going to the cinema. But I can’t always get to a computer. If they call me and I’m not in the right place they can suspend me. I don’t think that’s right.” A fair point!

On the other hand, the proponents of the whereabouts rule claim that the rule is reasonable and proportionate. In fact, the requirements have actually been reduced to one hour a day from the 24/7 requirement previously applied by a number of anti-doping organizations. Furthermore, it is claimed that, without such a rule, there would be no deterrent to drugs cheats; and it is justified to combat the endemic cheating that has bedeviled the Tour de France and international track and field events in recent times. In fact, John Fahey, the relatively-new President of WADA, has made the full implementation of the revised WADA Code, including the whereabouts rule, his top priority. And, according to Andy Parkinson, the head of UK Sport’s drug-testing agency: “If we can’t get access to athletes, and we don’t know where they are, it would make our job almost impossible.” Again, a fair point!

So, the arguments for and against the whereabouts rule appear to be evenly balanced, and there is clearly a need for an authoritative ruling on this matter to provide legal certainty for the benefit of all the interested parties.

The Belgian legal challenge is very much in its early stages, and it will be quite some time (in fact, a year or two or even longer) for it to progress through the Belgian Courts system and then on to the European Commission on Human Rights and, ultimately, if the Commission finds that there is a *prima facie* case to answer, to the European Court on Human Rights in Strasbourg. However long it takes, this appears to be a serious challenge and, if eventually successful, would seriously weaken the anti-doping in sport enforcement bodies, not least WADA.

Apart from all this, the Belgian athletes are also considering legal challenges under Data Protections Laws and the EU Working Time Directive, which provides that every employee is entitled to 20-24 days of annual holiday, arguing, in this case, that, if an athlete has to make himself/herself available for a drugs test 365 days a year, how can the whereabouts rule possibly comply with this legal entitlement?

It will be very interesting indeed to see how these legal challenges develop and what will be their final outcome. In all Human Rights cases, there is a need for a proper balance to be struck between the rights and interests of the individual and those of the wider public. Also, whether these challenges will result in a *Bosman* like effect on anti-doping measures is also an interesting point and remains to be seen!

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## IOC Rejects The EBU Bid for 2014-16 Olympic Games Broadcast Rights

Sports broadcasting rights are significant money spinners for sports bodies and sports event organisers. The current three-season deal ending in 2010 for the TV rights to the English Premier League, one of the richest Football Leagues in the world, are worth a staggering £1.7 billion! But is the so-called ‘credit crunch’ and global economic downturn beginning to bite as far as the economic value of sports rights generally and sports broadcasting rights in particular, is concerned and what sports bodies can get for them?

Perhaps the recent bid of the European Broadcasting Union (EBU) for the European broadcast rights to the Olympic Games, including the Paralympics, for the period 2014-2016, which the International Olympic Committee (IOC) recently rejected, is a portend of things to come and may suggest a slow down in the upward spiral trend of Sports TV rights in recent years. The 2014 Winter Olympics will be held in Sochi, Russia; whilst the host city for the 2016 Summer Games is yet to be decided and will be selected by the IOC in 2009.

The EBU is the largest association of national broadcasters (so-called ‘free to air’ broadcasters) in the world with 75 active members - in effect, it is a cartel, which, as such, has had its brushes with the Competition Directorate of the European Commission in the past on the grounds that the collective buying of sports broadcast rights may be anti-competitive under the European Union Competition Rules - but that is another story for another occasion!

The EBU has already bought the rights for the 2010 Vancouver Winter Games and the 2012 London Olympics and paid the IOC more than \$700 million for them!

In a recent Press Release, the current EBU President, Fritz Pleitgen, stated:

“We very much regret the decision of the IOC. We have worked with the IOC since 1956 to deliver the Olympic Games to the broadest possible audience, and ensured maximum exposure of the Olympic Games, and also Olympic Sports between the Games. We note that there are different views about the future monetary broadcast value of the Games. EBU Members were surprised by the high financial expectations of the IOC. We regret that, it seems, little account is taken of the additional high level of investment by

the EBU in rights for, and the production and quality editorial coverage of, World-, European- and National Championships, across many Olympic Sports.”

A fair point and argument, which did not cut much, if any, ice with the IOC, who, of course, are out to get as much money as they possibly can for their valuable broadcast rights for what is undoubtedly, despite the claims of FIFA in relation to their World Cup, the greatest sporting show on earth! In fact, the biggest source of the IOC revenue comes from broadcasting rights deals, which are expected to bring in close to \$4 billion for the next two Games periods of 2010 and 2012.

But despite all this, the IOC needs to be realistic and take account of present market forces and the current economic climate and, in particular, the fact that Europe, which is a vast market for sport and sports rights, is now officially in recession!

The EBU President-elect, Jean-Paul Philippot, also had this to say about the IOC rejection of the EBU bid:

“The worldwide financial crisis will not stop at the doorstep of free-to air television; it will also have an impact on the value of broadcast rights for sports events. The EBU’s offer reflected the maximum price public service broadcasters could pay for the rights, our philosophy of investing in Olympic sports throughout the Olympiad (the four years between the summer Games), and the value of offering Olympic sports free of charge to all citizens.”

Again, a fair point, which reflects the present economic situation. And Philippot further remarked:

“We are sorry that we did not manage to convince the IOC of the importance of our global support of Olympic sport. We will now carefully analyse the consequences of the IOC decision on our sports-rights acquisition policy”.

So, does this mean that the EBU may have a change of mind, despite their robust defence of their offer, the amount of which has not been disclosed, and come in with a higher offer?

It will be interesting to see what happens next. So, watch this space!

## EU, Sport, Law and Policy: Regulation, Re-regulation and Representation

By Simon Gardiner, Richard Parrish and Robert C.R. Siekmann (Eds.),  
T.M.C. Asser Press, The Hague 2009, pp. 648, hardcover, ISBN  
9789067042925, price: EUR 90 (US \$ 165)

Thus far in its short history, the area of European Union sports law and policy has undergone several stages of progression. During the period which began with the Court granting its first sports-related decision in 1974 and which slowly ended by mid-1990's there was no significant academic writing on the subject. This was a consequence of there being no defined EU sports law and policy, which in itself was understandable given the lack of the competence to intervene into what was perceived as the private affairs of sports. The next period was characterized by a profound change in the structure of the broadcasting sector and the trend of commercialization at all levels of the sports market. Consequential juridification of the sports sector signified by the number of Commission decisions and the Court's jurisprudence, notably in *Bosman*, was followed by a corresponding proliferation in the academic writing on the subject. In the past 10 years, a number of academic journals were established and many book titles were published, including the first edition of this book - it appeared in 2000 under the title *Professional Sport in the EU: Regulation and Re-regulation*, edited by Andrew Caiger and Simon Gardiner. Since then, new developments have taken place in the industry and together with judgments in *Meca-Medina* (2006) and *MOTOE* (2008), and the 2007 White Paper on Sport, have brought the whole of the sports law far beyond the existential skepticism seen in post-*Bosman* discussions and into the realm of an established legal discipline.

The book under review represents a tribute to this novel phase in the regulatory regime. It consists of twenty-nine high-quality articles contributed by prominent academics in the area. The opening articles provide a theoretical underpinning to the subject. The rest of the topics cover a wide range of legal issues falling into one of the following five categories:

1. *Sports governance* - This is a topic that has been discussed ever since the Commission FIA/F1 investigation but has recently gained a lot of attention in academic circles after the publication of the White Paper on Sport and *MOTOE* judgment (in his contribution Borja García, refers to it as a 'new hot topic' and with good reason). Both of these developments are the subject of detailed analysis in this book. For instance, Samuli Miettinen examines the lessons from *MOTOE* regarding the liabilities for special powers granted to undertakings under Article 86(1) and the breach of that provision in conjunction with Article 82. I particularly liked Stephen Weatherill's analysis of the White Paper on Sport and the case-law which elaborates on some of his previous works and whose ultimate purpose is to find a consistency in the Court's approach to matters of sports governance. His contributions to this title can be conveniently supplemented by his recent article: 'Article 82 EC and sporting 'conflict of interest': the judgment in *MOTOE*', in: *The International Sports Law Journal* (No.3-4), [2008], Special Addendum.

2. *Regulation under the EU internal market and competition provisions* - Comprised of articles on liberalization of the players market with special attention to the well-known issues such as: home-grown players' rule, transfer rules, contractual stability, *Kolpak* and *Bosman* cases and subsequent developments, but also, as a matter of digression from EU law, analysis of *Webster* case in the CAS jurisprudence, and power struggles in football and influence of former G14 clubs and UEFA on European policy-makers. In addition, an article on the regulation of sports services in the Community law, and an article on *Piau* and status of players' agents are also included. Regarding the issues of sports law other than governance and the players' status under the EU competition law, this part covers two topics; the first is related to the application of the Court's case law under Article 81 to sports media

rights and issues of exclusivity and collectivity in light of specificity of sports, and the second to the study of prospects for granting state aid to football clubs and its (in)compatibility with the Article 87 EC Treaty. Although some of these discussions have been ongoing for some time, all the contributions provide fresh insights and points of view that are more aligned with the modern state of affairs.

3. *Representation* - Social dialogue between the two sides of the industry in professional football is a category which provides the reader with details on the process and progress that has been made on a European level thus far while placing it into a broader regulatory context. This is the only title on the market which treats the topic of representation in football in such detail. Apart from European sports lawyers, anyone interested in collective bargaining and European social policy should find this a valuable and interesting contribution to the developments in the EU system of industrial relations. Issues covered by this topic should also prove an important source of analogy for the studies of representation and social dialogue in other European sports, as some methodological transplants can certainly be used from the practice employed in the sport of football.

4. *Anti-doping* - Two articles are dedicated to the topic of anti-doping policy and the EU. They touch upon legal basis in the EC Treaty and go over important developments in the 1980's and 1990's, the creation of WADA, the role of the Council of Europe, *Meca-Medina*, the details of the White Paper proposals on the fight against doping, and beyond.

5. *Football hooliganism* - Three articles with differing emphasis look into the social psychology of a football supporters and their role and influence as stakeholders, policy action on European level, and examine the success and legality of football banning orders in the United Kingdom as a means to combat hooliganism.

The last article is dedicated to *EU sports betting law*. The analysis centres on the treatment of the subject under EU internal market law in particular in light of relevant cases (from *Schindler* to *Placanica*) decided under the provisions of the EC Treaty on freedom to provide services and freedom of establishment. In this book, the topic of sports betting stands on its own outside the other identified categories. It is a 'purely business pursuit' and a gambling service rather than an activity that has to do with sports and its specificities. However, sports betting can be closely linked to corruption in sports, and the regulation of the services plays an important role in this respect.

In sum, this is the best and the most comprehensive edited book in the area of EU sports law and policy currently on the market, providing excellent legal analyses and up-to-date treatment of the legal issues in sports in light of, *inter alia*, the recent jurisprudence, new developments, and changed mentality in looking at the enforcement of EU law in the sports sector. It would not hurt to draw attention to its very competitive price. I highly recommend this book to academics and everyone else working in the field of European sports law and policy, as well as students on advanced levels of study.

To end this review with a small remark, and with all due respect to the editors' choice of contributors, I could not help but notice the fact that only one of the twenty nine articles has been written by a woman! The field of sports law is not *that* male dominated and having only one woman on board such a big project helps enhance the gender stereotypes in a field we all love, dear colleagues.

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## Sport: Law and Practice

By Adam Lewis and Jonathan Taylor (Editors), Tottel Publishing Ltd, Haywards Heath, United Kingdom, Second Edition 2008, pages 1485 + LXXI, ISBN 978 1 84766 066 4, price £175

As the editors point out, since the first edition of this Book was published five years ago, the law of sport has continued to develop “significantly”. They further comment as follows: “While sport may still not be more important than religion, for many it occupies more of their time and interest. As a result, sport continues to develop into an extremely valuable commercial sector.” In fact, sport accounts for more than 3% of world trade and more than 2% of the combined GNP of the twenty-seven Member States of the European Union (EU). Thus, there is so much to play for both on and off the field of play. And this gives rise, therefore, to an ever increasing range of legal issues.

The purpose of the Book is to provide “a practical resource for advisors in this sector.” The new edition of the Book naturally updates existing material and also adds new material - it is now over 300 pages longer than the first edition. In fact, one of the significant developments, since the first edition of the Book, is the awarding of the 2012 Summer Olympic and Paralympics Games to London, and this is reflected by a new section dedicated to the corresponding legal issues. This section is contributed by lawyers working for the London Games Organising Committee. One intriguing aspect of this subject is the section on the statutory measures (the London Olympic Games and Paralympics Games Act 2006 (‘LOGPGA 2006’)) that have been put in place to protect the Olympic Symbols and the right to be associated with the London Games (the so-called ‘London Olympics Association Right’ (‘LOAR’)) granted to sponsors and other commercial ‘partners’ of the event. In other words, the ambitious arrangements for combating ‘ambush marketing’ and ‘ambush marketers’ which remains a problem for major sports events’ organisers. In particular the right to use in advertising and promotional material such expressions as ‘twenty twelve’, ‘gold’, ‘silver’ and ‘bronze’, ‘medals’, and ‘London’. These measures are quite controversial and have been widely criticised by the UK Advertising and Marketing Industries as being too exclusive and restrictive!

The new edition of the Book follows the format of the old one. The First Part deals with the legal regulation of sport, including legal challenges to governing body decisions, which are on the increase. The Second Part covers another important and developing field of legal concern, namely, the EU Law and Sport, including the ground-breaking 2007 ‘White Paper on Sport’ following closely on the heels of the European Court of Justice landmark decision in the *Mecca-Medina* case, which applied a ‘rule of reason’ approach to competition law and sport rather than a ‘*per se*’ one, much to the consternation of the major sports governing bodies. The Third Part of the Book deals with the equally important subject of Human Rights and Sport, including a review of the provisions of the UK Human Rights Act of 1998, which, for the first time, incorporated the provisions of the 1950 European Convention on Human Rights directly into UK Law. The Fourth Part of the Book deals with the Participation of Individuals in Sport and includes a review of the important decision of the Court of Arbitration for Sport in the Andrew Webster case, which has attracted a great deal of interest and critical appraisal from sports law com-

mentators, including the author of this review. The Fifth Part of the Book addresses the controversial subject of Doping in Sport (see comments later). The Sixth Part covers the Organisation of Sports Events and includes a new section on sports governance. The Seventh Part deals with the commercialisation of sport and includes a section on risk management in sport - a topic of increasing importance given the litigious and blame culture that nowadays bedevils our lives and not least in the organisation and execution of sporting events! The Eighth and Final Part of the Book comprises the new section on the legal issues raised by the London Games of 2012, which your reviewer has already commented on above.

The author of this review finds it incredible that the section in the Book on the important and developing subject of sports persons’ image rights does not contain any references at all to the leading and comprehensive work on the subject of which the author is one of the Editors!

On the other hand, there are excellent sections on the controversial subjects of child protection issues, contributed by one of the leading exponents of this subject, Andy Gray, the legal adviser of British Swimming, which has been at the forefront of developing effective rules to combat this scourge; and also on the equally despicable subject of doping in sport, including a review of the revised WADA Anti Doping Code, effective as of 1 January 2009, and the copious case law generated to date.

One glaring omission, however, from an otherwise comprehensive coverage of sports legal issues in the Book is a section on the role of Alternative Dispute Resolution (ADR) in settling sports disputes of various kinds, and especially commercial ones, with the exception of doping cases. Although the practical and financial consequences of doping penalties wrongly imposed are particularly susceptible to settlement by ADR methods, particularly mediation. A subject dear to the heart of your reviewer. There is a rather pathetic short paragraph on ADR on page 160 of the Book, with an incorrect example of using ADR to determine whether a doping offence has been committed! How can you mediate on a doping offence - it has either been committed or not? Mediation, an established form of ADR, and even encouraged by the Courts, is proving particularly effective for resolving sports disputes generally and a section on this important topic would not have been out of place. Perhaps this omission can be rectified in the next edition of the Book. In fact, your reviewer would be very pleased to contribute it!

The contributors to the Book, although described as ‘the leading private practitioners of sports law’ in the UK, are the ‘usual suspects’, but there are some notable exceptions, such as a number of in-house legal advisers to some of the leading international sports bodies, such as the ICC. Their contributions would have added further authority to the Book.

Other omissions are the absence of a Glossary of Sporting Acronyms and a Bibliography - if not a comprehensive one, at least a ‘select’ one.

However, despite these few criticisms, all in all, the second edition of this Book is a very welcome addition to the ever growing sports law literature, and should, therefore, find a place on the bookshelf of every self-respecting sports law practitioner and sports administrator.

The law is stated as at 1 May 2008.

*Ian Blackshaw*

## Football Hooliganism in Europe

By Anastassia Tsoukala, Palgrave Macmillan United Kingdom, 2009, hardback, pages 179 + VIII, ISBN 9780230201149 price £50

This Book is the fruit of twenty years of research into football hooliganism - that is, collective football-related violence, which is often

referred to as ‘the English disease’ although English football fans abroad have generally been more muted and better behaved of late! - in Europe. The author, Anastassia Tsoukala, is Professor of Criminology at the University of Paris XI and also a Research Fellow at Paris V - Sorbonne University, well qualified, therefore, to tackle such a highly controversial and intractable phenomenon.

This is the first EU-wide study of this subject and, as its sub-title 'Security and Civil Liberties in the Balance' implies, the author draws attention to the erosion of civil liberties in the interests of public order and security in the fight against football hooliganism throughout Europe at the European (that is, actions by the Council of Europe and UEFA, the European Governing Body of Football) and National levels. In fact, the author concludes that, because control measures have become increasingly repressive, especially following the events of September 11, 2001, the "... breaching of civil liberties has become invisible to society because legal abnormality is now accepted as normal." Some years ago, the author of this review wrote an article in 'The Times' entitled 'Even the football supporter has rights', which the author of the study cites, and which did not go down very well in certain quarters, who were of the school of thought that the end justifies the severest of means! It is always a question of balance in this field and whether society as a whole has got that balance right. That question is not an easy one to answer in practice. And is a constant theme and also particular concern of this study.

The study is divided into three parts: part one covers discernible developments during the period 1965 - 1985 under the general heading of 'Clear Contours'; part two, 1985 - 1997 under the general heading of 'Blurred Boundaries'; and part three, 1997 - 2008 under the general heading of 'Splintered Contours'.

The study is also wide-ranging - both in terms of topics and geographical reach - and is based on research from the fields of law, criminology, the sociology of deviance and of policing and social control, political sociology and international relations. The study also draws on more than 70 interviews with security professionals from Belgium, France, Greece, Italy, the Netherlands and the UK. It is thus comparative in nature and this is one of its particular attractions.

Although, as already mentioned, the coverage is wide-ranging, the author does not claim to offer "... an exhaustive analysis of all aspects of domestic counter-hooliganism policies." Nevertheless, the study is a compelling and fascinating one and should be welcomed and read by all those interested and involved in fighting football hooliganism, not least the World, European and National Football Governing Bodies, who must bear their fair share of responsibility for creating a safe and controlled environment for all those fans of the 'beautiful game' who wish to enjoy peaceably their football and do not set out gratuitously and intentionally to cause trouble at matches. However, in the opinion of your reviewer, as long as we have football and all the passion that it generates, sadly, like the poor, football hooligans will always be with us!

*Ian Blackshaw*



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