Sports Betting in the Jurisprudence of the European Court of Justice*

by **Robert C.R. Siekmann****

A Study into the Application of the *Stare Decisis* Principle, or: the Application of the "Reversal Method" of Content Analysis and The Essence of the ECJ Case Law on Sports Betting

1. Introduction

Kaburakis' article on "ECJ Jurisprudence and Recent Developments in EU Sports Betting"[1] so far is the only substantial one on the matter.[2] From the article it becomes clear that to determine the evolution of the jurisprudence of the European Court of Justice (ECJ) on "sports betting" is a complex task. In this contribution I am presenting an innovative, although time-consuming method of research the purpose of which is to facilitate that effort considerably. The method starts from the fact that the ECJ jurisprudence is based on the *stare decisis* principle which is expressly applied by the Court when it makes references to the sources used, that is its previous decisions and the relevant paragraphs therein (this of couse does not exclude the possibility that phrasing in previous decisions are used literally later on without an express reference to the paragraphs concerned). Kaburakis in fact uses the traditional method of analysis by showing how the jurisprudence evolved from the first "sports betting" case up to and including the at the time of his writing most recent one. According to the alternative method it is preferred to reverse the chronological order of study, starting from the most recent case and going back to the first one. This operational method is similar to the approach taken by the Court when drafting a new decision. The new method is supposed to be a more objective, neutral, non-arbitrary and non-impressionist combination of close reading and feed-back; it might be called the "reversal" or "retrospective" method. This method allows us to determine which paragraphs in previous decisions are most important (or relatively important). It is possible that express references to these paragraphs occur more than once in their successors. So, when we closely read the text of later decisions, they may give us feed-back about the relative importance of their predecessors. If there is no reference to a "sports betting" case at all, it must logically be concluded that this is a (very) minor case and in any case not a landmark one. Of course, in this perspective the relative importance of the one most recent decision cannot be determined, since there are not any succeeding references made to it yet. It is not only possible to determine what the relative importance of paragraphs in preceding "sports betting" decisions is, but also to determine what the influence of previous non-"sports betting" decisions, of a gambling type or not has been (see below for definitions of the concepts of "gambling" and "sports betting"). Finally, it should be observed that in principle in non-betting/gambling and non-sports betting cases express reference may be made to sports betting/gambling cases. This would illustrate the influence of "sports betting" jurisprudence the other way round.

Of course, in using the "reversal" method of analysis, one should also take into account if and to what extent the factual backgrounds of the cases differ from each other, and whether possibly the applicable law has changed in the meantime (the latter is not the case from a EU perspective, because EU "(sports) betting" law Is ECJ case law). Of course, other aspects are a changing membership of the Court as well as Court members changing their views over time, whether or not under the impact of changing views on "sports betting" in the society at large, in particular regarding state monopolies and the position of state-run operators. In this respect, the Advocate-General's Opinions may be of major importance, and it is to be seen whether express reference is made to them in the ECJ's decisions and rulings.

In this contribution, the "reversal" method will be systematically and consistently tested in practice. While using the method it will be refined in applying it, if necessary. "Rules" for the use of the method will be developed in the process of its application. By using this method, it should be possible to determine the essentials of the case-law, its core content. Of course, it cannot be excluded that paragraphs that do not refer to previous ones in fact are of similar of even more importance than those. The latter of course is part of the test. I will present the "reversal" method in the process of its application, step-by-step - in order to verify its applicability with regard to the 'sports betting" jurisprudence of the ECJ. So, this contribution has two purposes regarding questions to be answered: will the "reversal" method work and how will it work? What is the essence of the jurisprudence of the ECJ on sports betting, on the basis of the application of this method? An additional question of course would be whether and how the "reversal" method reasonably may be compared with the results of the traditional method in order to know whether the outcome is qualitatively better. If the ECJ has applied the stare decisis principle consistently, one would say that the essence of its jurisprudence logically should come to the surface by using the "reversal" method of analysis.

Definition of "sports betting"

Before being in a position to apply the "reversal" method to the case law of the ECJ on "sports betting", it must be determined which decisions of the ECJ belong to the case-law. For that purpose, we need a definition which circumscribes "sports betting". In his article, Kaburakis gives no definition of "sports betting". With reference to previous jurisprudence, he states: "[…] one would anticipate a similar ECJ analysis in a *per se sport betting case* (italics added, RS); indeed it did not take long

* This contribution is an elaborated version of a paper that was presented by this author at the 6th international seminar on Sports Law and Taxation organized by NOLOT, Amsterdam, 4 December 2009. Since that time, the ECJ produced new jurisprudence on sports betting such as the Ladbrokes, Sporting Exchange ("Betfair"), Otto Sjöberg and Anders Gerdin v. Swedish State, and Carmen Media rulings. The information on the new case-law was added and incorporated in this contribution.

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1 In: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann, EU,Sport, Law and Policy: Regulation, Re-regulation and Representation, T.M.C. Asser Press The Hague 2009, pp. 555-580. A partly adaptation of this article will appear in print under the title: "European Union Law, Gambling, and Sport Betting. European Court of Justice Jurisprudence, Member States Case Law, and Policy", in: Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek (Eds), Sports Betting: Law and Policy, T.M.C. Asser Press, The Hague 2011. A general work of reference on EU law and gambling/betting is: Alan littler and Cyrille Fijnaut (Eds), The Regulation of Gambling - European and nNationalNationalperspectives, Leiden/Boston 2007.

2 A short overview on "Sports Betting and European Law" is presented by Marios Papaloukas in: The International Sports Law Journal (ISLJ) 2010/1-2 pp. 86-88.

after *Läärä* for such a case to come before the court."[3] He continues: "The factual background of *Zenatti* is […] revisited by the ECJ in the ensuing *Gambelli* an *Placanica* cases, which set the tone for modern legal handling of EU sport betting policies."[4]

In the Services Directive[5] it is stated in Article 2(h) that "gambling activities […] involve wagering a stake with pecuniary value in games of chance […]"[6].

In the EL Code of Conduct for Sports Betting[7] "gambling" is identified as "all types of games, including lotteries and betting transactions, involving wagering a stake with monetary value in games in which participants may win in full or in part, a monetary prize based, totally or partially, on chance or uncertainty of an outcome." According to the EL Code, "*sports betting*" includes "all sports betting-based games (i.e. fixed and running odds, totalisator/toto games, live betting, other games and football pools offered by sports betting operators, etc.)". In this context, sports is defined as "all physical human activities with specific rules, shared by a great number of participants, and involving competition amongst the different participants. Olympic sports, sports having as one's purpose to become Olympic sports and minor spors may be included in sports." So, the EL Code in fact has no definition of what sports betting is.

In *Zenatti* (paragraph 18) the phrase reading "[..] bets on sporting events, even if they cannot be regarded as games of pure chance […]" is found. So, generally speaking it may be concluded that "sports betting" are particularly games of, to a certain extent calculated chance, that are connected with a competitive sporting event ("[…] betting on sporting events is not a game of chance, but of informed prediction of the result"; "[…] an […] in my view usual […] distinction may be made between lotteries and betting on sporting events on the ground that the latter involves an element of skill absent from the former […]" , cf., Opinion of Advocate-General Fennelli re Zenatti, paras. 14 and 23 respectively; "Sports bets are not dependent on chance in the same way as lotteries. A bettor's chances of winning may also be affected by his skill and, above all, his knowledge. There is therefore some debate among legal commentators as to whether betting is to be classified as a game of skill or a game of chance. The fact that the events involved are largely dependent on chance, particularly in the case of bets placed on entire blocks of games, would suggest that it is a game of chance." , cf., Opinion of Advocate-General Alber re Gambelli, para. 71). "Sports betting" (or spelled as "sport betting", see Kaburakis) is not pure gambling. Apart from such "impressionist" considerations, "sports betting" purely is sport-related betting.

This contribution will commence with describing and comparing the factual backgrounds, the "facts" of the sport-related betting decisions and rulings of the ECJ which cover a period of now twenty years. It will be examined whether the societal context changed and the views on sports betting evolved in the course of time. Then, the "law", the case-law will be analysed by using the "reversal" method and finally presenting the results of this analysis. It is supposed that the outcome will learn us about what is the essence of the ECJ jurisprudence on "sports betting". Of course, the most recent ECJ ruling itself cannot be scrutinized by the "reversal" method, since by definition references to that ruling are non-existent. So, whether new aspects are to be added to the *stare decisis*, the doctrine of the ECJ. on the basis of that ruling is to determined in future.

3 Anastasios Kaburakis: "ECJ Jurisprudence and Recent Developments in EU Sports Betting" in: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann, EU,Sport, Law and Policy: Regulation, Re-regulation and Representation, T.M.C. Asser Press The Hague 2009, p. 560.

4 Idem.

5 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. 2006 L 76/36.

6 Similarly, Article 1(5)(d) of the E-commerce Directive, Directive 2000/31/EC of 8 June 2000, O.J. 2000 L.17/1.

7 EL = European Lotteries, which is the non-profit-making association representing the state-licensed lotteries and toto companies In Europe.

8 Cf., Case C-67/98, Judgment of the Court of 21 October 1999, paragraphs 3-7 of the preliminary ruling, ECR (1999) I-07289.

9 Cf., Case C-243/01, Judgment of the Court of 6 November 2003, paragraphs 7-15 of the preliminary ruling, ECT (2003) I-13031.

2. Legal and factual context of the case-law

Zenatti (1999)[8]

In Italy, under Article 88 of Royal Decree No 773 of 18 June 1931 approving the consolidated version of the laws on public order (GURI No 146 of 26 June 1931), "[n]o licence shall be granted for the taking of bets, with the exception of bets on races, regattas, ball games and other similar contests where the taking of bets is essential for the proper conduct of the competitive event".

Bets could be placed on the outcome of sporting events taking place under the supervision of the Comitato Olimpico Nazionale Italiano (National Olympic Committee, "CONI") or on the results of horse races organised though the Unione Nazionale Incremento Razze Equine (National Union for the Betterment of Horse Breeds, "UNIRE"). The use of the funds collected in the form of bets and allocated to those two bodies was regulated and must in particular serve to promote sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities, and support equine sports and the breeding of horses. Under various legislative provisions adopted between 1995 and 1997, arrangements for and the taking of bets reserved to CONI and UNIRE might be entrusted, following tendering procedures and on condition of payment of the prescribed fees, to persons or bodies offering appropriate safeguards.

Article 718 of the Italian Penal Code made it a criminal offence to conduct or organise games of chance and Article 4 of Law No 401 of 13 December 1989 (GURI No 401 of 18 December 1989) prohibited the unlawful participation in the organisation of games or betting reserved to the State or to organisations holding a State concession. Moreover, unauthorised gaming and betting were covered by Article 1933 of the Civil Code, according to which no action lies for the recovery of a gaming or betting debt. Nor, except in the event of fraud, could any sum paid voluntarily be reclaimed.

Since 29 March 1997, Mr Zenatti had acted as an intermediary in Italy for the London company SSP Overseas Betting Ltd ("SSP"), a licensed bookmaker. Mr Zenatti runned an information exchange for the Italian customers of SSP in relation to bets on foreign sports events. He sent to London by fax or Internet forms which have been filled in by customers, together with bank transfer forms, and received faxes from SSP for transmission to the same customers.

By decision of 16 April 1997 the Questore di Verona ordered Mr Zenatti to cease his activity on the ground that it was not one that could be licensed under Article 88 of the Royal Decree, since that provision allowed betting to be licensed only where it is essential for the proper conduct of competitive events.

Mr Zenatti initiated proceedings for judicial review of that decision before the Tribunale Amministrativo Regionale (Regional Administrative Court), Veneto and applied for an interim order suspending its enforcement. On 9 July 1997 the Tribunale Amministrativo Regionale granted an interim order to that effect.

The Questore di Verona appealed to the Consiglio di Stato for that order to be set aside.

The Consignilio di Stato considered that the decision to be given called for an interpretation of the Treaty provisions on the freedom to provide services.

Gambelli (2003)[9]

Under Article 88 of the Regio Decreto No 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931), no licence was to be granted for the taking of bets, with the exception of bets on races, regatta, ball games or similar contests where the taking of the bets was essential for the proper conduct of the competitive event.

Under Legge Finanziaria No 388 (Finance Law No 388) of 23 December 2000 (ordinary supplement to the GURI of 29 December 2000), authorisation to organise betting was granted exclusively to licence holders or to those entitled to do so by a ministry or other entity to which the law reserves the right to organise or carry on betting. Bets could relate to the outcome of sporting events taking place under the supervision of the CONI, or its subsidiary organisations, or to the results of horse races organised through the UNIRE.

Articles 4, 4a and 4b of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989 as amended by Law No 388/00, Article 37(5) of which inserted Articles 4a and 4b into Law No 401/89, provided as follows:

"Unlawful participation in the organisation of games or bets

Article 4

1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.
2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.
3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100,000 and ITL 1,000,000.

(...)

Article 4a

The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.

Article 4b

(...) the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration."

The Public Prosecutor and the investigating judge at the Tribunale di Fermo (Italy) established the existence of a widespread and complex organisation of Italian agencies linked by the internet to the English bookmaker Stanley International Betting Ltd ("Stanley"), established in Liverpool (United Kingdom), and to which Gambelli and others, the defendants in the main proceedings, belong. They were accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets which is normally reserved by law to the State, thus infringing Law No 401/89.

Such activity, which is considered to be incompatible with the monopoly on sporting bets enjoyed by the CONI and which constitutes an offence under Article 4 of Law No 401/89, is performed as follows: the bettor notifies the person in charge of the Italian agency of the events on which he wishes to bet and how much he intends to bet; the agency sends the application for acceptance to the bookmaker by internet, indicating the national football games in question and the bet; the bookmaker confirms acceptance of the bet in real time by internet; the confirmation is transmitted by the Italian agency to the bettor and the bettor pays the sum due to the agency, which sum is then transferred to the bookmaker into a foreign account specially designated for this purpose.

Stanley was an English capital company registered in the United Kingdom which carries on business as a bookmaker under a licence granted pursuant to the Betting, Gaming and Lotteries Act by the City of Liverpool. It was authorised to carry on its activity in the United Kingdom and abroad. It organised and managed bets under a UK licence, identifying the events, setting the stakes and assuming the economic risk. Stanley paid the winnings and the various duties payable in the United Kingdom, as well as taxes on salaries and so on. It was subject to rigorous controls in relation to the legality of its activities, which were carried out by a private audit company and by the Inland Revenue and Customs and Excise.

Stanley offered an extensive range of fixed sports bets on national, European and world sporting events. Individuals could participate from their own home, using various methods such as the internet, fax or telephone, in the betting organised and marketed by it.

Stanley's presence as an undertaking in Italy was consolidated by commercial agreements with Italian operators or intermediaries relating to the creation of data transmission centres. Those centres made electronic means of communication available to users, collect and register the intentions to bet and forward them to Stanley.

Gambelli and others were registered at the Camera di Commercio (Chamber of Commerce) as proprietors of undertakings which run data transfer centres and had received due authorisation from the Ministero delle Poste e delle Comunicazioni (Minister for Post and Communications) to transmit data.

The judge in charge of the preliminary investigations at the Tribunale di Fermo made an order for provisional sequestration and the defendants were also subjected to personal checks and to searches of their agencies, homes and vehicles. Mr Garrisi, who is on the Board of Stanley, was taken into police custody.

Gambelli and others brought an action for review before the Tribunale di Ascoli Piceno against the orders for sequestration relating to the data transmission centres of which they are the proprietors.

The Tribunale di Ascoli Piceno decided to stay proceedings and to refer the question to the European Court of Justice for a preliminary ruling.

Placanica (2007)[10]

The references for a preliminary ruling had been made in the course of criminal proceedings against Mr Placanica, Mr Palazzese and Mr Sorricchio for failure to comply with the Italian legislation governing the collection of bets. The legal and factual context of these references is similar to the situations that gave rise to the judgments in Case C-67/98 Zenatti [1999] ECR I-7289 and Case C-243/01 Gambelli and Others [2003] ECR I-13031.

Italian legislation essentially provided that participation in the organising of games of chance, including the collection of bets, is subject to possession of a licence and a police authorisation. Any infringement of that legislation carried criminal penalties of up to three years' imprisonment.

Until 2002 the awarding of licences for the organising of bets on sporting events was managed by the CONI and the UNIRE, which had the authority to organise bets relating to sporting events organised or conducted under their supervision. That resulted from Legislative Decree No 496 of 14 April 1948 (GURI No 118 of 14 April 1948), read in conjunction with Article 3(229) of Law No 549 of 28 December 1995 (GURI No 302 of 29 December 1995, Ordinary Supplement) and Article 3(78) of Law No 662 of 23 December 1996 (GURI No 303 of 28 December 1996, Ordinary Supplement).

Specific rules for the award of licences were laid down, in the case of CONI, by Decree No 174 of the Ministry of Economic Affairs and Finance of 2 June 1998 (GURI No 129 of 5 June 1998) and, in the case of UNIRE, by Decree No 169 of the President of the Republic of 8 April 1998 (GURI No 125 of 1 June 1998).

Decree No 174/98 provided that the award of licences by CONI was to be made by means of calls for tender. When awarding the licences, CONI had, in particular, to make sure that the share ownership of the

10 Cf., Joined cases C-338/04, C-359/04 and C-360/04, Judgment of the Court of 6 March 2007, paragraphs 2-14 and 18-31 of the preliminary ruling, ECR (2007) I-1891.

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licence holders was transparent and that the outlets for collecting and taking bets were rationally distributed across the national territory.

In order to ensure transparency of share ownership, Article 2(6) of Decree No 174/98 provided that where the licence holder took the form of a company, shares carrying voting rights had to be issued in the name of natural persons, general partnerships or limited partnerships, and could not be transferred by simple endorsement.

Similar provision was made with regard to the award of licences by UNIRE.

In 2002, following a number of legislative initiatives, the competences of CONI and UNIRE with respect to bets on sporting events were transferred to the independent authority for the administration of State monopolies, acting under the supervision of the Ministry of Economic Affairs and Finance.

Pursuant to an amendment introduced at that time by Article 22(11) of Law No 289 of 27 December 2002 (GURI No 305 of 31 December 2002, Ordinary Supplement) all companies - without any limitation as to their form - may now take part in tender procedures for the award of licences.

Police authorisation could be granted only to those who held a licence or authorisation granted by a Ministry or other body to which the law reserved the right to organise or manage betting. Those conditions were laid down in Article 88 of Royal Decree No 773, approving a single text of the laws on public security (Regio Decreto No 773, Testo unico delle leggi di pubblica sicurezza), of 18 June 1931 (GURI No 146 of 26 June 1931), as amended by Article 37(4) of Law No 388 of 23 December 2000 (GURI No 302 of 29 December 2000, Ordinary Supplement).

Furthermore, by virtue of Article 11 of the Royal Decree, read in conjunction with Article 14 thereof, a police authorisation could not be issued to a person who had had certain penalties imposed on him or who had been convicted of certain offences, in particular offences reflecting a lack of probity or good conduct, and infringements of the betting and gaming legislation.

Once authorisation had been granted, the holder must, pursuant to Article 16 of the Royal Decree, permit law enforcement officials access at any time to the premises where the authorised activity was pursued.

Article 4 of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989) as amended by Article 37(5) of Law No 388) provided in respect of criminal penalties for malpractice in the organising of games of chance:

'1. Any person who unlawfully participates in the organising of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, or by organisations under the authority of CONI, or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organising of betting on other contests between people or animals, or on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000. […]

2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein, shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.

3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein, shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.

[…]

4a. The penalties laid down in this article shall be applicable to any person who, without the concession, authorisation or licence required by Article 88 of [the Royal Decree], carries out activities in Italy for the purposes of accepting or collecting, or, in any case, of assisting the acceptance or in any way whatsoever the collection, including by telephone or by data transfer, of bets of any kind accepted by any person in Italy or abroad.

[…]'

According to the documents before the Court, CONI - acting in accordance with the Italian legislation - launched a call for tenders on 11 December 1998 for the award of 1 000 licences for sports betting operations, that being the number of licences considered on the basis of a specific assessment to be sufficient for the whole of the national territory. At the same time, a call for tenders in respect of 671 new licences for the taking of bets on competitive horse events was organised by the Ministry of Economic Affairs and Finance in agreement with the Ministry of Agricultural and Forestry Policy, and 329 existing licences were automatically renewed.

The application of the provisions concerning the transparency of share ownership that were in force at the time of those calls for tender had primarily the effect of excluding the participation of operators in the form of companies whose shares were quoted on the regulated markets, since in their case the precise identification of individual shareholders was not possible on an ongoing basis. Following those calls for tender, a number of licences - valid for six years and renewable for a further six years - were awarded in 1999.

Stanley International Betting Ltd is a company incorporated under English law and a member of the group Stanley Leisure plc, a company incorporated under English law and quoted on the London (United Kingdom) stock exchange. Both companies have their head office in Liverpool (United Kingdom). Stanley Leisure operates in the betting and gaming sector and is the fourth biggest bookmaker and the largest casino operator in the United Kingdom.

Stanley is one of Stanley Leisure's operational conduits outside the United Kingdom. It is duly authorised to operate as a bookmaker in the United Kingdom by virtue of a licence issued by the City of Liverpool. It is subject to controls by the British authorities in the interests of public order and safety; to internal controls over the lawfulness of its activities; to controls carried out by a private audit company; and to controls carried out by the Inland Revenue and the United Kingdom customs authorities.

In the hope of obtaining licences for at least 100 betting outlets in Italy, Stanley investigated the possibility of taking part in the tendering procedures, but realised that it could not meet the conditions concerning the transparency of share ownership because it formed part of a group quoted on the regulated markets. Accordingly, it did not participate in the tendering procedure and holds no licence for betting operations.

Stanley operated in Italy through more than 200 agencies, commonly called "data transmission centres" (DTCs). The DTCs supply their services in premises open to the public in which a data transmission link is placed at the disposal of bettors so that they can access the server of Stanley's host computer in the United Kingdom. In that way, bettors are able - electronically - to forward sports bets proposals to Stanley (chosen from lists of events, and the odds on them, supplied by Stanley), to receive notice that their proposals have been accepted, to pay their stakes and, where appropriate, to receive their winnings.

The DTCs are run by independent operators who have contractual links to Stanley. Mr Placanica, Mr Palazzese and Mr Sorricchio, the defendants in the main proceedings, are all DTC operators linked to Stanley.

According to the case-file forwarded by the Tribunale (District Court) di Teramo (Italy), Mr Palazzese and Mr Sorricchio applied, before commencing their activities, to Atri Police Headquarters for police authorisation in accordance with Article 88 of the Royal Decree. Those applications met with no response.

Accusing Mr Placanica of the offence set out in Article 4(4a) of Law No 401/89 in that, as a DTC operator for Stanley, Mr Placanica had pursued the organised activity of collecting bets without the required police authorisation, the Public Prosecutor brought criminal proceedings against him before the Tribunale di Larino (Italy).

That court expressed misgivings as to the soundness of the conclusion reached by the Corte suprema di cassazione in Gesualdi, with regard

to the compatibility of Article 4(4a) of Law No 401/89 with Community law. The Tribunale di Larino was uncertain whether the public order objectives invoked by the Corte suprema di cassazione justified the restrictions at issue.

Accordingly, the Tribunale di Larino decided to stay proceedings and to refer the uestion to the European Court of Justice for a preliminary ruling.

The Atri police authorities charged Mr Palazzese and Mr Sorricchio with pursuing, without a licence or a police authorisation, an organised activity with a view to facilitating the collection of bets, and placed their premises and equipment under preventive seizure on the basis of Article 4(4a) of Law No 401/89. Upon confirmation of the seizure measures by the Public Prosecutor, Mr Palazzese and Mr Sorricchio each brought an action challenging those measures before the Tribunale di Teramo.

In the view of that court, the restrictions imposed on companies quoted on the regulated markets, which prevented them in 1999 from taking part in the last tender procedure for the award of licences for the operation of betting activities, are incompatible with the principles of Community law because they discriminate against operators who are not Italian. In consequence - like the Tribunale di Larino - the Tribunale di Teramo has doubts as to whether the judgment in Gesualdi is sound.

The Tribunale di Teramo decided to stay proceedings and to refer the following question to the Court for a preliminary ruling.

***Commission v Italy** (2007)*[11]

In Italy, horse-race betting and gaming operations were originally run exclusively by the UNIRE, which had the option of operating the services of collecting and taking bets directly or delegating them to third parties. The UNIRE entrusted the operation of those services to bookmakers.

Law No 662 of 23 December 1996 (ordinary supplement to the GURI No 303, of 28 December 1996) subsequently assigned responsibility for the organisation and management of horse-race betting and gaming to the Ministry of Finance and the Ministry of Agriculture, Food and Forestry Resources, which were authorised either to operate the activity directly or through public bodies, companies or bookmakers appointed by them. Paragraph 78 of Article 3 of Law No 662 states that there is to be a reorganisation, by way of regulation, of the organisational, functional, fiscal and penal aspects of horse-race betting and gaming, as well as the sharing out of revenue from such betting.

In implementation of Article 3 of Law No 662, the Italian Government adopted Presidential Decree No 169 of 8 April 1998 (GURI No 125 of 1 June 1998), which provided in Article 2 that the Ministry of Finance, in agreement with the Ministry of Agricultural and Forestry Policy, was to award licences for horse-race betting operations to natural persons or companies fulfilling the relevant conditions by means of calls for tender organised in accordance with Community rules. As a transitional measure, Article 25 of Decree No 169/1998 provided for an extension of the period of validity of the licences granted by UNIRE until 31 December 1998, or, if it proved impossible to organise calls for tender by that date, the end of 1999.

A Ministerial Decree of 7 April 1999 (GURI No 86 of 14 April 1999) subsequently approved the plan to reinforce the network of outlets collecting and taking bets on horse-races with a view to increasing the number of betting shops across the whole of Italy from 329 to 1 000. Whereas 671 new licences were put out to tender, the directive of the Ministry of Finance of 9 December 1999 provided for the renewal of UNIRE's 329 'old licences'. In implementation of that directive, the decision of the Ministry of Finance of 21 December 1999 (GURI No 300 of 23 December 1999) renewed the said licences for a period of six years starting 1 January 2000.

Decree-Law No 452 of 28 December 2001 (GURI No 301 of 29 December 2001), converted after amendment into Law No 16 of 27 February 2002 (GURI No 49 of 27 February 2002), subsequently provided that the 'old licences' were to be reallocated in accordance with Decree No 169/1998, that is, by way of a Community call for tenders, and that they would remain valid until that reallocation had been finalised.

Finally, Decree-Law No 147 of 24 June 2003 extending time-limits and emergency provisions in budgetary matters (GURI No 145 of 25 June 2003), now Law No 200 of 1 August 2003 (GURI No 178 of 2 August 2003), provides in Article 8(1) that the financial status of each licence holder has to be assessed in order to resolve the problem of 'the guaranteed minimum', a levy which every licence holder had to pay to UNIRE irrespective of the actual amount of revenue generated during the year, which had proven to be excessive and had led to an economic crisis in the horse-race betting sector. In implementation of that law, the special commissioner appointed by UNIRE adopted decision No 107/2003 of 14 October 2003, which extended the period of validity of the licences that had already been granted until the deadline for the last payment, set for 30 October 2011, and, in any event, until the date on which the new licences are allocated by means of a call for tenders, in order to take the necessary steps to calculate the amounts to be paid by the licence holders.

Following a complaint lodged by a private operator in the horse-race betting sector, on 24 July 2001 the Commission sent the Italian authorities a letter of formal notice pursuant to Article 226 EC, drawing their attention to the incompatibility of the Italian system of granting licences for horse-race betting operations, and, in particular, the renewal by the contested decision of the 329 old licences granted by UNIRE without a competitive tendering procedure, with the general principle of transparency and the requirement of publication resulting from Articles 43 and 49 EC. In response, the Italian Government announced, by letters dated 30 November 2001 and 15 January 2002, respectively, the bill for and the adoption of Law No 16 of 27 February 2002

Since the Commission was not satisfied with the implementation of the provisions of that law, it issued a reasoned opinion on 16 October 2002 in which it asked the Italian Republic to adopt the necessary measures to comply with the reasoned opinion within two months of its receipt. By letter of 10 December 2002, the Italian Government responded that it had to conduct a detailed assessment of the financial status of existing licence holders before issuing calls for tenders.

Since it received no further information concerning the completion of that assessment and the launching of a call for tenders for the purposes of reallocating the licences at issue, the Commission decided to bring the present action.

***Liga Portuguesa de Futebol Profissional (2009)** (hereafter: Liga Portuguesa)*[12]

In Portugal games of chance are, in principle, prohibited. However, the State has reserved the right to authorise, in accordance with the system which it deems most appropriate, the operation of one or more games directly, through a State body or a body controlled directly by the State, or to grant the right to operate such games to private entities, whether profit-making or not, by calls for tender conducted in accordance with the Code of Administrative Procedure.

Games of chance in the form of lotteries, lotto games and sports betting are known in Portugal as games of a social nature ('jogos sociais') and the operation of such games is systematically entrusted to Santa Casa.

Each type of game of chance organised by Santa Casa is instituted separately by a decree-law and the entire organisation and operation of the various games offered by it, including the amount of stakes, the system for awarding prizes, the frequency of draws, the specific percentage of each prize, methods of collecting stakes, the method of selecting authorised distributors, and the methods and periods for payment of prizes, are covered by government regulation.

The first type of game in question was the national lottery (Lotaria Nacional), which was established by a royal edict of 18 November 1783, and a concession was awarded to Santa Casa, the concession being renewed regularly thereafter. Today that lottery consists in the monthly drawing of numbers by lot.

Following a number of legislative developments, Santa Casa acquired

11 Cf., Case C-260/04, judgment of the Court of 13 September 2007, paragraphs 2-10 of the preliminary ruling, ECR (2007) I-7083.

12 Cf., Case C-42/07, Judgment of the Court of 8 September 2009, paragraphs 3-28 of the preliminary ruling, ECR (2009) I-7633.

the right to organise other games of chance based on the drawing of numbers by lot or on sporting events. This led to the introduction of two games involving betting on football matches called 'Totobola' and 'Totogolo', respectively enabling participants to bet on the result (win, draw or loss) and the number of goals scored by the teams. There are also two lotto games, namely Totoloto, in which six numbers are chosen from a total of 49, and EuroMillions, a type of European lotto. Players of Totobola or Totoloto may also take part in a game called 'Joker', which consists in the drawing of a single number by lot. Lastly, there is also the Lotaria Instantânea, an instant game with a scratch card, commonly called 'raspadinha'.

In 2003 the legal framework governing lotteries, lotto games and sports betting was adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet. Those measures feature in Decree-Law No 282/2003 of 8 November 2003 (*Diário da República* I, series A, No 259, 8 November 2003). They seek essentially, first, to license Santa Casa to distribute its products by electronic means and, secondly, to extend Santa Casa's exclusive right of operation to include games offered by electronic means, in particular the internet, thereby prohibiting all other operators from using those means.

Article 2 of Decree-Law No 282/2003 confers on Santa Casa, through its Departamento de Jogos (Gaming Department), exclusive rights for the operation by electronic means of the games in question and for any other game the operation of which may be entrusted to Santa Casa, and states that that system covers all of the national territory, and includes, in particular, the internet.

Under Article 11(1) of Decree-Law No 282/2003 the following are classed as administrative offences:

'a the promotion, organisation or operation by electronic means of games [the operation of which has been entrusted to Santa Casa], in contravention of the exclusive rights granted by Article 2 [of the present Decree-Law], and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not;

b the promotion, organisation or operation by electronic means of lotteries or other draws similar to those of the Lotaria Nacional or the Lotaria Instantânea, in contravention of the exclusive rights granted by Article 2, and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not; […]'.

Article 12(1) of Decree-Law No 282/2003 sets the maximum and minimum fines for the administrative offences laid down in, inter alia, Article 11(1)(a) and (b) of that Decree-Law. For legal persons, the fine is to be not less than EUR 2 000 or more than three times the total amount deemed to have been collected from organising the game in question, provided that the triple figure is greater than EUR 2 000 but does not exceed a maximum of EUR 44 890.

The activities of Santa Casa were, at the material time, regulated by Decree-Law No 322/91 of 26 August 1991 adopting the statutes of Santa Casa da Misericórdia de Lisboa (*Diário da República* I, series A, No 195, 26 August 1991), as amended by Decree-Law No 469/99 of 6 November 1999 (*Diário da República* I, series A, No 259, 6 November 1999) ('Decree-Law No 322/91').

The preamble to Decree-Law No 322/91 emphasises the importance of the various aspects of Santa Casa - historical, social, cultural and economic - and concludes that the Government must pay 'specific and continuous attention in order to prevent negligence and failures […] while nevertheless granting [Santa Casa] the broadest possible autonomy in the management and operation of games of a social nature'.

Under Article 1(1) of its statutes, Santa Casa is a 'legal person in the public administrative interest'. The administrative organs of Santa Casa consist, by virtue of Article 12(1) of its statutes, of a director and a board of management. Pursuant to Article 13 of those statutes, the director is appointed by decree of the Prime Minister, the other members of Santa Casa's board of management being appointed by decree of the members of the Government under whose supervision Santa Casa falls.

Under Article 20(1) of its statutes, Santa Casa has been given specific tasks in the areas of protection of the family, mothers and children, help for unprotected minors at risk, assistance for old people, social situations of serious deprivation, and primary and specialised health care.

The earnings generated by the operation of games of chance are allocated between Santa Casa and other public-interest institutions or institutions involved in social projects. Those other public-interest institutions include associations of voluntary fire crews, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, and the cultural development fund.

The operation of games of chance falls within the responsibilities of the Gaming Department of Santa Casa. That department is governed by regulations adopted, as in the case of Santa Casa's statutes, by Decree-Law No 322/91, and it has its own administrative and control organs.

In accordance with Article 5 of the regulations governing the Gaming Department, the administrative organ of that department consists of the director of Santa Casa, who is the ex officio chairman, and two deputy directors appointed by joint decree of the Minister for Employment and Solidarity and the Minister for Health. Pursuant to Articles 8, 12 and 16 of the regulations of the Gaming Department, the majority of the members of the committees in charge of games, draws and complaints are representatives of the public authorities, that is to say, the General Tax Inspectorate and the District Government in Lisbon. Accordingly, the chairman of the complaints committee, who has a casting vote, is a judge appointed by decree of the Minister for Justice. Two of the three members of that committee are appointed by decree of the chief tax inspector and decree of the chief administrative officer (prefect) of the District of Lisbon respectively, while the third member of the committee is appointed by the director of Santa Casa.

The Gaming Department has the powers of an administrative authority to open, institute and prosecute proceedings concerning offences involving the illegal operation of games of chance in relation to which Santa Casa has the exclusive rights, and to investigate such offences. Decree-Law No 282/2003 confers upon the directors of the Gaming Department, inter alia, the necessary administrative powers to impose fines as provided for under Article 12(1) of that Decree-Law.

Bwin is an on-line gambling undertaking which has its registered office in Gibraltar. It offers games of chance on an internet site.

Bwin has no establishment in Portugal. Its servers for the on-line service are in Gibraltar and Austria. All bets are placed directly by the consumer on Bwin's internet site or by some other means of direct communication. Stakes on that site are paid by credit card in particular, but also by other means of electronic payment. The value of any winnings is credited to the gambling account opened for the gambler by Bwin. The gambler may use that money in order to gamble or ask for it to be transferred to his bank account.

Bwin offers a wide range of on-line games of chance covering sports betting, casino games, such as roulette and poker, and games based on drawing numbers by lot which are similar to the Totoloto operated by Santa Casa.

Betting is on the results of football matches and other sporting events. The different games offered include bets on the result (win, draw or loss) of football matches in the Portuguese championship equivalent to the Totobola and Totogolo games operated exclusively by Santa Casa. Bwin also offers on-line betting in real time, in which the odds are variable and change as the sporting event in question unfolds. Information such as the match score, the time elapsed, yellow and red cards given, and so on, are displayed in real time on the Bwin internet site, thus enabling gamblers to place bets interactively as the sporting event unfolds.

The Liga is a private-law legal person with the structure of a non-profit-making association, made up of all the clubs taking part in football competitions at professional level in Portugal. It organises, inter alia, the football competition corresponding to the national First Division and is responsible for the commercial operation of that competition.

A sponsorship agreement, concluded by the Liga and Bwin on 18 August 2005 for four playing seasons starting in 2005/2006, made Bwin the main institutional sponsor of the First Football Division in Portugal. Under the terms of that agreement, the First Division, previously known as the 'Super Liga', changed its name first to the Liga betandwin.com,

and then subsequently to the Bwin Liga. In addition, the Bwin logos were displayed on the sports kit worn by the players and affixed around the stadiums of the First Division clubs. The Liga's internet site also included references and a link allowing access to Bwin's internet site, making it possible for consumers in Portugal and other States to use the gambling services thus offered to them.

Subsequently, in exercising the powers conferred on them by Decree-Law No 282/2003, the directors of the Gaming Department of Santa Casa adopted decisions imposing fines of EUR 75 000 and EUR 74 500 respectively on the Liga and Bwin in respect of the administrative offences referred to in Article 11(1)(a) and (b) of that Decree-Law. Those sums represent the aggregated amounts of two fines imposed on each of the Liga and Bwin for promoting, organising and operating, via the internet, games of a social nature reserved to Santa Casa or such similar games, and also for advertising such gambling.

The Liga and Bwin brought actions before the national court for annulment of those decisions, invoking, inter alia, the relevant Community rules and case-law.

The Tribunal de Pequena Instânza Criminal do Porto (Local Criminal Court, Oporto) (Portugal) decided to stay the proceedings and to refer the question to the European Court of justice for a preliminary ruling.

Sporting Exchange Ltd ("Betfair") (2010)[13]

Article 1 of the Law on games of chance (Wet op de kansspelen; 'the Wok') provides:

'Subject to the provisions of Title Va of this Law, the following are prohibited:

(a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence, unless a licence therefor has been granted pursuant to this Law;

(b) promoting participation either in an opportunity as referred to under (a), provided without a licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom of the Netherlands in Europe, or to maintain a stock of materials intended to publicise or disseminate knowledge of such opportunities;

[…]'

Article 16(1) of the Wok is worded as follows:

'The Minister for Justice and the Minister for Welfare, Public Health and Culture may grant to one legal person with full legal capacity a licence, for a period to be determined by them, to organise sports-related prize competitions in the interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.'

Article 23 of the Wok states:

'1. A licence to organise a totalisator may be granted only in accordance with the provisions of this Title.

2. "Totalisator" shall mean any opportunity provided to bet on the outcome of trotting or other horse races, on the understanding that the total stake, apart from any deduction permitted by or by virtue of the law, will be distributed among those who have bet on the winner or on one of the prize winners.'

According to Article 24 of the Wok, the Minister for Agriculture and Fisheries and the Minister for Justice may grant to one legal person with full legal capacity a licence to organise a totalisator for a period to be determined by them.

Article 25 of the Wok provides:

'1. The Ministers referred to in Article 24 shall impose certain conditions on a licence to organise a totalisator.

2. Those conditions relate, inter alia, to:

a. the number of trotting and other horse races;

b. the maximum stake per person;

c. the percentage retained before distribution among the winners and the particular use of that percentage;

d. the supervision of the application of the Law by the authorities;

e. the obligation to prevent or take measures to prevent, so far as possible, unauthorised betting or the use of intermediaries at venues where trotting or other horse races take place.

3. The conditions may be amended or supplemented.'

Under Article 26 of the Wok:

'A licence granted in accordance with Article 24 may be withdrawn before its expiry by the Ministers referred to in that article in the event of a breach of the conditions imposed pursuant to Article 25.'

Article 27 of the Wok prohibits the offer or provision to the public of an intermediary service in the placing of bets with the operator of a totalisator.

Netherlands legislation in relation to games of chance is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

Furthermore, there is no possibility at all of offering games of chance interactively via the internet in the Netherlands.

The Stichting de Nationale Sporttotalisator ('De Lotto'), which is a non-profit-making foundation governed by private law, has held the licence for the organisation of sports-related prize competitions, the lottery and numbers games since 1961. The licence for the organisation of a totalisator on the outcome of horse races was granted to a limited company, Scientific Games Racing BV ('SGR'), which is a subsidiary of Scientific Games Corporation Inc., a company established in the United States.

According to De Lotto's constitution, its objects are the collection of funds by means of the organisation of games of chance and the distribution of those funds among institutions working in the public interest, particularly in the fields of sport, physical education, general welfare, public health and culture. De Lotto is managed by a five-member commission whose chairman is appointed by the Minister. The other members are designated by the Stichting Aanwending Loterijgelden Nederland (Foundation for the Use of Lottery Funds) and by the Nederlands Olympisch Comité/Nederlandse Sport Federatie (Netherlands Olympic Committee/Netherlands Sports Federation).

Betfair operates within the gaming sector. Its services are provided solely via the internet and by telephone. From the United Kingdom, it provides the recipients of its services with a platform for betting on sporting events and horse races, known as a 'betting exchange', on the basis of British and Maltese licences. Betfair has no office or sales outlet in the Netherlands.

As Betfair wished actively to offer its services on the Netherlands market, it requested the Minister to determine whether it required a licence in order to carry on such activities. It also applied to the Minister for a licence to organise sports-related prize competitions and a totalisator on the outcome of horse races, whether or not via the internet. By decision of 29 April 2004, the Minister refused those requests.

The objection lodged in respect of that decision was dismissed by the Minister on 9 August 2004. In particular, the Minister took the view that the Wok provides for a closed system of licences which does not allow for the possibility of licences being granted to provide opportunities for participating in games of chance via the internet. As Betfair could not obtain a licence for its current internet activities under the Wok, it was prohibited from offering those services to recipients established in the Netherlands.

Betfair also lodged two objections to the Minister's decisions of 10 December 2004 and 21 June 2005 concerning the renewal of licences granted to De Lotto and to SGR, respectively.

Those objections were dismissed by decisions of the Minister dated 17 March and 4 November 2005, respectively.

By judgment of 8 December 2006, the Rechtbank 's-Gravenhage (District Court, The Hague) declared Betfair's appeals against the dis-

13 Cf., Case C-203/08, Judgment of the Court of 3 June 2010, paragraphs 3-19.

missal decisions referred to above to be unfounded. Betfair subsequently appealed against that judgment to the Raad van State (Council of State).

Ladbrokes (2010)[14]

Article 1 of the Law on games of chance (Wet op de kansspelen; 'the Wok') provides:

'Subject to the provisions of Title Va of this Law, the following are prohibited:

(a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence, unless a licence therefor has been granted pursuant to this Law;

(b) promoting participation either in an opportunity as referred to under (a), provided without a licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom of the Netherlands in Europe, or to maintain a stock of materials intended to publicise or disseminate knowledge of such opportunities; […]'

Article 16 of the Wok is worded as follows:

'1. The Minister for Justice and the Minister for Welfare, Public Health and Culture may grant to one legal person with full legal capacity a licence, for a period to be determined by them, to organise sports-related prize competitions in the interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.

2. The proceeds from prize competitions […] shall be applied in respect of the interests which the legal person intends to serve by organising and operating sports-related prize competitions.

3. At least 47.5% of total proceeds from games of chance organised pursuant to this Title and to Title IVa, to be calculated on the basis of a calendar year, shall be allocated to the distribution of prizes. […]'

Article 21 of the Wok states:

1. The Ministers referred to in Article 16 shall lay down rules concerning licences for the organisation of sports-related prize competitions.
2. Those rules relate, inter alia, to:
   a. the number of competitions to be organised;
   b. the method of determining results and the prize scheme;
   c. the management and covering of organisational costs;
   d. the allocation of revenue from competitions organised;
   e. the constitution and regulations of the legal person;
   f. monitoring of compliance with the legislation by the authorities;
   g. delivery and publication of the report to be drawn up annually by the legal person concerning its activities and financial results.'

Netherlands legislation in relation to games of chance is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

Furthermore, there is no possibility at all of offering games of chance interactively via the internet in the Netherlands.

De Lotto is a non-profit-making foundation governed by private law which holds a licence for the organisation of sports-related prize competitions, the lottery and numbers games. Its objects, according to its constitution, are the collection of funds by means of the organisation of games of chance and the distribution of those funds among institutions working in the public interest, particularly in the fields of sport, physical education, general welfare, public health and culture.

The Ladbrokes companies are engaged in the organisation of sports-related prize competitions and are particularly well known for their bookmaking business. They offer a number of mainly sports-related games of chance on their internet site. They also offer the possibility of participating via a freephone number in the betting activities which they organise. The companies do not physically carry on any activity in the Netherlands.

De Lotto alleged that the Ladbrokes companies were, via the internet, offering games of chance to persons residing in the Netherlands for which they did not have the requisite licence under the Wok, and made an application for interim relief to the Rechtbank Arnhem (District Court, Arnhem) for the Ladbrokes companies to be required to put an end to that activity.

By judgment of 27 January 2003, the Rechtbank judge hearing the application for interim relief allowed the application and ordered the Ladbrokes companies to take steps to block access to their internet site for persons residing in the Netherlands and to make it impossible for such persons to participate in telephone betting. Those measures were confirmed by the judgments of the Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) and the Hoge Raad der Nederlanden (Supreme Court) of 2 September 2003 and 18 February 2005, respectively.

On 21 February 2003, De Lotto also issued proceedings against the Ladbrokes companies in a substantive action before the Rechtbank Arnhem. In its application, De Lotto sought confirmation of the coercive measures imposed on those companies by the judge who had heard the application for interim relief. By decision of 31 August 2005, the Rechtbank allowed De Lotto's application and ordered the Ladbrokes companies, on pain of imposition of a periodic penalty, to maintain the measures blocking access to games of chance via the internet or by telephone for persons residing in the Netherlands. That decision was upheld by the judgment of the Gerechtshof te Arnhem of 17 October 2006; the Ladbrokes companies therefore appealed in cassation to the referring court.

The Hoge Raad der Nederlanden took the view that an interpretation of European Union law was required to enable it to determine the dispute before it, and decided to stay the proceedings and to refer the questions to the European Court of justice for a preliminary ruling.

Otto Sjöberg and Anders Gerdin v. Swedish State (2010) *(hereafter: Sjöberg/Gerdin)*[15]

The Lotterilag governs all categories of gambling offered to the public in Sweden.

The objectives of Swedish gaming policy were summarised as follows in the *travaux préparatoires* for the Lotterilag:

'The main purpose underlying the gaming policy is […] to have in future a healthy and safe gaming market in which social protection interests and the demand for gaming are provided for in controlled forms. Profits from gaming should be protected and always reserved for objectives which are in the public interest or socially beneficial, that is, the activities of associations, equestrian sports and the State. As has been the case hitherto, the focus should be on prioritising social protection considerations whilst offering a variety of gaming options and taking heed of the risk of fraud and unlawful gaming.'

The Swedish legislation on gambling seeks to:

- counter criminal activity;
- counter negative social and economic effects;
- safeguard consumer protection interests, and
- apply the profits from lotteries to objectives which are in the public interest or socially beneficial.

Paragraph 9 of the Lotterilag provides that a licence is, as a general rule, required to organise gambling in Sweden.

Under Paragraph 15 of the Lotterilag, a licence may be issued to a Swedish legal person which is a non-profit-making association and which under its statutes has as its main purpose the advancement of socially beneficial objectives in Sweden and carries on activities which serve mainly the advancement of that objective. Under Paragraph 45 of the

14 Cf., Case C-258/08, Judgment of the Court of 3 June 2010, paragraphs 3-13 of the preliminary ruling.

15 Cf., Joined Cases C-447/08 and C-448/08,Judgment of the Court of 8 July 2010, paragraphs 3-25 and 27 of the preliminary ruling.

Lotterilag, the Swedish Government may also grant a special licence to organise gambling in cases other than those provided for in that law.

In accordance with a fundamental principle of the Swedish legislation on gambling, which provides that the profits from the operation of gambling should be reserved for socially beneficial objectives or those which are in the public interest, the Swedish gambling market is shared between, on the one hand, non-profit-making associations whose purpose is the advancement of socially beneficial objectives in Sweden which have been granted licences under Paragraph 15 of the Lotterilag, and, on the other, two operators which are either State owned or mainly State controlled, namely, the State owned gaming company Svenska Spel AB and Trav och Galopp AB, which is jointly owned by the State and the equestrian sports organisations, those companies holding special licences under Paragraph 45 of the Lotterilag.

Under Paragraph 48 of the Lotterilag, a public authority, namely the Lotteriinspektion, is the central body responsible for monitoring compliance with the Lotterilag. On the basis of that law, the Lotteriinspektion is authorised to draw up the regulations relating to the monitoring and internal rules necessary for the various games. It exercises supervision over Svenska Spel AB's activity and carries out inspections and regular checks.

Under Article 52 of the Lotterilag, the Lotteriinspektion can issue the directions and prohibitions necessary for compliance with the provisions of that law and decide on the rules and conditions adopted on the basis of it. Such a direction or prohibition may be accompanied by an administrative penal

Under Paragraph 14 of Chapter 16 of the Criminal Code (Brottsbalken, 'the Brottsbalk'), the organisation without a licence of gambling in Sweden constitutes an offence of unlawful gaming. This is punishable with a fine or imprisonment of up to two years. If the infringement is deemed serious, it is punishable, as an offence of unlawful gaming set out in Paragraph 14a of Chapter 16, with imprisonment for between six months and four years.

In addition, under Paragraph 54(1) of the Lotterilag, anyone who, intentionally or through gross recklessness, organises unlawful gambling or unlawfully owns certain types of slot machines is liable to a fine or a prison sentence of up to six months.

The provisions of the Brottsbalk relating to the offence of unlawful gaming cover specifically described criminal offences. Criminal offences which are less serious and which, for this reason, do not fall within Paragraph 14 thereof, fall within the scope of Paragraph 54(1) of the Lotterilag. Under Article 57(1) of the Lotterilag, that latter provision does not apply where the criminal offence is subject to a penalty provided for by the Brottsbalk.

Since the Lotterilag applies only in Sweden, the prohibition on organising a lottery without a licence does not apply to gambling operated abroad. Nor does that prohibition apply to gambling offered on the internet from another State to Swedish consumers and the same law does not prohibit Swedish consumers from participating in gambling organised abroad. Similarly, a licence granted under that law confers on its holder a right to offer gambling services only within the territorial scope of the Lotterilag, that is to say, within Sweden

Under Paragraph 38(1)(1) of the Lotterilag, it is prohibited, in commercial operations or otherwise to promote, without a special licence and for the purpose of profit, participation in unlicensed gambling, organised within Sweden or abroad.

Under Paragraph 38(2), a derogation from the prohibition referred to in Paragraph 38(1) may be granted as regards gambling which is organised on the basis of international cooperation with Swedish participation by a foreign operator authorised to organise gambling, under the rules applicable in the State where he is established, and to cooperate on an international level.

Paragraph 54(2) of the Lotterilag provides that a fine or a maximum of six months' imprisonment may be imposed on persons who, in commercial operations or otherwise for the purpose of profit, illegally promote participation in gambling organised abroad, if the promotion specifically relates to consumers resident in Sweden.

Under Paragraph (4)(1) of Chapter 23 of the Brottsbalk, it is not only the perpetrator of certain criminal acts who is liable for them, but also the person who promotes them by aiding or abetting them. Furthermore, under Paragraph (4)(2), even a person who is not regarded as the co-perpetrator of the offence is held responsible if he has encouraged a third party to commit it, if he has provoked it or if he has aided its perpetrator in any other way.

At the material time, Mr Sjöberg was the editor-in-chief and the publisher of the Expressen newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and August 2004, of advertisements for gambling organised abroad by the companies Expekt, Unibet, Ladbrokes and Centrebet.

Mr Gerdin, for his part, was, at the material time, the editor-in-chief and publisher of the Aftonbladet newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and June 2004, of advertisements for gambling organised abroad by those companies.

Expekt, Unibet, Ladbrokes and Centrebet are private operators established in Member States other than the Kingdom of Sweden who offer internet gambling, in particular to persons resident in Sweden. These games include, among others, sports betting and poker.

The Åklagaren (Public Prosecutor's Office) subsequently took proceedings against Mr Sjöberg and Mr Gerdin for infringement of Paragraph 54(2) of the Loterrilagen, for having promoted, unlawfully and for profit, the participation of Swedish residents in gambling organised abroad.

On 21 June and 6 September 2005, Mr Sjöberg and Mr Gerdin were each ordered by the Stockholms tingsrätt (District Court, Stockholm) to pay a criminal penalty of SEK 50 000 in respect of infringement of the Lotterilag.

Mr Sjöberg and Mr Gerdin both appealed against the judgment concerning them before the Svea hovrätt (Court of Appeal, Svea). That court however refused to allow the admissibility of the appeal brought against those two judgments.

The parties concerned appealed against those decisions of the Svea hovrätt before the Högsta domstolen (Supreme Court) and that latter court, on 5 February 2008, issued a decision declaring that the appeals before the Svea hovrätt were admissible, thereby referring the two cases back to it.

The Svea Hovrätt decided to stay the proceedings and to refer to the European Court of Justice the questions for a preliminary ruling.

Carmen Media (2010)[16]

Paragraph 284 of the Criminal Code (Strafgesetzbuch; 'the StGB') provides:

'1 Whosoever without the authorisation of a public authority publicly organises or operates a game of chance or makes equipment for it available shall be liable to imprisonment of not more than two years or a fine.

...

3 Whosoever in cases under subparagraph 1 above acts

1. on a commercial basis

...

shall be liable to imprisonment of between three months and five years.

...'

Apart from bets concerning official horse races, which fall primarily under the Law on Racing Bets and Lotteries (Rennwett- und Lotteriegesetz; 'the RWLG'), and the installation and use of gambling machines in establishments other than casinos (gaming arcades, cafes, hotels, restaurants and other accommodation), which fall primarily within the Trade and Industry Code (Gewerbeordnung) and the Regulation on Gambling Machines (Verordnung über Spielgeräte und andere Spiele mit Gewinnmöglichkeit), determination of the conditions under which authorisations within the meaning of Paragraph 284(1) of the StGB may be issued for games of chance has taken place at the level of the various *Länder*.

16 Cf., Case C-46/08, Judgment of the Court of 8 September 2010, paragraphs 3-25 and 38.

Paragraph 1(1) of the RWLG provides:

'An association wishing to operate a mutual betting undertaking on horse races or other public horse competitions must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*'.

Paragraph 2(1) of the RWLG provides:

'Any person wishing, on a commercial basis, to conclude bets on public horse competitions or serve as intermediary for such bets (Bookmaker) must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*'.

By the State treaty concerning lotteries in Germany (Staatsvertrag zum Lotteriewesen in Deutschland; 'the LottStV'), which entered into force on 1 July 2004, the *Länder* created a uniform framework for the organisation, operation and commercial placing of gambling, apart from casinos.

In a judgment of 28 March 2006, the Bundesverfassungsgericht (Federal Constitutional Court) held, concerning the legislation transposing the LottStV in the *Land* of Bavaria, that the public monopoly on bets on sporting competitions existing in that *Land* infringed Paragraph 12(1) of the Basic Law, guaranteeing freedom of occupation. That court held in particular that, by excluding private operators from the activity of organising bets, without at the same time providing a regulatory framework capable of ensuring, in form and in substance, both in law and in fact, effective pursuit of the aims of reducing the passion for gambling and combating addiction to it, that monopoly had a disproportionately adverse effect on the freedom of occupation thus guaranteed.

The State treaty on games of chance (Glücksspielstaatsvertrag; 'the GlüStV'), concluded between the *Länder* and which entered into force on 1 January 2008, establishes a new uniform framework for the organisation, operation and intermediation of games of chance aiming to satisfy the requirements laid down by the Bundesverfassungsgericht in the said judgment of 28 March 2006.

The explanatory report on the draft of the GlüStV ('the explanatory report') shows that the main aim of the latter is the prevention and combating of addiction to games of chance. According to the explanatory report, a study dating from April 2006, carried out, at the request of the Commission of the European Communities, by the Swiss Institute of Comparative Law and concerning the market for games of chance in the European Union, clearly showed the effectiveness which may result, in that perspective, from legislation and a strict channelling of the activities concerned.

As regards the specific area of bets on sporting competitions, the explanatory report indicated that whilst, for the great majority of persons placing bets, such bets might be only for relaxation and entertainment, it was very possible, on the evidence contained in the available scientific studies and expert reports, that, if the supply of those bets were significantly increased, the potential for dependency likely to be generated by them would be significant. It was thus necessary to adopt measures for preventing such dependency by imposing limits on the organisation, marketing and operation of such games of chance. The channelling and limitation of the market for those games by the GlüStV was to be obtained, in particular, by maintaining the existing monopoly on the organisation of bets on sporting competitions and on lotteries with particular risk potential.

According to Paragraph 1 of the GlüStV, the objectives of the latter are as follows:

'1. to prevent dependency on games of chance and on bets, and to create the conditions for effectively combating dependency,
2. to limit the supply of games of chance and to channel the gaming instinct of the population in an organised and supervised manner, preventing in particular a drift towards unauthorised games of chance,
3. to ensure the protection of minors and players,
4. to ensure the smooth operation of games of chance and the protection of players against fraudulent manoeuvres, and to prevent criminality connected with and arising from games of chance.'

Paragraph 2 of the GlüStV states that, with regard to casinos, only Paragraphs 1, 3 to 8, 20 and 23 apply.

Paragraph 4 of the GlüStV states:

'1 The organisation or intermediation of public games of chance may take place only with the authorisation of the competent authority of the *Land* concerned. All organisation or intermediation of such games is prohibited without such authorisation (unlawful games of chance).
2 Such authorisation shall be refused where the organisation or intermediation of the game of chance is contrary to the objectives of Paragraph 1. Authorisation shall not be issued for the intermediation of games of chance unlawful according to the present State treaty. There is no established right to the obtaining of an authorisation.
...
4 The organisation and intermediation of public games of chance on the internet are prohibited.'

Paragraph 10 of the GlüStV provides:

'1 In order to attain the objectives set out in Paragraph 1, the *Länder* are under a statutory obligation to ensure a sufficient supply of games of chance. They shall be assisted by a technical committee composed of experts specialised in combating dependency on games of chance.
2 In accordance with the law, the *Länder* may undertake that task either by themselves or through the intermediary of legal persons under public law or private law companies in which legal persons under public law hold a direct or indirect controlling shareholding.
...
5 Persons other than those referred to in subparagraph 2 shall be authorised to organise only lotteries and games in accordance with the provisions of the third section.'

The third section of the GlüStV concerns lotteries with a low risk of danger, which may be authorised under highly restrictive conditions and exclusively for organisers pursuing public interest or charitable aims.

Paragraph 25(6) of the GlüStV states:

'The *Länder* may, for a maximum period of one year after the entry into force of the State treaty, in derogation from Paragraph 4(4), permit the organisation and intermediation of lotteries on the internet where there is no reason to refuse them pursuant to Paragraph 4(2) and where the following conditions are met:

- exclusion of minors or prohibited players guaranteed by identification and authentication measures, in compliance with the directives of the Commission for the protection of minors as a closed group of media users;
- limitation of stakes, as fixed in the authorisation, to EUR 1 000 per month, and guarantee that credit is prohibited;
- prohibition of particular incitements to dependency by rapid draws and of the possibility of participating interactively with publication of results in real time; as regards lotteries, limitation to two winning draws per week;
- localisation by use of the most modern methods, in order to ensure that only persons within the scope of the authorisation may participate;
- establishment and operation of a programme of social measures adapted to the specific conditions of the internet, the effectiveness of which is to be assessed scientifically.'

According to the explanatory report, the transitional provision contained in Paragraph 25(6) of the GlüStV aims to provide equitable relief for two operators of commercial games who operate almost entirely on the internet and respectively employ 140 and 151 persons, by giving them sufficient time to bring their activity into conformity with the distribution channels authorised by the GlüStV.

The GlüStV was transposed by the Land Schleswig-Holstein by the law implementing the State treaty on games of chance in Germany (Gesetz zur Ausführung des Staatsvertrages zum Glücksspielwesen in Deutschland) of 13 December 2007 (GVOBl. 2007, p. 524; 'the GlüStV AG').

Paragraph 4 of the GlüStV AG provides:

'1 In order to achieve the objectives set out in Paragraph 1 of the GlüStV, the Land Schleswig-Holstein shall concern itself with supervision of games of chance, the guarantee of a sufficient provision of games of chance, and scientific research in order to avoid and prevent the dangers of dependency connected with games of chance.

2 In accordance with Paragraph 10(1) of the GlüStV, the Land Schleswig-Holstein shall fulfil that function through the intermediary of NordwestLotto Schleswig-Holstein GmbH & Co. KG. (NordwestLotto Schleswig-Holstein), the shares of which are held, directly or indirectly, in whole or in part, by the Land. ...

3 NordwestLotto Schleswig-Holstein may organise lottery draws, scratch cards and sporting bets, as well as lotteries and additional games in the matter.

...'

Paragraph 5(1) of the GlüStV AG provides:

'Authorisation under Paragraph 4(1) of the GlüStV for games of chance which are not lotteries having a low potential for danger (Paragraph 6) presupposes:

1. the absence of grounds for refusal set out in Paragraph 4(2), first and second sentences, of the GlüStV,
2. compliance with:
   a the requirements concerning the protection of minors in accordance with Paragraph 4(3) of the GlüStV,
   b the internet prohibition contained in Paragraph 4(4) of the GlüStV,
   c the restrictions on advertising contained in Paragraph 5 of the GlüStV,
   d the requirements concerning the programme of social measures contained in Paragraph 6 of the GlüStV, and
   e the requirements on explanations concerning the risks of dependency in accordance with Paragraph 7 of the GlüStV,
3. the reliability of the organiser or the intermediary, who must, in particular, ensure that the organisation and intermediation are carried out in a regular manner and easily verifiable by players and the competent authorities,
4. the participation, in accordance with Paragraph 9(5) of the GlüStV, of the technical committee in the introduction of new games of chance, of new distribution channels or in considerable enlargement of existing distribution channels and a guarantee that a report on the social repercussions of the new or enlarged supply of games of chance has been drafted,
5. a guarantee that the organisers, within the meaning of Paragraph 10(2) of the GlüStV, participate in the concerted system for prohibiting certain players in accordance with Paragraphs 8 and 23 of the GlüStV,
6. a guarantee that players prohibited from gambling in accordance with the first sentence of Paragraph 21(3) and the first sentence of paragraph 22(2) of the GlüStV are excluded, and
7. compliance by intermediaries in commercial gambling with Paragraph 19 of the GlüStV.

If the conditions in the first sentence are met, authorisation should be given.'

Paragraph 9 of the GlüStV AG provides:

'By derogation from Paragraph 4(4) of the GlüStV, in the case of lotteries, organisation and intermediation on the internet may be authorised until 31 December 2008 if compliance with the conditions set out in Paragraph 25(6) of the GlüStV is guaranteed. ...'

Carmen Media is established in Gibraltar, where it obtained a licence authorising it to market bets on sporting competitions. For tax reasons, however, that licence is limited to the marketing of bets abroad ('offshore bookmaking').

In February 2006, wishing to offer such bets via the internet in Germany, Carmen Media applied to the Land Schleswig-Holstein for a declaration that that activity was lawful, having regard to the licence which Carmen Media holds in Gibraltar. In the alternative, it applied for the issuing of an authorisation for its activity, or, failing that, for tolerance of that activity until the establishment of an authorisation procedure for private offerors of bets which complies with Community law.

Those applications having been rejected on 29 May 2006, Carmen Media brought an action on 30 June 2006 before the Schleswig-Holsteinisches Verwaltungsgericht (Schleswig-Holstein Administrative Court).

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The Schleswig-Holsteinisches Verwaltungsgericht decided to stay the proceedings before it and to refer the questions to the European Court of Justice for a preliminary ruling.

Summary of the legal and factual context of the case-law

The factual background of *Zenatti* was revisited by the ECJ in the ensuing Gambelli and Placanica cases, which set the tone for modern legal handling of EU sports betting policies. *Zenatti* concerned the prohibition imposed on the defendant from acting as an intermediary in Italy for a company established in the United Kingdom specializing in the taking of bets on sporting events.

Gambelli involved a similar background to *Zenatti*. The defendants were accused of having unlawfully organized clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constituted an offence of fraud against the State.

The European Court of Justice was given a third opportunity to assume a definite stance on such matters of restrictive practices and national policies on sports betting in violation of the provisions of the EC Treaty, in *Placanica*. Once again, like in *Gambelli* Stanley and its agents in Italy were involved (in all three "Italian" cases, including *Zenatti* UK-based sports betting enterprises were involved; so, in fact these were "UK/Italian" cases); the latter (in *Placanica*) were three defendants who were prosecuted by the Italian State for running the "data transmission" sites one found in *Zenatti* and *Gambelli*. Until 2002, the method of licensing sport betting operators was reserved by and for the state-affiliated and licensed organizations CONI (Italian National Olympic Committee) and UNIRE (horse-racing) respectively. In 2002, the competences of the CONI and UNIRE with respect to bets on sporting events were transferred to the independent authority for the administration of State monopolies, acting under the supervision of the Ministry of Economic Affairs and Finance. Other than the subjective difficulty in obtaining such a license from Italian authorities, the Italian Penal Code criminalised such sport betting activities, as foreign sport betting operators would not be allowed to run their business without a license. It is expressly stated in *Placanica* that the legal and factual context of this case is similar to the situations that gave rise to the judgements in *Zenatti* and *Gambelli*.

The judgment in *Commission v Italy* (all other sports betting cases mentioned here are preliminary rulings of the ECJ) concerned a complaint lodged by a private operator, Italy had failed to fulfil its obligations under the EC Treaty by renewing 329 licences for horse-race betting operations without inviting any competing bids.

The case of *Liga Portuguesa de Futebol Profissional* concerned fines imposed on the plaintiffs on the ground that they had infringed the Portuguese legislation governing the provision of certain games of chance via the internet. It is a case of modern times, that is a case of so-called "remote gambling" - without intermediaries like in *Zenatti*, *Gambelli* and *Placanica.* Bets are placed directly by the consumer on the internet or by some other means of direct communication. In 2003 the legal framework in Portugal governing *inter alia* sports betting had been adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet.

The conclusion is that the factual context of *Zenatti*, *Gambelli* and *Placanica* is similar, and *Liga Portuguesa de Futebol Profissional* is a case of "remote gambling", whereas *Commission v Italy* is essentially different from these cases.

Since the Liga Portuguesa case, four new rulings were delivered by

the European Court of Justice in 2010 only, in chronological order: Ladbrokes and Sporting Exchange ("Betfair") on the same day (3 June 2010), Sjöberg/Gerdin, and Carmen Media. The first four cases were Ïtalian ones (Zenatti, Gambelli, Placanica and Commission v. Italy), followed by a Portuguese one; after these Southern European cases the focus now has shifted to Northern Europe: Betfair and Ladbrokes are Dutch cases, Sjöberg/Gerdin is a Swedish one, Carmen Media a German one, and Engelsmann an Austrian case.

In the Ladbrokes and Betfair cases UK-based sports betting enterprises were involved. The case concerned the possible unlawful conduct of Ladbrokes on the Netherlands market for games of chance, and the rejection of Betfair's applications for a licence to organize games of chance in the Netherlands. it is observed that Netherlands legislation in relation to games of chance is based on a system of exclusive licences, and there is no possibility at all of offering games of chance interactively via the internet in the Netherlands. De Lotto holds the licence for the organization of sports-related prize competitions and others.

In Sweden (Sjöberg/Gerdin case), under the Criminal Code the organization without a licence of gambling constitutes an unlawful act. Under the Lotteries Act it is prohibited to promote, without a special licence and for the purpose of profit, participation in unlicensed gambling, organized within Sweden or abroad. Expekt, Unibet, Ladbrokes and Centrebet are private operators established in Member States other than Sweden who offer internet gambling, in particular to persons resident in Sweden. These games include, among others, sports betting. The Swedish newspaper publishers Sjöberg and Gerdin promoted the participation of Swedish residents in gambling organized abroad.

The Carmen Media case concerned the refusal of a request by Carmen Media for acknowledgement of the right to offer bets on sporting competitions via the internet in the Land Schleswig-Holstein. Carmen Media is established in Gibraltar, where it obtained a licence authorizing it to market bets on sporting competitions abroad ('offshore bookmaking").

The Ladbrokes, Betfair, Sjöberg/Gerdin and Carmen Media cases like Liga Portuguesa are all remote gambling cases.

3. The case-law presented according to the "reversal" method

Carmen Media

40 In that regard, it should be noted that activities which consist in allowing users to participate, for remuneration, in a game of chance constitute 'services' for the purposes of Article 49 EC (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 25, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 24).

41 Therefore, as consistent case-law shows, such services fall within the scope of Article 49 EC where the provider is established in a Member State other than the one in which the service is offered (see, to that effect, *Zenatti*, paragraphs 24 and 25). That is particularly so in the case of services which the provider offers via the internet to potential recipients established in other Member States and which he provides without moving from the Member State in which he is established (see, to that effect, *Gambelli and Others*, paragraphs 53 and 54).

44 Such a finding is, moreover, without prejudice to the ability of any Member State whose territory is covered by an offer of bets emanating, via the internet, from such an operator, to require the latter to comply with restrictions laid down by its legislation in that area, provided those restrictions comply with the requirements of European Union law ('EU law'), particularly that they be non-discriminatory and proportionate (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 48 and 49).

45 In that regard, it should be noted that, with regard to the justifications which may be accepted where internal measures restrict the freedom to provide services, the Court has held several times that the objectives pursued by national legislation in the area of gambling and bets, considered as a whole, usually concern the protection of the recipients of the services in question, and of consumers more generally, and the protection of public order. It has also held that such objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services (see to that effect, in particular, *Schindler*, paragraph 58; *Läärä and Others*, paragraph 33; *Zenatti*, paragraph 31; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 73; and *Placanica and Others*, paragraph 46).

46 The case-law of the Court of Justice thus shows that it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary wholly or partially to prohibit activities of that nature, or only to restrict them and to lay down more or less strict supervisory rules for that purpose, the necessity and the proportionality of the measures thus adopted having only to be assessed having regard to the objectives pursued and the level of protection sought to be ensured by the national authorities concerned (see to that effect, in particular, *Läärä and Others*, paragraphs 35 and 36; *Zenatti*, paragraphs 33 and 34; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 58).

55 As a preliminary observation, it should be noted that, in paragraph 67 of the judgment in *Gambelli and Others*, after stating that restrictions on gaming activities might be justified by imperative requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling, the Court held that that applied only in so far as such restrictions, based on such grounds and on the need to preserve public order, were suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

60 The Court has also held that, in the matter of games of chance, it is in principle necessary to examine separately for each of the restrictions imposed by the national legislation whether, in particular, it is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives (*Placanica and Others*, paragraph 49).

65 The Court has, similarly, held that it is for the national courts to ensure, having regard in particular to the actual rules for applying the restrictive legislation concerned, that the latter genuinely meets the concern to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner (see to that effect, in particular, *Zenatti*, paragraphs 36 and 37, and *Placanica and Others*, paragraphs 52 and 53).

66 As the Court has already held in those various respects, in *Gambelli and Others*, paragraphs 7, 8 and 69, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance or betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for gambling in order to justify restrictive measures, even if, as in that case, the latter relate exclusively to betting activities.

85 However, the margin of discretion which the Member States thus enjoy in restricting gambling does not exonerate them from ensuring that the measures they impose satisfy the conditions laid down in the case-law of the Court, particularly as regards their proportionality (see, in particular, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59 and case-law cited).

86 According to consistent case-law, where a system of authorisation pursuing legitimate objectives recognised by the case-law is established in a Member State, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see, in particular, Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, paragraph 49).

87 Also, if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them (see *Sporting Exchange*, paragraph 50 and case-law cited).

101 The Court has already had occasion to emphasise the particularities concerned with the offering of games of chance on the internet (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72).

102 It has thus observed in particular that, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70).

Sjöberg/Gerdin

32 It must be recalled at the outset that Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services covers both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51 and the case-law cited).

36 Article 46(1) EC, applicable in this field by reason of Article 55 EC, allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the general interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46 and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

37 In that context, it must be observed that the legislation on gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 57).

38 The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58).

39 The Member States are therefore free to set the objectives of their policy on gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

40 It is thus necessary to examine in particular whether, in the cases in the main action, the restriction on advertising imposed by the Lotterilag in respect of gambling organised in Member States other than the Kingdom of Sweden, by private operators for the purpose of profit, is suitable for achieving the legitimate objective or objectives invoked by that Member State, and whether it does not go beyond what is necessary in order to achieve those objectives. National legislation is moreover appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, those restrictions must be applied without discrimination (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 60 and 61).

49 Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that European Union law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by European Union law (*Placanica and Others*, paragraph 68).

50 It follows moreover from the case-law of the Court that restrictive measures imposed by the Member States on account of the pursuit of objectives in the public interest must be applied without discrimination (*Placanica and Others*, paragraph 49, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 60).

54 In that context, it must be recalled that the cooperation between the national courts and the Court of Justice established by Article 267 TFEU is based on a clear division of responsibilities. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice (see, to that effect, *Placanica and Others*, paragraph 36, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 37).

Ladbrokes

15 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51 and the case-law cited).

16 It is common ground that the legislation of a Member State under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State, constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 52, and Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, paragraph 24).

17 However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 55).

18 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

19 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (*Gambelli and Others*, paragraph 63, and *Placanica and Others*, paragraph 47).

20 The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, *Placanica and Others*, paragraph 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

21 Specifically, restrictions based on the reasons referred to in paragraph 18 of the present judgment must be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a con-

sistent and systematic manner (see, to that effect, *Gambelli and Others*, paragraph 67).

22 According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives (*Gambelli and Others*, paragraph 75, and *Placanica and Others*, paragraph 58).

25 As the Court has already held, it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming - and, as such, activities which are prohibited - to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques (*Placanica and Others*, paragraph 55).

26 While it is true that the grounds of the judgment in *Placanica and Others* refer solely to the objective of crime prevention in the betting and gaming sector, whereas, in the present case, the Netherlands legislation is also designed to curb gambling addiction, the fact remains that those two objectives must be considered together, since they relate both to consumer protection and to the preservation of public order (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 58; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 33; and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 31).

52 That question falls within the same legal framework as the first question referred in the case giving rise to the judgment in *Sporting Exchange* and is identical to it.

54 In that regard, it should be noted that the internet gaming industry has not been the subject of harmonisation within the European Union. A Member State is therefore entitled to take the view that the mere fact that an operator such as the Ladbrokes companies lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, is not a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69).

55 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70).

57 It follows from this that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72).

Sporting Exchange ("Betfair")

23 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51 and the case-law cited).

24 It is common ground that legislation of a Member State such as the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 52, and Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-0000, paragraph 16).

25 However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 55).

26 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

27 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 63, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 47).

28 The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, *Placanica and Others*, paragraph 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

29 According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives (*Gambelli and Others*, paragraph 75, and *Placanica and Others*, paragraph 58).

33 It should be noted in that regard that the internet gaming industry has not been the subject of harmonisation within the European Union. A Member State is therefore entitled to take the view that the mere fact that an operator such as Betfair lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69).

34 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70).

36 It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72).

49 Nevertheless, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to a fundamental freedom such as the freedom to provide services.

50 It has consistently been held that if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily (Case C-389/05 *Commission* v *France* [2008] ECR I-5397, paragraph 94, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 64). Furthermore, any person affected by a restrictive measure based on such a derogation must have a judicial remedy available to them (see, to that effect, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 38).

59 In any event, the restrictions on the fundamental freedom enshrined in Article 49 EC which arise specifically from the procedures for the grant of a licence to a single operator or for the renewal thereof, such as those at issue in the main proceedings, may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities (see, to that effect, Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraphs 40 and 42, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 66 and 67).

Liga Portuguesa de Futebol Profissional *(Hereafter: Liga Portuguesa)*

37 In that connection, it should be noted that the cooperative arrangements established by Article 234 EC are based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 36).

51 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16).

52 It is accepted that the legislation of a Member State which prohibits providers such as Bwin, established in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 54).

55 It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.

56 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, paragraph 46 and case-law cited).

57 In that context, as most of the Member States which submitted observations to the Court have noted, the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (see, inter alia, Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraph 15; Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 32; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraphs 56 and 60, and *Placanica and Others*, paragraph 47).

58 The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 36, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 34).

59 The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48).

60 In the present case, it is thus necessary to examine in particular whether the restriction of the provision of games of chance via the internet, imposed by the national legislation at issue in the main proceedings, is suitable for achieving the objective or objectives invoked by the Member State concerned, and whether it does not go beyond what is necessary in order to achieve those objectives. In any event, those restrictions must be applied without discrimination (see, to that effect, *Placanica and Others*, paragraph 49).

61 In that context, it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 55).

64 The Court has also recognised that limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation (see *Läärä and Others*, paragraph 37, and *Zenatti*, paragraph 35).

66 In that regard, it is apparent from the national legal framework, set out in paragraphs 12 to 19 of the present judgment, that the organisation and functioning of Santa Casa are governed by considerations and requirements relating to the pursuit of objectives in the public interest. The Gaming Department of Santa Casa has been given the powers of an administrative authority to open, institute and prosecute proceedings involving offences of illegal operation of games of chance in relation to which Santa Casa has the exclusive rights.

67 In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

69 In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks

of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.

70 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.

72 It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime.

Commission v Italy

20 As the Commission rightly observed, the Italian Government has not denied, either during the pre-litigation procedure or in the course of these proceedings, that the award of licences for horse-race betting operations in Italy constitutes a public service concession. That classification was accepted by the Court in Placanica and Others (C-338/04, C-359/04 and C-360/04 [2007] ECR I-0000), in which it interprets Articles 43 and 49 EC in relation to the same national legislation.

26 In those circumstances, it is necessary to consider whether the renewal may be recognised as an exceptional measure, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see, to that effect, Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraph 60, and Placanica and Others, cited above, paragraph 45).

27 On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (Placanica and Others, cited above, paragraph 46).

28 Although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality (Placanica and Others, cited above, paragraph 48).

29 It should therefore be examined whether the renewal of the licences without inviting any competing bids is suitable for achieving the objective pursued by the Italian Republic and does not go beyond what is necessary in order to achieve that objective. In any case, the renewal must be applied without discrimination (see, to that effect, Gambelli and Others, paragraphs 64 and 65, and Placanica and Others, paragraphs 49).

Placanica

2 The references have been made in the course of criminal proceedings against Mr Placanica, Mr Palazzese and Mr Sorricchio for failure to comply with the Italian legislation governing the collection of bets. The legal and factual context of these references is similar to the situations that gave rise to the judgments in Case C-67/98 Zenatti [1999] ECR I-7289 and Case C-243/01 Gambelli and Others [2003] ECR I-13031.

36 Admittedly, as regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (see, in particular, Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 19, and Wilson, paragraphs 34 and 35).

42 The Court has already ruled that, in so far as the national legislation at issue in the main proceedings prohibits - on pain of criminal penalties - the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the State, it constitutes a restriction on the freedom of establishment and the freedom to provide services (see Gambelli and Others, paragraph 59 and the operative part).

43 In the first place, the restrictions imposed on intermediaries such as the defendants in the main proceedings constitute obstacles to the freedom of establishment of companies established in another Member State, such as Stanley, which pursue the activity of collecting bets in other Member States through an organisation of agencies such as the DTCs operated by the defendants in the main proceedings (see Gambelli and Others, paragraph 46).

44 Secondly, the prohibition imposed on intermediaries such as the defendants in the main proceedings, under which they are forbidden to facilitate the provision of betting services in relation to sporting events organised by a supplier, such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, constitutes a restriction on the right of that supplier freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services (see Gambelli and Others, paragraph 58).

45 In those circumstances, it is necessary to consider whether the restrictions at issue in the main proceedings may be recognised as exceptional measures, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see Gambelli and Others, paragraph 60).

46 On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (see, to that effect, Case C-275/92 Schindler [1994] ECR I-1039, paragraphs 57 to 60; Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraphs 32 and 33; Zenatti, paragraphs 30 and 31; and Gambelli and Others, paragraph 67).

47 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Gambelli and Others, paragraph 63).

48 However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality.

49 The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination (see to that effect Gebhard, paragraph 37, as well as Gambelli and Others, paragraphs 64 and 65, and Case C-42/02 Lindman [2003] ECR I-13519, paragraph 25).

52 As regards the objectives capable of justifying those obstacles, a distinction must be drawn in this context between, on the one hand, the objective of reducing gambling opportunities and, on the other hand - in so far as games of chance are permitted - the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled.

53 With regard to the first type of objective, it is clear from the case-law that although restrictions on the number of operators are in principle capable of being justified, those restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities and to limit activities in that sector in a consistent and

systematic manner (see, to that effect, Zenatti, paragraphs 35 and 36, and Gambelli and Others, paragraphs 62 and 67).

55 Indeed it is the second type of objective, namely that of preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controllable systems, that is identified, both by the Corte suprema di cassazione and by the Italian Government in its observations before the Court, as the true goal of the Italian legislation at issue in the main proceedings. Viewed from that perspective, it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming - and, as such, activities which are prohibited - to activities which are authorised and regulated. As the Belgian and French Governments, in particular, have pointed out, in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.

58 It will be for the referring courts to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation genuinely contributes to the objective invoked by the Italian Government, namely, that of preventing the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it will be for the referring courts to ascertain whether those restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality.

61 The Court has already ruled that, even if the exclusion from tender procedures is applied without distinction to all companies quoted on the regulated markets which could be interested in those licences - regardless of whether they are established in Italy or in another Member State - in so far as the lack of foreign operators among the licensees is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment (see Gambelli and Others, paragraph 48).

68 Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law (see Case C-348/96 Calfa [1999] ECR I-11, paragraph 17).

Gambelli

46 Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.

48 In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.

53 The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member states and provides without moving from the Member State in which he is established (Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 22).

54 Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley established in a Member State, in this case the United Kingdom, offers via the internet and so without moving to recipients in another Member State, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.

58 The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.

59 It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.

60 In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.

62 As stated in paragraph 36 of the judgment in Zenatti, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.

63 On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

64 In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37).

65 According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

67 First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

68 In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.

69 In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.

75 It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

Zenatti

24 As the Court held in Schindler, the Treaty provisions on the freedom to provide services apply, in the context of running lotteries, to an

activity which enables people to participate in gambling in return for remuneration. Such an activity therefore falls within the scope of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) if at least one of the providers is established in a Member State other than that in which the service is offered.

25 In this case, the services at issue are provided by the organizer of the betting and his agents by enabling those placing bets to participate in a game of chance which holds out prospects of winnings. Those services are normally provided for remuneration consisting in payment of the stake and they are cross-frontier in character.

30 According to the information given in the order for reference and the observations of the Italian Government, the legislation at issue in the main proceedings pursues objectives similar to those pursued by the United Kingdom legislation on lotteries, as identified by the Court in Schindler. The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports.

31 As the Court acknowledged in paragraph 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v Van Wesemael [1979] ECR 35, paragraph 28, Case 220/83 Commission v France [1986] ECR 3663, paragraph 20, and Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them.

33 However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of Schindler, recognized as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.

34 In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.

35 As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 Läärä and Others [1999] ECR I-0000 in relation to slot machines, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.

36 However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

37 It is for the national court to verify whether, having regard to the specific rules for governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.

Analysis of the case-law

The paragraphs in *Carmen Media* which explicitly refer to previous rulings are:

40, 41, 44, 45, 46, 55, 60, 65, 66, 85, 86, 87, 101, and 102 (14 in total, making 26 references to previous rulings).

Carmen Media being the most recent case of all, not any reference is made to this ruling.

The paragraphs in *Sjöberg/Gerdin* which explicitly refer to previous rulings are:

32, 36, 37, 38, 39, 40, 49, 50, and 54 (9 in total, making 13 references to previous rulings).

There are no paragraphs in Sjöberg/Gerdin to which reference is made in a later ruling, that is Carmen Media.

The paragraphs in *Ladbrokes* which explicitly refer to previous rulings are:

15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 52, 54, 55, and 57 (14 in total, making 19 references to previous rulings).

There is one paragraph in Ladbrokes to which reference is made in another ruling:

16 (in Sporting Exchange 24).

The paragraphs in *Sporting Exchange* (*"Betfair"*) which explicitly refer to previous rulings are:

23, 24, 25, 26, 27, 28, 29, 33, 34, 36, and 59 (11 in total, making 15 references to previous rulings).

The paragraphs in Sporting Exchange to which reference is made in a later ruling are:

24 (in Ladbrokes 16), 49 (in Carmen Media 86), and 50 (in Carmen Media 87).

A general reference (without a specific paragraph or paragraphs mentioned) to Sporting Exchange is made in Ladbrokes 52 (N.B. Ladbrokes and Sporting Exchange are of the same date, 3 June 2010, and refer to each other, see also above). The total number of references to Sporting Exchange is: 4.

The paragraphs in *Liga Portuguesa* which explicitly refer to previous rulings are:

37, 52, 56, 57, 58, 59, 60, and 64 (8 in total, making 10 references to previous rulings).

The paragraphs in Liga Portuguesa to which reference is made in later rulings are:

37 (in Sjöberg /Gerdin 54), 51 (in Sporting Exchange 23, in Ladbrokes 15, in Sjöberg/Gerdin 32), 52 (in Sporting Exchange 24, in Ladbrokes 16), 55 (in Sporting Exchange 25, in Ladbrokes 17), 56 (in Sporting Exchange 26, in Ladbrokes 18, in Sjöberg/Gerdin 36), 57 (in Sjöberg/Gerdin 37), 58 (in Sjöberg/Gerdin 38, in Carmen Media 46), 59 (in Sporting Exchange 28, in Ladbrokes 20, in Sjöberg/Gerdin 39, in Carmen Media 85), 60 (in Sjöberg/Gerdin 40, Sjöberg/Gerdin 50), 61 (in Sjöberg/Gerdin 40), 66 (Sporting Exchange 59), 67 (Sporting Exchange 59), 69 (in Sporting Exchange 33, in Ladbrokes 54), 70 (in Sporting Exchange 34, in Ladbrokes 55, in Carmen Media 102), and 72 (in Sporting Exchange 36, in Ladbrokes 57, in Carmen Media 101).

The total number of references to Liga Portuguesa is: 31.

The paragraphs in *Commission v Italy* which explicitly refer to previous rulings are:

20, 26, 27, 28, and 29 (5 in total, making 8 references to previous rulings).

There are no paragraphs in Commission v Italy to which reference is made in any later ruling.

The paragraphs in *Placanica* which explicitly refer to previous rulings are:

2, 42, 43, 44, 45, 46, 47,49, 53, and 61 (10 in total, making 18 references to previous rulings).

The paragraphs in Placanica to which reference is made in later rulings are:

36 (in Liga Portuguesa 37, in Sjöberg/Gerdin 54), 45 (in Commission v Italy 26), 46 (in Commission v Italy 27, in Liga Portuguesa 56, in Sjöberg/Gerdin 36, in Carmen Media 45), 47 (in Liga Portuguesa 57, in Sporting Exchange 27, in Ladbrokes 19), 48 (in Commission v Italy 28, in Liga Portuguesa 59, in Sporting Exchange 28, in Ladbrokes 20, in Carmen Media 44), 49 (in Commission v Italy 29, in Liga Portuguesa 60, in Sjöberg/Gerdin 50, in Carmen Media 44, in Carmen Media 60), 52 (in Carmen Media 65), 53 (in Carmen Media 65), 55 (in Ladbrokes 25), 58 (in Sporting Exchange 29, in Ladbrokes 22), and 68 (Sjöberg/Gerdin 49).

A general reference to Placanica is made in Commission v Italy 20 and Ladbrokes 26.

The total number of references to Placanica is: 28.

There is one paragraph in *Gambelli* which explicitly refers to a previous ruling: 67 (one reference).

The paragraphs in Gambelli to which reference is made in later rulings are:

46 (in Placanica 43), 48 (in Placanica 61), 53 (in Carmen Media 41), 54 (in Liga Portuguesa 52, in Carmen Media 41), 58 (in Placanica 44), 59 (in Placanica 42), 60 (in Placanica 45, Commission v Italy 26), 62 (in Placanica 53), 63 (in Placanica 47, in Ladbrokes 19, in Sporting Exchange 27), 64 (in Placanica 49, in Commission v Italy 29), 65 (in Placanica 49, in Commission v Italy 29), 67 (in Placanica 46, in Placanica 53, in Ladbrokes 21, in Carmen Media 55, in Carmen Media 66), 68 (in Carmen Media 66), 69 (in Carmen Media 66), and 75 (in Ladbrokes 22, in Sporting Exchange 29).

A general reference to Gambelli is made in Placanica 2.

A reference to "the operative part" of Gambelli is found in Placanica 42.

A reference to "case-law cited" in Placanica 46 (including Gambelli 67) is made in Liga Portuguesa 56.

The total number of references to Gambelli is: 29.

Zenatti being the first ruling of all, there are no paragraphs in Zenatti which explicitly refer to previous rulings.

The paragraphs in Zenatti to which reference is made in later rulings are:

24 (in Carmen Media 40, in Carmen Media 41), 25 (in Carmen Media 41), 30 (in Placanica 46), 31 (in Placanica 46, in Ladbrokes 26, in Carmen Media 45), 33 (in Carmen Media 46), 34 (in Liga Portuguesa 58, in Carmen Media 46), 35 (in Placanica 53, in Liga Portuguesa 64), 36 (in Gambelli 62, in Placanica 53, in Carmen Media 65),and 37 (in Carmen Media 65).

General references to Zenatti are made in Gambelli 63, Gambelli 67, and Placanica 2.

A reference to "case-law cited" in Placanica 46 (including Zenatti 30 and Zenatti 31) is made in Liga Portuguesa 56.

Total number of references to Zenatti: 20.

It is striking that Commission v Italy (which is not a preliminary ruling like all others) is in an isolated position in relation to the other cases. Not any reference is made to this öld" case. Liga Portuguesa is the ruling most referred to, although it succeeded to four previous rulings, and was followed by only four new ones.

Table: Analysis of the case-law

	Zenatti	Gambelli	Placanica	Comm./It.	Liga Port.	Sport. Exch.	Ladbrokes	Sjöberg	Carmen M.
	(0)	(3)	(18)	(8)	(11)	(15)	(19)	(13)	(26)
Zenatti (20)	x	3	5	0	3	0	1	0	8
Gambelli (29)		x	13	3	2	2	3	0	6
Placanica (28)			x	5	5	3	5	4	6
Comm./It. (0)				x	0	0	0	0	0
Liga Port. (31)					x	10	8	9	4
Sport. Exch. (4)						x	2	0	2
Ladbrokes (1)						1	x	0	0
Sjöberg (0)								x	0
Carmen M.									x
	[20]	[32]	[46]	[8]	[42]	[19]	[20]	[13]	[26]

N.B. The rulings at the horizontal line are the referring ones, the rulings at the vertical line are referred to. The number of times that a reference is made is indicated. The "Indirect" references from Liga Portuguesa 56 to "case-law cited" in Placanica 46 - that is Zenatti 30-31 and Gambelli 67 - have been counted twice. The totals are indicated between brackets on the left side after the (abbreviated) names of the rulings. The totals of references made per ruling are indicated between brackets under the (abbreviated) names of the rulings at the horizontal line. The totals of the vertical and horizontal lines per ruling are indicated underneath the Table between square brackets. Each reference has two aspects: a stare decisis creating, generating one ("active reference", see also horizontal total numbers) and a stare decisis receiving one ("passive reference", see vertical total numbers). Stare decisis works both ways: because of the relevance of argument in the previous ruling it is referred back to, but this "recognition" materializes only if an (explicit) back-reference is made.

However, it looks like a central position is a good position also with regard to contributing to stare decisis (in a "passive" manner). Zenatti , Gambelli and Placanica "score less", although the difference with Liga Portuguesa is not so impressive as with the newest four, of the year 2010. On the other hand, the "active" role of Liga Portuguesa is restricted. Placanica and the new rulings of, in particular, Ladbrokes and Carmen Media have a much higher score. Apart from "content" (see below), the total ("passive" and "active" references) of Placanica provides the number one position: 46 (Liga Portuguesa (42) is in second position, Gambelli (32) in third, and Carmen Media (26 äctive"references!) in fourth). What are the average scores? On the one ultimate end, Zenatti, being the first ruling, could not refer to any previous case, and on the other ultimate end. Carmen Media, being the most recent ruling, could not be referred to. And the opposite is also true. Zenatti could be referred to in 8 rulings; so, the average currently is: 20/8 = 2,5. The other averages as to "passive" references are as follows: Gambelli: 29/7 = appr. 4; Placanica: 28/6 = appr. 4,5; Commission v Italy: 0/5 = 0; Liga Portuguesa: 31/4 = appr. 7,7; Sporting Exchange: 4/3 = 1,3,; Ladbrokes and Sjöberg score less than 1. It is clear that Liga Portuguesa is by far most prominent, followed by Placanica and Gambelli. The averages as to "active" references are: Gambelli: 3/1 = 3, Placanica: 18/2 = 9, Commission v Italy: 8/3 = appr. 3, Liga Portuguesa: 11/4 = appr. 3, Sporting Exchange: 15/5 = 3, Ladbrokes: 19/6 = appr. 3, Sjöberg: 13/7 = appr. 2, and Carmen Media: 26/8 = appr. 3. So, Placanica is by very far most prominent, The conclusion is that Placanica and Liga Portuguesa are the most prominent rulings of all in several respects.

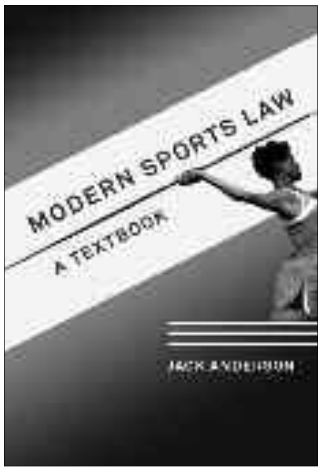
Now, the "content" of the paragraphs which have been referred to more than once will be focused on:

New *from* Hart Publishing

Modern Sports Law

A Textbook

by Jack Anderson



'This is a well-researched and well-written Book on 'Sports Law' and one that I would heartily and unhesitatingly recommend to students and practitioners alike.' Professor Ian Blackshaw, *International Sport Law Journal*

The aim of this book is to provide an account of how the law influences the operation, administration and playing of modern sports. Although the book focuses on legal doctrine it has been written bearing in mind sport's historical, cultural, social and economic context, including the drama and colour of sport's major events and leading personalities. And although it is inevitably very much concerned with elite professional sports it is not dominated by them, and seeks to cover the widest possible range of sports, professional and amateur.

Initially, the book addresses practical issues such as the structures of national and international sport, and examines the evolution of the body of law known as 'sports law'. Thereafter three main themes are identified: regulatory; participatory; and financial aspects of modern sport. The regulatory theme is dealt with in chapters considering the manner in which decisions of sports governing bodies may be challenged in the ordinary courts and the development of alternative dispute resolution mechanisms in sport. The participatory theme includes the legal regulation of doping and violence in sport, as well as the broader topic of tortious liability for sporting injuries. The financial theme, reflecting the enhanced commercialisation of sport at all levels, is developed in chapters concerning issues in applied contract and employment law for players and legal matters surrounding the organisation of major sports events. The conclusion summarises modern sport's experience of EU law, pointing the way to the future direction of sports law more generally.

While the book is aimed primarily at students, and is designed to cover fundamental and topical areas of sports law (sports law in general; sports bodies and the courts; arbitration in sport; corruption; doping; violence; civil liability; discrimination; the commodification of modern sport; and the likely future of sports law), it should also prove of wider interest to practitioners, sports administrators and governing bodies; and though focused primarily on UK law it will also appeal to readers in Australia, Canada, New Zealand and the USA.

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six times: Gambelli 67; five times: Placanica 48 and 49; four times: Zenatti 31, Placanica 46, and Liga Portuguesa 59; three times: Zenatti 36; Gambelli 63,

Placanica 47, and Liga Portuguesa 51, 56, 70, and 72; twice: Zenatti 24, 30, 34, and 35; Gambelli 54, 60, 64, 65, and 75; Placanica: 36 and 58; Liga Portuguesa:

52, 55, 58, 60, and 69; once: Zenatti 25, 30, 33, and 37 (and three general references); Gambelli 46, 48, 53, 58, 59, 62, 68, and 69 (and a general reference, a reference to its operative paragraph and a reference to "case-law cited"), Placanica 45, 52, 53, 55, and 68 (and two general references); Liga Portuguesa: 37, 57, 61, 66, and 67; Sporting Exchange 24, 49, and 50; Ladbrokes 16.

The paragraphs referred to five and four times read in full as follows:

First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. (*Gambelli 67*)

However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality. (*Placanica 48*)

The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination (see to that effect Gebhard, paragraph 37, as well as Gambelli and Others, paragraphs 64 and 65, and Case C-42/02 Lindman [2003] ECR I-13519, paragraph 25).(*Placanica 49*)

As the Court acknowledged in paragraph 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v Van Wesemael [1979] ECR 35, paragraph 28, Case 220/83 Commission v France [1986] ECR 3663, paragraph 20, and Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them. (*Zenatti 31*)

On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (see, to that effect, Case C-275/92 Schindler [1994] ECR I-1039, paragraphs 57 to 60; Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraphs 32 and 33; Zenatti, paragraphs 30 and 31; and Gambelli and Others, paragraph 67). (*Placanica 46*).

The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48). (*Liga Portuguesa 59*).

The above cited paragraphs may be generalized and summarized as follows (cross-references to immediately preceding, "scoring"and "non-scoring" paragraphs of course have been taken into account contextually).

Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality.(N.B. Since *Placanica 48* and *Liga Portuguesa 59* are identical (Liga Portuguesa referring to Placanica), the number of references in fact amounts to 9 for this reference.) Restrictions on gaming activities must be justified by imperative requirements (overriding reasons; *Zenatti 31*) in the general interest, such as consumer protection (protection of the recipients of the service, *Zenatti 31*) and the prevention of both fraud and incitement to squander on gaming; restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. (*Gambelli 67*) Those objectives must be considered together. (*Zenatti 31*) The measures must not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination. (*Placanica 49*) Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. (see below).

The paragraphs referred to three times read in full as follows:

However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services. (*Zenatti 36*).

On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. (*Gambelli 63*).

In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Gambelli and Others, paragraph 63). (*Placanica 47*).

Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-58/98 *Corsten* [2000] ECR i-7919, paragraph 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16). (*Liga Portuguesa 51*).

Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, paragraph 46 and case-law cited). (*Liga Portuguesa 56*).

In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve differ-

ent and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games. (*Liga Portuguesa 70*).

It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime. (*Liga Portuguesa 72*).

N.B. Since the paragraphs of *Gambelli 63* and *Placanica 47* are identical (Planacia referring to Gambelli), the number of references in fact amounts to 6 for this reference. So, its essence is (to be) added to the above summary: moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

4. Sports betting and the concept of "sports law"

Is "sports betting" part of sports law, international and European sports law, respectively, or is "sports betting" just an example of "sport and the law"? [17] Of course it is a part of sports law, if we take the broader concept of sports law as the standard of evaluation: everywhere that sport and law meet, we may speak of "sports law". But does sports betting also belong to the hard core of the concept, where sports rules and regulations, the specific "sporting law", is tested against regular public, societal law - to find out whether there is a conflict of law or not? It does not seem like that, since rules and regulations of sports governing bodies do not exist, at least not in the context of ECJ jurisprudence. In ECJ jurisprudence "sports betting" in principle is not treated differently from other forms of gambling which may be illustrated by the fact that in sports betting cases explicit reference is made to non-sports betting cases like *Schindler* and *Läärä* by way of *stare decisis.* Whereas in landmark cases of European Sports Law like *Walrave*, *Bosman,* and *Meca-Medina,* sporting measures and practices were tested, the ECJ jurisprudence on sports betting is not of a similar character; it is marginal. What is tested against EU law, is national public legislation on lotteries, including sport lotteries. So, Member States' law is the "intermediary" between the ECJ and organized sport. Sports betting, like, for example football hooliganism belongs to the world at large around sport, it is away from the playing field, off the pitch, and generally speaking not directly related to what happens on the field of play. In ECJ jurisprudence on sports betting there are only a few observations which show to some extent the specificity of sport in this context, for example it is said that an objective of national legislation may be to allow sports betting only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports (Zenatti, 30) Here sports betting is linked with the promotion of sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities (Zenatti, 4). Sports betting has a role in the broader context of sports funding at the amateur and recreational grass-roots level. Or: "[…] the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits." (*Liga Portuguesa 71*). Here sports betting clearly is connected to the threat of fraud and corruption in sport. In the White Paper on Sport it is said that, since in some Member States parts of the profits generated by lotteries may be allocated to public interest goals, including sport, questions were raised if "the specificity of sporting needs" may allow for restrictions on the free movement of gambling services in order not to decrease the level of these profits.[18]

5. Conclusion

The "reversal or retrospective method" of content analysis introduced in this contribution (see in *1. Introduction* for the detailed explanation of its meaning and way of application; see also in section 3 *supra* under "Analysis of the case-law" for the "rules" of the method used in practice) in fact is kind of a statistical method of research applied to law. By its application. legal science moves to a certain extent into the direction of becoming exact science.

Sports betting is not defined in the jurisprudence of the European Court of Justice. Generally speaking, it may be defined as sports-related betting.

The essence of the ECJ jurisprudence on sports betting may be summarized as follows on the basis of the application of the "reversal method" of content analysis:

Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality. Restrictions on gaming activities must be justified by imperative requirements or overriding reasons in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming; restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. Those objectives must be considered together. The measures must not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination. Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

The ECJ jurisprudence on sports betting is part of "sports law", in particular international (EU) sports law, although it does not belong to its hard core from a doctrinal point of view, the specificity of sport not playing any systematic role in relation to this subject of sports law. The ECJ has tested and will continue testing national legislation and policy on sports betting against EU law; in this context it does not test any rules and regulations of sports organisations whether they might be acceptable under EU law (such rules and regulations are non-existent in this context).

17 See, for a discussion whether sports law exists, whether there is a sports law, and what it is, what it consists of, the author's inaugural lecture as professor of International and European Sports Law at the School of Law of Erasmus University Rotterdam, 10 June 2010; see for the English-language version The International Sports Law Journal (ISLJ) 2011/3-4: "What is Sports Law? A Reappraisal of Content and Terminology".

18 Commission Staff Working Document - The EU and Sport: Background and Content, Accompanying document to the White Paper on Sport (2007), p. 109

Reorganization of the Sports Betting Market in Germany

by **Martin Nolte***

Introduction

Ladies and gentlemen,
Sport plays an important role in the lives of people around the world. Its welfare functions are essential to state and society.

Sport socializes, integrates and is used for identification; it therefore exhibits the social functions that are absolutely necessary for cohesion in every national community - in Germany and in China. Furthermore, sport is of massive **economic** significance. The European Commission estimates that it is responsible for 3.6% of global gross domestic product. Politicians take note of these facts. Governments promote sport because of its welfare functions and for external appearances.

The growing significance of sport is, however, leading to legal problems with increasing frequency and these do not stop at national borders, as sport is an international phenomenon. Legal issues within sport assume a corresponding international dimension. The Sino-German Day of Sports Law takes on these challenges and sheds light on highly topical legal sports law issues with international implications.

This also concerns sports financing, because one thing is clear - sport cannot fulfil its important functions without an economic basis. Gambling is especially significant for financing sport because around 50% of the financing for communal sport in Germany is based on government subsidies from its gambling monopoly.

This gambling monopoly exists for major lotteries and sports betting. In the case of major lotteries, players can bet on numbers they have previously filled in being drawn from a limited pool of numbers and win more than one million euros for a financial stake. In the case of sports betting, the player has the opportunity of betting on events during sporting competitions. There are essentially no private providers in either field.

Things are different for minor lotteries and local, very limited sports betting, which lie in the hands of private providers. The same applies to betting on horses, casinos and commercial gambling machines. These games of chance are organized either exclusively or predominantly by private businessmen. The only other field in which there are state-run providers is casinos.

Sports betting is, however, of particular importance to sport. There are three reasons for this:

First, sports betting is based on the sports organizer's individual performances. Sports betting is inconceivable without his planning, organization, and execution of the competition.

Second, sports betting affects the integrity of sporting competitions, in other words the inability to influence them. Betting is on the outcome of sporting events, which entails the risk of manipulation. Sport loses its attractiveness and thus its recognition by state and society when competitions are manipulated.

Third, the German sports betting monopoly prohibits advertising of sports betting, which applies to television, stadium advertising, and players' shirts. This has considerable negative consequences for professional sport. German football clubs, in particular, have financial competitive disadvantages where international competition is concerned. Spanish club Real Madrid can advertise private gambling provider bwin on its players' shirts, but German champion 1. FC Bayern Munich is banned from doing so.

Difficult, highly topical cross-cutting questions go hand in hand with this because compelled by a state treaty between the German federal states and recent decisions of the European Court of Justice the German gambling monopoly on lotteries and sports betting must be evaluated by the end of 2010,.

On September 8, 2010, the European Court of Justice shared German courts' legal concerns about the German gambling monopoly. In its opinion, this is unsystematically, if not to say incoherently, geared to the aim of combating addiction. On the one hand, the government justifies its monopoly in the areas of lottery and sports betting with this aim. On the other, it is operating a policy of expansion in the field of betting on horses, casinos and commercial gambling. These are incompatible, given that the liberalized areas exhibit greater potential for addiction than sports betting.

In view of this my paper is divided into three parts:

The first part deals with the framework for sports betting in Germany, for which a decision by the German Federal Constitutional Court of 28 March 2006 is decisive. In the second part, I will describe developments in the sports betting market during the last four years. In the third part, I will address future regulation of the sports betting market, in which I will pay particular attention to constitutional and European law, after which I will sum everything up.

Part 1. Framework conditions for sports betting in Germany

First, I would like to look at the framework conditions for sports betting in Germany.

The state basically has a monopoly on organization. This monopoly was based solely on the lottery laws of the German federal states for a long time. These concluded a treaty on July 1, 2004, which mutually obliged all the federal states to maintain the sports betting monopoly.

This was based on the conviction that ensuring an adequate supply of sports betting is a public duty. According to the German constitution's allocation of rights and duties, fulfilment of this duty is the responsibility of the individual federal states. State lottery companies exist to fulfil this responsibility.

There are two exceptions to this principle: first, the special field of betting on horses, which has traditionally been in private hands since 1922 and for which the Federal government's Race Betting and Lottery Act is authoritative. Second, there are few private betting licenses with limited local validity. They were issued between 1989 and 1990 in the transitional period when the German Democratic Republic was reunifying with the Federal Republic of Germany and have limited local validity for the new federal states.

1.1. German Federal Constitutional Court's sports betting judgement of 28 March 2006

The framework conditions have been heavily influenced by the German Federal Constitutional Court's sports betting judgement of March 28, 2006, in which the highest German court declared the sports betting monopoly to be unconstitutional.

In its view the betting monopoly's specific formation violates the freedom of profession guaranteed under constitutional law. The monopoly constitutes a particularly fierce attack on the freedom of profession, which can only be justified with great difficulty. Fiscal motives were not sufficient, only the aim of combating addiction could uphold the sports betting monopoly. At any rate, the monopoly would have to be consistently geared to this aim, and it is not.

Despite being unconstitutional, the legal situation continued on as it was. However, the state was obliged to reorganize the sports betting market, for which it was given until December 31, 2007. There were two forms of reorganization open to the government. On the one hand, it could continue the monopoly, in which case it would have to keep a close eye on the aim of combating addiction. On the other hand, it

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could also decide, without further ado, to open up the sports betting market to private providers under controlled circumstances.

1.2. Direct impact of the sports betting judgement
The sports betting judgement has a direct impact on the provision of betting and to the conclusion of a new state treaty.

1.2.1. Considerable limitations on betting provision
The judgement of March 28, 2006 initially lead to considerable restrictions on betting provision.

The state lottery companies have been banned from part-time and live betting. The same applied to betting using SMS (Short Message Service) telecommunications service and within football stadiums. Registration of new betting customers was suspended. "Old customers" were subjected to strict identification measures. Other restrictions were added to these, concerning various forms of advertising. Football club 1. FC Bayern Munich was banned from pitch-side advertising for the state monopolies and also had various addiction prevention measures stopped, which included, for example, warning notices on betting slips referring to the danger of addiction to sports betting.

At the same time pressure on illegal private sports betting providers was increased. The authorities prohibited the acceptance and broking of private bets. They declared their decrees to be immediately enforceable. They threatened substantial fines in the event of non-compliance. The courts held these measures to be lawful. They referred to the Federal Constitutional Court's judgement, according to which organization and broking of sports betting without a German licence is strictly prohibited. This represented a danger to public safety. The reorganization orders were therefore lawful.

1.2.2. New state treaty on gambling as of 1 January 2008
The sports betting judgement also quickly led to conclusion of a new state treaty on gambling, between the Federal Republic of Germany's federal states, which has been in force since January 1, 2008.

This state treaty forcefully emphasized the state sports betting monopoly. The federal states cited the following to justify the monopoly: the monopoly is a suitable method of combating the risks associated with betting. This applies especially to the combating of addiction and crime. The policy of strict regulation had proved its worth; this policy must therefore be adhered to.

That the admission of private companies, on the other hand, should be refused is basically supported by two reasons:

First, the admission of private betting companies would lead to an undesirable expansion of the gambling market, as had been proved by forecasts by stakeholders and the public safety authorities.

Second, the number of addicted gamblers and those at risk of addiction would rise to the same extent, which would in turn have a negative impact on accompanying and acquisitive crime.

Although the reasons for the sports betting monopoly were legitimate at the time, developments between 2006 and 2010 contradict the assumption that the sports betting monopoly has achieved its aims.

Part 2: Trend in sports betting between 2006 and 2010

Between 2006 and 2010 the sports betting trend has essentially been shaped by two factors.

First, state sports betting turnover has really slumped, while the black market has flourished massively in the same period.

Second, there was a flood of lawsuits against the sports betting monopoly, which prompted the most recent decisions by the European Court of Justice, which shared the concerns of German courts regarding the admissibility of the sports betting monopoly.

2.1. Slump in turnover and development of the black market
The decline in state betting turnover between 2006 and 2010 was massive. Cautious estimates assume a decline exceeding 60%. In the first instance this could be used to back up the sports betting monopoly's success, whose goal it is to inhibit the passion for gambling, yet on closer inspection this goal has not been achieved, as the turnover of illegal and foreign providers has flourished in the same period.

This development forces one to the following conclusion: the monopoly is not fulfilling its regulatory objective. On the contrary, it has generated a sizeable black market. The total sports betting market volume in Germany is conservatively held to be around five billion euros per annum, of which less than 200 million euros can be ascribed to legal state providers. The remaining share of sports betting is turned over by illegal or foreign providers.

From a regulatory policy view, the monopoly is not only unsuitable, it is even counterproductive. The same must apply to the remaining regulatory aims of the state gaming treaty.

There is a recent comparative law study on addiction prevention carried out in 2010. It comes to the conclusion that the addiction is best combated using a licensing model. The following should also be considered when countering crime: the latest betting scandal in Germany in 2009 occurred under the current state monopoly, which continues to cause a substantial black market operating outside the prevailing law. There can thus be no talk of countering crime in this area. Effective combating of crime is different.

2.2. Legal objections to the sports betting monopoly
There is a correlation between the negative trends in the sports betting monopoly and the legal objections, which are based on German constitutional law and European law.

At the level of German constitutional law, it is first and foremost a question of the monopoly's compatibility with private providers' freedom to exercise a profession. The monopoly serves to inhibit the passion for gambling and to combat addiction and crime; a proclamation of which in the new state treaty is, however, insufficient to justify the state monopoly. The Federal Constitutional Court has repeatedly made clear that the action taken must also actually be suitable to promote the specified objectives. This must be the subject of considerable doubt in view of more recent developments in the sports betting market.

The Federal Constitutional Court has not previously shared this concern. In more recent decisions it has not had an opportunity to rule on the content in this matter. In view of the trends that have been highlighted, it is highly probable that at the next opportunity the court will arrive at the sports betting monopoly's unconstitutionality. It is at any rate certain that more recent developments will be taken into account.

Second, there are far reaching concerns with regard to European law. They concern the sports betting monopoly's compatibility with the private provider's freedom of establishment and freedom to render a service. Although restriction of these freedoms would be permissible for reasons of regulatory policy, especially to curb addiction, the actions in this case would have to be coherent, in other words, consistent.

This is not the case in Germany because ultimately there are licensed gambling sectors such as horse betting, casinos and commercial gambling. In these areas the government is pursuing an expansionist policy, which contradicts the aim of combating addiction which the state is pursuing in the field of sports betting. Finally, the state is still advertising, especially where lotteries are concerned. This fact is also incompatible with the aim of combating addiction.

I therefore permit myself to make an interim summation. The gambling treaty's regulatory targets have been missed. The monopoly is having a counterproductive effect. The state is losing considerable income from the decline in state betting revenues and the simultaneous exclusion of private products. Finally, the state gambling treaty violates European law and is exposed to significant constitutional law concerns in view of the black market. It is thus a question of time as to when the Federal Constitutional Court will declare the treaty to be inadmissible.

Part 3: Future regulation of the sports betting market

This is the background to future regulation of the sports betting market. In this case two different models are being discussed:

On the one hand, the continuation of the sports betting monopoly for the purpose of combating addiction, and on the other hand, regulated opening up of the sports betting market to private entities, subject to government supervision.

3.1. Continuation of the sports betting monopoly

For regulatory policy, fiscal, economic and legal policy reasons, continuation of the sports betting monopoly for the purposes of combating addiction appears to be wrong, as is shown by the following:

3.1.1. Counterproductive to regulatory policy

In regulatory policy terms the sports betting monopoly is counterproductive, as is shown by the trend in the past four years. During this period neither enthusiasm for gambling, nor addiction, nor crime, were curtailed. On the contrary, the monopoly caused a black market. This ensues from the evaluation committee's latest interim report. Therefore, it cannot be assumed that the regulatory objectives would be achieved through continuation of the monopoly.

They would only be fulfilled if one were allowed to cautiously expand the range of services, to advertise and to access the internet. These options are, however, barred under the monopoly, as increasing attractiveness contradicts the objective of combating addiction. The monopoly's weakness in regulatory terms is therefore inherent.

3.1.2. Detrimental to fiscal policy

The sports betting monopoly is detrimental to fiscal policy because its continuation leads to state betting turnover falling further. The monopoly can only be justified by rigorous combating of addiction. Fiscal motives are prohibited. The necessary objective of combating addiction contradicts any increase in attractiveness.

Another thing: the European Court of Justice allows the sports betting monopoly to continue. In this case, Germany would have to coherently direct its entire gambling policy to the fight against addiction. This has a considerable impact on the concessionary areas of horse betting, commercial gambling and casinos. Private licences in these areas would be massively devalued, with significant losses in value added tax. The German horse betting market alone has an annual turnover of approximately 260 million euros. There are 8,000 arcades with more than 100,000 machines and around 40 private casinos. If a strict fight against addiction were to operate where these facilities are concerned, this would give rise to significant compensation payments on the part of the state.

3.1.3. Anachronistic in terms of economic policy

Continuation of the monopoly is anachronistic in terms of economic policy. More and more European Union member states such as France, Italy, and Denmark, are opening up their sports betting markets to private providers. Germany's market remains closed. This is causing private companies to migrate abroad, which has significant consequences for the domestic market, as Germany loses jobs, turnover, and taxes. The problem would be home-made. Continuing the sports betting monopoly is contradictory to the objective of European treaties.

3.1.4. Extremely risky in terms of legal policy

Finally, continuation of the monopoly is extremely risky in terms of legal policy. The sports betting monopoly is supposed to combat addiction, curb enthusiasm for playing, and deflect crime. The last four years have shown that the monopoly has not been able to fulfil its regulatory policy objectives. The Federal Constitutional Court had, however, stated that combating addiction as an aim is theoretically sufficient to operate a monopoly. In view of the increasing black market, there is nevertheless a suggestion that the court could come to the conclusion in future that the German monopoly in fact does not fulfil its supporting regulatory objectives.

Add to this another factor. Supporters of this monopoly perpetuate its maintenance with the aim of safeguarding the lottery monopoly. Their opinion follows presumed logic - if one were to approve sports betting, with a greater potential for addiction, one would first have to approve lotteries, with a lesser potential for addiction, thus losing the lottery monopoly, which must be retained at all costs.

This argument seems illuminating, but it is not. On closer inspection this argument endangers the lottery monopoly more than it safeguards it, as continuation of the sports betting monopoly with the aim of combating addiction is already questionable on factual grounds. If the sports betting monopoly were successfully challenged, the lottery monopoly would also be overturned. The sports betting monopoly and lottery monopoly would ultimately be fatefully linked through the aim of combating addiction.

3.2. Regulated opening up of the sports betting market

The alternative to the monopoly is therefore regulated opening up of the sports betting market to private providers, under government supervision. The Federal Constitutional Court already referred to this alternative in its decision of March 28, 2006. This model could be based on four cornerstones:

3.2.1. Preventative regulation through qualified concessions

First, preventative regulation through qualified concessions. The sports betting market would not be opened up through wild liberalization. Instead a licensing model would be sought which contributes to preventative regulation of the sports betting market. Organization of sports betting would only be permitted with a prior licence. This qualified concession would have a preventative regulatory effect, as grant of the licence could be linked to regulatory requirements such as the provider's reliability and liquidity.

3.2.2. Protecting the integrity of sporting competition through collateral provisions

Second, protection of the integrity of sporting competition must be ensured through provisions collateral to the licence. To do this, the administration must be authorized to issue collateral provisions, which could specify precise requirements on the permissible forms of gambling. Forms of gambling that are especially addictive or highly manipulative, such as betting on the next yellow card, or the next foul, would have to be precluded. This would not only achieve general regulatory objectives, it would also better protect the integrity of sporting competition. For this purpose one would have to have recourse to the sport's special expertise. Its involvement in concrete considerations on prohibiting specific products could be achieved by giving it a seat and a voice when drawing up collateral provisions.

3.2.3. Regulatory control using the licensing model

Third, the licensing model would achieve regulatory control. Opening up the market reduces the weight of justification that the state has for forming a monopoly. Under the monopoly the regulatory aims of combating addiction and deflecting crime have a claim to absoluteness. This largely precludes increased attractiveness of the gambling offering. The situation changes fundamentally if the sports betting market is opened up. The state's weight of justification decreases. The regulatory objectives lose their absolute weight. They can be appropriately balanced with economic and fiscal policy motives. This is associated with significant manoeuvring room on the part of the state. It can open up the internet for sports betting, allow advertising, and moderately increase the range of products. This increases the attractiveness of legal sports betting in Germany. And as a result, a large part of the illegal market would transfer to the legal market, and people who are especially prone to addiction could consequently be better reached. Therefore, the licensing model is preferable in terms of regulatory policy.

3.2.4. Regulatory sports betting tax

Fourth, a regulatory sports betting tax could be levied. It would support and strengthen market supervision and the aims pursued by admission to the market. In particular, the significance of the sports betting tax should lie in making the range of sports betting more expensive and limiting it to reduce the risk of game manipulation. This regulatory objective is permissible without hesitation. The sports betting tax would accordingly be a form of special tax exclusively geared to a regulatory purpose. The rate of the tax would have to be governed by this objective, which is why a percentage should be chosen which, as in France and Italy, moves in the band between being perceptible and competitive.

The tax revenue would ultimately have to be used for the same function, in other words for regulatory purposes, which particularly include the integrity of sporting competition, whose protection could be achieved

by part of the revenues going to organisers of sporting competitions. Promoting the integrity of sporting competition by means of a financing guarantee would be nothing other than surrender of regulatory objectives to justify the sports betting tax.

Summary

Allow me to sum up as follows.

Sports betting in Germany leads to numerous cross-cutting questions at the interface between regulatory, economic, and sports policy, and in which law plays a central role. The various interests must be ranked and balanced against each other so that they can all come to fruition in the best possible way.

This applies also to the interests of sport. Sports betting entails the risk of manipulation and thus prejudices the integrity of sporting competition, which is why intelligent safeguards and controls are required. Sports betting also opens up significant economic and fiscal opportunities, which should not be placed in the hands of illegal providers.

In view of the current black market and the mandatory stipulations of constitutional and European law, sports betting in Germany requires reorganization. Continuation of the sports betting monopoly for the purposes of combating addiction is extremely risky and obviously disadvantageous. It will continue the dramatic slump experienced by state-run providers and lend impetus to development of the black market. Finally, the aim of combating addiction would also place the lottery monopoly at risk. Anyone supporting continuation of the sports betting monopoly with the old justification should be clear about these circumstances.

The real alternative can only be controlled opening up of the sports betting market to private entities under government supervision. The licensing model offers significant channelling potential. It achieves the regulatory objectives, in conjunction with considerable additional revenue for the state. Sport would benefit too, as it is concerned with the integrity of its events, with solid basic financing from gambling revenues and additional advertising opportunities.

There is therefore no alternative to controlled opening up of the sports betting market.

Thank you very much for your attention.

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LEX LUDICA IN ANCIENT CHINESE FOOTBALL

THE DIRECT, INDIRECT AND FREEE GAMES OF CUJU

CuJu has a long history of about 2300 years in China. The earliest written record can be found in the third century BC. There are three kinds of *CuJu* in history: the direct game, the indirect game and the free game. The *direct game* was widely accepted in the Han dynasty (206 BC-220 AD). There were 12 players in each team, and there were two goals in the field. They played the game like a battle. The team which scored more was the winner. This kind of play was used for military practice, for example for the training of soldiers. The *indirect game* was popular in the Tan (61-907 AD) and the Song dynasties (960-1279 AD). There was only one goal in the field .The players kicked a leather ball through a hole in a piece of silk cloth which was strung between two 30 feet long poles. A remarkable feature is that while they played, the ball should not drop on the ground. The team who scored more was be the winner. This kind of play was usually for diplomatic performances and the entertainment of the royalty. The *free game* was the most popular one and had the longest history. There was no goal in the field, the players kick the ball freely, and the game's most important factor was the skill of the players, the most attractive one was the winner. *[Editors' comment: the "direct game" is similar to the basics of the modern association football game; the "indirect game" is somewhat like the modern training form of "foot volley" - keeping the ball in the air. The "free game" in fact is a free-style and jury type of football, purely showing your technical skills.]*

CuJu is ancient Chinese football

The FIFA "6+5" Quota System: Legal Admissibility under the Terms of the Treaty of Lisbon

by **Andreas Lange**

I. Introduction

European football undoubtedly is a very popular sport. Therefore, it is not surprising that the market values of the largest football clubs in Europe varied between EUR 55 mio and EUR 116 mio in the Season 2006/2007 with the most expensive teams[1] reaching levels far beyond EUR 300 mio each.[2] In the past 15 years there has been a significant increase of the proportion of foreign professional player in European football leagues.[3]

For this reason there have been and there are strong efforts to introduce player quotas. These quotas were and are meant to support honourable aims, but indeed could not persist under European Community Law in the past. According to the ruling of the European Court of Justice (ECJ) in the cases "Dona"[4], "Bosman"[5] and "Simutenkov"[6] player quotas even reach beyond sports law.

The so-called "6+5" Rule and the "home-grown players" Rule[7] have to be designated as recent examples to the aforementioned. As a matter of fact in the year of the so called "Bosman" ruling professional clubs in the Community already employed a considerable number of players from other Member States and non-member countries[8] and the number even increased until nowadays.

The International Federation of Association Football (FIFA) fears the competitive balance of sports at the level of national and international competition could be weakened without a quota system and the sporting and financial concentration could even increase affecting the promotion of junior players and the quality and substance of the national teams.[9]

FIFA's latest attempt to address these issues is the "6+5" Rule mentioned above.[10] According to this rule, a football club is obliged to begin a game with at least six players entitled to play for the national team of the country where the club is located. [11] The teams are entitled to substitute three additional players against foreign ones during the match, so that the balance might be "3+8" in the end. Furthermore there are no restrictions for a club in concluding contracts with foreign players.

FIFA originally intended to introduce the "6+5" Rule until the 2012/2013 season beginning with a "4+7" Rule in the 2010/2011 season, in order to grant a reasonable amount of time to the clubs to adapt their squads. [12]

In the meantime the European Parliament[13] voted for a rejection of the "6+5" Rule and the European Commission[14] recognized a breach of Art. 45 TFEU[15].

At present the aforementioned rule has not been effected and according to a study from September 2010 the 60th FIFA Congress meeting in Johannesburg in June 2010 decided to withdraw the "6+5" Rule.[16]

Nevertheless FIFA's President Mr. Blatter is continuing to defend "his Rule"[17] by seeking further political support for this project.

II. Legal admissibility of the Rule

In the following the legal admissibility of the "6+5" Rule will be considered in detail. Therefore an analysis of its compatibility with Art. 45 TFEU and with Art. 101, 102 TFEU is required.

1. Breach of freedom of movement for Personas

Economic integration of the Member States is a primary aim of the Union (Art. 3 TEU[18]) and therefore the Treaty provides the abolishment of all obstacles to the basic freedoms within the Community (Art. 3 para.1 b), Art. 4 para.2 b), Art. 26 TFEU).

In addition the fundamental freedoms are no longer considered as the sole prohibitions of discrimination but were developed by the ECJ as liberty rights.[19] Thus the scope of Art. 18 TFEU is subsidiary. This understanding of fundamental freedoms as liberty rights is necessary to achieve a more extensive access to national markets and required by the „effet utile".[20] The ECJ stated to abolish all disadvantages for cross-border economic activity.[21]

a) Scope of protection

Furthermore it has to be considered, if regulations of Sports Associations are included within the scope of Art. 45 TFEU.

(1) Subject matter of protection

With reference to the Rule there is no exhaustive secondary law, which leads to the relevance of Art. 45 TFEU. Regarding the applicability of this provision a cross border element is required.[22] The existence of such element shall be assumed hereinafter.

For determination of the subject matter as well as of the personal scope of protection of Art. 45 TFEU the concept of worker has to be considered as of central significance.[23] Economic activities in terms of

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* Paper within the Master of Laws Program, Open University, Hagen, Germany, Winter term 2010/2011.

1 FC Chelsea London, Real Madrid, FC Barcelona.

2 *Frick*, SJPE 2007, page 422.

3 *Battis* in INEA 2008, page 27 et seq..

4 Case 13/76, Donà, Judgment of the Court, ECR [1976] Page 1333.

5 Case C-415/93, Bosman, Judgment of the Court, ECR [1995] Page I-4921.

6 Case C-265/03, Simutenkov, Judgment of the Court, ECR [2005] Page I-2579.

7 See Articles 17 para. 8 to 12 of Union of European Football Associations (UEFA) Regulations for the Champions League and the UEFA Cup.

8 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 57.

9 INEA 2008, page 185.

10 *Lynam*, FIFA`s "6+5 Rule", page 1: The Rule appeared first four years ago in the Memorandum of Understanding between FIFA and FIFPro dated 2 November 2006. Later on 30 May 2008 FIFA's Congress passed a overwhelmingly accepted resolution to fully support the objectives of the "6+5" Rule.

11 *Battis* in INEA 2008, page 18; *Apps*, SJ 2008, page 18.

12 *Kusch*, ISLJ 2010, page 114.

13 European Parliament, Legislative Observatory, INI/2007/2261, 08/05/2008 - EP: non-legislative resolution.

14 Press release, European Commission, UEFA rule on „home-grown players : compatibility with the principle of free movement of persons, RAPID, 28 May 2008, IP/08/807.

15 Official Journal of the European Union, 30 March 2010, 2010/C 83/01.

16 *Parrish/García/Miettinen/Siekmann,* The Lisbon Treaty and EU Sports, page 32.

17 See: http://www.fifa.com/aboutfifa/cultural/news/newsid=1316570.html: FIFA in Paris for Africa (FIFA.com) 12 October 2010: '6+5', protecting minors and the Transfer Matching System; www.fifa.com/aboutfifa/ federation/president/news/ newsid=1281244. html: Blatter congratulates new Hungarian President (FIFA.com) 4 August 2010: Schmitt accepted the role of '6+5 ambassador' to the European Parliament in order to promote and defend the rule; http://www.fifa.com/worldcup/news/newsid= 1233802/: Blatter: My mission is not over (FIFA.com) 10 June 2010: we also spoke about 6+5; http://www.fifa. com/newscentre/news/newsid=1187396.html: Rama Yade: France will be up to the task (FIFA.com) 30 March 2010: Rama Yade assured President Blatter of her support for the 6+5 rule; http://www.fifa.com/aboutfifa/federation/releases/newsid=1161813.html: Spanish President meets FIFA President in Madrid (FIFA.com) 25 January 2010: In connection with the Spanish presidency of the European Union in the first half of 2010, Rodríguez Zapatero and Blatter discussed the best way of implementing the proposals made by the FIFA Congress with a view to protecting national teams, safeguarding the education and training of young players and training clubs, preserving the values of commitment and motivation in football and maintaining the national identity of clubs (6+5).

18 Official Journal of the European Union, 30 March 2010, 2010/C 83/01.

19 *Ehlers* in Ehlers, EuGR, para. 7 / ref. 28 et seq.; *Brechmann* in Calliess/Ruffert, EUV/EGV, Art. 39 EGV / ref. 52.

20 *Streinz*, Europarecht, para. 12 / ref. 672; *Haratsch/Koenig/Pechstein*, Europarecht, Chapter IV / ref. 878 cons., ref. 785 et seq. diff. view: only indiscriminate measures demand the understanding of fundamental freedoms as liberty rights.

21 Case C-415/93, Bosman, Judgment of the Court, ECR [1995] Page I-4921 ref 94.

22 *Scheuer/Weerth* in Lenz, EU-Verträge, Art. 45 AEUV / ref. 4.

23 *Becker* in Ehlers, EuGR, para. 9 / ref. 4 et seq..

24 *Randelzhofer/Forsthoff* in Grabitz/Hilf, Das Recht der EU, Art. 39 EGV / ref. 22 et seq..

25 *Randelzhofer/Forsthoff* in Grabitz/Hilf,

Art. 3 TEU solely are within the scope of Art. 45 TFEU.[24] Professional football players undoubtedly are part of economic life.[25] The scope of freedom of movement may even be applicable to players without citizenship of any Member State but them being citizens of any third country bounded under a association agreement with the European Community.[26] So the question, if the rule is concerning economic or purely sporting activities, has to be answered.

(2) Exception to the scope - purely sporting activities
The ECJ formerly appeared as generous and explained that the provisions of the Treaty do not affect rules concerning questions which are of purely sporting interest and, as such, have nothing to do with economic activity.[27] Thus it developed an exception to the scope of Art. 45 TFEU. Whenever matches are purely of sporting rather than of economic nature, such as competitions between national teams, the basic freedoms are not affected.[28]

According to some opinions participating at the start of a game shall not be considered as the central issue of the occupational activities protected by the right to freedom of movement and, hence, is not subject to Art. 45 TFEU. The occupational activities of the individual player is not affected in his capacity as employee of the club.[29]

It should be noted that this opinion does not conform to the recent "Meca-Medina"[30] ruling. The ECJ took another important decision with regards to the relation between sport and Community law: even if a rule concerns questions purely of a sporting nature and, as such, has nothing to do with an economic activity per se, this does not mean that the activity governed by that rule or the body which lays it down are not governed by the Treaty.[31]

The ECJ voted for a broad approach. If a sporting activity falls within the scope of the Treaty, there should no exceptions per se be applicable. Thus the "6+5" Rule can be subject to all obligations resulting from Treaty provisions and should be analysed from the perspective of a restriction to fundamental freedoms.[32]

Therefore FIFA is entitled to introduce discriminatory rules[33] based upon the autonomy granted to sport associations by Art. 11 European Convention on Human Rights.[34] Since the "Meca-Medina" ruling even purely sporting rules must be proportional.[35] Assuming the rule is according to basic rights it nevertheless has to be examined with reference to any justification.

Furthermore the Lisbon Treaty Art. 165 TFEU was extended to cover the European dimension in sports.[36]

In its "Bernard"[37] ruling the ECJ displays considerable willingness to consider the social and cultural value of sport and the particular circumstances under which sport operates, albeit without extending sport an exception in the strict sense. For the first time the Court refers to the new Art. 165 TFEU and made a point of the fact that the Member States have recognized the special character of sports in the Treaties.[38]

The responsibility of the European Union under Art. 165 TFEU paying attention to the distinctiveness of sport, however, should not be overstated. Quite the contrary, Art. 165 TFEU may not serve as a basis for a sweeping and comprehensive exception to the scope of Art. 45 TFEU demanding sports.[39] Factual activities according to Art. 165 TFEU will be by far of political nature.[40]

The aforementioned leads to the conclusion that the "6+5" Rule is within the scope of Art. 45 TFEU.

b) Interference with the fundamental freedoms
As mentioned above the "6+5" Rule will be introduced by Sports Associations. Therefore it has to be considered, if Art. 45 TFEU solely addresses to Member States or is effecting third-parties.

(1) Sports Associations: an entity bound by Art. 45 TFEU
The ECJ has extended applicability of the scope of Art. 45 TFEU at least partially to horizontal constellations, e.g. in case of involvement of private parties in any claims.[41] Moreover the ECJ has clarified that rules established by sporting associations and federations, both on national and on international level, are subject to Community law.[42] Such rulings clarified that sport clubs, associations or federations have to consider the non-discrimination principle when approving their internal codes and regulations.[43]

In this coherence should be noted, that the ECJ extended the third-party effect in its "Angonese"[44] ruling even too far. The autonomy of private persons requires more attention and the approach of the Court must be considered as too restrictive.[45] A private banking corporation is not equipped with an equal position of power compared to a sporting association or federation of earlier rulings.[46]

(2) Existence of „discrimination"
Art. 45 TFEU obviously prohibits direct discrimination[47] on grounds of nationality.[48] The ECJ confirmed that Art. 45 TFEU does not only apply to discriminatory rules but also to rules which, although they are expressed to apply without distinction (Indirect or covert discrimination)[49], impede the exercise of the free movement rights.[50] Furthermore such rules constituting an obstacle prohibited under Art. 45 TFEU, the provisions must affect the access of workers to the labour market.[51]

Nevertheless the ECJ decided that player quotas impair the freedom of movement due to the participation in games being a main goal of professional players.[52] In a press release from May 28th 2008, the Commission has disclosed its legal conception, holding directly discriminatory rules such as the "6+5" Rule as incompatible with European law.[53]

Against a direct discrimination can be argued that clubs would still be enabled to recruit players not eligible for the national team of the according club's country. Therefore the "6+5" Rule can only be regarded as indirect restriction with regard to the player„s work since being only applicable to the starting line-up.[54]

Advocate General Lenz countered this argument appropriate in his "Bosman" opinion by noting that the Commission correctly referred to Article 4 para. 1 of Regulation (EEC) No 1612/68[55] on freedom of movement for workers within the Community. The Regulation provides that provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment

Das Recht der EU, Art. 39 EGV / ref. 28; diff. view: *Haratsch/Koenig/Pechstein*, Europarecht, Chapter IV / ref. 856.

26 *Streinz*, SpuRt 2008, page 226; *Conzelmann*, ISLJ 2008, page 28.

27 Case 36-74 ,Walrave and Koch, Judgment of the Court, ECR [1974] Page 1405 ref. 8; Case 13/76, Donà, Judgment of the Court, ECR [1976] Page 1333 ref. 14.

28 *Majani*, ISLJ 2009, page 22.

29 *Fleiner* in INEA 2008, page 119.

30 Case C-519/04 P, Meca-Medina, Judgment of the Court, ECR [2006] Page I-6991.

31 Case C-519/04 P, Meca-Medina, Judgment of the Court, ECR [2006] Page I-6991 ref. 25 et seq.; White Paper on Sport, COM(2007) 391 final, page 115.

32 White Paper on Sport, COM(2007) 391 final, page 102.

33 *Conzelmann*, ISLJ 2008, page 28.

34 likewise Art. 12 Charter of Fundamental Rights of the European Union which according to Art. 6 para.1.1 TEU is now recognized by the Treaty of Lisbon; e.g.: *Streinz* in Streinz, Der Vertrag von Lissabon, page 118 et seq..

35 *Heermann*, causa sport 3/2006, page 357.

36 Union action shall be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen, e.g. *Brost*, SpuRt 2010, page 180 et seq..

37 Case C-325/08 , Bernard, Judgment of the Court, ECR [2010] Page 0.

38 *Lindholm*, CMLRev, page 1195.

39 *Muresan*, causa sport 2010, page 102.

40 *Muresan*, causa sport 2010, page 104.

41 *Haratsch/Koenig/Pechstein*, Europarecht, Chapter IV / ref. 781, 870.

42 *Apps*, SJ 2008, page 20; White Paper on Sport, COM(2007) 391 final, page 115.

43 *Kahn* in Geiger/Kahn/Kotzur, EUV/AEUV, Art. 45 AEUV /. ref. 18.

44 Case C-281/98, Angonese, Judgment of the Court, ECR [2000] Page I-4139.

45 *Streinz*, Europarecht, para. 12 / ref.707; diff. view: *Brechmann* in Calliess/Ruffert, EUV/EGV, Art. 39 EGV / ref. 55 et seq..

46 *Franck* in Tietje, Beiträge zum Völker- und Europarecht, Heft 1, 2009, page 12.

47 See e.g.: *Kahn* in Geiger/Kahn/Kotzur, EUV/AEUV, Art. 18 AEUV /. ref. 8: Direct or overt discrimination occurs when the national and the non-national are treated differently in law.

48 *Brechmann* in Calliess/Ruffert, EUV/EGV, Art. 39 EGV / ref. 50.

49 See e.g.: *Kahn* in Geiger/Kahn/Kotzur, EUV/AEUV, Art. 18 AEUV /. ref. 9: Indirect or covert discrimination occurs when an apparently neutral rule affects non-nationals more heavily than nationals.

50 *Kahn* in Geiger/Kahn/Kotzur, EUV/AEUV, Art. 45 AEUV / ref. 17.

51 *Scheuer/Weerth in* Lenz, EU-Verträge, Art. 45 AEUV / ref. 4.

52 Case C-415/93, Bosman, Judgment of the Court, ECR [1995] Page I-4921 ref 120.

53 See n. 14.

54 *Fleiner* in INEA 2008, page 103.

55 See *Haratsch/Koenig/Pechstein*, Europarecht, Chapter IV / ref. 874.

of foreign workers are not to apply to nationals of other Member States.[56] The "6+5" Rule, under which only the number of foreign players who can play in the starting line-up is limited, but not the number of players a club can engage, is still in breach of Art. 45 TFEU.

Besides for factual and economic reasons clubs would not engage many more foreign players than are allowed in the starting line-up.[57]

c) Justification of the interference

Currently it needs to be clarified, if a direct discrimination can only be justified by one of the cases as listed in Art. 45 para. 3 and 4 TFEU[58] or whether reasons of common good can be consulted in addition.[59]

According to the first opinion singly Art. 45 para. 3 TFEU seems to be applicable.[60] The provision provides a derogation to the freedom of movement. On that basis solely limitations on grounds of public policy, public security or public health can be justified. In this respect, as mentioned above, the sporting associations have an organizational autonomy to establish and observe the institution of sports (see also Art. 165 TFEU).[61]

The circumstance that football is existing without the "6+5" Rule until today already proves the non-existence of pressing reasons of public interest. A justification based on the "Ordre-Public" Exception therefore is not applicable.

In accordance with the second opinion exist persuasive arguments that direct discriminations can be justified by reasons of common good.[62] As already considered above in general, purely sporting rules are within the scope of Art. 45 TFEU.

According to the ECJ ruling in the "Bosman" case it seems to be suitable to prove possible reasons of common good within justification.[63] Since these reasons have to be proportional, the aims of the "6+5" Rule need to be eligible, necessary and adequate.[64]

(1) Protection of the national identity of football and the national teams

The argument is brought forward that the reduced participation of national football players in national football clubs generally leads to a reduction in the level of national teams.[65] This point is unpersuasive since recently Mesut Özil and Sami Khedira, two key players in Germany s national team signed a contract with Real Madrid and this so far shows no evident negative effect on the national team. Only an additional employment abroad can be proven which by the way could have positive effect on the player„s development.[66]

Thus can be ascertained that the "6+5" Rule is not eligible to protect or even improve the quality of national teams.

Furthermore it is argued that the conservation of a national identity and cultural diversity justifies the introduction of quota systems.[67] Against this can be argued, that the participation in international competitions is limited due to competitive game results, without any identifiable effect caused by the nationalities of signed players.[68] Nor does the participation of foreign players prevent a team's supporters from identifying with the team.[69] Quite on the contrary, those players rather do attract the admiration and affection of football fans.[70]

Besides for a breach to the freedom of movement the argument of national identity would not be adequate since it cannot be based on Art. 45 para. 3 TFEU.[71]

(2) Promotion of junior players

It is argued that the promotion of national junior players is necessary, because most junior players come from South America and Africa, and secondly, European clubs favour older, experienced European football players.[72] Young domestic players do not get a chance to gain practical experience. Regarding economical aspects it is cheaper than training and developing own junior players by taking a financial investment with incalculable outcome.[73]

In general this aim can be also found in the European Sports Charter[74]. In its Article 1 the Charter declares, that all young people should have the opportunity to receive physical education instruction and the opportunity to acquire sports skills. European bodies as the ECJ, the European Counsel, Commission and Parliament have explicitly acknowledged the training and development of young players as legitimate goals in sports.[75]

In the year 2005 the UEFA introduced a so called "home-grown players" Rule.[76] Clubs are obliged to employ locally trained players which must have spent at least 3 years between the ages of 15 and 21 in their club or in another club of the same country. Thus there is no nationality condition.[77] The idea is to promote training of young players and to encourage clubs to invest in training of young people and not only in transfers of players.[78]

Hence the "6+5" Rule would not be necessary to promote junior players. The argument that the "home-grown players" Rule leads to early recruitment of underage players from abroad is not convincing.[79]

Extraordinary young football talents have been scouted worldwide even before the "home-grown players" Rule was introduced. Accordingly Advocate General Lenz argues that the employment of foreign players does not cause any particular disadvantages.[80]

Furthermore it is argued that the "home-grown players" Rule does not help to promote junior players with the nationality of the country the club is located in.[81] As already mentioned above a connection between game experience and the national level could not be proven.

(3) Improving competition in sport

Finally the "6+5" Rule is regarded as eligible to install competitive balance between the teams.[82] But as a matter of fact, the richest clubs are always able to afford the best and most expensive players. At the same time, they are able to employ the best native players and therefore quota systems would not change this.[83]

This leads to the conclusion that the most successful clubs shall remain successful. Their financial potential, their name and historical fame attracts the best talents and gives an advance compared to smaller clubs which lies in the nature of things.[84]

Therefore the "6+5" Rule shall not lead to any improvement of competition.[85]

d) Conclusion

The aforementioned leads to the conclusion that the "6+5" Rule must be regarded as a breach of freedom of movement and the aims of that rule have no sufficient weight to sustain justification.

56 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 135.
57 *Conzelmann*, ISLJ 2008, page 28.
58 *Wölker/Grill* in Groeben/Schwarze, Kommentar zum EU-/EG-Vertrag, Art. 39 EGV / ref. 153.
59 *Scheuer/Weerth* in Lenz, EU-Verträge, Art. 45 AEUV / ref. 41; *Conzelmann*, ISLJ 2008, page 29 et seq..
60 *Randelzhofer/Forsthoff* in Grabitz/Hilf, Das Recht der EU, Art. 39 EGV / ref. 211.
61 *Brost*, SpuRt 2010, page 180.
62 *Jarass*, EuR 2000, page 719; *Haratsch/Koenig/Pechstein*, Europarecht, Chapter IV / ref. 890, 895.
63 *Weiß*, EuZW 1999, page. 497; *Randelzhofer/Forsthoff* in Grabitz/Hilf, Das Recht der EU, Art. 39 EGV / ref. 30.
64 *Haratsch/Koenig/Pechstein*, Europarecht, Chapter IV / ref. 789.
65 *Tsatsos* in INEA 2008, page 75.
66 *Streinz*, SpuRt 2008, page 227.
67 *Conzelmann*, ISLJ 2008, page 28.
68 Case C-415/93, Bosman, Judgment of the Court, ECR [1995] Page I-4921 ref 132.
69 *Streinz*, SpuRt 2008, page 227.
70 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 143.
71 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 142.
72 *Majani*, ISLJ 2009, page 19; *Tsatsos* in INEA 2008 page 72.
73 *Conzelmann*, ISLJ 2008, page 26.
74 *Battis/Ingold/Kuhnert*, EuR 2010, page 7.
75 *Kusch*, ISLJ 2010, page 115.
76 See n. 7; *Streinz* in FS Steiner, page 858.
77 *Streinz* in FS Steiner, page 859.
78 White Paper on Sport, COM(2007) 391 final, page 13.
79 *Battis* in INEA 2008, page 146; *Battis/Ingold/Kuhnert*, EuR 2010, page 17.
80 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 146.
81 *Battis* in INEA 2008, page 146 et seq..
82 *Tsatsos* in INEA 2008, page 71; *Battis/Ingold/Kuhnert*, EuR 2010, page 15 et seq..
83 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 147.
84 *Majani*, ISLJ 2009, page 24.
85 *Streinz*, SpuRt 2008, page 227.
86 *Streinz* in Streinz, Der Vertrag von Lissabon, page 83.
87 Case C-519/04 P, Meca-Medina, Judgment of the Court, ECR [2006] Page I-6991.

2. Breach of European competition law (Art. 101, 102 TFEU)
In order to examine the legal admissibility of the "6+5" Rule European competition law needs comprehensively to be considered.

The aim of EU competition law is to prevent restrictive trade practices that are likely to interfere with trade between Member States or lead to a distortion of competition in the Union. According to the Treaty of Lisbon this aim is now laid down in the Protocol (Nr. 31) "on the internal market and competition" as said there that the internal market as set out in Article 2 of the Treaty on European Union includes a system ensuring that competition is not distorted.[86]

a) Violation of Art. 101 TFEU
(1) Applicability / exceptions for the segment
As shown above even rules concerning purely sporting activities are ruled by the Treaty. This means that sporting regulations are no longer automatically excluded from the scope of competition law but are tested for compatibility with competition law.[87]

(2) Coordination of behaviour between companies or trade associations
In addition, FIFA needs to be regarded as an „undertaking" under the terms of Art. 101 TFEU. The TFEU does not define the concept of an "undertaking" for the purposes of the competition rules. The ECJ stated that the term "undertaking" encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way with it is financed.[88]

Members of FIFA are the national associations[89] and hereby in the end the football clubs which are entities with economic aims.[90] The clubs are for example selling media rights, tickets or are active on the transfer market for players.[91] Consequently, the "6+5" Rule must be regarded as an agreement between undertakings.

(3) Restriction to competition
The competition concerned is the competition between the clubs, in particular the one for new players. The relevant market could be the market of professional players.[92] It is argued that the competition neither regards supply nor demand. The players supply as service providers and the clubs are regarded as customers.[93] This idea disregards that clubs often receive transfer money and therefore have own economic interests to offer players to the relevant market. The rule in question not only restricts the clubs in completing their squads, thus in engaging new players, as well as it restricts the possibility to offer players which actually are employed.

(4) Hindering international trade
Considering the hindering effect of the "6+5" Rule on trade between Member States the ECJ requires a agreement "capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States".[94] The adverse effect must also be appreciable.[95]

In that regard, the ECJ has consistently stated that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[96]

The "6+5" Rule will influence the player transfer between the Member States with high probability. Against it is argued that players are employees and the trade concept does not cover the employment of workers by clubs across national borders.[97] In line with the ECJ ruling it can be said against it that the concept of trade has a wide scope.[98] Professional players are therefore an economic good which is traded.[99]

(5) Appreciability (the "de minimis rule")
There must be a possibility of an appreciable amount of inter Community trade being affected, as Art. 101 para. 1 TFEU is subject to the "de minimis rule". If the market share held by each of the parties to the agreement does exceed 15 % the agreement is noticeable.[100] The "6+5" Rule will affect a market share of 100 % because every club will be legally bound. FIFA de facto holds a monopoly.[101] The argument, that the "de minimis rule" is not appreciable because the "6+5" Rule does not attend the aim to weaken competitors is not convincing.[102] As shown above the rule does not solely concern sporting matters.

(6) Justification
There is a dispute if only an exemption in accordance with Art. 101 para. 3 TFEU is possible, or if there are additional exemptions constraining the scope of Art. 101 TFEU (the so called "rule of reason approach").[103] To the point the Court s jurisprudence appears as implicit limitation and not as a "rule of reason approach".[104]

So the "6+5" Rule can gain a legal exemption[105] under Art. 101 para. 3 TFEU if it satisfies the conditions given hereby. Generally speaking, the reason for such exemptions is the cognizance that certain agreements may have positive effect on competition that outweigh any possible detrimental effect on trade.[106]

As shown above the supposed positive aims for the Rule could not justify a limitation of the basic freedom. In context of unfair competition an additional argument states that professional sport clubs rely on each other s existence, because sporting events can only be successfully commercially exploited, if certain sportive balance between the clubs remains.[107] On the other hand the "6+5" Rule is not neutral in the manner that it has no effect on the normal functioning of competition at all.[108]

And even more important the sporting balance between the clubs will not be improved by the "6+5" Rule.

As intermediate result a violation of Art. 101 TFEU is recognizable.

b) Violation of Art. 102 TFEU
With regard to competition law it must be considered, if FIFA abuses a dominant market position by implementing the "6+5" Rule.

Generally speaking, Art. 102 TFEU seeks to prevent undertakings from becoming involved in anti-competitive behavior.[109]

(1) Dominant Position
The relevant market is the player market, as shown above. FIFA itself is only involved by installing the rules. Therefore a dominant position within Art. 102 TFEU can only be hold by the clubs bounded as a collective entity.[110]

For such a position three cumulative conditions must be fulfilled: The clubs must have mutual knowledge of behavior, the rule must have constancy and there has to be an absence of foreseeable adverse effects.[111] The aforementioned conditions are fulfilled.

The "6+5" Rule affects all football clubs worldwide. Thus every single club on the relevant market will be concerned.

88 *Hoppe/Frohn*, causa sport 2008, page 256; Case C-41/90, Höfner and Elser, Judgment of the Court, ECR [1991] Page I-1979 ref. 21.
89 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 256: There is likewise no doubt that the individual football associations are to be regarded as associations of undertakings within the meaning of Article 85.
90 *Schwarze/Hetzel*, EuR 2005, page 589.
91 *Manville*, ISLJ 2009, page 26.
92 *Battis* in INEA 2008, page 163.
93 *Battis* in INEA 2008, page 165.
94 Case 22/78, Hugin v Commission, Judgment of the Court, ECR [1979] Page 1869 ref.17.
95 See e.g.: Case 28/77, Tepea v Commission, Judgment of the Court, ECR [1978] Page 1391 ref. 46 and 47.
96 Joined cases C-215/96 and C-216/96, Bagnasco, Judgment of the Court, ECR [1999] Page I-0135 ref. 47.
97 *Battis* in INEA 2008, page 170.
98 Case 172/80, Züchner, Judgment of the Court, ECR [1981] Page 2021 ref. 18.
99 *Manville*, ISLJ 2009, page 28.
100 Official Journal of the European Union, 22 December 2001, 2001/C 368/07.
101 *Conzelmann*, ISLJ 2008, page 29.
102 *Conzelmann*, ISLJ 2008, page 29.
103 *Emmerich* in Immenga/Mestmäcker, Wettbewerbsrecht, Art. 81 para.1 / ref. 246 et seq..
104 *Weiß* in Calliess/Ruffert, EUV/EGV, Art. 81 EGV / ref. 114; diff. view: *Haratsch/Koenig/Pechstein*, Europarecht, Chapter III / ref. 1054f.
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107 *Conzelmann*, ISLJ 2008, page 28.
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109 *Haratsch/Koenig/Pechstein*, Europarecht, Chapter III / ref. 1092.
110 White Paper on Sport, COM(2007) 391 final, page 68; *Manville*, ISLJ 2009, page 33; *Haratsch/Koenig/Pechstein*, Europarecht, Chapter III / ref. 1101.
111 Case T-193/02, Piau v Commission, Judgment of the Court, ECR [2005] Page II-0209 ref. 111.

(2) Abuse

According to General Attorney Lenz there is no abuse given since the rule only restricts competition between the clubs and not between the clubs and the players.[112]

This argument must be regarded as unpersuasive as the players themselves are suppliers to the relevant market. The "6+5" Rule brings a barrier to market access[113] for the players. Secondly the rule also will bring a quantitative restriction on the competition between the clubs.[114]

In accordance with the "Meca-Medina"[115] ruling the "6+5" Rule would be no abuse if the legitimate objectives are proportionate.

As shown above no legitimate aims for the rule are existing.

c) Conclusion

The aforementioned leads to the conclusion that also a violation of Art. 102 TFEU is recognizable.

3. Possible legal proceedings against the "6+5" Rule

Finally the question occurs, how an implementation of the rule could be handled on a legal basis respectively what legal procedures can be undertaken.

In the past rules on foreign players already have been in force without leading to court proceedings against them. [116] The involved sporting clubs will often abide a rule voluntarily.

Also as the "Bosman" case shows players can file a lawsuit. In addition the EU Competition Commission can take measures under Art. 105 TFEU and FIFA will be required to desist the exercise of the "6+5" Rule and a substantial fine can be imposed.

III. Summary and Results

A consolidated view of the aforementioned indicates that the "6+5" Rule violates Community Law. Nevertheless, it has to be admitted that the "6+5" Rule was meant to support eligible aims.

Since the "home-grown player" Rule is with good reasons deemed insufficient to achieve a promotion of national junior players, the delevopment of alternative instruments is required.

One possible concept suggested is to introduce a "promotion tax"[117] for young players. According to this concept, football clubs are obliged to field a minimum number of domestic young players or will have to pay a so called "promotion tax" for every missing player to a young player promotion fund.

An alternative model votes for the possibility to introduce a kind of "bonus-system". Every time a club fields domestic young players, this will be rewarded by a certain "bonus-payment".[118]

Nevertheless both concepts anyway could lead to an indirect discrimination of foreign players. Although under certain conditions such discrimination can be justified, the aim should be to avoid any unnecessary discrimination. Therefore, to support FIFA s "6+5" aims an admissible option can be a moderate "promotion tax" combined with "bonuses" by equal extend.

In accordance with the "Meca-Medina"[119] ruling a such a moderate "promotion tax and bonus" system could be considered as proportional. Hence it would cause no breach to European law especially the freedom of movement and European competition law.

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112 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 265.

113 *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, para. 16 / ref. 33.

114 *Manville*, ISLJ 2009, page 34.

115 Case C-519/04 P, Meca-Medina, Judgment of the Court, ECR [2006] Page I-6991.

116 Case C-415/93, Bosman, Opinion of Mr Advocate General Lenz, ECR [1995] Page I-4921, ref. 113: In one case, in Germany (spring 1995) 1. FC Nürnberg, threatened with relegation, were at home to SV Meppen in a German second division match. A few minutes before the end Nürnberg, who were leading 2-0, by mistake brought on as substitute a fourth foreigner, who had Austrian nationality. Because of that infringement, the DFB awarded the match, which had ended 2-0 to Nürnberg, to SV Meppen by two goals to nil and two points to nil. Nürnberg accepted the deduction of the points.

117 *Conzelmann*, ISLJ 2008, page 27.

118 *Hoppe/Frohn*, causa sport 2008, page 258.

119 Case C-519/04 P, Meca-Medina, Judgment of the Court, ECR [2006] Page I-6991.

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The Autonomy Case in Brazil*

by **Maurício Ferrão Pereira Borges****

Introduction

Brazil has one of the most complex legal systems in the world, especially in regard to sports law. For that reason, sports law in Brazil has been a theorized area of study for a few years. The extension of this growing interest in sports law has undoubtedly served to strengthen it in terms of theoretical approach. The maturation of sports law as an academic subject is not only reflected in the growing volume of academic texts on the matter, but also in the sports law cases being brought to the court. The most recent of the high court cases is the so-called 'Autonomy Case', which involves the internal organization of one of the most important clubs in South America: the *São Paulo Futebol Clube*.

The Brazilian legal system is facing nowadays a conflict of norms in relation to the autonomy of sports entities as to their internal organization and operation. We will describe below the main aspects involving this notorious case, which can have a major impact on the Brazilian football world and be regarded as one of the most important cases in recent Brazilian sports law history.

I. Autonomy under the Federal Constitution

Although it may have divergent applications in different countries, protecting autonomy is today one of the central values of all legal systems. The concept of autonomy has an universal appeal and therefore shapes the whole structure of relationships between individuals, entities and the state. In its simplest and most natural sense, autonomy means self-rule. In other words, it signifies the right of individuals, or of associations, or of states to make their own laws for themselves.

Understood in this way, autonomy could be defined as a synonym for license, which is to say, the ability to do what you want within your private sphere (individual), scope (entity) or territory (state). However, autonomy implies certain measures of self-restraint. It is a limited license, a kind of power with restraints.

In this context, the meaning of autonomy is connected with liberty, which is one of the most important purposes and justifications for the existence of the law. As a general rule, the law protects liberty and autonomy drawing the lines that determine the range of their self-rule. It is not different in the Brazilian constitutional law. Article 217 paragraph I of the Brazilian Federal Constitution, promulgated in 1988, provides that Brazilian legislation shall guarantee autonomy for all sports entities in relation to their internal organization and operation, including (i) sports directing entities such as the Olympic or Paralympic Committees, confederations and federations and (ii) sports associations in general.

Ipsis litteris, article 217 paragraph I of the Brazilian Federal Constitution stipulates that: "It is the duty of the State to foster the practice of formal and informal sports, as a right of each individual, with due regard for: I - the autonomy of the directing sports entities and associations, as to their organization and operation".

In short, sports autonomy always deserves a special chapter in all kinds of sports law books, because it is undoubtedly "the keystone of the whole Brazilian sports legal system".[1]

II. Autonomy under the International Sports Law

Pursuant to the Brazilian *lex magna*, as we can see, the importance of the autonomy of the sports entities is also intimately connected with the concepts of self-organization and internal operation. Both concepts guard sports associations against unwarranted intrusion. The main idea of the above-mentioned legal framework is in accordance with the philosophy of FIFA, IOC and, consequently, the international sports law.[2]

The international sports law is ruled by organizations such FIFA and IOC.[3] They are world governing bodies placed at the apex of the so-called sports pyramids. A sport pyramid is an expression of the necessary organizational structure of sport. In football, for example, FIFA is placed at the apex. Beneath FIFA lie the continental associations - in South America, CONMEBOL. On the next level further down are the national associations, along with other participants, including regional associations and eventually leagues. And then come the sports clubs and the players at the pyramid s bottom.[4]

On the one hand, an association that wants to be admitted into FIFA is obliged to "ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies".[5] On the other hand, as provides the Olympic Charter, each international federation "maintains its independence and autonomy in the administration of its sport"[6] and the National Olympic Committees "must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter".[7] According to article 217 of the Brazilian Federal Constitution, FIFA, IOC, the International Federations and the National Olympic Committees are 'directing sports entities' and the clubs 'sports entities' or 'sports associations'.[8] Of course the goal of the two most important sports organizations of the world regarding autonomy is not exactly the same as that of the Brazilian constitutional law. FIFA and IOC do not accept any government interference with its members and, aiming to avoid such interference, established rules to safeguard the autonomy of all directing sports entities and associations.

That was the subject of a very interesting decision of the FIFA Emergency Committee, which suspended the Nigeria Football Federation (NFF) with immediate effect on account of government interference.[9] Last June, Nigerian President Goodluck Jonathan suspended the Nigerian national football team from any international competitions for the next two years after a disappointing run in the World Cup. The reason behind the President's attitude was the widespread corruption that existed in the NFF. Supposedly, the NFF spent their $6 million World Cup funds carelessly. Therefore, President Jonathan ordered that a financial audit of the World Cup project be carried out in order to investigate any misuse of funds and any wrongdoing related to the project. The results of those investigations include spending $250,000 to charter a faulty airplane to fly the national team from London to South Africa and paying $800,000 in allowances to 220 delegates to the World Cup when only 47 were federation officials. The rest were friends, associates, girlfriends etc.

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* This paper is based on a presentation held at the XXVI IASL World Congress 2010, Hanyang University, Seoul, Korea, November 25, 2010.

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1 See Álvaro Melo Filho, the author of the chapter about sports in the Brazilian Federal Constitution, O Desporto na Ordem Jurídico-Constitucional Brasileira (1995), Malheiros Editores, p. 63: "The question of autonomy is not an issue of form but of substance".

2 See my book Verbandsgerichtsbarkeit und Schiedsgerichtsbarkeit im internationalen Berufsfußball. Unter Berücksichtigung der verbandsinternen FIFA-Rechtsprechung in Bezug auf die *lex sportiva* (2009), Peter Lang, pp. 63-64.

3 It is important to note the difference between international sports law, which is ruled by the sports world bodies, and the *lex sportiva*, which is grounded on the jurisprudence of the Court of Arbitration for Sport: the supreme court of the global sports law nowadays.

4 See Dirk Monheim, Sportlerrecht und Sportgerichte im Lichte des rechtsstaatsprinzips - auf dem Weg zu einem Bundessportgericht (2006), Herbert Utz, pp. 6-8. For a critical view of the matter see Stephen Weatherill, is the pyramid compatible with EC Law?, in European Sports Law: collected papers (2007), T.M.C. Asser Press, pp. 265 *et seq*.

5 See article 13 d of the FIFA Statutes.

6 See article 26 par. 2 of the Olympic Charter.

7 See article 28 par. 6 of the Olympic Charter.

8 About the Olympic system and the law of the Olympic Games see Jean-Loup Chappelet; Brenda Kubler-Mabbott, The international Olympic Committee and the Olympic System (2008), Routledge and Alexandre M. Mestre, The Law of the Olympic Games (2009), T.M.C. Asser Press.

9 See our newsletter in http://www.felsberg.com.br/Newsletter/Internationalout_10/newsletter.html.

In accordance with FIFA s decision, however, some events linked to the NFF were vital to the suspension of the NFF from all international competitions, such as: (i) the court actions against elected members of the NFF Executive Committee preventing them from exercising their functions and duties; (ii) the stepping down of the acting NFF General Secretary on the instructions of the National Sports Commission; (iii) the decision of the Minister of Sports to have the Nigerian League start without relegation from the previous season; (iv) and the fact that the NFF Executive Committee cannot work properly due to this interference.

The suspension will be maintained until the court actions terminate and the duly elected NFF Executive Committee is able to work without any interference by the Nigerian government. During the period of suspension, the NFF will not be able to be represented in any regional, continental or international competitions, including at club level, or even in friendly matches. In addition, neither the NFF nor any of its members or officials can benefit from any development program, course, or training from FIFA or CAF (Confederation of African Football) while the federation remains suspended.

Even though the cited constitutional provision (article 217 of the Brazilian Federal Constitution) is quite limiting, this subject was also addressed in Law no. 9.615/98, commonly known as 'Pelé Law'.[10] By regulating sports in Brazil since March 24, 1998, Pelé Law establishes the autonomy as a basic principle of all sporting activities:

> "Art. 2 Sporting activity, as an individual right, is based on the following principles: (...) II - autonomy, defined by the faculty and freedom of individuals and legal entities of organizing themselves for the purposes of performing sporting activities."

As per the reasons stated above, one could say that the autonomy of the directing sports entities and associations is certainly guaranteed both by constitutional law and special law in Brazil. This statement could be true. Unfortunately, it might be only partially true under Brazilian law.

III. Autonomy under the Civil Code

Whilst the Federal Constitution guarantees the autonomy, the Brazilian Civil Code establishes limits to the autonomy of sports entities, as article 59 provides that only the general assembly has competence to change articles of association, even though the entity s bylaws may establish the opposite. If the constitutional law[11] clearly safeguards the autonomy of sports clubs, how could civil law be applicable to them?

Regarding article 59 of the Brazilian Civil Code, which came into force on January 11, 2003:[12] "The General Meeting shall have exclusive powers to: I - remove officers; II - amend the articles of association."

The Sole Paragraph of the same article provides the following: "The resolutions mentioned in items I and II above shall be passed by a general meeting called especially for such purpose, with the respective quorum and criteria for election of officers as established in the articles of association."

Evidently, the provisions outlined in the Brazilian Civil Code go against the autonomy of sports entities, in such a way that they require football clubs, which have been created with the legal status of associations, to change articles of association by means of a general meeting of the associates,[13] even though these clubs perform such action through their decision-making bodies.[14]

The above-mentioned situation was worse until Law no. 11.127/2005 came into force, which partially modified article 59 removing from it the exclusive powers of the general meeting to (i) elect the officers of the association and (ii) approve its accounts. In this context, the dispute in the Autonomy Case arose out of the conflict of norms ongoing in Brazil. It consists indeed in a big question with no easy answer and, therefore, quite a challenge to Brazilian courts.

With this in mind, the case at hand offers an analysis of the complexity of norms relating to the autonomy of sports associations under the Brazilian legal system. Let us begin with the facts of the case.

IV. The 'Autonomy Case'

The well-known Autonomy Case of sports associations is certainly one of the most important leading cases in Brazilian sports law. The main issue, amongst several subsidiary ones, addressed herein is the conflict between constitutional law and civil law as to whether sports associations may have full or limited autonomy.

The question of how autonomy should be treated when sports clubs intend to amend their own articles of association became a controversial matter in Brazilian law. Even after the new Brazilian Civil Code came into force on January 11, 2003,[15] many sport clubs had continued to change their own articles of association through resolutions of their decision-making bodies instead of by general meeting s decision.

As a result, the Brazilian sports clubs, especially the ones that changed their articles of association grounded on the constitutional provision, have experienced legal instability. This situation has led to several lawsuits on this matter, mostly involving country's leading football clubs such as *Santos FC*, *SE Palmeiras* and *São Paulo FC*.

The Autonomy Case arose in 2004 from proceedings brought before the court of São Paulo by a member of the decision-making body of *São Paulo FC* against the sports association *São Paulo FC*. The claimant wanted to avoid changes in the articles of association of the sports entity. According to a first instance decision in the Autonomy Case, the provision of the Civil Code only concerns non-sporting associations. Further, most of the decisions also by the state courts have ruled that the provision in article 59 of the Civil Code does not apply to sports entities, as they have their autonomy guaranteed by the Federal Constitution and by a specific law (Pelé Law).[16]

Despite the clear directions contained in the decision of the court of first instance, the State Court of São Paulo has taken an opposing stance on this issue with the understanding that sports associations must comply with the Civil Code and submit changes to their articles of association to a general meeting.

The dispute has been recently brought to the consideration of the Brazilian highest courts (*Supremo Tribunal Federal/STF* and *Superior Tribunal de Justiça/STJ*) by means of appeals. Due to its complexity, the issue in this case may be stated in various ways. In short, its outcome rests basically on three legal doctrines:

i Supremacy of the Constitution over the Civil Code;
ii Specificity of civil law;
iii Constitution and Civil Code as centers of private law.

After that, in early 2010, members of the decision-making body of *São Paulo FC* filed a lawsuit against the club itself aiming to avoid the reelection of its current chairman Mr. Juvenal Juvêncio. Actually, the claimants wanted to discuss a matter which still has no final decision by the highest courts: the same matter discussed in the Autonomy Case. The claim is focused on the fact that the decision-making body of *São Paulo FC* voted on changing the articles of association is illegal in light of the Brazilian civil law because made through an intern resolution instead of a general meeting s voting. Based on this amendment, which also intended to extend the tenure of the club s chairman, Mr. Juvenal Juvêncio was re-elected president of *São Paulo FC* for the third time.

Before the club s decision-making body changed the articles of association, the chairman used to be elected to a two-year term. After the amendment, the term of office as chairman was extended to three years. *São Paulo FC* s articles of association, though, just allows one reelection

10 *Édson Arantes do Nascimento*, the former football player "Pelé", held the office of Minister of Sports in Brazil at the time Law no. 9.615/98 came into effect.

11 See article 217 I of the Brazilian Federal Constitution.

12 The Brazilian Civil Code was promulgated on January 10, 2002, and came into force one year later.

13 See Felipe Legrazie Ezabella, As Associações no Novo Código Civil Brasileiro, a Influência no Direito Desportivo (Lei no. 10.672/2003) e a Alteração de seus Estatutos Sociais, in Direito Desportivo - Tributo a Marcílio Krieger (2009), Quartier Latin, pp. 267 *et seq*.

14 With a critical overview of the matter Álvaro melo Filho, Autonomia Desportiva: uma questão central do Direito Desportivo (2006), IOB Thompson, p. 62.

15 About the *vacatio legis* of the Brazilian Civil Code see my book Solidarität im Recht. Die Wirkungen der Solidarität auf die *invitatio ad offerendum* im deutschen Recht vor dem Hintergrund der brasilianischen Rechtserfahrung (2009), GRIN Verlag, p. 113, footnote 273.

16 See www.tj.sp.gov.br - Lawsuit no. 011.04.015698-3 - 3rd Court of 1st Instance (Forum Regional de Pinheiros).

and, according to the claimants, if the amendment was illegal, the current chairman could not be reelected for a 'third time'.

Anyway, due to this (legal or illegal) modification, the chairman of *São Paulo FC* was elected by the club s decision-making body (i) for a term of two years (2007-2008), (ii) for a term of three years (2008-2011) and (iii) for another term of three years (2011-2014). As to the Defendant s, the current chairman was re-elected only one time, because the first opportunity for him to be re-elected under the new rule i.e. for a three-year term was in 2011.

Conclusion

The Autonomy Case can certainly be the most important leading case in Brazilian sports law. The matter has not yet come to a final decision. This landmark judgment will be the first ruling at high court level which may or may not apply the Civil Code to sports association.

The Autonomy Case, whatever its outcome, will pave the way for the sports clubs to organize and operate themselves. That is why we will have to wait for the final rule of the Brazilian Supreme Courts to conclude which law will prevail in a conflict of norms related to sports law in Brazil: the constitutional law or the civil law.

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International and European Sports Law Course

School of Law, Erasmus University Rotterdam, The Netherlands

Lecturer: Prof. Dr R.C.R. Siekmann
Structure: ten 2-hour interactive lectures
Assessment: paper (10 pages) and oral exam
Preknowledge: basic knowledge of public international and EU law
Period: 2011/2012

Content

The world of sport also has its own international rules and procedures. This, coupled with the further professionalization and commercialisation of top-level sport, has led increasingly to tension and friction with general international (and national) legal standards. The application and applicability of such standards in relation to professional top-level sport in particular is the central theme of the current problems in this area. Some examples may illustrate this. In the field of EU law the central question is whether the specificity of sport is such that exceptions to that law (the four freedoms, fair competition) can be tolerated in relation to the legal status of unions, clubs and sportspersons. The applicability of the human rights treaties (ECHR, ICCPR) comes into play in relation to the disciplinary proceedings against the sportsperson suspected of doping. In the area of dispute settlement at international level within this context particular consideration must be given to the position adopted by the International Court of Arbitration for Sport (CAS).

Course aims

The course provides an overview of the major themes in the field of international and European sports law (capita selecta).
In particular, within the context of this legal field, the focus is on providing insight into the problems such as outlined above and the possible solutions for these in a sector ("subculture") attracting growing public interest with specific organisational and other features.
It is intended that the course participants also actively contribute to seeking and evaluating solutions. This is done through interactive lectures in which articles written by the lecturer are explained by the lecturer and discussed. Practice-oriented experts shall, where relevant, be invited to share their views on the subject and to enter into discussions with course participants.
Course participants can write their paper on any subject of international and European sports law, whether or not this subject is part of the capita selecta. The oral exam is based on the paper and the subject matter dealt with in the lectures may also be discussed. The best papers are eligible for publication in The International Sports Law Journal (ISLJ). Aside from the main lecturer, some of the lectures will be provided by guest lecturers.

Literature

Course material includes in particular the relevant articles written by the lecturer and published or intended for publication in The International Sports Law Journal (ISLJ).

For further information: please, contact Prof. Robert Siekmann via sportslaw@asser.nl

The Sale of Liverpool Football Club; Controversial or Commonplace?

by **Max Eppel***

"At a football club, there's a holy trinity - the players, the manager and the supporters. Directors don't come into it. They are only there to sign the cheques."
Bill Shankly, 2nd September 1913 - 29th September 1981

Never having met Mr Shankly I cannot say how he would have reacted to the recent sale of his beloved Liverpool Football Club ("LFC") to New England Sports Ventures LLC ("NESV") which was completed under very public circumstances on 15th October 2010. But I suspect that he would have been horrified in light of his above quote. Not necessarily at the new owners who have a proven record of success with the Boston Red Sox - and it would be grossly unfair to judge them before they have had a chance to do anything - but in the manner in which the sale was conducted.

Of course times have moved on significantly since Mr Shankly made his comments. Directors/Owners have now become central figures in a club's dealings and wield considerable influence in almost every area including, it is suspected in some clubs, picking the team. Will this become more commonplace and is it really so controversial? If you had invested hundreds of millions of pounds into a project and you had a proven track record of success wouldn't you want to exert as much of your own proven influence as possible? Or should these people curb their power to the Board Room and leave the Boot Room matters to the true football personnel?

This article is intended as a commentary on the sale from the unpopular Messrs Hicks & Gillett and to explore whether it was indeed controversial. The "commonplace" tag in the title is intended to stimulate debate as to whether the sale was actually so out of the ordinary as to warrant extra attention. Or was it merely a further indication that capitalism has devoured socialism's great game and the deal was simply another piece of faceless litigation between two non-English corporate heavyweights slugging it out over an asset from which they hope one day to reap a handsome reward? I shall address everything in full below. Let me say for the record that, in my personal opinion, the entire game has gorged itself on greed and is fed by a culture of short-termism that can only have a damaging impact on the future of the sport. I also feel that these repercussions are already beginning to be felt - the words "insolvency", "administrators" and "football creditors" now make bigger headlines than your favourite striker's hat-trick against your local rivals. Or indeed my own personal favourite of "ugly defender scores own goal." However, it is my intention to give as balanced a view as possible on the entire affair and I hope that is borne out in this article.

Abbreviated chronology leading up to the Court proceedings

This is not the forum to enter into an exhaustive discussion of the history which could well take up an entire article in itself. I have opted to provide selected highlights which lead up to the Court proceedings.

Early 2004
- The then LFC board accept that they need to sell the club specifically to enable them to compete with Manchester United FC ("MUFC"), Chelsea FC ("CFC") and Arsenal FC ("AFC") in match-day revenue. The need for the backing of a wealthy owner to assist with the funding was the primary motivation behind the decision to sell.
- 3-year search for a new owner commences.

February 2007
- Hicks & Gillett acquire LFC for £5,000 per share which values the club at £174.1m, which, along with the debt at £44.8m, puts the overall figure at £218.9m.
- "*We have purchased the club with no debt on the club*," and "*The spade has to be in the ground [on the new stadium proposal at Stanley Park] within 60* days," are 2 particular highlights from their original press release.
- Attempts to distinguish their acquisition from the bitterly fan-opposed Glazer/MUFC one by insisting the club would not be laden with debt via a leveraged buy-out.

January 2008
- First protests on the Kop against Hicks & Gillett.
- Advanced negotiations with Dubai International Capital entered into but no sale is agreed.

By February 2008
- The relationship between Hicks & Gillett breaks down leaving the club paralysed because each of the Americans owns 50% of the club so decisions cannot be taken.

October 2008
- No work undertaken on the new stadium, 18 months on from "*spade... in the ground*" comments.

January 2009
- Discussions with the Al-Kharafi family of Kuwait over buying LFC. No deal agreed.

June 2009
- LFC's accounts for the year ending July 2009 reveal that the owners did in fact borrow to fund the takeover, having secured a £350m loan facility with Bank of Scotland ("RBS") & Wachovia to Kop Football Limited ("KFL") - the SPV used to acquire the club.
- Despite a record turnover of £159.1m the parent company, Kop Football Holdings Ltd, made a £42.6m loss. This is mainly due to the interest payments of £36.5m per year.
- No work has taken place on the stadium. Hicks & Gillett point to the global financial crisis.
- Auditors KPMG provide a warning that there exists "material uncertainty" casting "significant doubt" on LFC's ability to continue as a going concern.
- Christian Purslow replaces Rick Parry as Managing Director with his sole task being to secure £100m of fresh investment into the club to reduce the debt.
- LFC fail to secure Champions League football for next season.

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April 2010	• Hicks & Gillett reject an offer of £110m from the Rhone Group for 40% of the club. • RBS refinance the loan for 6 months on the condition that the club is put up for sale and Martin Broughton (in conjunction with Barclays Capital) appointed as an Independent Chairman to oversee the sale. The other members comprise Ian Ayre & Christian Purslow (as well as Hicks & Gillett). • Hicks claims the club is worth £800m.
June 2010	• Hicks & Gillett attempt to refinance their loan but are blocked by the other 3 directors.
August 2010	• 2 potential bids are said to be on the table from Kenny Huang and Yahya Kirdi but they fail to materialise. • Hicks attempts, unsuccessfully, to secure refinancing from Blackstone hedge fund for the £237m debt. Reports emerge that RBS have set a deadline of 15 October.
September 2010	• LFC's supporters instigate a large-scale campaign against the American owners.
October 2010	• With the date looming to repay RBS or face a £60m penalty charge, rumours emerge that a proposed deal with NESV was agreed on 5 October. • A boardroom struggle ensues, with an official statement from the club detailing Hicks and Gillett's attempts to remove Chairman Martin Broughton, Managing Director Christian Purslow and Commercial Director Ian Ayre from the board and install Mack Hicks and Lori Kay McCutcheon. • The following day, a statement is released by Martin Broughton to confirm that a proposed sale to NESV had been agreed subject to the court proceedings instigated by Hicks & Gillett. • RBS, the primary creditors, are granted an injunction on 12 October preventing Hicks & Gillett from changing any Board members. The fear is that if they install their own people then the sale will be blocked. • On 13 October the High Court (Mr Justice Floyd) rules in favour of RBS which means that the Board can be reconstituted and the sale can proceed. • On the same day, Hicks & Gillett commenced legal proceedings in Texas. They alleged that the English Directors and NESV (amongst others) had conspired to sell the Club below the market value. The Texan court then issued a Temporary Restraining Order preventing the sale to NESV and preventing RBS from enforcing its loan. • On 14 October a further ruling was sought from Mr Justice Floyd and he again found in favour of RBS. • The sale to NESV was completed on Friday 15 October.

The legal proceedings

Again, this is not the correct place to enter into an exhaustive discussion of what actually took place in court but the highlights below should serve as an aide-memoire and lead-in to the commentary below.

Wednesday 13 October *2010*

- RBS applied for a Mandatory Injunction to restore the validity of the Board of KFL to the position prior to 5 October 2010. Hicks & Gillett also sought an injunction to restrain the sale to NESV.
- RBS submitted that Hicks & Gillett were in breach of various corporate governance provisions relating to KFL's Board membership.
- Hicks & Gillett contended that there had been repudiatory breaches by both KFL and RBS which therefore entitled them to treat the agreement as having been terminated.
- Mr Justice Floyd ruled in favour of RBS and applied the first test laid down by the House of Lords in *American Cyanamid v Ethicon (1975)* AC *396* which is whether there was a serious issue to be tried. The Judge concluded that there was no seriously arguable defence to RBS's claim and he gave extremely direct dicta to that effect.
- It was ordered that the board of KFL should be reconstituted to its form of 5 October 2010 and that the sale should be dealt with by that Board. The injunction sought by Hicks & Gillett was declined.

Thursday 14 October *2010*

- RBS applied for an "anti-suit injunction" which is extremely rare. The effect of these injunctions is to prevent parties from commencing or continuing proceedings in another jurisdiction. In this case, RBS felt that Hicks & Gillett were simply trying to frustrate the English proceedings via the Texas courts. An anti-suit injunction does not require the English court to make any findings about the jurisdiction of the foreign court.
- It was held that the conduct of Hicks & Gillett was "unconscionable" with their only purpose being to deprive RBS of the benefit of their injunction and earlier judgment.
- Mr Justice Floyd also took into consideration the fact that the English Directors could be committed to a Texan prison if it were not made immediately. It was also noted that any further delays would prevent the Club from being able to meet its liabilities to RBS. As such, the court made the anti-suit injunction and the sale was able to proceed the following day.

Commentary

Why did the sale end up going to court and should the sale, and indeed future sales of any football club, be the subject of such public scrutiny? Was it controversial or commonplace or none of the above?

It is my view that this is simply the latest high-profile club whose sale has been the subject of due legal process. It is lamentable that a club which used to be known for conducting their affairs in private - "The Liverpool Way" - with a glorious tradition both on and off the pitch have now become headliners in the most non-athletic of ways. However, I do not deem this to be unusual nor indeed un-commonplace. The list of clubs who have changed owners publicly and with a degree of acrimony is extensive and includes, in recent times, Manchester United, Chelsea (Bates/Harding), Spurs (Venables/Sugar) and of course Liverpool. These clubs are scions of the English game but just as susceptible to hostile takeovers, leveraged buyouts or directors' disputes as any other corporate entity.

Why did LFC's sale go to Court?

My answer to this question is simple - it was because of two deeply entrenched positions adopted by opposing parties who had lost all semblance of effective communication and wished to assert their rights at law. Sadly, this does not sound any different to the basis of any other piece of litigation. Which is the thrust of one of my points of view in this article - that football cannot expect to be treated any differently to other businesses as we move further into the 21st century.

After all, what are the alternatives? Most sports are fiercely self-regulating and I'm sure that Sepp Blatter would prefer these disputes or deals to be dealt with within the "football family" but there is really no power to enforce such a course of action despite the promulgation of Article 64(2) & (3) of the FIFA Statutes which provides as follows:

"*2 Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.*

3. The Associations shall insert a clause in their statutes or regulations, stip-

ulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS.

The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law."

I readily concede that the above Article does not appear to specifically envision a dispute between a club and its lending institution. But certainly the wording *"it is prohibited to take disputes... affecting.... clubs... to the ordinary courts of law"* could, on some interpretations, be held to convey the meaning that any dispute whatsoever involving a club and anyone or anything else should be channelled through FIFA.

Such an Article has placed FIFA under enormous pressure at the level of the European Parliament ("EP") which adopted the following motion on 29 March 2007:

"1....

2. ...

3. [The EP] Takes the view that applying to the civil courts, even when not justified in sports terms, cannot be penalised by disciplinary regulations; and condemns the arbitrary decisions by FIFA in this respect;

4. Asks UEFA and FIFA to accept in their statutes the right of recourse to ordinary courts, but recognises that the principle self-regulation implies and justifies the structures of the European sports model and the fundamental principles governing the organisation of sporting competitions, including anti-doping regulations and disciplinary sanctions."

If there is no faith or indeed no adequate remedies within FIFA then clubs have no option but to turn to the High Court (or their local civil courts). It is of note, I believe, that there was no protest from FIFA HQ in Zurich about the recent spate of high-level football clubs seeking redress outside of FIFA or the Court of Arbitration for Sport ("CAS"). This must be taken as a tacit admission that whilst a particular level of dispute can, and should, be dealt with through FIFA (or National Associations) they are inherently ill-equipped to deal with the commercial realities of today's world. Hence, the application to the High Court by both RBS and Hicks & Gillett.

Should LFC's sale, and indeed future sales of any football club, be the subject of such public scrutiny?

Hicks & Gillett, now famously, promised during their acquisition of LFC in February 2007 that *"The payment of interest on... the [lending] facilities will not depend to any significant extent on the business of Liverpool."* It set out the £298m they had borrowed from RBS and Wachovia to facilitate their takeover and investment of LFC. The club itself cost £174m. What actually happened was that Hicks & Gillett did pay the interest on the loan, approximately £35m a year, from LFC's income. This meant that instead of showing record profits from turnover of £185m the club posted a £53m loss in 2009.

Why did this happen? A promise not to do something in the future is not, strictly speaking, enforceable. And it would behove fans of LFC, and indeed other clubs, to heed the statement provided by John W Henry of NESV on 4 November 2010 when asked if he would be "leveraging" the costs of NESV's purchase of the club onto the club:

"It [the promise not to leverage] was not asked for. I don't remember anything being discussed along those lines except that there was a desire for all of the debt to be removed except stadium debt."

And that has been done. RBS has confirmed that that the £150m owed to them has been repaid, as has the £50m owed to Wachovia. RBS are still owed £37m for the development work on the proposed new stadium - such a bone of contention under Hicks & Gillett. Does this mean that NESV are simply the next in a line of foreign speculators hoping to make a fast buck from an English sporting institution (not that Hicks & Gillett did so)? The answer, quite simply, is that they could be. However, examining their success with the Boston Red Sox it can be seen that NESV invested money into them, resolved a tricky stadium issue, lead them to the championship and have not drawn a dividend in their 9 years of ownership. If the same model is adopted at LFC then fans of the Reds will find themselves eternally grateful to the former Board and their legal team.

The reason this case was the subject of such intense scrutiny was because of the high-profile nature of the club and the fast-paced and exciting twists and turns of the court case. But, make no mistake, fans of the so-called smaller clubs will be just as invested in a winding-up petition by HMRC, for example, as a major club being bought and sold for hundreds of millions of pounds.

My conclusion to this section ties in with my submissions in the above section - that there is simply no way of avoiding such public scrutiny when so much is at stake and the lives of so many people are invested in the club. It also ties in with the peculiarly British idiom of being hopelessly entranced with the private lives of football players and, latterly, the private machinations of the clubs. It is only natural as the amount of money increases in the game that our gazes should come to rest above the Boot Room and into the Board Room if that is where the real action is now taking place.

Certainly, our fascination with Abramovich's, Storrie's and Ridsdale's would only have served to bemuse Mr Shankly.

Conclusions

I was in the High Court for the recent hearings involving Portsmouth FC and LFC. Granted, both were of very contrasting natures. Portsmouth were fighting off a challenge from HMRC but were placed there, some might say, because of the actions of some of their Directors/Owners. Southend, Cardiff, Plymouth Argyle and Leeds are just a few other clubs who have found themselves fighting off similar claims. This brings me to my final question - just how unusual is it to see clubs in the High Court? My belief is that, whether it is to do with unpaid taxes, the actions of Directors/Owners, or change of ownership and disputes thereto, there is really nothing unusual about it anymore. It is simply a sign of the changed times that, as ever greater tides of money flood the game, so will there be more vicious and hard-fought disputes. Litigation these days is expensive and, while every effort is made to settle cases, we all know that sometimes nothing short of a High Court judgment or order will suffice.

As a fan of football it saddens me to see the disputes overshadowing the dribbles; the litigation grabbing headlines ahead of leading scorers; but as a Sports Lawyer I am certain that High Court actions are preferable to having these matters dealt with by FIFA or even The FA. My reasoning is, I hope, clear - that the boom of Pay TV money must be balanced out with the commercial realities of 21st century life; that where there is money there are, generally speaking, disputes. And where there are disputes there must be the Rule of Law.

To sum up, therefore, I would say that the sale of LFC is both commonplace and controversial but seeing football clubs in court is becoming both more commonplace and less controversial every year.

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RFU Wins Court Order in Ticket Touting Case

by **Ian Blackshaw**

Wayne Rooney Stays at Manchester United - But at a Cost!

A former UK Prime Minister, Harold Wilson, once said that 'a week is a long time in politics'. In football, 48 hours is no time at all! That is how long - or short! - it took for Wayne Rooney to change his mind about leaving the world's most famous and favourite Football Club, Manchester United.

First, the 25 year old striker and English International is leaving the Club; and, then, surprisingly, he is staying. What a spectacular *volte-face*! But that, I suppose, is the nature of the 'beautiful game'!

First, his manager, Alex Ferguson, is 'dumbfounded' by the news of his departure; and, then, he is 'delighted' that Rooney is staying with the Club after all. They kiss and make up like lovers after a tiff! But, at what cost to football and the Club?

Certainly, despite Rooney's apologies to the Club, the Management, the Owners and - not least - the fans about his disparaging remarks about ManU lacking ambition and his behaviour generally, his own image and that of the Club has been damaged. The 'beautiful game' also, in my view, has been sullied by this episode. Apart from that, there is a financial hit too!

Rooney walks away with a new five-year contract reputedly worth between £150,000 and £200,000 a week, apart from bonuses. This, in my view, is obscene, particularly in the light of the UK Government spending cuts and job losses announced at the same time that Rooney was negotiating his new deal. In fact, during the term of his new contract, 400,000 workers in the Manchester area alone are expected to lose their jobs! But, again, that, I suppose, is football: not only the world's favourite game, but also the world's most lucrative sport. Furthermore, one English tabloid newspaper, the *Mirror*, characterised the whole Rooney saga as 'greed'.

Rooney will not only now need to perform on the field of play, after a disastrous World Cup, by scoring goals again and soon, but also off the pitch as well, by regaining the confidence and support of his Club, the Management, the Owners and, of course, the ManU fans, the leader of which described the whole affair as being 'completely mad.' Will it all end in tears? Or will Rooney rise to the challenge? We will wait and see with great interest!

The Rooney saga, if it proves anything at all, apart from the fact that Rooney seems to have played his cards well and proved to be a good negotiator, if not a skilled poker player, going for bust and winning hands down, shows, in my view, that there is some truth after all in the *dictum* of Bill Shankly, the legendary manager of Liverpool Football Club (also in the news recently): 'football is not a matter of life and death, it is much more important than that!'

Kick Corruption Out of Football!

The 'beautiful game' is fast becoming the 'ugly game' as more and more corruption scandals come to light!

The latest one concerns the sale of votes for hosting the FIFA World Cup, which is fast overtaking the Olympics as the biggest global sporting event and money spinner.

FIFA, the world governing body of football, is investigating allegations made by a British newspaper on 17 October, 2010 that two officials offered to sell their votes in the bidding contest to host the 2018 World Cup.

Reporters from 'The Sunday Times' newspaper posed as lobbyists for

a consortium of private American companies, who wished to help secure the World Cup for the United States. The reporters stated that, posing as 'fixers', they approached six current and former FIFA officials, who all said that the way to help secure the vote in favour of the American bid was to "to pay huge bribes to FIFA executive committee members".

One of the members approached by the reporters was Amos Adamu, the Nigerian President of the West African Football Union, who, it is alleged, at an initial meeting in London, told the reporters that he wanted US$800,000 to build four artificial football pitches in his home country. It is further alleged that Adamu, when asked whether the money for a "private project" would have an effect on the way he voted, replied: "Obviously, it will have an effect. Of course it will. Because certainly if you are to invest in that, that means you also want the vote."

Another member approached was Reynald Temarii, President of the Oceania Football Confederation, and he is also alleged to have asked for money: in his case, to finance a sports academy.

FIFA have responded quickly to these allegations and have issued the following statement to the media:

"FIFA and the FIFA Ethics Committee have closely monitored the bidding process for the 2018 and 2022 FIFA World Cups and will continue to do so. FIFA has already requested to receive all of the information and documents related to this matter, and is awaiting to receive this material.

In any case, FIFA will immediately analyse the material available and only once this analysis has concluded will FIFA be able to decide on any potential next steps.

In the meantime, FIFA is not in a position to provide any further comments on this matter.

Sepp Blatter, President of FIFA, is very embarrassed by this affair and has admitted that the scandal has had a "very negative impact" on the world governing body.

He has written to the 24 executive committee members promising a full investigation.

The letter says:

"I am sorry to have to inform you of a very unpleasant situation, which has developed in relation to an article published today in The Sunday Times titled "World Cup votes for sale".

The information in the article has created a very negative impact on FIFA and on the bidding process for the 2018 and 2022 FIFA World Cups.

Some current and former members of the executive committee are mentioned in the article.

FIFA will... open an in-depth investigation, which we will start immediately together with the FIFA ethics committee and the FIFA secretary general.

I will keep you duly informed of any further developments."

FIFA has the option of postponing the vote, which is set for 2 December, 2010, but have announced that the vote will go ahead as planned.

The Oceania Football Confederation (OFC) has confirmed that it is investigating the newspaper reports and has issued the following statement:

"OFC is aware of the story that appeared in The Sunday Times in England. As such, OFC is currently looking into the matter."

England, Russia and joint bids from Netherlands/Belgium and Spain/Portugal are in contention to host the 2018 World Cup.

The US - the last remaining non-European bidder - pulled out of the contest on 15 October, 2010; and Australia withdrew from her candidature in June, 2010. Both countries have said that they will refocus their efforts on the 2022 World Cup, along with Japan, South Korea and Qatar who are also bidding to host the event.

Adamu and Temarii have been suspended pending the outcome of the FIFA investigations.

Reactions to the latest corruption scandal to affect football have ranged from surprise to 'what's new?' And some commentators have questioned whether bribes were paid to the secure the 1996 World Cup in Germany!

Certainly Blatter needs to act urgently, decisively and transparently in this matter and, if the allegations are found to be true and substantiated, to make an example of the wrongdoers and boot them out 'for the good of the game'. Otherwise, it will just be a 'whitewash' and 'business as usual' and somebody else will be offering votes for cash on a future occasion!

The outcome of the FIFA investigations will be awaited, therefore, with great interest.

Tour De France: Latest Doping Investigations

Shock! Horror! Cycling once again is in the dock for doping!

Cycling, in general, and its flag ship event, the *Tour de France*, in particular, seems to breed a culture for doping. Indeed, one commentator has described the sport's world governing body, the International Cycling Union (UCI), as being an absolute joke and as much to blame as the drug-takers themselves for bringing their sport into disrepute!

This time, it is the 2010 *Tour de France* winner, Alberto Contador, of Spain, who has tested positive for the banned substance *clenbuterol*, a muscle-building and fat-burning drug.

However, Contador, the 27 year-old three-times *Tour de France* cycling champion, insists that the positive test came from contaminated meat and he will fight the doping allegations made against him vigorously. In the meantime, Contador has been provisionally suspended by the UCI, who have now referred the case, as they are required to do under the Rules, to the Spanish Cycling Federation (RFEC) for investigations to be carried out and a decision made.

Against this background, Contador's spokesman, Jacinto Vidarte, has released a statement to the media in which he says:

"The legal team of Alberto Contador, after receiving and carefully studying the report submitted by the International Cycling Union to the Spanish Cycling Federation, maintains their optimism and confidence in bringing a resolution to the case.

The dossier prepared by the UCI and World Anti-Doping Agency [WADA] focuses on the hypothesis of food contamination.

Thus, according to documents submitted by the UCI and WADA, food contamination remains the only reasonable explanation, from a scientific point of view, to justify the presence of the tiny amount of clenbuterol in the body of the rider during the Tour de France."

A WADA-accredited laboratory in Cologne, Germany, did indeed find a "very small concentration" of the banned substance in Contador's urine sample on 21 July, 2010. Apparently, the amount of the substance was 400 times less than the 50 picogram benchmark measurement that WADA-accredited anti-doping laboratories must be able to detect to establish a doping offence.

Vidarte also disclosed that Contador's legal team will be led by the Swiss Lawyer, Rocco Taminelli, who successfully defended the Italian rider, Franco Pellizotti, when he was acquitted of doping charges in Italy in October.

Under the UCI Rules, the RFEC investigations have to be completed within a month, but the RFEC has told the Spanish media that they will take "at least two months" to carry them out and decide on Contador's fate

If Contador's failed doping test is upheld, he could be stripped of his 2010 Tour de France title and also given a two-year ban, as a first-time offender. In fact, the only previous *Tour de France* winner to be stripped of their title was Floyd Landis in 2006.

If, on the other hand, the Spanish Cycling Federation decides not to punish Contador, the UCI and WADA, under the provisions of the WADA Anti Doping Code, can appeal to the Court of Arbitration for Sport for a final ruling in the case.

It would appear from the above account that Contador may stand a good chance of 'getting off' and avoiding sanctions. But this, as usual, will depend upon the scientific evidence, and one never knows what this will actually reveal and, perhaps more importantly, how it will be interpreted by the sporting and anti doping authorities.

In any case, cycling needs to get its act together so far as eradicating doping from its sport is concerned.

Watch this space!

Formula One Removes Ban On 'Team Orders' Rule?

The World Governing Body of Motor Sport, the FIA (*Federation Internationale de Motor Sport*) has removed the controversial ban on 'team orders' from its rule book.

This rule forbids F1 teams from instructing a driver to cede to his team-mate in order to gain points, and recently came under scrutiny after Ferrari were fined for using team orders in 2010. This happened at the German Grand Prix in July 2010 when the Ferrari driver, Felipe Massa, who had been leading the Hockenheim race, moved aside to allow his team mate, Fernando Alonso, to pass him on Lap 49 and win the race. A few moments before, Massa's race engineer had told the Brazilian: "Fernando is faster than you. Can you confirm you understood that message?"

Although Ferrari insisted that this did not constitute a 'team order', but was merely giving the driver information, and Massa claimed that he and not the team had made the decision to surrender the lead to Alonso, nevertheless, the race stewards decided that Ferrari had, in fact, contravened Article 39.1 of the F1 Sporting Regulations, which provides that "*team orders which interfere with a race result are prohibited*", and had also breached Article 151 (c) of the International Sporting Code, which prohibits "*any fraudulent conduct or any act prejudicial to the interests of any competition or to the interests of motor sport generally*". The stewards then handed Ferrari the maximum fine of US$100,000 that they are empowered to impose on a competitor.

The FIA considered that the rule on banning 'team orders', which was introduced in 2002 after Rubens Barrichello allowed his Ferrari teammate at the time, Michael Schumacher, to win, was difficult to enforce in practice.

Apart from that practical consideration, I never did understand what all the fuss regarding the 'team orders' rule was about, as F1 is essentially a team sport, although, of course, there is one individual champion in each season, but, again, the winner is a member of a particular team.

However, Article 151 (c) remains in force. This is the so-called rule against 'bringing the sport into disrepute' - a very popular provision in the Disciplinary Rules of many International Sports Governing Bodies. This rule is also, I consider, rather difficult to enforce in practice, as it is essentially 'subjective' in nature.

It is rather like a rule that bans conduct which is against 'public policy', which has been described by one English Judge, namely Mr. Justice Burrough, in the case of *Richardson v Mellish* (1824), 2 Bing. 229, 252, 130 Eng. Rep. 294, at page 303, as: "*a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.*"

So, perhaps, despite the change, the F1 'team orders' rule remains, but in a much less clear form!

FIFA To Set Up Anti-Corruption Body

The President of football's world governing body, FIFA, Sepp Blatter announced on 2 January, 2011 that he intends to set up "*an anti-corruption committee to police world football's governing body.*"

This development follows close on the heals of the corruption allegations, which overshadowed the bidding and voting process for the awarding of the World Cup in 2018 and 2022, which led, in the event, to bans being imposed on two members of the FIFA Executive Committee, Amos Adamu and Reynald Temarii. It should be added that both of them have strenuously denied the allegations that have been made against them of selling their votes (see my previous ISLJ Opinion of 20 November, 2010, entitled, '*Kick corruption out of football*').

According to Sepp Blatter:

"*This committee will strengthen our credibility and give us a new image in terms of transparency.*"

And gave the following personal pledge:

"*I will take care of it personally, to ensure there is no corruption at FIFA.*"

The new committee will consist of between seven and nine members, who will be drawn not only from sport, but also from politics, finance, business and culture. This is indeed good news. But, of course, the value of any body depends upon its members and it will be interesting to see who is, in fact, appointed - hopefully not 'the usual suspects'! The issue here is summed up in the well-known Latin tag coined by the Roman poet Juvenal: '*Quis custodiet ipsos custodes*?'

Furthermore, Blatter also confirmed that he would not be a member of this committee, in order to guarantee its independence. Again, a step in the right direction.

Of course, one thing that is not so clear and that is what will happen to FIFA's ethics committee, which investigated the claims of corruption last year, and, incidentally, exonerated FIFA officials from any involvement.

Certainly, Sepp Blatter is to be congratulated on acting quickly and decisively on announcing the setting up of this new FIFA Anti-Corruption body to kick corruption - in all its insidious forms - out of the 'beautiful game'. Particularly noteworthy is the fact that Blatter will not be a member of this body and also that he has given his personal pledge to make the new arrangements work.

It all sounds too good to be true. So, let us hope that this is not just rhetoric - to serve Blatter's re-election purposes later this year - but that actions really will speak louder than words!

English Football under Government Spotlight

Despite its popularity, according to the UK Sports Minister, Hugh Robertson, English football is "*the worst governed sport in Britain*" and the UK Parliament Culture, Media and Sport Select Committee is conducting a high-level and wide-ranging inquiry into the way the '*beautiful game*' is organised and run in England.

As followers of football will know, English football has suffered two recent defeats: early elimination from the 2010 World Cup in South Africa in a spectacular 4-1 defeat by Germany and also elimination from the first round of voting in England's bid to host the 2018 World Cup - apparently, by only two votes!

This inquiry comes at an interesting time when a new English Football Association (FA) Chairman, David Bernstein, takes up his post, replacing the outspoken and indiscreet Lord Triesman, and a lot of changes in the way the English FA is run in the future are expected of him.

Ironically, members of this Select Committee will try to find their answers from Germany and will visit Frankfurt and Munich in the next few weeks as part of a fact-finding mission.

German football has long been considered to be a role model for other countries to follow for a number of reasons. German football officials invest more in youth development; have strict quotas on foreign players in the *Bundesliga*; and also maintain tighter club ownership rules, which prevent any single "outside" investor from holding more than 49% of the shares in a German football club.

But perhaps the most important feature of the successful regulation of football in Germany lies in the fact that the Governing Body, *Deutscher Fussball Bund*, has retained control over the entire game in Germany and, in particular, the *Bundesliga*. By contrast, in England, the FA has ceded quite a bit of turf and influence to the English Premier League, which has become more and more powerful over the last twenty years or so. As a result of this, it is expected that the balance of that power between the FA and the Premier League will form a significant part of the Select Committee's Inquiry.

Once the Select Committee Inquiry reports, which it is expected to do later in the year, it is questionable whether the UK Government will act on its findings and recommendations, given the fact that, for the first time in decades, the Government is a Coalition, consisting of the Conservatives and the Liberal Democrats.

Equally, it is unclear how far the English FA will go, acting on its own initiative, to put its own house in order, given its past record and dismal performance in this respect; and, in particular, the vexed question of separating the regulation of the sporting side of English football from its marketing side - something which is long overdue.

However, who knows, it may turn out to be a case of '*plus ça change, plus c'est la même chose*.'

Half-Time Score in EU TV Sports Rights Case

On 3 February, 2011, the German Advocate General at the European Court of Justice (ECJ), Juliane Kokott, published her Opinion in the long-running football pub broadcasting cases pending before the ECJ. She came down firmly on the side of the Portsmouth publican, Karen Murphy, and the decoder supplier, QC Leisure, involved in the cases. Murphy was fined for using a cheaper Greek service to show English FA Premier League games in her Pub and had argued that the EU single market should allow her to use any European provider.

In Kokott's view, Broadcasters cannot stop customers using cheaper foreign satellite TV services to watch Premier League football in the UK, because such restrictions infringe

EU Laws, in particular the EU Competition Rules. According to Kokott, exclusivity agreements relating to transmission of football matches on a country-by-country basis are unlawful. Her Opinion has been widely welcomed as being very good for the paying public.

Naturally, Sky and ESPN, who hold the broadcasting rights to Premier League football in the UK, have opposed this contention. At the heart of the case is whether a TV rights holder, such as the English FA Premier League may license its content on a country-by-country basis, thereby dividing up the European market, in order to fully maximise the value of these rights, which are currently worth £1.782 billion over three years!

A spokesman for the English FA Premier League, which is studying the Advocate General's Opinion in this case, said that, if the Opinion were adopted by the ECJ, this "*would damage the interests of broadcasters and viewers of Premier League football across the EU*". Really?! Certainly broadcasters; but not viewers, I would argue!

The spokesman added that it would stop rights holders from marketing their properties in a way which meets the territorial and cultural demands of Broadcasters, claiming that

the current EU Law had been "*framed to help promote, celebrate and develop the cultural differences within the EU*". Again, a smoke-screen for maximising the financial returns of Sports TV Broadcasters at the expense of the viewers, I would further argue!

Furthermore, if the European Commission wanted to create a pan-European licensing model for sports, film and music, then it must go through the proper consultative and legislative processes and not use the courts. But, what are the courts there for in the first place? Surely, to interpret and apply the Law!

The Advocate General's Opinion is not binding on the ECJ, who will make a ruling on the matter later this year, but the ECJ tends to follow it in 70% of the cases. It will be interesting to see if the ECJ does so in the present case, which, if it does, will significantly alter the entire landscape of Sports TV Rights in Europe and prevent the segmentation of national markets in the future. This, surely, is not compatible with a single EU market and the rules on freedom of competition designed to ensure it. We will see what happens

So, watch this space!

Landmark ECJ Rulings in FIFA & UEFA 'Crown Jewels' Cases

On 17 February, 2011, the General Court (formerly the Court of First Instance) (Seventh Chamber) of the European Court of Justice (ECJ) handed down two landmark Judgements in the so-called 'Crown Jewels' cases brought by FIFA, the World Governing Body of Football, and UEFA, the European Governing Body of Football.

At the heart of these cases is Article 3a of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as inserted by Directive 97/36/EC of the European Parliament

and of the Council of 30 June 1997 amending [Directive 89/552] (OJ 1997 L 202, p. 60), known, in short form and colloquially, as 'The Television Without Frontiers' Directive. Para. 1 of this Article provides as follows:

"1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage."

In the FIFA case, The United Kingdom and the Belgian Governments had decided to list all the FIFA World Cup matches as sporting events which they consider to be of "major importance for society" in the UK and Belgium and should, therefore, be shown on free-to-air television. This meant that these events could not exclusively sold to subscription and 'pay-per-view' channels. FIFA, not surprisingly, objected, claiming that this action was not compatible with EU Law.

In the UEFA case, the European Championship was in play in both countries.

FIFA and UEFA argued that the listing of these events, which are money-spinners for them, as 'free-to-air' under 'The Television Without Frontiers Directive' restricted their bargaining rights with TV companies for football content and were contrary to the EU Competition Rules.

The ECJ held that the World Cup and the European Championship were single sporting events and could not, therefore, be divided up (known, in the jargon, as 'siphoning off') at the will of FIFA and UEFA. The Court also held that the Governmental measures, taken after full public consultation, to list these events as ones to be broadcast on 'free-to-air' television were proportionate and served the public interest; and, moreover, did not go any further than was necessary to attain that objective. In other words, they were not anti-competitive and, therefore, compatible with EU Law.

On the commercialisation and sale, especially 'collective selling', of Sports Broadcasting Rights, see 'TV Rights and Sport: Legal Aspects', I. S. Blackshaw, S. Cornelius and R.C.R.Siekmann (eds.), TMC Asser Press, The Hague, The Netherlands 2009.

So, the ECJ has struck an important blow for ordinary football fans, who wish to have unrestricted access to the broadcasting of the World Cup and the European Championship; and the Football Supporters' Federation were obviously "delighted" with the Court's Rulings.

On the other hand, FIFA and UEFA, not unnaturally, were "disappointed" with the Rulings, which they say they are carefully considering. They have two months in which to file an appeal to try to overturn them.

It will be interesting to see whether they do, in fact, appeal and, if so, what happens next!

The Contador Doping Saga Continues: CAS Is Now Involved!

Alberto Contador, one of only five cyclists so far to win the three Grand Tours - the Tour de France (three times), Giro d'Italia and Spanish Vuelta - has not yet crossed the finishing line as far as his alleged doping offence is concerned.

The 28-year old Spaniard tested positive for the banned substance *clenbuterol* (a fat-burning and muscle-building drug) just days before his 2010 Tour de France win in July of last year. The World Anti-Doping Agency (WADA) regards *clenbuterol* as a zero-tolerance drug, although under the WADA Anti Doping Code, athletes are able to escape a sanction if they prove "*no fault or negligence*" on their part (see Article 10.5.1 of the WADA Anti Doping Code 2009). It should be noted, however, that this Article only eliminates a sanction, but does not expunge the doping offence itself, which still stands.

But the Spanish Cycling Federation (RFEC) cleared Contador in February of this year accepting his claim that the minute traces of this banned substance found in his urine got into his system through his inadvertently eating contaminated beef. Originally, the RFEC imposed a one-year ban and then changed this to a no ban at all.

For further details and comment on the background to this affair by Professor Blackshaw, the author of this present News Item, see '*Tour de France: latest doping investigations*' posted on the Asser International Sports Law Centre website on 2010-11-22.

However, the International Cycling Union (UCI), Cycling's World Governing Body, announced on 24 March, 2011 that it will ask sport's highest court, the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, to ban Contador for doping.

According to the UCI President, Pat McQuaid:

"*We've studied the case and we feel there's strict liability whereby the athlete has to prove how the product got into his system. We feel he hasn't done that in this case and there's a case to answer.*
Of course it's damaging for the sport but, by the same token, the sport has to police itself and remain credible. That's what the UCI does."

Certainly, cycling does not have a very good doping record! So, it is not surprising that the UCI is taking the case to the CAS for a definitive ruling.

It is hoped that the CAS will hear and decide the Appeal before May or June, so that Contador's position will be clear before the 2011 Tour de France. However, this may not be possible, as Matthieu Reeb, Secretary General of the CAS, has commented:

"*From what I heard, we are heading for a fierce defence. I am pessimistic that we can make a ruling before the end of June.*"

If the Appeal by UCI is upheld by the CAS, Contador can be banned for two years and stripped of his 2010 Tour de France title. Of course, until the CAS makes its Award, Contador can continue competing in cycling events - as he currently is doing with his new team Saxo Bank-Sungard. To date, only one cyclist has lost a Tour de France title for doping and that was the American Floyd Landis, who was stripped of his 2006 victory.

The Contador case is a high profile one, and there is a lot of interest in its outcome, not only in Spain, where even the Spanish Prime Minister, Jose Luis Rodriguez Zapatero, declared that "*there was no legal reason to justify sanctioning Contador*", but also in the world of cycling in general.

So, once again, watch this space!

RFU Wins Court Order in Ticket Touting Case

The unlawful advertising and sale of tickets to major sports events, especially by ticket touts who sell at prices well above their face value, is an increasingly widespread phenomenon, and poses an administrative nightmare for sports event organisers or rights holders, normally the Governing Bodies of the sports concerned. For example, the current fine of £5,000 for touts unlawfully offering to sell tickets for the 2012 London Olympics is being raised to £20,000! To avoid problems, punters should buy their tickets only from official ticketing sources.

The English High Court rendered an important judgement on 30 March, 2011 in a ticket touting case involving the Rugby Football Union [RFU] v. Viagogo Ltd ([2011] EWHC 764 (QB)). In that case, a so-called *Norwich Pharmacal* order was granted by the Court to the RFU.

The facts concerning the parties and their respective activities and the basic legal issues raised in this case, including the nature of a *Norwich Pharmacal* order, are set out and explained in the first part of the Judgement of Mr Justice Tugendhat as follows:

"There are 82,000 seats in the Claimant's ("RFU") Stadium at Twickenham ("the Stadium"). It is the home ground for England international rugby matches, and other matches are played there. There are days when those seats are very much in demand. As the owner of the Stadium, RFU is entitled to decide who can enter it and occupy those seats. Any member of the public who enters without permission is a trespasser. That is so, whether or not they are aware that they are trespassers.

Permission to the public to enter premises is generally given by the owners of the premises in the form of a ticket (or, if entry is free, the permission may be called an invitation). Permission is called a licence by lawyers. It does not have to be in writing, but it often is. If it is in writing, then it is usually printed on a permanent medium, such as paper or card. RFU issues paper tickets with bar codes, and these are scanned at the entrances to the Stadium.

The permission and the physical medium are distinct. The permission may be revoked or expire even if the physical medium cannot be retrieved from the holder by the owner of the premises. And a person who does not hold a physical ticket may be able to prove to the owner of the premises that he has the permission to enter, even if he has lost the physical ticket, for example by credit card data.

RFU is a company incorporated under the Industrial and Provident Societies Act 1965. As the owner of the stadium, RFU could, if it chose, issue tickets at prices designed to maximise profits. But it does not do this. RFU is also the governing body for rugby union in England. As governing body for rugby union, it has responsibilities. Its main object is not to make profits. It does use its right to issue tickets to raise the revenue it needs to operate the Stadium and to cover its expenses. But it also issues them on terms designed to promote and develop the sport. It keeps ticket prices at an affordable level to encourage interest and involvement in the sport by a wide section of the public. And when it does use tickets to raise revenue, in many instances it does so indirectly, by issuing them as part of long term arrangements. These arrangements may be with debenture holders, sponsors and suppliers, and in connection with corporate hospitality packages. So individuals may become ticket holders without having paid cash for the ticket.

Individuals who hold tickets may wish to transfer their tickets to other people for many different reasons. RFU raises no objection to ticket holders doing this under certain limited conditions.

What RFU does object to is when ticket holders advertise tickets for sale, or when they sell, or attempt to sell, their tickets for a price in excess of the value that appears on the face of the ticket. RFU objects to this, because it considers that that tends to defeat the purpose for which it had kept the price affordable or low, and for which it had itself chosen to forego revenue which it might otherwise have received. I am not concerned with whether RFU are right to take this view or not. It is lawful for RFU to take this view, as is not in dispute. So whether that view is right or wise is irrelevant to these proceedings.

When tickets are in demand, there may be many people who are willing to pay more than the face value. Sometimes they are willing to pay many times the face value, especially at times like the present when the England team is doing well. To the extent that RFU has kept the price down to an affordable level, and so to forego revenue, holders will be aware that there is a difference between the face value of the ticket and the price that third parties would be willing to pay on the open market. So holders of tickets may be tempted to sell their ticket at a profit and take the benefit of it in cash, rather than in kind by attending the match.

So, RFU has taken steps to try to prevent the resale of tickets at prices above the face value of the ticket. What it has done is to have its lawyers draw up various legal documents, and to print legal wording on the tickets. The intention of this is that the permission to enter the Stadium which is represented by the paper ticket shall automatically expire, or be revoked, in the event that the paper ticket has been advertised for sale, or transferred at a price above its face value.

If these legal documents and words achieve that purpose, then any persons who hold a ticket sold at more than its face value will (whether they know it or not) be trespassers if they enter the Stadium. And, on RFU's case, there will be other wrongs committed as well……

The Form of the Order

The information sought as set out in the draft order is as follows:

a) the names and addresses of the people who have advertised for sale and/or sold RFU tickets ("the tickets") via www.viagogo.co.uk and www.viagogo.com ("the websites") and/or via the respondent directly, to the autumn international 2010 matches held at Twickenham Stadium;
b) the names and addresses of the people who have advertised and/or sold tickets via the website and/or via the respondent directly to the Six Nations 2011 matches to be held at Twickenham Stadium;
c) the full details of all the tickets advertised for sale on the Websites and/or otherwise via the Respondent for the Autumn International 2010 and Six Nations 2011 matches including but not limited to in the case of each Ticket the gate, block, row and seat number and the price at which the Ticket was advertised for sale;
d) [similar detail as to the price at which the Ticket was sold].

Viagogo's business

Viagogo operates a successful online business. It carries on business for profit, and has no other responsibilities. I accept that businesses conducted solely for profit may provide great benefits to the public. But our civic and public life would be much diminished if all businesses were conducted solely for maximising profit. I mention this because the evidence on each side contains passages that are directed to demonstrating that the party concerned is providing a public benefit, and the business, or stance, of the other is to be disapproved in various ways. Since the business models of both parties are in principle lawful, the court is simply not concerned with this debate.

Viagogo provides a secondary market for tickets for many different venues and events. Its main business does not involve itself buying and selling tickets. For the most part it offers a place where prospective sellers may record details of tickets they are offering for sale, and prospective buyers may find the tickets they want and buy them directly from the seller. There are many other companies that do business on this model, including eBay, and a number of them are competitors of Viagogo, both generally, and in respect of tickets issued by RFU.

Viagogo naturally charge for this service. It may well be that, on occasions when the match is not so popular, tickets are sold and bought for less than their face value. But RFU still object to their tickets being advertised for sale. RFU also objects to sellers and buyers agreeing prices through the Viagogo website which are higher than the face value of the ticket.

When sellers advertise RFU tickets for sale, and when buyers do agree to the transfer of RFU's tickets for a price higher than the face value, it is RFU's case that various wrongs are committed (that is wrongs under the civil law), and that the licence or permission represented by the ticket automatically expires or is revoked. But nevertheless, the buyer may

obtain entry to the Stadium by presenting the ticket, and if he does so, then he does so as a trespasser. So it is RFU's case that the holder of a ticket who gains entry as a trespasser is a wrongdoer, and that the sale that makes this possible also has the effect of making a number of other people wrongdoers. The wrongdoers may include the seller, and they may include the person or company to whom the paper ticket was first delivered by RFU, and others as well.

It is no part of RFU's case that Viagogo becomes a wrongdoer in this way. RFU has in the past questioned the legality of what Viagogo does when a sale occurs through its website at a price above the face value of the ticket. But in these proceedings no such allegation is made. In these proceedings I assume that Viagogo are innocent of any wrongdoing when such a sale occurs through its website in this way.

However it is RFU's case that when such a sale occurs Viagogo has facilitated, or become mixed up in, the wrongdoing it alleges has been committed by others, and that RFU is therefore entitled to an order of the court requiring Viagogo to disclose information by which RFU might be able to discover the identity of the wrongdoers. An application for such an order is known as a Norwich Pharmacal application (Norwich Pharmacal v Customs and Excise Commissioners [1974] AC 133).

The principle in Norwich Pharmacal is described in the speech of Lord Reid (at page 175):

"If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

This application gives rise to four issues:

i) Was there arguably wrongdoing? If so,
ii) Is RFU intending to try to seek redress for the wrong? If so,
iii) Is disclosure of the information to RFU necessary? If so,
iv) Should the court exercise its discretion in favour of granting relief?

RFU must satisfy a fifth condition, namely to show that Viagogo is involved in the arguable wrongdoing, however innocently. But it is accepted by Viagogo that, if there is arguably wrongdoing, then it has innocently become mixed up in it.

The legal test to be applied

The first point is to establish the applicable legal test. This is not in dispute between the parties. There is no dispute that the standard of proof which an applicant must attain before a Norwich Pharmacal order may be granted is that he has at least an arguable case: see R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2009] 1 WLR 2579; [2008] EWHC 2048 (Admin) ("Binyan Mohammed") para 67. In Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033 Lord Woolf CJ said that a claimant must identify "clearly the wrongdoing on which he relies in general terms". And the parties also agree that the law is as I stated it to be in United Company Rusal v HSBC Bank Plc & Ors [2011] EWHC 404 (QB) at para 52:

"… the court [has] to be as satisfied as it can be, having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction, or that the applicant has a much better argument than the defendant. That test is appropriate in Norwich Pharmacal applications." "

The Judgement then goes on to discuss the legal arguments and general principles applicable in the case and the legal basis on which the requested order has been granted.

As will be seen from the above extracts from the Judgement in the RFU case, the *Norwich Pharmacal* order is a very useful weapon for major sports event organisers and rights holders in England to fight unlawful ticket sales, which undermine the integrity of the sport and the event concerned, and, in particular, find out who is behind them in order to take appropriate legal action to stop their unlawful activities.

As mentioned above, the full reasoning of the Court in the RFU case will be found in the rest of the Judgement, which extends to several pages, and the text of the full Judgement may be accessed on line at: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/764.html&query=Viagogo&method=boolean

Also, further information about this important decision can be obtained from Louise Millington-Roberts of the London Sports Law Firm, Max Bitel Greene LLP, who acted as the solicitor on behalf of the RFU in this matter.

Ticket touts, you have been warned!

❖

"Season of Birth Bias" or "The Relative Age Effect": Systemic Discrimination in European Youth Football"

by **Steve Lawrence**

Dear Professor Siekmann,

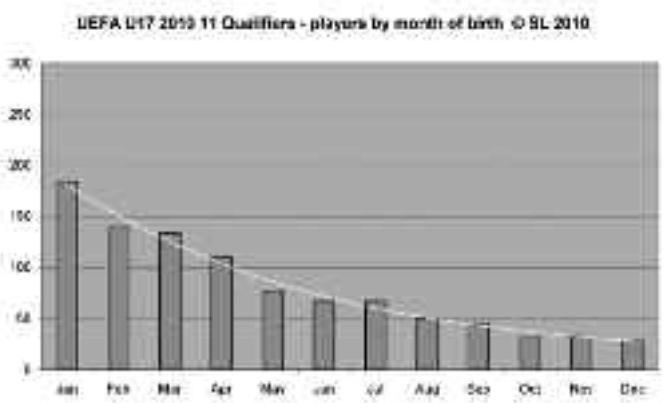
Having e-mailed you last week I have since discovered that you are one of the authors of the Study on the Lisbon Treaty and EU Sports Policy.

I would like to bring to the attention of the Culture and Education Committee of the European Union an issue of systemic discrimination which has evolved in European football (and in sport generally).

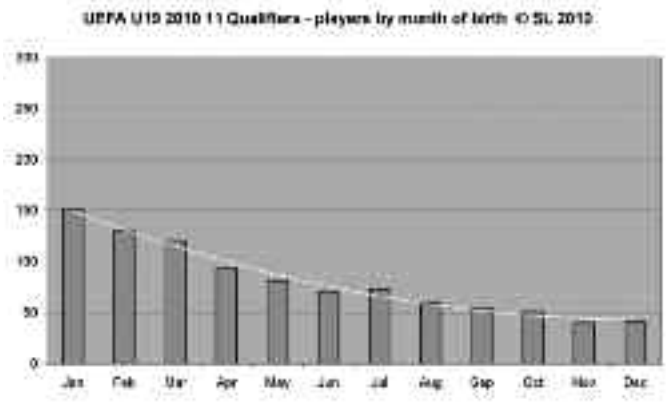
I would be very grateful for your advice on how best to do this. I do believe that the new competence conferred on the European Union by the Lisbon Treaty will enable the Culture and Education Committee to examine the issue and possibly to sponsor or initiate action to reduce the effects of the discrimination. In fact it seems to me that the issue is a perfect example of how the new competence can be exercised to achieve fairness in a situation which is clearly unfair at the moment.

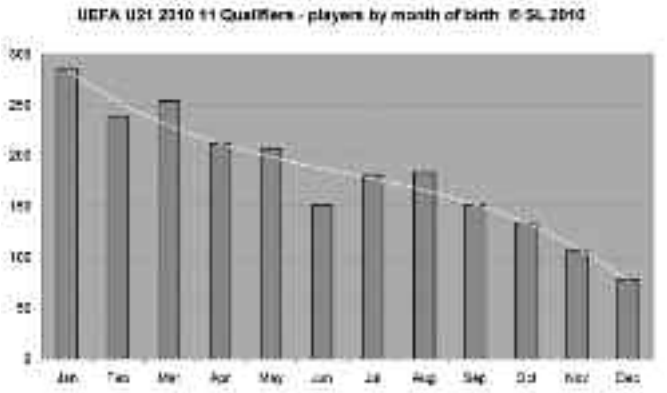
The discrimination has become known as *'season of birth bias'* or *'the relative age effect'*. I have studied the bias for the last eight years since I first became aware of it and I am pleased to say that there are now a number of academic papers on the subject.*

My analysis of the recent UEFA U17, U19 and U21 (see graphs) qualifying tournaments amply illustrates the problem .



You will see that each of the competitions is heavily over-populated with early born players and correspondingly under-populated with late born players. At U 17 the ratio of January born players to December born players is nearly 7 to 1.





The discrimination is unfair in that it denies opportunity to a (systemically defined) set of young players to compete at an appropriate level.

The discrimination has become structural and systemic because of a single rule adopted by UEFA which is to impose a cut-off date for participation at 1 January at the beginning of the year of the relevant tournament.

The discrimination can be easily removed by one of three methods:

1. By restricting participation by actual age on the day of any given match.
2. By imposing quotas requiring a spectrum of ages in any competing squad.
3. By initiating parallel competitions for the under-represented age groups.

The reason given for not introducing these measures (at least by The FA in England) is that additional and burdensome administration would be required to solve the problem. This does not seem to me to be an adequate reason for allowing the discrimination to continue.

You will see that the discrimination is worst in the U17 cohort, slightly less evident in the U19 cohort and least in the U21 cohort. The bias clearly reduces as players get older but it is still evident and significant at the time when players are entering into their first contracts of employment at about the age of 18. It is fair to say therefore that the discrimination extends beyond the sporting 'loss of opportunity to compete' and into the realm of the employment prospects of individual players although, I acknowledge, that this requires much deeper study.

The discrimination actually spreads much wider than just football, it extends to any sport which has a cut-off date for participation (there have been academic studies on tennis and ice-hockey) and indeed it extends into education generally with a bias apparent in university entry.

I hope you don't mind me approaching you like this and I would be grateful for any advice on how I can bring this matter to the attention of the Culture and Education Committee. Furthermore I would be very interested in your opinion on whether the issue is appropriate for consideration by the Committee and what courses of action might be open.

Yours sincerely,

Steve Lawrence
Amsterdam
The Netherlands

The International Sports Law Journal

N.B. Dear reader, Please send your comments to sportslaw@asser.nl and those will be forwarded to the author for consideration and reply to you. (RS)

* The academic papers are the following:

1. David Gutierrez Diaz Del Campo, Juan Carlos, Pastor Vicedo, Sixto Gonzales Villora and Onefre Ricardo Contreras Jordan (2010)
   The relative age effect in youth soccer players from Spain
   University of Castilla-La Mancha, Faculty of Education, Spain
2. David Butler, Robbie Butler & Meadhbh Sherman, (2010)
   Working Paper - The Relative Age Effect in Under 21 Association Football: An Irish and European Perspective
   Department of Economics, University of Cork, Republic of Ireland
3. John Ashworth & Bruno Heyndels (2007)
   Selection Bias and Peer Effects in Team Sports: the Effect of Age Grouping on Earnings of German Soccer Players.
   Department of Economics, University of Durham, Durham, UK.
   Vrije Universiteit Brussel, Belgium.
4. Roel Vaeyens, Renaat M. Philippaerts, & Robert M. Malina (2004)
   The relative age effect in soccer: A match-related perspective.
   Department of Movement and Sports Sciences, Ghent University, Belgium and Tarleton State University, Stephenville, USA.
5. Werner F. Hiesen, Jan van Winckel, & A. Mark Williams (2004)
   The relative age effect in youth soccer across Europe.
   Department if Kinesiology, Katholieke Universiteit Leuven, Belgium and Research Institute for Sports and Exercise Sciences, Liverpool John Moores University, Liverpool, UK.
6. Susan Edgar & Peter O'Donoghue (2004)
   Season of birth distribution of elite tennis players.
   School of Education, University of Ulster, Jordanstown, UK and School of Sport, Physical Education and Recreation, University of Wales Institute, Cardiff, Wales.
7. Craig Simmons & Geoffrey C. Paull (2001)
   Season-of-birth bias in Association Football.
   The Football Association, Lilleshall National Sports Centre, Shropshire, UK.
8. Musch J. & Grondin S. (2001)
   Unequal competition as an impediment to personal development; a review of the relative age effect in sport.
   Developmental Review
9. Musch J. & Hay R. (1999)
   The relative age effect in soccer, cross cultural evidence for a systematic discrimination against children born late in the competition year.
   Sociology of Sport Journal
10. Thompson, A.H., Barnsley, R.H. and Stebelsky, G. (1991)
    "Born to Play Ball" The Relative Age Effect and Major League Baseball.
    Division of Mental Health, University of Alberta and St. Mary's University
    Sociology of Sport Journal
11. Barnsley, R.H. and Thompson, A.H. (1988)
    Birthdate and success in minor hockey: The key to the NHL.
    Faculty of Education, St. Mary's University & Alberta Mental Health Services
    Canadian Journal of Behavioural Science

Lisbon Treaty and EU Sports Policy*

Introduction

The principle of conferral stipulates that the EU must act within the limits of the powers conferred upon it by the Treaty. Until the entry into force of the Treaty on the Functioning of the European Union (TFEU) in December 2009, sport was not mentioned in the Treaties.

This meant that the EU was not granted a competence to operate a 'direct' sports policy.

This gave rise to two broad concerns:

First, there is a concern that EU sports policy to date has been guided by the European Court of Justice (ECJ) and that single market laws have not sufficiently recognised the specificity of sport. EU single market competences, particularly those relating to free movement and competition law, exert an indirect influence over sport. Following the judgment of the ECJ in *Bosman*, many sports bodies argued that the lack of a Treaty competence for sport resulted in single market laws, designed to regulate overtly economic activities, being applied to sporting contexts without due consideration for the specific nature of sport.[1] The judgment of the Court in *Meca-Medina* is often cited as another example of the insensitive application of single market laws to sporting contexts.[2] *Meca-Medina* received particular criticism for promoting a case-by-case approach to assessing the legality of contested rules, rather than allowing for a more holistic assessment of the specific nature of sport.

A second concern is that EU sports policy has lacked status and coherence. Sport has become associated not only with single market competences, but with a large number of other EU policy areas including, public health policy, education, training and youth policy, equal opportunities and disabilities policy, employment policy, environmental policy, media policy and cultural policy. However, the ability of the EU to allocate budgetary appropriations to this activity was limited by its lack of competence to act in the field of sport. Following *UK v Commission*[3] the Commission was compelled to suspend some of its sports-related funding programmes and attach these to areas of existing competence in the Treaty such as education policy. The competence question has meant that the EU has struggled to give sport high status and comprehensive treatment, particularly in an era where the EU is being increasingly asked by sports stakeholders to provide a coherent response to contemporary challenges in sport.

A potential solution to the above two issues is for sport to find its place within the EU's constitutional framework. On two occasions, during the Amsterdam and Nice Treaty negotiations, proponents of a Treaty article for sport failed to persuade the Member States of the value of such a move. The convening of the Convention on the Future of Europe set in motion a process resulting in the ratification of the Lisbon Treaty and the adoption of an article for sport in the Treaty on the Functioning of the European Union (Articles 6 and 165).[4]

Structured around 6 chapters, this study explores the significance of this article on current and pending issues in EU sports law and policy. Chapter 1 explores the meaning and origins of key phrases contained in Article 165 including 'European sporting issues', the 'specific nature of sport' and the 'European dimension of sport'. Chapter 2 explains the constitutional limits to EU action in the field of sport. Chapter 3 explores how the general meanings discussed in chapter 1 find legal expression within the context of the application of EU free movement and competition laws. Chapter 4 explains the significance of Article 165 in relation to the EU's ability to carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport. Chapter 5 presents the findings of the study's consultation exercise which was designed to establish interested stakeholders' preferences and priorities for the implementation of Article 165 TFEU. Finally, chapter 6 presents conclusions and recommendations.

[…]

5. Results of Consultation Exercise

A consultation effort was designed to complement this study with the views from sport governing bodies, sport stakeholders, other sport non-governmental organisations, public authorities, private companies, academics and practitioners with a knowledge and experience in the field. The call for contributions was sent to a wide range of experts and interested organisations, which were asked to elaborate on their preferences and priorities for the implementation of Article 165 TFEU. A total of 37 contributions from 52 organisations were received.[5]

Table 1: Distribution of responses by organisations

ORGANISATIONS	CONTRIBUTIONS
Stakeholders' associations	8
National Olympic Committees	6
Academics, practitioners and think tanks	7
National Governments of EU Member States	4
International sport non-governmental organisations	5
International Sport Federations	3
National Sport Federations	2
IOC ('Olympic and sports movement')	2
International Organisations	1
TOTAL	37

In the contributions received there is a clear representation of the Olympic movement, with 8 submissions from Olympic committees at both national and international level and 4 sport federations also at national and international levels. Thus, the governing bodies of sport presented altogether a majority of 12 responses to the consultation. Sport stakeholders (athletes, supporters, clubs and leagues) have submitted a total of 6 contributions, being the second most represented group in the consultation. The contribution of 4 EU Member State governments is also noteworthy. The present section of the study summarises the most relevant points of the responses received, highlighting those where a very general consensus has been found, but the distribution of responses, which clearly overrepresented the positions of the Olympic movement and the governing bodies of sport, needs to be taken into account when considering the results. Whilst a good degree of consensus can be found in some of the priorities, it is also clear that sport organisations can also present contradictory demands in specific key issues that would be difficult to reconcile with the development of EU sport policy under Article 165 TFEU.

Thematically, the contributions received could be categorised into three broad groups. First, there is a set of responses proposing very specific priorities for the implementation of policies and programmes under Article 165 TFEU. These are concrete suggestions with articulated policy objectives and suggested courses of action. Second, there are those submissions focusing on interpretation of concepts that could shape not only the policy on sport, but also other EU competences when dealing with sport matters. These contributions highlight the impact of EU law and policies on sport and they request a more explicit recognition of the autonomy of sport organisations and a better definition of the specifici-

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* From Study on Lisbon Treaty and EU Sports Policy, commissioned by the European Parliament to the T.M.C. Asser Institute, the Netherlands, Edge Hill and Loughborough Universities, United Kingdom, September 2010.

1 For a useful list of critical comments from sports organisations see Chappelet, J-L., (2010), Autonomy of Sport in Europe, Strasbourg: Council of Europe, pp. 89-108.

2 See for example, Infantino, G., Meca-Medina: a step backwards for the European sports model, accessed at: http://www. uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480401_DOWNLOAD.pd.

3 Case C-106/96 UK v Commission ECR [1998] I-02729.

4 All article references, unless otherwise stated, are to the TFEU.

5 Some of the contributions received were joint efforts by several organisations, especially the views of the 'Olympic and Sports movement' that were presented as endorsed by 18 Olympic Committees and Sports federations.

ty of sport recognised in Article 165 TFEU in order to provide the sporting movement with greater legal certainty. Finally, there is a third group of submissions that can be considered to address an horizontal level, where stakeholders elaborate on the general characteristics that any EU action in the field of sport should have. Each of the three groups is discussed now in turn.

5.1. Priorities for a direct EU sports policy

Three areas emerge as clear consensus priorities for the development of EU sport policy in the consultation. These are: (1) sport health and education, (2) the recognition and encouragement of volunteering in sport, and (3) the development of sport activities as a tool for social inclusion. EU action addressing these three policy objectives would be welcome by the respondent stakeholders. The three priorities feature prominently in almost every one of the responses and they are also clearly aligned with the priority areas identified by the Commission in the White Paper on Sport,[6] the 2009 and 2010 preparatory actions[7] and the public consultation exercise.[8] Similar areas, albeit with different headings, were discussed in the European Sport Forum 2010 organised in Madrid and were positively received by the representatives of the sport organisations.[9] It is becoming increasingly apparent that these areas emerge as the translation of the general principles enshrined in the Treaty into policy objectives where Article 165(1) TFEU calls for the Union to contribute to the promotion of sport's 'structures based on voluntary activity and its social and educational function'.

The majority of contributors have a preference for measures with a clear added value at European level. Thus, it is suggested that EU action should focus on research funding, facilitating the exchange of best practices, elaborating guidelines and on adopting incentive frameworks to encourage civil society, national and sub-national authorities to implement similar policies. The latter is especially stressed in the case of volunteering, where sport organisations contributing to this consultation feel that they face too many regulatory barriers to develop effective volunteering programmes. Some of the most concrete contributions in this area propose, for example, a twofold strategy whereby EU policy shall aim at encouraging legal and even fiscal incentives to volunteering, together with measures to remove obstacles to the free movement and exchange of volunteers within EU Member States. One of the most cited examples of the latter is the need to recognise formally the skills developed by volunteers as part of the EU Lifelong Learning Programme.

There is also a second group of policy priorities that have been put forward in a majority of contributions but do not carry the same degree of consensus that those explained above. These relate to the integrity of sport and can be summarised as comprising (1) the fight against doping, (2) the relationship between gambling and sport, and (3) the welfare of under-age sportspersons. These priorities feature especially in the contributions submitted by sport governing bodies and sport organisations engaged in the promotion of grassroots sport and sport for all (e.g. the International Sport and Culture Association). Again, these three main headings are also well aligned with the priorities identified by the European Commission[10] and could also be considered as concrete policy translations of Article 165 (2) TFEU when it refers to 'promoting sporting fairness' and 'protecting the physical and moral integrity of sportsmen and sportswomen'.

In relation to anti-doping, EU action would be welcome in two very concrete fields: research funding due to the World Anti-Doping Organisation's limited resources, and facilitating the development of a collaborative network of National Anti Doping Organisations within the EU Member States. In this area it is particularly stressed that EU action is only desired as a valued complement to the ongoing policies of Member States, WADA, UNESCO and sport organisations. The contribution of the Ministry of Education and Culture of Finland, for example, calls to concentrate on areas 'that are currently lacking of European-level cooperation'. The relationship between gambling and sport raises two different concerns.

First, the influence of betting practices in sport. Sport governing bodies would welcome any EU actions that could facilitate police cooperation in the fight against illegal betting and corruption in sport. Second, sport organisations express their worries that a possible liberalisation of the betting and gambling market could have negative consequences on the funding of sport, especially at grassroots level, in countries where most sport programmes rely on funding from lotteries. Finally, in relation to the welfare of under-age sportspersons, the collaboration of EU institutions is requested to help in the fight against the trafficking of underage athletes and in the exchange of good practices to ensure the training of minors is correctly designed and monitored.

5.2. Priorities regarding the impact of EU law and policies on sport

The second category of priorities expressed in the consultation refers to the impact of EU legal provisions on sport, rather than to the active development of a future EU sports policy. This clearly originates in the reference within Article 165(1) to the need to take 'account of the specific nature of sport', crystallising the references to the specificity of sport that can be found in the Amsterdam and Nice declarations on sport and many rulings of the ECJ. The contributions in this category do not present however the same degree of consensus and, therefore, it is necessary to point out from the outset that initiatives under these priorities would be more difficult to adopt with the general support of sport stakeholders.

The main action requested in the contributions is the elaboration of a definition for the specificity of sport which is as complete as possible. This is a top priority for the 'Olympic and sports movement' and sport governing bodies, with support of Member States' governments. The governments of Finland, Germany and the Netherlands specifically call for the drafting of guidelines in the application of competition policy and other EU legal provisions to sport. It is argued by sports organisations that guidelines on the application of EU law to sport would increase legal certainty, hence reinforcing their autonomy and efficiency in the governance and regulation of sport. In view of the analysis in this study, it is however difficult to see how the guidelines that are demanded would add greater legal certainty for sports organisations when the case law of the ECJ is fairly consistent.

The notion of the specificity of sport is widely supported by EU Member States, as reflected in the conclusions of the European Council in 1997, 2000 and 2008, but the specific request to draft extensive guidelines is however less concrete. The European Parliament, on the other hand, has already clearly requested the Commission to elaborate guidelines on the application of competition policy to sport.[11] As explained elsewhere in this study, the European Commission argued in the White Paper on Sport that the ECJ's case law prevents the adoption of guidelines because the application of competition policy provisions has to be analysed on a case-by-case basis.

The division within EU institutions in this respect mirrors the disagreements among sport organisations. Whilst governing bodies and Olympic committees support the development of the specificity of sport, other stakeholders such as athletes, clubs and leagues clearly warn in their contributions that the definition of sport's specificity ought to respect workers and stakeholders' rights, especially as the TFEU renders legal the Charter of Fundamental Rights. Thus, the elaboration of guidelines does not represent a top priority (if at all) for these actors. Those who support, in principle, the specific nature of sport as a concept worth exploring (e.g. the European Professional Football Leagues or the European Clubs Association) request to be consulted and involved in any exercise whose result might be an interpretation of the application of EU law to sport.

6 180 See White Paper on Sport (2007), p. 3-7.

7 European Commission (2009), 2009 annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events, COM (2009) 1685, 16 March 2009.

8 European Commission (2010), Strategic choices for the implementation of a new EU competence in the field of sport, EU-wide consultation report, available online at http://ec.europa.eu/sport library/doc/a/100726_online_consultation_report.pdf.

9 See the Forum's report published by the European Commission, available online at http://ec.europa.eu/sport/library/doc/b1/sport_forum_madrid_report_11_05_10.pdf.

10 See notes 6-9 above.

11 European Parliament (2007), Resolution of the European Parliament on the Future of Professional Football in Europe, A6-0036/2007, 29 March. (The Belet Report), paragraph 55.

5.3. Priorities for the horizontal development of EU sport policy

The third group of priorities presented in the contributions refers to the way in which stakeholders would like to see EU actions implemented, rather than to the content of the policies. This is seen as extremely important in a large majority of the contributions and, therefore, it merits attention when considering the course of action in the development of policies under Article 165 TFEU. First, there is a unanimous call for EU institutions to focus on added value and European-level initiatives. This reiterates the provisions contained in Articles 6 and 165 TFEU on the level of competence, but the insistence in this respect suggests there might be an anxiety among the respondents that EU institutions risk usurping the competences of Member States and, especially, the competences of sport organisations. A strict application of the principle of subsidiarity, with due respect for the autonomy of sport, is requested by sport governing bodies and Member State governments alike.

Second, there is also an agreement to support the need for a knowledge-based policy. This has two main implications. On the one hand, there is a common call for the EU to fund research in sport-related areas, with the economic impact of sport and anti-doping being the most commonly cited. On the other hand, sport stakeholders such as athletes and supporters demand to be consulted as a source of expertise in the elaboration of policy initiatives within their remit.

Third, in terms of policy instruments, direct regulation by the EU is not a priority of the contributors to the consultation. In the area of sports agents requests were made in the past for the European Commission to study the possibility of regulation,[12] but stakeholders now prefer EU institutions to facilitate debate and information exchange to adopt sound self-regulation. Thus, EU institutions are requested mostly to facilitate the development of networks, the comparison of policies across EU Member States and the cooperation among sport organisations and public authorities. There is, however, one area where an important number of stakeholders request active promotion by the European Commission: social dialogue in the sports sector. Contributions by athletes and by football supporters call on the EU institutions to support and promote social dialogue as a tool for good governance.

Finally, there is a common call for EU institutions to keep sports organisations involved in the development and implementation of EU sport policy. In this respect Article 165(2) TFEU calls for the EU to promote 'cooperation between bodies responsible for sport' and Article 165(3) demands that 'the Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport'.

None of these provisions expressly call to cooperate *with* sport organisations in the development of EU sports policy, but the Amsterdam and Nice Declarations pointed out the Member States' willingness to keep them involved. The Commission and the European Parliament have so far proved able to engage with the sports sector. Stakeholders have expressed their unanimous desire to collaborate with EU institutions, putting their expertise at their disposal. Moreover, there is also a request made especially by Olympic committees and governing bodies that the implementation of any future EU programme in the field of sport prioritises the participation of local sports organisations.

6. Conclusions and Recommendations

Article 165 does not contain a horizontal clause. There are no provisions in the Article that require sporting issues to be taken into account when making policies in other areas, but there are also no provisions in 165 which prohibit the EU from doing so. Regardless of the value attached to Article 165 by the Court and the Commission, its existence is unlikely to alter their existing approach to sport. A review of existing EU sports law cases reveals that Article 165 TFEU will add little further protection for contested sports rules beyond that already provided by the Court and the Commission. In this regard, the review reveals that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Therefore, the often requested production of guidelines on the application of free movement and competition law to the sports sector may not greatly assist the search for legal certainty. The Commission's White Paper on Sport more than adequately explains the legal framework applicable to sport. Furthermore, as the ECJ decided in *Meca-Medina*, contextual analysis and the requirements of proportionality control in EU law necessitate a case-by-case analysis of disputes involving sport. This renders any informal guidelines subject to challenge.[13]

Rather than passively relying on the reference to the 'specific nature of sport' contained in Article 165 to seek to limit the influence of EU law in sport, the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly reasoned and backed with robust data. The EU has a strong role to play in facilitating this dialogue, sharing best practice and ensuring that sporting autonomy is conditioned on the implementation of good governance in sport. Efforts at encouraging social dialogue in sport should be maintained and moves towards a structured dialogue should not undermine these efforts. Thematic dialogue with the sports movement should be encouraged.

Article 165 resolves any legal uncertainty concerning the competence of the EU to directly fund sports related programmes. It is now clear that the EU has the competence to directly carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport and this competence grants the EU a potentially wide field of action.

However, the choice of priority themes should be directly linked to the themes contained in Article 165 and before supporting priority areas, the EU should demonstarte the European dimension in sport and establish the added value of EU action. A focus on a narrow range of priority areas is to be favoured over a broad approach so that the added value of EU action can be demonstrated. In this connection, the consultation exercise reveals that stakeholders favour action in the areas of health enhancing physical education, volunteering and social inclusion. A majority of respondents also identified the fight against doping, the relationship between gambling and sport and, the welfare of under-age sportspersons. In addition to these areas, there is a need to focus on evidence based policy making and in this connection the EU should fund research and encourage stakeholders to justify their positions with solid data and research.

On the face of it, Article 165(4) also appears to be unequivocal concerning the prohibition on harmonisation of the laws and regulations of the Member States. This statement might encourage claims that the laws and regulations of the Member States cannot be harmonised in so far as this would affect sporting practices. However, an examination of past prohibitions of harmonisation and their treatment by the ECJ suggests that harmonising measures can be taken despite this type of prohibition so long as the harmonising measures are nominally based on another Treaty competence. Despite similarly worded prohibitions of harmonisation in the fields of social policy, education, vocational training, culture, and public health, the EU has in practice achieved convergence in legislation through other legal bases.

[…]

Executive Summary

Background

The principle of conferral stipulates that the European Union (EU) must act within the limits of the powers conferred upon it by the Treaty. Until the entry into force of the Treaty on the Functioning of the European Union (TFEU) in December 2009, sport was not mentioned in the Treaties. This meant that the EU was not granted a competence to operate a 'direct' sports policy. This gave rise to two broad concerns. First, that EU sports policy to date has been guided by the judgments of the European Court of Justice (ECJ) and that single market laws, such as those concerning freedom of movement and competition, have not sufficiently recognised the specificity of sport. A second concern is that EU sports policy has lacked status and coherence. Sport has become

12 White Paper on Sport, p. 16.

13 Case C-519/04 P, David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991.

Law and Sports in India

Development Issues and Challenges

This book is the first endeavour in elucidating the anomalies in the passionate and popular sports industry in India. This book is a must have for every sports lover, sportsperson, sports administrator and anyone connected with the sports industry. This work seeks to create legal awareness about the issues that are of vital importance in sports.

Justice M. Mudgal and the assistant authors Vidushpat Singhania and Nitin Mishra have taken into perspective the incidents and decisions worldwide in the sporting sector while applying their expertise in law. The authors have managed to derive a paradigm for sports in India, which should form the legal framework for the sports industry.

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SPORTS LAW CONFERENCE - MARCH 2012

The Centre for Sports Law Research at Edge Hill University, in association with Brabners Chaffe Street Solicitors, is pleased to announce its Sports Law Conference to be held at the Hilton Deansgate Manchester on 29-30 March 2012. Aimed at legal practice, clubs, athletes, governing bodies, regulators and academics, the conference will feature a series of keynote speakers and high quality, peer reviewed papers. Proposals for papers are invited on any issue concerning sport and the law, and may be written from a practice-oriented, theoretical, or interdisciplinary perspective. The organisers also invite proposals for complete panels of three or more papers.

Proposals will be reviewed by the organisers, assisted by the Conference advisory panel.

Advisory Panel

Jack Anderson, Queens University Belfast
Carol Couse, Brabners Chaffe Street
Deborah Healy, University of New South Wales
Mark James, University of Salford
Ken Foster, University of Westminster
Dave McArdle, University of Stirling
James Nafziger, Willamette University
Rob Siekmann, TMC Asser Institute
Maurice Watkins, Brabners Chaffe Street
Stephen Weatherill, University of Oxford

Conference fees start at £195 and include a two day conference pass, lunch and refreshments on both days and a drinks reception to be held at Cloud23 at 18.00 on March 29th. At an additional cost, delegates are also offered CPD hours and the option of a conference dinner following the drinks reception. Further details and a draft programme are available at *www.edgehill.ac.uk/law/research/cslr*

associated not only with free movement and competition laws but also with a large number of other EU policy areas including, public health, education, training, youth, equal opportunities, employment, environment, media and culture. However, the ability of the EU to allocate financial resources to this activity and to develop a coherent policy on sport has met with constitutional difficulties given the absence of an express Treaty competence for sport. The competence question has meant that the EU has struggled to give sport high status and comprehensive treatment. This is a concern given that the EU is increasingly being asked by sports stakeholders to provide a coherent response to contemporary challenges in sport.

Aims

The aim of the present study is to provide the European Parliament's Committee on Culture and Education with a panorama of the possibilities of EU sports policy at a time when these are being reviewed after the approval of the Lisbon Treaty. In particular, the study assesses from a legal point of view, the potential of the new TFEU to enable the EU to attain the objectives of greater fairness and openness in sporting competitions and greater protection of the moral and physical integrity of sports practitioners whilst taking account of the specific nature of sport. Structured around 6 chapters, this study explores the significance of Article 165 on current and pending issues in EU sports law and policy.

Chapter 1 explores the meaning and origins of key phrases contained in Article 165 including 'European sporting issues', the 'specific nature of sport' and the 'European dimension of sport'. Chapter 2 explains the constitutional limits to EU action in the field of sport. Chapter 3 explores how the general meanings discussed in chapter 1 find legal expression within the context of the application of EU free movement and competition laws.

Chapter 4 explains the significance of Article 165 in relation to the EU's ability to carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport. Chapter 5 presents the findings of the study's consultation exercise which was designed to establish interested stakeholders' preferences and priorities for the implementation of Article 165 TFEU. Finally, chapter 6 presents conclusions and recommendations.

The New Article 165 Competence

Article 165(1) TFEU provides that 'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'. Article 165(2) continues that 'Union action shall be aimed at: developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen'. Article 165(3) states that 'The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe'. Finally, Article 165(4) permits the EU institutions to adopt incentive measures and recommendations, excluding any harmonisation of the laws and regulations of the Member States'. This new competence has raised expectations that the Treaty Article can provide solutions to the two concerns detailed in 'background' above. In this respect, this study draws two main conclusions:

1. Application of eu free movement and competition laws

First, Article 165 will have a limited impact on the EU's legal powers over sport, particularly in relation to the application of internal market laws. This is because Article 165 does not contain a horizontal clause requiring sporting issues, and questions of fairness and openness in sporting competitions, to be taken into account in the exercise of other powers, such as free movement and competition law. This is to be contrasted with other Treaty competencies, such as the provisions on environmental protection and public health, which do contain horizontal clauses. Therefore, from a strict constitutional perspective Article 165 should not alter the existing sports related jurisprudence of the ECJ and the decision making practice of the Commission. This is not to say that sport cannot, will not, or ought not be considered when taking action in other fields. For example, in the sporting case of *Bernard*, the Court confirmed that the Article 165 TFEU reference to the specific nature of sport strengthened arguments that they should be taken into account when examining the legality of restrictions to freedom of movement.[14] However, Article 165 TFEU seems to stop short of imposing a constitutional requirement to do so in either legislative or administrative action. At least in the *Bernard* judgment, reference to the specific nature of sport merely reinforces judicial possibilities which were already open prior to the passage of the Lisbon Treaty.

The absence of horizontality is, in the opinion of the research team, not detrimental to the interests of sports bodies who may have been hoping that Article 165 offers greater protection from the reach of EU law than previously existed. This is because the opportunities to give sports bodies a wide margin of appreciation are substantial even if Article 165 TFEU stops short of imposing a constitutional requirement to do so. For example, in the *Walrave* judgment, the ECJ made a distinction between 'purely sporting rules' that had nothing to do with economic activity, and those that had impacts on economic activity.[15] The judgment also suggested that nationality discrimination, otherwise clearly prohibited by the Treaties, was not relevant to 'the composition of sports teams, in particular national teams'.[16] Although the extent of the exemptions given to sports in both of these interpretations have since been curtailed by modern case law, three modern methods go beyond the limited exemption in *Walrave* and enable sporting practices to receive sensitive treatment even in the absence of legislative special treatment.

First, rules that are 'inherent' to the proper conduct of sport may in some circumstances not fall within the Treaty. Secondly, rules that do fall within the Treaty because they are restrictions of freedom of movement may be justified, by reference to both grounds found in the Treaty itself and to objective justifications developed before the ECJ. Competition law and free movement both also entail grounds of justification found in the Treaties. The third, and more unconventional method, is for the legal framework to be applied to sport in a sensitive way in those cases where it contains few sport-specific exceptions. A review of the existing case law undertaken by the research team confirms that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Indeed, it is worth re-iterating that the ECJ's treatment of Article 165 TFEU in the *Bernard* case supports the view that whilst the new sports competence may have given further weight to sports-related arguments, it has not opened any new previously undiscovered avenues of appeal. This is because the judicial avenues for recognising the specific nature of sport are already well developed by the Court and the Commission.

2. The status and coherence of eu sports policy

On the second area of concern - that EU sports policy has thus far lacked status and coherence - Article 165 TFEU will make a much more definitive contribution. Article 165 allows for the development of a direct supportive and complementary policy in the field of sport. Previously, in order to escape accusations of acting beyond its powers, the EU linked its sports-related funding programmes to existing competencies in the Treaty, such as education policy. The new sports competence contained in Article 165 allows the EU to finance sport directly without the need to justify this action with reference to other Treaty competencies. Thus, the entry into force of the TFEU opens a range of possibilities to EU institutions including, amongst others, funding programmes on social inclusion, health promotion, education and training, volunteering, anti-doping, the protection of minors, combating violence and corruption in sport, the promotion of good governance in sport and supporting the development of a well researched evidence base on current issues in sport.

In the consultation exercise undertaken to inform this study, the

14 Case C-325/08, Olympic Lyonnais v Bernard & Newcastle United, paragraph 40.

15 Case 36/74 Walrave and Koch v Association Union Cycliste Internationale ECR [1974] 1405, paragraph 4.

16 Walrave paragraph 8.

respondents identified three priority areas for EU action in the field of sport: (1) sport health and education, (2) the recognition and encouragement of volunteering in sport, and (3) the development of sport activities as a tool for social inclusion. The three priorities feature prominently in almost all of the responses and they are also clearly aligned with the priority areas identified by the Commission in the White Paper on Sport,[17] the 2009 and 2010 preparatory actions[18] and the public consultation exercise.[19] Similar areas, albeit with different headings, were discussed in the European Sport Forum 2010 organised in Madrid and were positively received by the representatives of the sport organisations.[20]

In the White Paper on Sport the Commission recognised that the commercialisation of sport has attracted new stakeholders and this 'is posing new questions as regards governance, democracy and representation of interest within the sport movement'.[21] The Commission suggested that it can play a role in helping to develop a common set of principles for good governance in sport such as transparency, democracy, accountability and representation of stakeholders. In the White Paper, the Commission argued that governance issues in sport should fall within a territory of autonomy and that most challenges can be addressed through self-regulation which must however be 'respectful of good governance principles'.[22]

In this respect, the reference in Article 165(2) to the promotion of cooperation between bodies responsible for sports adds impetus to the Commission's agenda. In particular, the Commission has long promoted dialogue with the sports movement and has been at the forefront of encouraging social dialogue. Article 165 also adds impetus to efforts to move dialogue between the EU and the sports movement onto a more structured footing.

However, given the diversity of the sports movement, structuring dialogue on a meaningful and inclusive basis is a significant challenge for the EU.

A way forward for the Commission in this respect is to use Article 165(2) to develop thematic dialogue with the sports movement over specific issues such as the regulation of agents and the protection of minors. The structure of this dialogue should not assume that any single stakeholder has a monopoly on representation and therefore bilateral dialogue between the Commission and individual stakeholders should be discouraged. Thematic structured dialogue should not lead to 'agreements' such as the so-called Bangermann agreement on player quotas in 1991. In this instance, the ECJ reminded the Commission that it does not possess the power to authorise practices that are contrary to the Treaty.[23]

It is also important that structured dialogue, either conducted through the European Sports Forum, bilaterally or thematically, in no way undermines efforts by social partners to conclude agreements within the context of social dialogue committees in sport.

The other innovation brought by Article 165 concerns the possibilities surrounding member state political cooperation. Until the entry into force of Article 165 TFEU, member state political cooperation took place informally outside the formal Council structure. Individual Presidencies often decided to prioritise sport but discussion was restricted to informal meetings of EU Sport Ministers and EU Sport directors and to *ad hoc* expert meetings on priority themes. Article 165 grants the Member States a competence to adopt a more formal and coherent approach to sport and in May 2010, ministers discussed EU sport policy for the first time in a formal Council setting.

Conclusions and Recommendations

Article 165 does not contain a horizontal clause. There are no provisions in the Article that require sporting issues to be taken into account when making policies in other areas, but there are also no provisions in 165 which prohibit the EU from doing so. Regardless of the value attached to Article 165 by the Court and the Commission, its existence is unlikely to alter their existing approach to sport. A review of existing EU sports law cases reveals that Article 165 TFEU will add little further protection for contested sports rules beyond that already provided by the Court and the Commission. In this regard, the review reveals that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Therefore, the often requested production of guidelines on the application of free movement and competition law to the sports sector may not greatly assist the search for legal certainty. The Commission's White Paper on Sport more than adequately explains the legal framework applicable to sport. Furthermore, as the ECJ decided in *Meca-Medina*, contextual analysis and the requirements of proportionality control in EU law necessitate a case-by-case analysis of disputes involving sport. This renders any informal guidelines subject to challenge.[24]

Rather than passively relying on the reference to the 'specific nature of sport' contained in Article 165 to seek to repel the influence of EU law in sport, the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly reasoned and backed with robust data. The EU has a strong role to play in facilitating this dialogue, sharing best practice and ensuring that sporting autonomy is conditioned on the implementation of good governance in sport. Efforts at encouraging social dialogue in sport should be maintained and moves towards a structured dialogue should not undermine these efforts. Thematic dialogue with the sports movement should be encouraged.

Article 165 resolves any legal uncertainty concerning the competence of the EU to directly fund sports related programmes. It is now clear that the EU has the competence to directly carry out actions to support, coordinate or supplement the actions of the member states in the field of sport and this competence grants the EU a potentially wide field of action.

However, the choice of priority themes should be directly linked to the themes contained in Article 165 and before supporting priority areas, the EU should demonstrate the European dimension in sport and establish the added value of EU action. A focus on a narrow range of priority areas is to be favoured over a broad approach so that the added value of EU action can be demonstrated. In this connection, the consultation exercise reveals that stakeholders favour action in the areas of health enhancing physical education, volunteering and social inclusion. In addition to these areas, there is a need to focus on evidence based policy making and in this connection the EU should fund research and encourage stakeholders to justify their positions with solid data and research.

On the face of it, Article 165(4) also appears to be unequivocal concerning the prohibition on harmonisation of the laws and regulations of the member states. This statement might encourage claims that the laws and regulations of the member states cannot be harmonised in so far as this would affect sporting practices. However, an examination of past prohibitions of harmonisation and their treatment by the ECJ suggests that harmonising measures can be taken despite this type of prohibition so long as the harmonising measures are nominally based on another Treaty competence. Despite similarly worded prohibitions of harmonisation in the fields of social policy, education, vocational training, culture, and public health, the EU has in practice achieved convergence in legislation through other legal bases.

17 European Commission (2007), White Paper on Sport, COM(2007), 391 final, p. 3-7.

18 European Commission (2009), 2009 annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events, COM (2009) 1685, 16 March 2009.

19 European Commission (2010), Strategic choices for the implementation of a new EU competence in the field of sport, EU-wide consultation report, available online at ec.europa.eu/sport/library/doc/a/100726_online_consultation_report.pdf.

20 See the Forum's report published by the European Commission, available online at http://ec.europa.eu/sport/library/doc/b1/sport_forum_madrid_report_11_05_10.pdf.

21 White Paper, section 4.

22 Ibid section 4.

23 Case C-415/93 Union Royale Belge Sociétés de Football Association and Others v Bosman and Others, [1995] ECR I-4921, paragraph 136.

24 Case C-519/04 P, David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991.

Equal Treatment of Non-Nationals in Individual Sports Competitions*

Chapter I: Introduction

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

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

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

The Court has consistently reaffirmed this restriction on the scope of EU law in subsequent case law (e.g. *Donà, Bosman, Deliège*), adding that such rules of 'purely sporting interest' must remain limited to their proper objectives. This has for a long time offered matches between national teams shelter from the application of the Treaty free movement and competition rules. In its recent *Meca-Medina* ruling, the Court of Justice refined this approach in a competition law context, in practice dismantling the concept of rules of purely sporting interest but replacing the idea with a new test. The Court held that for the purposes of the application of the competition law rules to a particular case, account must firstly be taken of the overall context in which the decision was taken or produces its effects and, more specifically, of its objectives; subsequently, it has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them. These findings can be transposed to the free movement context. It constitutes a new standard by which the Court of Justice of the European Union will in the future evaluate sports rules and practices.

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

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

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

Rules designed to maintain the purity of national competitions can lead to the adoption of discriminatory measures. For example, with effect from March 2008 the Belgian Swimming Federation adopted new rules excluding non-nationals from participating in national swimming championships in Belgium. The report provides a comprehensive list

* Study on *The Equal Treatment of Non-Nationals in Individual Sports Competitions,* commisioned by the European Commission to the T.M.C. Asser Institute, Edge Hill and Leiden Universities, December 2010. The Study was presented by Prof. Van den Bogaert at the European Sport Forum in Budapest (Hungary) on 20-22 February 2011.

of such measures and the sports in which these restrictions present themselves. Some sports raise specific issues in this respect For example, the participation of non-nationals in the national championships of sports with direct elimination, such as tennis or fencing, may exert a more significant impact on the outcome of the competition than in other sports. Furthermore, the report will specify the level at which the discriminatory provisions are adopted. In determining whether the discriminatory measures involve access to sports, the conditions relating to the actual practice of sports, the determination of national records, the award of medals or titles, or any other aspect of the sport, the report will investigate the objectives pursued by these measures and the consequences on each sport of removing the restrictions. In doing so, the report will comprehensively enquire into the ongoing debate within the sports movement concerning the definition of the 'specificity of sport' and its application in EU law to both the economic and non-economic aspects of sport. This will allow for the presentation of a typological analysis of the discriminatory measures identified.

This typology against which the directly or indirectly discriminatory measures identified will be measured will be essentially the same as in the context of discriminatory measures at club level and will primarily consist of the Treaty rules on freedom of movement. Furthermore, the Treaty provisions on Union citizenship, which is destined to be the fundamental status of nationals of the EU Member States (*Grzelczyk*) will duly be regarded in this respect. According to settled case-law, EU citizens lawfully resident in the territory of a host Member State who find themselves in the same situation as home State nationals can rely on Article 18 TFEU to receive the same treatment in law irrespective of their nationality in all situations which fall within the scope *ratione materiae* of EU law. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 21 TFEU . In addition, where and whenever necessary, also instruments of EU secondary legislation such as, in particular, Directive 2004/38 on the rights of citizens and their family members to move and reside in the EU and Regulation 1612/68 will be taken into consideration. Essentially, all discriminatory rules will be grouped in four different categories: firstly rules of purely sporting interest; secondly, rules which are inherent in the organisation of the sport and necessary to pursue the objectives outlined and which therefore do not constitute a restriction of EU law; thirdly, those rules which are discriminatory but capable of justification and proportionate; and finally those rules which are discriminatory and cannot be justified and must therefore be dismissed.

Additionally, the report will undertake an assessment of the likely impact of the Lisbon Treaty which establishes sport as a competence of the EU. Article 165(1) TFEU provides that 'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'. Article 165(2) adds that Union actions shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen'. The likely impact of these provisions on the jurisprudence of the Court will be considered. In particular, the report will consider whether these provisions constitute the legal basis for eliminating the discrimination in question or a means of insulating such measures.

Methodology

In the first phase of the Study, the national experts in the 27 EU Member States were asked to complete the following questionnaire:

A. *Discriminatory measures in sports (competition) regulations*

1. Please. provide a full evaluation of the situation in your country concerning the provisions in sports (competition) regulations that are discriminatory based on nationality in the sports disciplines selected, and relating to access and all other aspects of individual sports competitions.
2. Please, specify, in particular, the level at which the discriminatory provisions identified are adopted (national, regional or local sports federations) and indicate whether they are imposed at lower levels of this pyramid-shaped hierarchy.
3. Please, provide information regarding any regulatory provisions that are discriminatory on grounds of nationality established under public administrative decision.

B. *Typology analysis of the discriminatory measures identified*

1) Please, indicate whether the discriminatory measures involve access to sports (participation in competitions), conditions relating to the actual practice of sports, the award of medals and titles, etc.
2) Please, list the various criteria that hamper access to competitions either directly or indirectly.
3) Please, present a detailed list of the various objectives identified as underlying the establishment of discriminatory measures. Particular attention shall be given to the selection of national champions, determining national records, the award of titles and medals to nationals, avoiding the award of national titles to athletes in different Member States, etc.

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

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

The term "individual sports competitions" was defined as follows:

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

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

Several national experts reported that they had encountered considerable problems in collecting the pertinent information, in particular regarding the *ratio* of the discriminatory measures identified. In a number of cases they could not acquire of the relevant competition regulations in particular sports which turned out to be not available on the Internet (otherwise than association statutes and other basic documents, competition regulations are "secondary law") . This was true especially in the smaller EU countries there is no national governing body which applies mainly to Winter sports. It was reported for example that some sport associations did not respond to the efforts made by the national expert, either by phone or by e-mail. Sometimes the national expert was informed that the respondent person was not available or that the expert would receive an answer per e-mail at a later time, without then receiving any information from such associations. In general, in many cases the national expert was not able to identify the reason for certain discriminatory provisions of the associations. For example, it is reported that, when directly asking for the reason of a specific provision, the usual answers were: "there have to be some kind of criteria", 'we do not know", "this is simply the way it is", or "the same provision exists also in other countries". Thus, even if such rules were justifiable, no justification has been put forward. In this context, it should be stated that the collection of information is problematic because competition regulations are not generally accompanied by any official explanatory documents. Sports regulations cannot be compared with national public legislation in this respect. Sports organisations are apart from a very few large ones (major professional sports) in this respect not very professional: they are vol-

untary organisations that lack administrative manpower and any tradition of legislative documentation. Moreover, the average sports official and the average citizen tend to take accept sports rules at face value.

Content of the Study

Chapter II presents the general framework of EU free movement law, citizenship and non-discrimination and its application to sport. The relevant rules require potentially restrictive measures to be justified and entitle EU citizens and their family members to equal treatment. Although some sports-related case law permits limited instances of nationality discrimination, these rules will often place heavy burdens on sports governing bodies to demonstrate that restrictive measures are both justifiable and proportionate. Where they are not, such rules cannot be applied to individuals who benefit from rights under EU law.

Chapter III provides an overview of the information regarding the 27 EU Member States. This information is presented per country, in an alphabetical order. The national reports are published in full in the Annex to the Report (available in digital format). Each country report is arranged as follows: First, the information is summarized in a diagram (typology per category) in which the information is classified according to several categories. These categories range from "unrestricted access to national championship" which implies no discrimination/full equal treatment of non-nationals to "no access to national championship" which implies full discrimination/non-equal treatment of non-nationals. The other categories are: unrestricted access to national competitions; access subject to club membership; access to national championship, but not able to establish national record; access to national championship, but not able to become national champion; access to national championship, but not able to score points or receive medals; Residence requirements; no access to local and regional championships/ competitions for qualification to national championship". As to the difference between the concepts of "national championship" and "national competitions" it is observed that "national competitions" refers to all remaining competitions which are not explicitly included in the category of "national championship" .With regard to the category "access subject to membership of club" it is observed that this category concerns provisions that the sportsperson is to be licensed or certificated by the national association before he or she can participate in competitions. This may also involve clearance from the home national association of the individual to provide their agreement and additionally in certain situations to have clearance from the relevant international sports federation. For practical purposes, two further categories are added: "Sports without discriminatory provisions", which means that in the competition regulations not any such provisions were found; and "No information on competition regulations available".

Then, under the diagram the relevant provisions in the competition regulations of the respective sports are listed per category. The numbers between brackets after the provisions refer to the corresponding lines in the full text of the national reports in the Annex to the Report (in the case of Austria these numbers are not added because of the layout of the national report). Finally, a summary regarding "Participation in national championship" is added to each country report. The Chapter is concluded by an integrated comparative overview of the diagrams per country, and a diagram regarding participation in national championship for the European Union at large.

Chapter IV presents the information in relation to each sport in alphabetical order. Each sports report is arranged as follows: First the information is summarized in a diagram (typology per category). Then, under the diagram the relevant provisions in the competition regulations of the sports governing bodies in the 27 EU Member States are listed per category. The final summary corresponds to the summary in the chapters on country reports *mutatis mutandis*. The Chapter is concluded by an integrated comparative overview of the diagrams per sport. Logically, the diagram regarding participation in national championship for the European Union at large is repeated here.

Chapter V on categories of rationales contains separate information from the various national reports regarding types of objectives identified as underlying the establishment of discriminatory (and non-discriminatory) measures.

Finally, Chapter VI contains the analysis and recommendations of the Study. This draws upon the legal framework and the national reports to identify key issues arising from the current treatment of non-nationals in sporting competitions.

Included with this Study is a CD-ROM containing the Annex with the full text of the national reports.

Chapter II: Freedom of Movement: General Principles and their Application to Sport

1. General EU Law Framework on Infringements of EU Rules on Freedom of Movement, Citizenship and Non-Discrimination

1.1. Introduction and personal scope of application

This chapter examines the general legal framework for assessing potential infringements of EU law by national measures, specifically as discrimination based on nationality is concerned. First it explores the general principle of equal treatment and non-discrimination on the basis of nationality as found in art. 18 TFEU. It then considers the rules of free movement, which form a *lex specialis* to the general principle of non-discrimination also going into the grounds that exist to possibly justify direct or indirect discrimination. Finally, the concept of EU citizenship is analyzed, as this rapidly developing construct also grants rights against discrimination.

By way of preliminary, it must be observed that it is settled case-law that Articles 45 and 56 TFEU extend not only to the actions of public authorities, but also to rules of any other nature aimed at regulating gainful employment in a collective manner.[1] The Court of Justice of the EU has made it clear that since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions laid down by Article 45 TFEU to acts of a public authority would risk creating inequality in its application.[2]

EU nationals who engage in a professional sporting activity can generally invoke the Treaty provisions on free movement of workers - when they work in an employed capacity[3] - or freedom to provide services - when they are active as self-employed[4]- to enforce their rights. The EU citizenship rights are particularly relevant for amateur sportsmen and -women who want to preserve their rights.

Conversely, third-country nationals cannot invoke the EU Treaty provisions. However, that does not mean that they may never enjoy any protection under EU law. First, they do enjoy derived rights as family members of an EU citizen who has made use of his free movement rights under Regulation 1612/68 and Directive 2004/38. Second, they may autonomously benefit from the rights conferred upon them in international agreements concluded between the EU and their country of origin. For example, in *Simutenkov*, it was held by the Court of Justice of the EU that a Russian football player, legally resident and legally employed in a host Member State, could directly rely upon the non-discrimination clause concerning working conditions laid down in the Partnership Agreement with Russia in relation to host Member State nationals.[5] The question whether, and if so, which rights can be relied upon by third-country nationals in this respect cannot be answered *in abstracto* and will have to be evaluated on a case-by-case basis.

1.2. Infringement of EU Law

1.2.1. The principle of equal treatment and non-discrimination

The general principle of equality is 'one of the fundamental principles of Community law,' as the Court of Justice of the EU expressly determined in the case of *Ruckdeschel.*[6] This principle requires that similar situations shall not be treated differently, unless differentiation is justified. With this statement, the Court of Justice has instituted a superior

1 Case C-414/93 *Bosman*, [1995] ECR I-4921, para. 82.

2 For a far reaching application of this logic see case C-281/98 *Angonese*, [2000] ECR I-4139 para 36.

3 See Case 325/08 *Bernard* nyr.

4 Cases C-51/96 & C-191/97 *Deliège* [2000] ECR I-2549.

5 See especially Case C-265/03 *Simutenkov* [2005] ECR I-2579.

6 Joined cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St.Annen* [1977] ECR 1753, par. 7.

7 Lenaerts, "Gelijke behandeling in het Gemeenschapsrecht", in Alen & Lemmens (eds.), *Gelijkheid en Non-*

rule of law with general application. [7] This fundamental principle of equal treatment finds specific expression, in particular, in the general prohibition of any discrimination on grounds of nationality, as laid down in Article 18 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU). It is further specified in Articles 45, 49 and 56 TFEU.

Article 18, situated in Part Two on Non-Discrimination and Citizenship of the TFEU, generally provides that 'within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited…' Conceptually, the principle of non-discrimination is generally perceived in terms of arbitrarily or unjustifiable unequal treatment between nationals of the host Member State and nationals of the other Member States within the scope of EU law. Prohibited discrimination on grounds of nationality will also occur where a Member State treats nationals of a given Member State more favourably than the nationals of another Member State of the European Union.[8] On several occasions, the Court has held that the general principle of non-discrimination contained in Article 18 TFEU can only be invoked independently of the other Treaty provisions in situations where no more specific Treaty prohibition of discrimination, such as a free movement right, applies.[9] It has, however, also consistently stressed that these more specific Treaty prohibitions of nationality discrimination are to be interpreted in the light of the general prohibition of Article 18 TFEU.[10] Furthermore, it also decided that national measures incompatible with the provisions laid down in the Article 45, 49 and 56 TFEU also automatically and inevitably constitute a violation of Article 18 TFEU.[11]

As will be discussed further below, Article 18 TFEU also links to the concept of citizenship, which prohibits discrimination between all those exercising their EU-citizenship rights. First, however, it is necessary to look at the different freedoms individually.

1.2.1.1. Free movement of workers

Article 45(2) TFEU stipulates that the freedom of movement of workers 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. It is clear from the wording of this provision that the principle of non-discrimination forms the conceptual basis for the application of the free movement of workers. Article 45(3) further provides that '(I)t shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

a to accept offers of employment actually made;
b to move freely within the territory of Member States for this purpose;
c to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
d to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.'

The Court has made it clear in *Saunders*[12] that the principle of non-discrimination laid down in Article 45(2) also covers the rights and freedoms guaranteed by Article 45(3).

1.2.1.2. Freedom to provide services

Article 56 TFEU provides that 'Within the framework of the provisions set out below, *restrictions* on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.' Subsequently, Article 57 TFEU stipulates then that 'Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*' (emphasis added). Initially, the wording of the respective Articles 56 and 57 TFEU may thus have given rise to some doubts or ambivalence as to the specific role or importance attributed to the principle of non-discrimination within the specific context of the freedom to provide services. However, the text of Article 61 TFEU[13] and the definition of restrictions in the General Programme for the abolition of restrictions of freedom to provide services[14] leave no doubt that the prohibition of discrimination on grounds of nationality in effect lies at the basis of the provisions concerning this fundamental freedom. This conclusion is further strengthened by the case law of the Court of Justice on the matter.[15]

1.2.1.3. Freedom of establishment

Article 49 TFEU provides: 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished. […] Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter on capital.' As was the case with Articles 56-57 TFEU in the field of services, it cannot clearly be deduced from the wording of Article 49 TFEU which is the specific function of the principle of non-discrimination within the domain of establishment. In the first paragraph of Article 49, mention is made of the broader term 'restrictions', whereas in the second part of the Article the Treaty simply refers to 'the conditions laid down for its own nationals'. Be that as it may, in view of the parallel structure of the Articles and the identical concepts used in the two sets of provisions, the observations that were made in the field of services generally also hold true for Article 49 TFEU. The prohibition of discrimination on grounds of nationality therefore also forms the conceptual basis of the fundamental freedom of establishment. This conclusion is further corroborated by the provisions of the General Programme for the abolition of restrictions on freedom of establishment[16] and has again also been confirmed in the case law of the Court of Justice.[17]

Discriminatie. Verslagen voortgebracht op een colloquium te Leuven op 10 oktober 1990 (Kluwer, 1991), 50.

8 Schermers and Waelbroeck, *Judicial Protection in the European Communities* (Kluwer, 1992), 121; Handoll, *Free Movement of Persons in the European Union* (Wiley and Sons, 1995) at 133.

9 See, inter alia, Case C-10/90 *Masgio v Bundesknappschaft* [1991] ECR I-1119, par. 12; Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-505, par. 6; Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783.

10 Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195.

11 Case 305/87 *Commission v Greece* [1989] ECR 1461, par. 12.

12 Case 175/78 *R v Saunders* [1979] ECR 1129.

13 Article 61 TFEU provides that "As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions *without distinction on grounds of nationality or residence* to all persons providing services within the meaning of the first paragraph of Article 56". In this respect, it must be acknowledged though that the Court of Justice seems to have never invoked this provision to interpret Article 49 EC: see Martin, "'Discriminations', 'entraves' et 'raisons impérieuses' dans le Traité CE: trois concepts en quête d'identité", *o.c.,* at 562. See also Warner AG in Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, and the Court's subsequent rejection of his opinion in par. 16 of its judgment.

14 General Programme for the abolition of restrictions of freedom to provide services of 18 December 1961, *Official Journal of 15 January 1962, Special Editions, Second Series*, IX, p. 32: Restrictions are defined as "any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as a result of the application of such a provision, or of administrative practices, prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person *by treating him differently from nationals of the State concerned*." Furthermore, are also to be regarded as restrictions, "any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, where, although *applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by foreign nationals*" (Title III) (emphasis added).

15 Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, par. 25. It must be observed, however, that in paragraph 10 of the same decision, the Court already laid the foundations for a potentially broader approach in the future, Be that as it may, this observation does not detract anything from the fact that the Court views the freedom to provide services as a specific expression of the general principle of equal treatment or non-discrimination. See also Case 39/75 *Coenen v Sociaal-Economische Raad* [1975] ECR 1547.

1.2.2. Types of discrimination

Under EU law, there are two forms of discrimination on grounds of nationality: direct and indirect discrimination. Both are in principle prohibited. Direct discrimination involves different treatment of persons who are in a comparable situation explicitly on grounds of nationality. Nationality is the ground for the differentiation. A directly discriminatory measure leads to different treatment in law and in fact. [18]

Indirect discrimination entails different treatment of persons who are in a comparable situation based on an apparently neutral ground. There must actually or potentially be a particular disadvantage for foreigners. An indirectly discriminatory measure is equally applicable in law, but leads to different treatment in *fact*. Language or residence requirements are frequently used examples of indirectly discriminatory conduct.[19] In the case of *O'Flynn,*[20] the Court of Justice defined the concept of indirect discrimination, holding that 'conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers,[21] or the great majority of those affected are migrant workers,[22] where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers,[23] or where there is a risk that they may operate to the particular detriment of migrant workers.'[24] Discrimination, whether direct or indirect, will furthermore not only be found where two groups which are comparable in relevant ways are treated differently, but also where groups which are not comparable are treated in the same way.[25]

1.2.3. The concept of restriction

Having developed the distinction between direct and indirect discrimination, the Court of Justice subsequently broadened the scope of application of the free movement provisions so as to include also genuinely non-discriminatory measures. In cases such as *Säger*, *Kraus* and *Bosman*, the Court stipulated that 'any measure which is liable to hamper, or make less attractive, the exercise of the right to free movement' may amount to a restriction to the freedom of movement guaranteed in the Treaty. As a result, even non-discriminatory measures may conflict with the Treaty right to free movement, requiring a justification under EU law.

In summary, there are three types of infringements of the free movement rights in the Treaty: 1) directly discriminatory measures, 2) indirectly discriminatory measures and 3) restrictions.

1.3. The issue of justification

Once it has been established that a given measures constitutes a restriction of the right to freedom of movement, it must be assessed whether that restriction can be justified, or whether if forms a violation of EU law. Concretely, this means that it must be examined 1) whether the disputed measure pursues a legitimate goal; and 2) whether it satisfies the requirements of the proportionality test.

Generally speaking, there are two different types of justification. The first category includes the derogations which are expressly provided in Treaty. The second consists of the objective justifications which have been recognised by the Court of Justice of the EU in its case law, under the so-called 'rule of reason' doctrine.

The precise scope of these exceptions to the fundamental freedoms has been further outlined in Directive 2004/38 and/or in the case law of the Court of Justice of the EU.[26] Generally, these concepts must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without being subject to control by the EU institutions.[27] The competent national authorities do, however, retain an area of discretion within the limits imposed by the Treaty in this matter.[28]

1.3.1. Express treaty derogations

Article 45(3) TFEU stipulates that the free movement rights are 'subject to limitations justified on grounds of public policy, public security or public health.' Articles 46(1) and 55 EC contain equal provisions.[29] These grounds of justification 'shall not be invoked to service economic ends' and 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.'[30] The Court added as a rule that 'recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.'[31]

According to Article 45(4) TFEU, the provisions on freedom of movement of workers 'shall not apply to employment in the public service.' In line with its approach of the derogations contained in Article 45(3) TFEU, the Court has stressed that also this exception 'cannot have a scope going beyond the aim in view of which this derogation was included.'[32] The Court has ruled that the interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting *admission* of foreign nationals to certain activities in the public service. In *Commission v Belgium,*[33] the Court stipulated that Article 45(4) EC 'removes from the ambit of Article 45(1) to (3) a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities', explaining that 'such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.'[34] These two requirements seem to be cumulative rather than alternative.[35] In 1988, the Commission endeavoured to provide some practical guidance on the sorts of State functions which it considered would or would not benefit from the exception of Article 39(4):[36] the armed forces, police, judiciary, tax authorities, and certain public bodies engaged in prepar-

16 General Programme for the abolition of restrictions on freedom of establishment, *OJ Special Edition*, Second Series, IX, 7.

17 Case 2/74 *Reyners v Belgian State* [1974] ECR 631.

18 See further Davies, G., *Nationality Discrimination in the European Internal Market* (Kluwer, 2003) 22-31.

19 Clearly the many residence requirements found in national regulation of sports therefore also require scrutiny.

20 Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR 2631.

21 See inter alia Case 41/84 *Pinna v Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, par. 24; Case 33/88 *Allué and Another v Università degli Studi di Venezia* [1989] ECR 1591, par. 12; *Le Manoir*, par. 11.

22 See Case C-279/89 *Commission v United Kingdom* [1992] ECR I-5785, par. 42; Case C-272/92 *Spotti v Freistaat Bayern* [1993] ECR I-5185, par. 18.

23 See Case *Commission v Luxembourg*, par. 10; Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, par. 23.

24 See Case C-175/88 *Biehl v Administration des Contributions* [1990] ECR I-1779, par. 14; Case C-204/90 *Bachmann v Belgian State* [1992] ECR I-249, par. 9.

25 Case C-356/98 *Kaba v Home Secretary* [2000] ECR I-2623.

26 See, for more details, Hall, "The ECHR and Public Policy Exceptions to the Free Movement of Workers in the EEC Treaty", 16 *EL Rev.* (1991) 466.

27 See Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, par. 18.

28 *Van Duyn*, par. 18. In subsequent case law, it subtly qualified this statement, ruling that Member States "must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States." See *e.g.* Cases 115 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, par. 7.

29 Within the domain of goods, more grounds of justification are available. Article 30 EC provides that "the provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of individual property." See, *inter alia*, Case 34/79 *R v Henn and Darby* [1979] ECR 3795; Case 231/83 *Cullet v Centre Leclerc* [1985] ECR 305; Case 72/83 *Campus Oil Ltd. v Ministry for Industry and Energy* [1984] ECR 272; Case 251/78 *Denkavit Futtermittel v Minister für Ernährung, Landwirtschaft und Forsten des Landes* [1979] ECR 3369; Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR 487.

30 Article 27 Directive 2004/38..See also Case 30/77 *R v Bouchereau* [1977] ECR 1999, paras. 28-29.

31 Article 27 Directive 2004/38. In Case 131/79 *R v Secretary of State for Home Affairs, ex parte Mario Santillo* [1980] ECR 1585, par. 18, the Court considered it essential that "the social danger resulting from a foreigner's presence should be assessed at the very time when the decision ordering expulsion is made against him as the factors to be taken into account, particularly those concerning his conduct, are likely to change in the course of time." See also Case C-348/96 *Criminal proceedings against Calfa* [1999] ECR I-11.

32 Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, par. 4.

33 Case 149/79 *Commission v Belgium* [1980] ECR 3881.

34 *Commission v Belgium*, par. 10. In the

ing or monitoring legal acts were mentioned as examples of the former, whereas those which probably would not included nursing, teaching and non-military research in public establishments. In many situations however, it remains unclear what does and what does not constitute a post reserved for Member State nationals.[37]

The 'official authority' exception38 of Article 62 TFEU can be legitimately considered as the functional equivalent of the 'public service' exception in the domain of the free movement of workers. This official authority exception can also not be given a scope which would exceed the objective for which this exemption clause was inserted.39 The Court has limited the right of Member States to exclude non-nationals from taking up functions involving the exercise of official authority to 'those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority.'40 It further specified that an extension of this exception to a whole profession would be possible 'only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.'41

1.3.2. Objective justification and the 'rule of reason' doctrine

Apart from this limitative category of express treaty derogations, the Court of Justice has also elaborated in its case law an additional, open category of grounds for justification based on imperative requirements in the general interest. This way, national measures which cannot be justified by one of the express Treaty derogations but nevertheless serve objectively legitimate purposes can be *safeguarded*. In legal literature, this idea is often referred to as the 'rule of reason'.[42] Just as with the express treaty derogations, the objective justifications must be interpreted restrictively. Specifically with regard to sports, the Court has e.g. already accepted the following objectives as legitimate: i) the need to encourage the training and development of young players, ii) the maintenance of a certain sporting and financial balance between clubs, or iii) the need to ensure the regularity of a competition and the uncertainty of results.

1.3.3. Which derogations for which type of discrimination?

An important issue is of course which kind of derogations can be invoked so as to cover which type of discriminatory measures. According to an orthodox view, both directly and indirectly discriminatory measures can both be justified by the express Treaty exceptions, whereas indirectly discriminatory measures can only be justified by the judicially created overriding requirements in the general interest. The proverbial exceptional case that confirms the rule and perhaps a number of implicit examples notwithstanding[43], the Court of Justice of the EU has always held on to this orthodoxy.[44] There is, however, an increasing school of thought in legal doctrine that argues that that also directly discriminatory measures should be open to justification by overriding requirements.[45] This school argues that even if extra-Treaty grounds were to be allowed to justify directly discriminatory measures, this would not significantly change current practice since it will be difficult to demonstrate that a directly discriminatory measure is proportionate.

If the orthodox view were to be followed in this study, this would mean that most, if not all, accepted justification grounds in previous sports related cases cannot be invoked to justify the directly discriminatory measures imposed by sporting federations. This would only be different if one were to adhere to the more progressive school of thought, and would endorse a theoretical framework that less emphatically restricts objective justification to indirectly discriminatory measures.

1.3.4. The principle of proportionality

Finally, in order to be justifiable, a contested national measure must also comply with the principle of proportionality.[46] This principle, which is one of the general principles of EU law, requires that the national measures under investigation must be '*suitable* for securing the attainment of the objectives which they pursue and must not go beyond what is *necessary* in order to attain it.'[47] Concretely, this implies that the Court will firstly verify the appropriateness of the means chosen to achieve the end, and will secondly review whether it is not possible to conceive an alternative measure which is less restrictive of the freedom of movement under the given circumstances and nevertheless capable of producing the same result.[48] It is sometimes suggested that the test of proportionality contains a third element, i.e. even if there are no less restrictive alternatives, it must still be established that the contested measure does not have an excessive or disproportionate effect,[49] or that the disadvantage caused by the measure is proportionate to the benefit of the aims pursued,[50] but in practice the Court does not really seem to maintain a strict dividing line between the second and the third element.[51]

Essentially, the test of proportionality thus consists of a *balancing exercise* between the aims pursued by the national measure and its restrictive effects on the exercise of the right to freedom of movement. Consequently, it is not uncommon for the Court to begin a judgment by observing that a measure under challenge which is liable to hinder the right to freedom of movement pursues a legitimate aim and therefore in principle deserves to be justified, only to conclude that the measure does not comply with the principle of proportionality.[52] In some instances, the Court itself applies the principle of proportionality to the factual circumstances of the particular case. In other situations, the Court wisely leaves the issue to be decided by the national courts. In this respect, Advocate General Jacobs stipulated that 'it may be difficult always to draw the dividing line in the right place', expressing neverthe-

words of Mancini AG in Case 307/84 *Commission v France* [1986] ECR 1725, at 1727-1733: "In short, in order to be made inaccessible to nationals of another State, it is not sufficient for the duties inherent in the post at issue to be directed specifically towards public objectives which influence the conduct and action of private individuals. Those who occupy the post must don full battle dress: in non-metaphorical terms, the duties must involve acts of will which affect private individuals by requiring their obedience or, in the event of disobedience, by compelling them to comply."

35 See for example, O'Keeffe, "Judicial Interpretation of the Public Service Exception to the Free Movement of Workers", in Curtin and O'Keeffe (eds.), *Constitutional Adjudication in the European Community and National Law* (Butterworths, 1992) 89, at 96; or Léger AG in Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, par. 18.

36 (1988) OJ C 72/2.

37 It is argued that Member States could 'abuse' unequivocal, straightforward legislation with the purpose of deviating from or undermining the Court's case law. Furthermore, it is observed that "such legislation could ossify the process of creating a 'citizen's Europe". See Mancini, "The Free Movement of Workers in the Case-Law of the European Court of Justice" in Curtin & O'Keeffe (eds.), *o.c.,*67; Craig & de Burca, *EU Law. Text, Cases & Materials,* at 724-727.

38 In his opinion in the case of *Reyners*, Advocate General Mayras defined official authority as "that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens." See Mayras AG in Case 2/74 *Reyners v Belgium* [1974] ECR 631, at 664.

39 Case 2/74 *Reyners v Belgium* [1974] ECR 631, par. 43. For other examples, see Case C-306/89 *Commission v Greece* [1991] ECR I-5863 on the activities of traffic-accident experts; Case C-272/91 *Commission v Italy* [1994] ECR I-1409 on operating a computerisation system for a national lottery; Case C-42/92 *Thijssen v Controledienst voor de Verzekeringen* [1993] ECR I-4047 on commissioners of insurance companies.

40 *Reyners*, par. 45.

41 *Reyners*, par. 46. Conversely, it declared that the extension is not possible "when, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole." (par. 47)

42 For more elaboration on this issue of objective justification, consult Scott, "Mandatory or Imperative Requirements in the EU and the WTO, in Barnard and Scott (eds.), *The Legal Foundations of the Single market: Unpacking the Premises* (Hart, 2002) 269.

43 Case C- 2/90 *Walloon Waste*, [1992] ECR I-4431, and Case C-414/93 *Bosman*, [1995] ECR I-4921.

44 Case C-64/08 *Engelmann* [2010] nyr.

45 See e.g. C. Barnard, *The Substantive Law of the EU: The Four Freedoms* 3rd ed. (OUP, Oxford, 2010) .

46 In general, see Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart 1999)

47 See *inter alia*, Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, paras. 29-30; *Gebhard*, par. 37.

48 Tridimas, "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny", in Ellis, *o.c.,* 65, at 68. See for a practical example Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.

49 de Búrca, "The Principle of Proportionality and its Application in EC Law", 13 *YBEL* (1993) 105.

50 Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

51 Van Gerven, "The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe", in Ellis, *o.c.,* 37.

52 Case C-193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929.

less the opinion that it may be preferable for the Court to make the final assessment itself when it has the necessary technical expertise and has sufficient knowledge of the facts.[53]

Due to the open texture and balancing element of proportionality, it is of central importance to also appreciate the significant freedom that the Court of Justice has in *how* to apply proportionality. Very much does therefore depends on the *level of scrutiny* the Court chooses to apply, and the margin it leaves to Member States to strike a balance between restrictions and justifications. Significant differences can be seen between sectors here, with the Court generally leaving a significant margin where sports are concerned.[54]

1.4. EU Citizenship- A nascent fifth freedom

The classical free movement rights form the central and best developed body of rules specifically implementing the principle of equal treatment and non-discrimination. These freedoms, together with the gradually refined framework for potentially justifying any restrictions to them, therefore form the bulk of the rules against which national sports regulation must be tested.

EU-citizenship, however, forms an increasingly important addition to these classical free movement rights. Since its inception in the Treaty of Maastricht[55] the Court of Justice has rather aggressively developed the concept of Union Citizenship, especially by linking it with the principle of equal treatment.[56] As a result, individuals exercising their citizenship rights are entitled to equal treatment even where they do not exercise the economic freedoms of movement. In addition, these citizenships rights have been further developed in secondary legislation, first and foremost in the "Citizenship directive."[57] As a result, citizenship now forms an essential element of the equal treatment framework.[58]

After Lisbon citizenship of the Union is granted under art. 9 TEU.[59] As before Lisbon, every national of a Member State automatically also is a citizen of the Union, enjoying the rights and benefits that come with that status.[60] This status itself is further established and developed by Articles 20 and 21 TFEU.[61] Most importantly for this framework, Article 21 TFEU grants each EU-citizen "the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

The Court has firmly embraced this concept of citizenship, gradually developing it into something akin to a fifth freedom in its case law. A development defended by the now classic line that "Union Citizenship is destined to be the fundamental status of nationals of the Member States."[62]

Two effects of citizenship are of central importance here. First, by exercising their citizenship rights, individuals fall under the ambit of EU law. Secondly, as a result, they not only have the rights directly flowing from citizenship itself, but also the right to equal treatment flowing from art. 18 TFEU. Both these effects will be discussed in more detail below.

1.4.1. Expanding the scope ratione materiae of EU law

An individual can only rely on EU rights, such as the right to equal treatment under Article 18 TFEU, when falling under the scope of the Treaty. By way of illustration, a French grocer selling a bottle of French wine to a French customer in France is not covered by EU law.[63] A German soccer player accepting a job in the English premier league, on the other hand, is using his free movement right as a worker, and therefore falls under the scope of EU law.

As discussed above, however, to fall under the scope of the free movement rights for workers or service providers one needs to be engaged in an *economic activity*. As a result, all those that are not economically active, such as most amateur athletes, fall *outside* the scope of classical free movement provisions, and thereby outside the scope of EU law in general.

Citizenship changes this picture by removing the requirement of economic activity, significantly expanding the scope of EU law. This is so because every EU-citizen has certain rights simply by being a citizen, without any economic activity being required. As elaborated below, every EU-citizen for instance has the right to move and reside in other Member States. By using these rights, that is simply by moving or residing in another Member State, an EU-citizen therefore also enters the scope of EU law, in the same way a worker does who accepts a job in another Member State. As a result that citizen receives all the protection and rights provided by EU law. Most importantly, of course, this includes the right not to be discriminated based on nationality as found in article 18 TFEU.

1.4.2. The right to equal treatment when exercising citizenship rights

Each EU citizen moving or residing in another Member State may not be discriminated, either directly or indirectly, based on his nationality.[64] As discussed above, this prohibition of discrimination also forms the core of classical free movement, albeit that with the notion of a 'restriction' free movement goes an important step beyond mere equal treatment. As a result, active EU-citizens receive a significant level of protection, making citizenship a sort of quasi-freedom.

The citizens' right to equal treatment comprises *all* measures that might affect the free exercise of the right to move and reside. No matter how "national", or unrelated to EU competences, if a national measure is capable of effects on the rights of an EU-citizen it cannot discriminate. [65] Considering this very broad interpretation followed by the Court of Justice, discrimination in the area of sports may clearly also be problematic from the perspective of citizenship. This is especially so as the concept of citizenship is still in development, meaning that more rights and protection might accrue to this status in the future.

1.4.3. Justifying restrictions on citizenship rights

As described in the general framework on free movement above, restrictions on free movement may be justified. To this end the Treaty contains specific exception clauses, and the Court of Justice has developed the 'rule of reason' doctrine. With EU-citizenship now almost forming a fifth freedom, the question arises whether restrictions on these citizen rights may be justified as well, or whether they are always prohibited.

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53 Jacobs, "Recent Developments in the Principle of Proportionality in European Community Law", in Ellis, *o.c.,* 1, at 19-20.

54 See further below the specific framework on EU sports law.

55 The articles on citizenship were introduced after a Spanish proposal, and although believed by many to be hollow rhetoric have since developed into a force to be reckoned with. See for instance S.O'Leary, "*The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenshipi* (The Hague Kluwer, 1996) p. 18 a.o.

56 See for instance case C-413/99 *Baumbast* [2002] ECR I-7091.as a further example also see case C-200/02 *Chen* [2004] ECR I-9925.

57 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77. Also Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, to the extent that it is not repealed by art. 38 of 2004/38.

58 The Lisbon Treaty in fact even covers both in the same part two of the TFEU, adequately titled: "Non-discrimination and Citizenship of the Union".

59 Art. 9 TEU thereby already refers explicitly to equal treatment: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

60 In case of dual citizenship, of which only one is EU, other Member States have to accept Union Citizenship, with the associated rights, even where the non-EU nationality is dominant. See case C-369/90 *Micheletti* [1992] ECR I-4239, paragraph 14 a.o.

61 The former art. 17 and 18 EC.

62 First used in the classic case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31.

63 See for instance joined cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, and further on this notion of an internal situation A.Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe", 35 *IEI,* p. 43 a.o. (2008).

64 Case C-258/04 *Ioannidis* [2005] ECR I-8275, para. 26.

65 Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-148/02 *Garcia Avello* [2003] ECR I-11613; Case C-524/06 *Huber* [2008] ECR I-9705. Nevertheless, the Court of Justice limits these effects by easily finding a transnational element, see for instance case C-370/90 *Singh* [1992] ECR I-4265, and, perhaps taking it too far, case C-60/00 *Carpenter* [2002] ECR I-6279. See however also the recent opinion of Sharpston AG of 30 September 2010 in Case C-34/09 Gerardo Ruiz Zambrano where she attacks this notion of a fully internal situation.

66 See however also the last sentence of art. 21 TFEU: "These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the

As the Treaty contains no specific exceptions,[66] any such exceptions had to be developed by the Court of Justice. Although there certainly is some uncertainty left on this point, the Court has, quite logically, chosen to apply, *mutatis mutandis*, its rule of reason approach, requiring for each restriction a legitimate aim which is pursued in a proportionate fashion.[67]

The recent *Gottwald* judgment provides a clear illustration of this approach.[68] Mr. Gottwald, a German citizen, is severely disabled. Driving to his holiday destination in Austria he was fined for not having paid toll. As disabled persons ordinarily resident in Austria are exempt from this toll, Gottwald claimed that he, as an EU-citizen, should be exempt as well, and that not exempting him was a form of discrimination.

The Court of Justice acknowledged that such a residency requirement was a form of, in principle prohibited, indirect discrimination. It then continued, however, to state that: "Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions"[69] The Austrian measures were then found to have the combined legitimate objectives of promoting the mobility and integration of disabled persons and to ensure that there was a *connection* between the society of the Member State concerned and the recipient of a benefit.[70] The measures were, furthermore, also found to be proportionate to these objectives, especially since even individuals who regularly travel in Austria were in practice exempted.[71] As a result, this clear limitation on citizenship and equal treatment was allowed.

1.4.4. Secondary legislation: the Citizens' Rights Directive

Directive 2004/38 further demarcates the rights of citizens and their family. Three types of residence rights thereby need to be distinguished, being the right to travel and short term residence (three months maximum), residence for more than three months, and permanent residence.

Free movement and short term residence up to three months are always allowed, as long as the citizen has a valid ID, and either does not become an unreasonable burden, *or* is employed, self-employed, or has a reasonable chance of finding a job.[72]

Long term residence is regulated more strictly, and is granted to three groups of citizens. [73] First, the employed and self-employed.[74] Second, citizens who have "sufficient resources for themselves and their family members not to become a burden" and also have comprehensive sickness insurance.[75] Third, students with comprehensive sickness insurance and sufficient means not to become a burden for the duration of their studies also have a longer residence right.

The right to permanent residence is acquired after legal residence for five years.[76] Once acquired, no resource requirement applies anymore.[77]

Now of primary importance for this framework is that for all three types of resident citizens, no discrimination is allowed. Firstly because, as discussed above, by exercising their citizenship rights, individuals fall under the protection of art. 18 TFEU. The Citizenship Directive, however, also contains its own specific prohibition of discrimination based on nationality in art. 24(1):

"1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence."[78]

1.4.4. The rights of family members of active citizens

Of further potential relevance for this framework is that the family members of EU citizens also derive rights from their relation to the citizen. Clearly these rights become relevant where a not so sportive EU citizen brings along more sports-oriented or gifted family members, or any other family member, for that reasons, that wishes to participate in sports. Centrally these family members also enjoy the right to take up employment[79] and the right to equal treatment and may therefore not be discriminated against on the basis of nationality.[80] The "family" in this regard primarily consists of the spouse or registered partner, direct descendants under 21, or dependent direct relatives in the ascending line.[81] These family members, furthermore, may come from outside the EU.[82] The Court has also declared that the right for workers to all social advantages of domestic citizens includes the right to be accompanied by unmarried family members. [83]As a result, Member States must not only respect the right to equal treatment of citizens, but also of their family members. Even though third country nationals do not directly enjoy freedom of movement rights, they may be protected as family members of a citizen or 'social advantages' of an EU worker.

1.4.5. Conclusions on Citizenship

EU Citizenship has become an important new bastion of rights, granting far reaching rights to equal treatment, even to those not directly economically active. As such it forms a further limitation on the freedom for Member States to directly or indirectly discriminate on the basis of nationality. Furthermore, this limitation can be especially relevant to amateurs. As amateurs' participation in sport will often not constitute an economic activity, they would not otherwise have any rights under the economically oriented free movement rights. As citizenship rights do not depend on economic activity, these amateurs do derive equal treatment rights from their citizenship, meaning that even national regulation of amateur sportsmen must to a certain extent ensure equal treatment. Since the family members of EU citizens may come from third countries, national regulation of amateur sportsmen may in that regard also need to ensure equal treatment of third country nationals as well as EU citizens.

Chapter 2. Nationality Discrimination and Sport in the Case Law of the Court of Justice of the European Union

A limited number of cases decided by the Court of Justice of the European Union concern nationality discrimination in the context of sport. Although there are some indications that certain instances of nationality discrimination could be justifiable or exempt, these seem relatively restricted. In most cases, the general rules prohibiting discrimination on the grounds of nationality seem to apply. See on this point, however, especially the specific session on analysis and recommendations.

In *Walrave*,[84] the ECJ was asked to consider a rule in international cycling which required pacemakers to be of the same nationality as stayers. Whilst it accepted that sporting activity could be economic activity, and thus fall within the scope of the TFEU,[85] it declared that the prohibition on discrimination on the basis of nationality 'does not affect the composition of sports teams, in particular national teams, the for-

measures adopted hereunder."

67 See for instance case C-224/98 *D'Hoop* [2002] ECR I-6191, para 36: "The condition at issue could be justified only if it were based on objective considerations independent of the nationality of the persons concerned, and were proportionate to the legitimate aim of the national provisions." See for instance also case C-11/06 *Morgan* [2007] ECR I-9161.

68 Case C-103/08 *Gottwald* [2009] ECR I-9117.

69 *Gottwald*, paragraph 30.

70 *Gottwald* paragraph 32.

71 *Gottwald* paragraphs 39 and 40.

72 2004/38 articles 4-6 and 14. Since there is no right so social assistance in the first three months, there is by the way little risk of a person becoming such a burden, see art. 24(2) of the Directive.

73 Article 7 Directive 2004/38.

74 The concepts of employment and work used for this determination are the same as the ones discussed above under the free movement for workers.

75 See on these requirements also case C-413/99 *Baumbast* [2002] ECR I-7091, case C-184/99 *Grzelczyk* [2001] ECR I-6193, and case C-398/06 *Commission v. Netherlands* [2008] ECR I-56.

76 Article 16 Directive 2004/38.

77 Article 16(1) Directive 2004/38.

78 Note that this article extends the right to equal treatment to non-EU family members, thereby going beyond art. 18 TFEU.

79 2004/38 article 23.

80 2004/38 article 24(1). For their other rights, including residence rights

81 2004/38 article 2(2). In addition a "second tier" of family relations is also recognized in art. 3(2) who, once accepted, also have a right of equal treatment.

82 See especially case C-127/08 *Metock* [2008] ECR I-6241, and D.Chalmers et al. *European Union Law* (CUP 2010, Cambridge, 2nd edition) p. 470 a.o.

83 See Regulation 1612/68 Article 7(2) and Case 208/78 *Even* [1979] ECR 2019 para 22. Thus an unmarried companion was a 'social advantage' in Case 59/85 *Netherlands v Reed* [1986] ECR 1283 para 28.

84 Case 36/74 *Walrave and Koch* [1974] ECR 1405.

85 At the time, the EEC Treaty.

86 *Walrave* paragraph 8.

87 *Walrave* paragraph 9.

mation of which is a question of purely sporting interest and as such has nothing to do with economic activity'.[86] The Court emphasised that the exception to the prohibition on nationality discrimination must 'remain limited to its proper objective'.[87] However, it did not venture to explain what those proper objectives might be. Advocate General Warner was more direct in his opinion in the case. According to AG Warner, the exception related to 'rules of organisations concerned with sport that are designed to secure that a national team shall consist only of nationals of the country that that team is intended to represent'.[88] In other words, AG Warner had invited the Court to exempt only those nationality rules that required national teams to be composed only of nationals.

In the *Donà* case, the Court was asked whether nationality discrimination could be permitted in the context of professional football. AG Trabucchi invited the Court to expand the sporting exception beyond the composition of national teams, and suggested that nationality discrimination could be permitted where its purpose was to ensure that teams competing in a national championship were representative of the state.[89] In response, the Court reiterated that nationality discrimination was in principle prohibited where sport was practiced as an economic activity. The Court accepted the possibility of excluding 'foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only such as, for example, matches between national teams from different countries'.[90] However, it stressed that such rules must be limited to their proper objectives.[91]

In *Bosman*, nationality discrimination in professional sport was again in question, this time in the guise of a rule approved by the European Commission which allowed national federations to limit the number of non-nationals who could be fielded in a professional football match. Dismissing a claim that sporting activity in itself was exempt from the Treaty, the court reiterated that whilst 'rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches' could be exempt, when limited to its 'proper objective', it could not 'be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.'.[92] Since the nationality clauses did not 'concern specific matches between teams representing their countries but apply to all official matches between clubs and thus to the essence of the activity of professional players',[93] they were not 'limited to their proper objective' within the meaning of the *Walrave* sporting exception. After finding that they were therefore within the scope of the Treaty, the Court turned to the question of whether the restrictions could be justified.

In this context, the Court's judgment raised a question which to some extent remains unanswered today. In dismissing the arguments in favour of nationality discrimination, it nevertheless seemed to entertain the possibility that reasons other than the three express derogations found in Article 45(3) TFEU could be used to justify nationality discrimination against workers from other Member States. It seemed prepared in principle to consider the 'inherent' nature of a club's links with the Member State in which it played or its sub-national region. It rejected this not because such a link could not, in principle, justify nationality discrimination, but because such a link did not in fact exist.[94] This invites speculation as to whether those links, where they exist, may be preserved even for reasons which fall outside the Article 45(3) grounds of public policy, public health and public security. In a similar fashion, the Court seemed to accept that the need to protect competitive balance could in theory require nationality discrimination, but that on the facts, the rule was disproportionate since it was not suitable for the aim of maintaining competitive balance.[95]

In *Kolpak*, the Court was asked to consider rules which discriminated against non-EU nationals. These non-nationals were protected by association agreement clauses analogous to the fundamental freedoms from which EU citizens benefit. The Court examined justifications put forward to justify such discrimination and found that they were not within the meaning of the *Walrave* purely sporting rules since the 'clauses do not concern specific matches between teams representing their countries but apply to all official matches between clubs and thus to the essence of the activity of professional players.'[96] This reasoning was reiterated in the similar *Simutenkov and Kahveci* cases.[97]

The Court's case law on nationality discrimination in sport focuses mostly on sport which is economic in nature. According to this case law, professional sportsmen are clearly protected by the Treaty economic freedoms. Whilst this case law on nationality discrimination tends to concern professional team sports, the case has not been made for treating individual sports differently.

Amateur sports could be subject to equally strong rights of non-discrimination, based both on the rights of the economically active as well as economically inactive citizens and their family members. In *Commission v France,* the Court observed that non-discriminatory access to leisure activities is a corollary of freedom of movement.[98] Workers are entitled to equal treatment not only in the context of their employment, but any 'social advantages' which may include access to amateur sport.[99] In *Grzelczyk*, the Court considered any situation involving movement between Member States to constitute a situation 'within the scope of' the equal treatment rule in Article 18 TFEU.[100] The right to equal treatment 'within the scope of the Treaties' in Article 24(1) of the Citizens' Rights Directive extends to both Union citizens residing in the territory of another Member State as well as their family members. Thus, it could be argued that not only discrimination against EU citizens but rules which restrict a third country national family member's access to sport are contrary to the Citizens' Rights Directive, or alternatively Article 21(1) TFEU read together with Article 18 TFEU.

At the time of writing, several alternative schools of thought exist as to the justifiability, in principle, of direct nationality discrimination. Much of the orthodox case law of the Court states explicitly that direct nationality discrimination which is within the scope of the Treaty[101] can only be justified with reference to express derogations such as the public health, public policy and public security grounds found in Article 45(3) TFEU.[102] According to this line of reasoning, sport-specific justifications that do not fall within these categories cannot be considered when nationality discrimination is direct, such as a quota on foreign players. The only exception to this would then be the *Walrave* rule, which can with some justification be considered limited to nationality rules governing national team sports.

If the distinction between direct and indirect discrimination is material, it must furthermore be noted that there is also some confusion as to what constitutes direct nationality discrimination. A rule that prevents a player from playing simply because she is not a national is clearly directly discriminatory. However, it is often relatively easy to rephrase those rules in such a way as to achieve similar results, but without direct reference to nationality. At one logical extreme, a rule phrased in terms of a criterion other than nationality discrimination could in principle have effects identical to a directly discriminatory rule. The question is then whether that *prima facie* indirectly discriminatory, and thus justifiable, rule is in fact direct discrimination justifiable only with reference to an express Treaty derogation. A recent example of this can be found in the *Bressol* case, which suggests that such rules are indirectly, rather than directly discriminatory.[103] In *Bressol,* the Court was asked to con-

88 *Walrave* Opinion of AG Warner p. 1526 1st col.
89 Case 13/76 *Donà v Mantero* [1976] ECR 1333, Opinion of AG Trabucchi p. 1344 1st col.
90 *Donà* paragraph 14.
91 *Donà* paragraph 15.
92 Case C-415/93 *Bosman* [1995] ECR I-4921 paragraph 76.
93 *Bosman* paragraph 128.
94 *Bosman* paragraphs 130-133.
95 *Bosman* paragraph 135.
96 Case C-438/00 *Kolpak* [2003] ECR I-4135 paragraph 54.
97 Case C-265/03 *Simutenkov* [2006] ECR I-2579 paragraphs 38-39, Case C-152/08 *Kahveci* [2008] ECR I-6291 paragraphs 31-32.
98 Case C-334/94 *Commission v France* [1996] ECR I-1307 paragraph 21.
99 Article 7(2).Regulation 1612/68
100 Case C-184/99 *Grzelczyk* [2001] ECR I-6193
101 Employment in the public service is exempt under Article 45(4) TFEU as is the exercise of official authority in the context of services and establishment.
102 See for example Case C-546/07 *Commission v Germany* paragraph 48 judgment of January 21, 2010 not yet reported; Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 86. *Contra* Barnard, C., *The Substantive Law of the EU* 3rd ed. (Oxford University Press 2010) 239, citing joined cases C-338/04, 359/04 and 360/04 *Placanica* [2007] ECR I-1891.
103 Case C-73/08 *Bressol* judgment of 13. April 2010 not yet reported.

sider rules that required students to both principally reside in Belgium and demonstrate fulfilment of one of eight additional criteria. As one of these eight secondary criteria was whether the resident also had the right to permanent residence, the rules in practice always admitted resident nationals who by law always had the right to permanent residence. However, the rules required resident non-nationals to demonstrate eligibility. Without formulating the rules in terms of nationality, resident nationals were always eligible whereas resident non-nationals were subject to additional tests. The Court considered this to constitute indirect discrimination despite the view of AG Sharpston that, as direct discrimination, it could not be justified. [104]

The Lisbon Treaty has neither developed nor clarified any possible special status for sport. The new sport competence calls for 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen'.[105] This sport competence is limited to 'incentive measures'. It does not appear to constitute a horizontal obligation applicable to other areas such as the economic freedoms. Whilst the EU seeks to achieve these aims, it does not appear constitutionally obliged to take them into account when legislating in other fields. [106] The thus far only reference to this provision by the CJEU in the *Bernard* case has not seen any novel reinterpretation of past precedents based on the introduction of Article 165 TFEU.[107] Furthermore, even if Article 165 TFEU should be accorded greater prominence in future, it contains ideals which may contradict each other, thus lessening the likelihood that invoking Article 165 TFEU should in itself lead to a radical reinterpretation of EU law. For example, Article 165 TFEU advocates both fairness and openness, but does not specify how these should be weighed when they conflict. Thus, the conclusion remains that direct nationality discrimination remains difficult to justify even in the context of the Court's sport-related case law, where apart from very limited adjustments, nationality discrimination is as problematic as in other sectors of economic and non-economic activity.

[…]

Chapter VI: Analysis and Recommendations

1. Specific EU law framework for analysis

It follows from the EU Treaty provisions, secondary EU legislation and the case law from the Court of Justice of the European Union on EU citizenship and freedom of movement that sports rules and practices can be grouped in four different categories:

1. Measures which do not fall under the EU free movement rules;
2. Measures which do not constitute a restriction to freedom of movement;
3. Measures which amount to a restriction of the right to free movement but are nevertheless capable of justification and proportionate;
4. Measures which cannot be justified and/or are disproportionate, therefore violate EU law, and may consequently no longer be applied in a Member State.

First, certain rules do not come under the material scope of application of the EU Treaty.

A fortiori, they do not fall under the EU Treaty free movement rules either. The so-called *rules of purely sporting interest* fall under this category.[108] Traditionally, the rules concerning matches between national teams were considered to be a paradigm example of this. So far, the Court of Justice of the EU has consistently refused to interfere with instances of nationality discrimination concerning matches between national teams.[109] According to an established line of case law, the free movement provisions 'do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.'[110]

This permissive approach of the Court in relation to national teams has not met with substantial criticism. In his opinion on *Bosman*, Advocate General Lenz stated that it appears 'obvious and convincing'.[111] However that may be, it must be acknowledged that in contemporary society, the Court's explanation for this 'restriction on the scope of EU law' no longer reflects reality. In general, matches between national teams have economic implications and are therefore no longer of 'purely sporting interest'. There must be a better legal explanation for the Court's receptiveness towards nationality discrimination in sporting contests between national teams.[112] At the same time, it must be acknowledged that the Court of Justice has also consistently stressed that 'such a restriction on the scope of the Treaty provisions must remain limited to its proper objective', and 'cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.'[113]

In its *Meca-Medina* judgment, in the context of EU competition law, the Court issued a number of highly relevant statements with regard to the concept of 'rules of purely sporting interest'.[114] The Court specified that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down. If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition.'[115] This refinement by the Court has the effect of practically dismantling the concept of rules of purely sporting interest.[116] Only rules with no or a merely marginal or in any event clearly subordinate or secondary economic impact or effect are now likely to continue to fall under this category. It is submitted that the so-called *rules of the game* are a good illustration of what can still be regarded as a rule of purely sporting interest in this respect.

Secondly, certain measures do fall under the EU free movement rules, but do not amount to a restriction on freedom of movement.

Under the free movement rules, nationals of EU Member States have in particular the right, which they derive directly from the EU Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity.[117] Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom. However, in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market. [118]

104 Paragraph 47 *Bressol*. See *contra* the opinion of the Advocate General, points 64 to 76 and points 128-9.

105 Article 165(2) TFEU.

106 See R. Parrish, B. Garcia,, S. Miettinen, and R. Siekmann, 'The Lisbon Treaty and EU Sports Policy' (European Parliament 2010), esp. Chapter 2..

107 Case C-325/08 *Bernard,* judgment of 16 March 2010, *nyr.*

108 See for an introduction to this concept S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International, European Monographs, n° 48, The Hague, 2005), p. 16, and J.-P. Dubey, "*La libre circulation des sportifs en Europe* (Bruylant, Brussels 2000). Also see S. Weatherill, " 'Fair Play Please', Recent Developments in the Application of EC Law to Sport."(2003) 40 CMLRev. 89, and A. Husting, "Quelle reconnaissance pour l' 'exception' ou pour la spécificité sportive dans la nouvelle constitution européenne?" (2004) 481 *Revue du Marché commun en de L'Union européenne* 515.

109 S. Van den Bogaert and A. Vermeersch, 'Sport & the European Treaty: A Tale of Uneasy Bedfellows?' (2006) 31 *European Law Review*, 821-840.

110 Case 36/74 *Walrave*, [1974] ECR 1405, par. 8; Case 13/76 *Donà*, [1976] ECR 1333, par. 14, Case C-414/93 *Bosman*, [1995] ECR I-4921, paras 76 and 127; Cases C-51/96 & C-191/97 *Deliège* [2000] ECR I-2549, para. 43.

111 Lenz AG in *Bosman*, para. 139.

112 S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International, European Monographs, n° 48, The Hague, 2005), p. 455.

113 Cf. *inter alia Bosman*, para. 76.

114 Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

115 *Meca-Medina*, para. 28.

116 See also S. Weatherill, ''Anti-doping revisited - the demise of the rule of 'purely sporting interest'?' (2006) 27(12) *European Competition Law Review*, 645.

117 *Bosman*, para. 95; Case C-18/95 *Terhoeve v* Inspecteur van de Belastingdienst Particulieren / Ondernemingen Buitenland [1999] ECR I-345, para. 38.

118 Case C-190/98 [2000] *Graf* ECR I-493, para. 23

In the case of *Graf*, the Court provided an important clarification of this stance.[119] This case concerned a worker's entitlement to compensation on termination of employment if he terminates his contract of employment himself in order to take up employment in another Member State, when the provisions of the contested legislation grant him entitlement to such compensation only if the contract ends without the termination being at his own initiative or attributable to him. The Court held that entitlement to compensation on termination of employment is not dependent on the worker's choosing whether or not to stay with his current employer, but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him.[120] The Court was therefore of the opinion that such an event is *too uncertain and indirect* a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers.[121]

In the cases of *Deliège* and *Meca-Medina*, the Court added another significant refinement. In *Deliège,* the contested selection rules inevitably had the effect of limiting the number of participants in a judo tournament, but such a limitation was regarded as being 'inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted.'[122] Such rules could thus not in themselves be regarded as constituting a restriction on the principle of freedom of movement. The Court also held that the adoption of one system for selecting participants rather than another must be based 'on a large number of considerations unconnected with the personal situation of any athlete, such as the nature, the organization and the financing of the sport concerned.'[123] The free movement rules would only come into play if the selection rules were disproportionate.[124]

In *Meca-Medina*, the Court stipulated in more principled terms that the compatibility of rules with the Treaty provisions cannot be assessed in the abstract: for the purposes of application of a Treaty provision to a particular case, account must first of all be taken of the overall context in which the rule was taken or produces its effects and, more specifically, of its objectives; then, it has to be considered whether the consequential restrictive effects it produces are *inherent* in the pursuit of those objectives and are *proportionate* to them.[125] The *Meca-Medina* case was set in the context of EU competition law, but it is nevertheless suggested that the Court's findings with regard to the application of the Treaty competition provisions to sports may be transposed *mutatis mutandis* to the free movement context.[126]

To illustrate this principle in practice, the Court in *Meca-Medina* ultimately ruled, first, that the general objective of the contested anti-doping rules was to combat doping, in order for competitive sport to be conducted fairly; and that this included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.[127] Secondly, it held that the effect on athletes' freedom of action of the penalties imposed in the federation's rules to enforce the doping ban, must be considered to be, in principle, inherent in the organization and proper conduct of competitive sport, whose very purpose is to ensure healthy rivalry between athletes.[128] Finally, the Court did not find a violation of the proportionality principle. It therefore concluded that the anti-doping rules *did not in law constitute a restriction* of competition incompatible with the common market even if they *in fact* had ancillary effects that did restrict competition.[129]

This legal category could also be an elegant solution to help matches between national teams escape the need for more detailed justification under EU law. It could be stipulated that a rule requiring athletes to have the nationality of the country of which they represent the national team in international sporting events, does not in itself constitute a restriction on the Treaty free movement provisions, as long as it derives from a need inherent in the organisation of such a competition.[130] On the one hand, it reflects the assumption that in encounters between national teams, matters such as national pride and identity play a decisive role and, in principle, outweigh the economic and financial interests at stake. As a result, these matches might deserve shelter from the application of EU law. On the other hand, applying this rule rather than the 'purely sporting' line of reasoning recognises that matches between national teams have often become huge commercial events. Therefore, when the restrictive effect of these particular nationality clauses goes beyond what is necessary and inherent to organise matches between national teams, the rule would constitute a restriction of free movement. This conclusion fits squarely into the Court's principled statement that the 'restriction on the scope of the provisions in question must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity' from the scope of the Treaty.[131]

Thirdly, certain sports rules do amount to an obstacle to an athlete's right to freedom of movement, but are nevertheless justifiable because they pursue a legitimate objective and fulfill the terms of the proportionality test.

In the case of *Lehtonen* for example, the Court of Justice first held that rules of a basketball federation which provide that players can only be transferred to other clubs during limited 'transfer windows', constituted a barrier to the free movement of workers, but subsequently acknowledged that such a measure could be justified by the legitimate objective of ensuring the regularity of sporting competitions.[132] Ultimately, it left it to the national court to examine the proportionality of the contested measure.

Two crucial issues arise in this respect. The first is which justifications are available. Secondly, and more importantly, it must be considered which types of discriminatory measures can be justified by which types of justifications. As has been outlined in earlier chapters , there are two types of justifications: the exceptions expressly provided in the Treaty, and the judicially created mandatory or overriding requirements in the general interest. The Treaty exceptions are a limited and in relation to the free movement of persons include justifications on grounds of public policy, public security, public health and employment in the public service.[133] The overriding requirements, often also referred to as objective justifications, are an open-ended category of justifications accepted by the Court of Justice.[134] In sports-related case law, the Court has, for example, already accepted the need to ensure the training and development of young players, the need to maintain a certain sporting equilibrium between clubs and the need to preserve the regularity of a sporting competition as legitimate objectives.[135] However, the exception for matches between national teams notwithstanding, the Court of Justice has until the time of writing never explicitly recognized extra-treaty justifications for direct discrimination on grounds of nationality. Traditionally, the approach of the Court has been to allow only the express Treaty derogations as possible justifications when confronted with directly discriminatory measures, and to restrict the use of mandatory requirements to indirectly discriminatory measures.[136] Some legal doctrine invites the Court to depart from this strict approach and to adopt a more uniform stance on this issue, or considers that it has already done so. [137] This would potentially allow mandatory requirements to also justify directly as well as indirectly discriminatory measures. It is possible to point to some cases in the jurisprudence of the Court, includ-

119 Idem.
120 *Graf*, para. 24.
121 *Graf*, para. 25.
122 *Deliège*, para. 64. Also note that the criteria in this case were not based on nationality.
123 *Deliège*, para. 65.
124 For more info , see also S. Van den Bogaert, 'The European Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?' (2000) 25 *European Law Review* 554-563.
125 *Meca-Medina*, para. 42, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, para. 97.
126 See also S. Weatherill, 'Ánti-doping revisited - the demise of the rule of 'purely sporting interest'?' (2006) 27(12) *European Competition Law Review*, 645
127 Meca-medina, para. 43.
128 Meca-Medina, para. 45.
129 Meca-Medina, para. 55.
130 *Deliège*, para. 69.
131 *Donà*, paras 14 and 15; *Bosman*, paras 76 and 127.
132 Case C-176/96, *Lehtonen v FRBSB* [2000] ECR I-2681.
133 See e.g. Article 45(3) and (4) TFEU.
134 See also Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di* Milano [1996] ECR I-4165.
135 See e.g. *Bosman* and *Lehtonen*.
136 In general see Kapteyn & Verloren van Themaat, *"The Law of the European Union and the European Communities*" (4th revised ed. Kluwer 2008), p. 654 a.o, and on this orthodoxy see C.W.A. Timmermans, " 'Creative Homogeneity' in: M. Johansson et al. (eds), "*A European for all Seasons: Liber Amicorum Sven Norberg* (Brussels, 2006) p. 471.
137 See e.g. Barnard, C., *The Substantive*

ing those on sport, which would implicitly add further substance to this argument.[138] However, the Court still continues to refer regularly to the strict orthodox rule, also in recent cases.[139] It is therefore unclear whether the Court would be prepared to depart from it where sport is concerned.

If directly discriminatory measures were to be considered objectively justifiable, the introduction and recognition of a sports-specific overriding requirement in the general interest which would allow some form of nationality discrimination in sports under certain strictly regulated and safeguarded circumstances might be contemplated.[140] Such an exception could be based on *respect for the representation of culture and national identity through sports*. This way, the EU could recognize the positive role of nationality in the organization of sporting competitions, and thereby contribute to the further eradication of all negative forms of discrimination. The new Treaty basis for sport in Article 165 TFEU might be invoked to play a role in this regard, bearing mind that the 'Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.'

In addition to the legitimate objective required to justify a restriction, the ultimate verdict of the Court on a claimed justification also hinges upon the level of scrutiny the Court is willing to exert when assessing whether the principle of proportionality is being respected. Taking into consideration the Court's awareness about the EU's supporting, coordinating and supplementing competence in sporting affairs and the corresponding conditional regulatory autonomy of the sporting federations, and also the societal relevance of sport, it is possible that the Court's review of the tests of suitability and necessity in a sporting context will be merely marginal.[141]

Fourthly, any given sports measure that restricts freedom of movement and cannot be properly justified and/or is not proportionate violates EU law and may no longer be applied.
The *Bosman* case constitutes the best-known example in this respect. In *Bosman*, the Court of Justice dismissed the long-standing transfer rules and the so-called '3+2' nationality clauses in professional football for unjustifiably violating the principle of free movement for workers. The Court did admit that the need to ensure the training and development of young players and to preserve a certain sporting equilibrium amount to legitimate objectives,[142] but nevertheless concluded that these goals could be achieved in a less restrictive way.[143] As a result, EU professional football players whose contract with their club of affiliation has expired are now entitled to move to another club, without any transfer sum being due to the former club, and nationality clauses in sport are no longer applicable to sportsmen with an EU nationality.

As far as proportionality is concerned, much turns on the case-by-case analysis of the Court, and the level of scrutiny the Court chooses to apply. For example, in the *Bernard* case, the Court accepted that the education and training of young players was a goal worthy of protection, but observed that where damages exceeded the costs of training, they would be disproportionate.[144] Thus, a legitimate objective does not in itself suffice to protect a practice. Nevertheless, in some other cases, such as *Deliège*, it seems that proportionality is less strictly policed.

2. Analysis of the compatibility of the various types of sporting rules with EU law on freedom of movement, non-discrimination and citizenship

In general, the sport rules and practices under scrutiny can be grouped into a number of separate categories. There are rules which:

- prevent or hinder foreign nationals' access to national sporting competitions;
- prevent foreign nationals' access to national championships;
- deny foreigners the possibility to win the national title in any given sporting discipline;
- deny foreigners the opportunity to set national records or win medals at national championships.

Each of these sets of rules will be examined as to its conformity with EU law, more specifically the EU Treaty provisions on freedom of movement, non-discrimination on grounds of nationality and EU citizenship.

2.1. Exclusion from participation in national competitions

A first type of rule which is under scrutiny concerns the access of sportsmen and sportswomen to national competitions. Sporting events, tournaments and competitions organised at national level are understood as distinct from national championships or international tournaments.

It is submitted at the outset that a barrier to or even a downright ban on access to this type of 'ordinary' competition on grounds of nationality in individual sports will be most difficult to justify, just as is the case with nationality discrimination in team sports. For this reason, it is suggested that the general starting point as regards national competitions in individual sports should be one of *open access to all EU citizens, and by extension also to their family members*[145] and any third country nationals that can derive equal treatment rights from EU law.[146] In view of the great variety between individual sports, the factual diversity between different sporting competitions, the way they are set up, and the role they play in the larger organisation of a sport,[147] it may, however, prove to be necessary to make a number of adjustments or exceptions to this general principle, based on the particular circumstances of a given case. This may, for instance, be the case when the national competition is directly linked to the national championship. Whilst the question of unrestricted access to national competitions may perhaps not be the most sensitive issue involved in this study, the empirical research shows that it nevertheless is in this area that, quantitatively speaking, most problems probably exist. Many different sports in different Member States require, for instance, overly long residency requirements, or have other unjustified barriers in place.

2.1.1. Not a rule of purely sporting interest

First of all, rules which restrict foreigners' access to national competitions in a given sporting discipline cannot be qualified as being of pure-

Law of the EU: The Four Freedoms 3rd ed. (Oxford University Press 2010) 239 and 511.

138 See e.g. *Bosman,* discussed in this context in Chapter 2 above. In general, see also Case C-2/90 *Commission v Belgium* (Walloon Waste) [1992] ECR I-4431 or Case C-379/98 *PreussenElektra AG v Schlesweg AG* [2001] I-2099, and especially the Opinion of AG Jacobs in that case. Similarly the judgments in Case C-204/90, *Hanns-Martin Bachman v. Belgium* [1992] ECR I-249 and Cases C-34-36/95, *De Agostini* [1997] ECR I-3843 point to allowing *de facto* discriminatory measures under the rule of reason.

139 See for example Case C-546/07 *Commission v Germany* paragraph 48 judgment of January 21, 2010 not yet reported.

140 Some counter arguments must be recognised in this respect. First, whilst the Court has accepted cultural policy as a mandatory requirement (Case C-288/89 *Gouda* [1991] ECR I-4007 paras 22-23.), when invited to consider that cultural policy, a supporting competence under Article 167 TFEU that is similar in structure to Article 165 TFEU, required the recognition of a non-Treaty 'derogation' to support directly discriminatory restrictions, the Court responded in *Spanish Cinema Dubbing* that cultural policy was not one of the derogations set out in the Treaty (Case C-17/92 *Spanish Cinema Dubbing* ECR I-2239 para 20.). When cultural arguments have been invoked in past sports-related case law, e.g. in *Bosman*, the Court has tended not to find these decisive. Any extension of the mandatory requirements, particularly in relation to directly discriminatory rules, would therefore seem to require either an express Treaty derogation or a judicial re-examination and re-evaluation of the past case law on direct nationality discrimination. As the outcome of *Bosman* demonstrates, even the support of the European Commission if offered is on its own insufficient to achieve this effect (Bosman, para. 136).

141 See e.g. *Meca-Medina*, paras. 49-54.

142 *Bosman*, para. 106.

143 *Bosman*, para. 110.

144 Case 352/08 *Bernard and Newcastle United v Olympique Lyonnais*, judgment of 16 March 2010, not yet reported, paragraphs 46-48.

145 Article 7(2) Regulation 1612/68.

146 See e.g. Case C-265/03 *Simutenkov* [2005] ECR I-2579. Also see S. van den Bogaert, "Free Movement for Workers and the Nationality Requirement", in: Schneider (ed.) "*Migration, Integration and Citizenship: A Challenge for Europe's Future, Vol. I* (Forum, Maastricht 2005), p. 55-72.

147 Cfr. the Court's principled statement in *Meca Medina* that 'the compatibility of rules with the Treaty provisions cannot be assessed in the abstract: for the purposes of application of a Treaty provision to a particular case, account must first of all be taken of the overall context in which the rule was taken or produces its effects and, more specifically, of its objectives; then, it has to be considered whether the consequential restrictive effects it produces are inherent in the pursuit of those objectives and are proportionate to them.'

ly sporting interest. First, it can hardly be defended that these competitions are only about sport; most also involve (clear) economic interests. Furthermore, a complete refusal of access to national competitions would almost inevitably lead to 'excluding the whole of a sporting activity from the scope of the Treaty', which is precisely one of the explicit limits set to this 'sporting restriction' by the Court of Justice.[148] Consequently, it is highly unlikely that the Court would allow the exclusion of foreigners from national competitions as a rule of purely sporting interest.

Even restrictions in amateur sports would be difficult to excuse under the traditional 'purely sporting interest' formula. Since the Court's recognition in *Meca-Medina* of the difficulty of severing economic and uneconomic aspects of sport, it may be difficult to consider that amateur sport has 'nothing to do with economic activity'. This is further underlined by the Court's observations in *Deliège* regarding the economic impacts of sponsorship agreements and other economic implications in situations where the athletes are not directly remunerated: Sportspersons may be providing a service 'even if some of those services are not paid for by those for whom they are performed'.[149]

2.1.2. Under the scope of the EU Treaty but no restriction?

In the same vein, it would be unexpected if the Court were to allow these rules under the category of rules which *in law* do not constitute restrictions under the general framework outlined above. First, the *Graf* situation does not seem to apply as access to the sporting competition forms the core of an athlete's activity. Restricting access to that core activity therefore does not qualify as too uncertain and indirect. Secondly, preventing access of non-nationals to ordinary sporting events cannot generally be qualified as 'inherent and proportionate' to the objectives pursued by the organisation of such competitions.[150] It is difficult to see which inherent need is served by excluding, even temporarily, foreign nationals, let alone how a full exclusion should be proportionate to such an aim. For instance, banning foreigners from participating in a national competition is not inherently required to keep a fair and balanced competition or to enable sufficient training of youth, let alone that such restrictions would be proportionate for those aims. As a result, the second category also fails to offer good prospects for allowing the rules which restrict access to a national competition.

2.1.3. Restriction to freedom of movement, but acceptable justification?

A sporting rule applicable to an individual sporting discipline which bans foreign athletes from taking part in national competitions, appears liable to render the exercise of EU citizens' free movement rights less attractive. Hence, it constitutes a restriction to freedom of movement. Therefore, such a rule is prohibited, and must be disapplied, unless it can be justified.

As the four freedoms are of a fundamental nature, they are to be interpreted extensively; hence, the corresponding derogations are to be interpreted and applied restrictively.[151] A rule preventing foreigners from taking part in a national sporting competition must be classified as a directly discriminatory measure. Arguably, the express Treaty derogations which might in principle be available - public policy, public security and public health or employment in the public service - cannot serve as grounds for justification in this respect. According to the orthodox view, mandatory requirements cannot be invoked so as to justify directly discriminatory measures. And even if it were assumed that the Court would accept that objective justifications in the general interest can also be invoked to justify a directly discriminatory measure, such a measure must still also pass the test of proportionality. It will be very difficult to demonstrate that there is no less restrictive alternative to a directly discriminatory measure. Only the need to train young players seems somewhat plausible as a justification to banning foreign athletes from national competition. Even so, the measure is very unlikely to pass the proportionality hurdle: it appears too far-reaching. As outlined above in the previous section of this chapter, one could envisage a newly designed judicially created overriding requirement in the general interest narrowly focusing on the positive features of nationality in sports which might be capable of justifying direct nationality discrimination under strict circumstances, but it is submitted that this does not seem appropriate in this context either: in national sporting events, the focus is not on identity, honour and representation, which so far has proven to be most potent justificatory aims.[152] Consequently, a rule excluding foreigners from ordinary national competitions probably cannot be justified.

A rule containing a residence requirement entailing that athletes are only entitled to take part in a sporting competition when they have already been resident for a certain duration in the country where the competition takes place is likely to be qualified as indirectly discriminatory. Indirectly discriminatory measures can be justified by the express Treaty derogations as well as by the overriding requirements in the general interest. In addition, these measures must also pass the test of proportionality. Even if the Court were already to accept a legitimate aim in this particular context, which does not seem straightforward, the measure must still be regarded as proportionate. It is not easy to imagine a rule containing a residence requirement being considered as suitable and necessary, particularly where the purpose of that rule has not been explained as was the conclusion of many country experts commissioned by this study.

2.1.4. Conclusions and recommendations

With regard to these rules restricting access to national competitions, the general conclusions are the following:

- the blanket exclusion of foreigners from participation in national competitions is a directly discriminatory measure which amounts to an unjustifiable infringement of EU athletes' free movement rights. These overly restrictive rules will have to be dismissed so as to allow foreign EU athletes access to these competitions.
- Rules containing residence requirements tend to favour nationals over non-nationals. They are thus indirectly discriminatory and must in all likelihood also be dismissed as contrary to EU law unless they can be justified, which appears unlikely.
- Athletes from countries outside the EU cannot directly benefit from free movement rights. However, they may enjoy some form of legal protection as family members of an EU national or under an international agreement concluded between the EU and their country. When third country nationals are family members of EU citizens or acquire the protection of non-discrimination provisions in e.g. Association Agreements, these third country nationals can no longer be excluded from participation in national competitions.

Current practice in many sports and in several EU Member States does not seem to comply with the required general level of openness. Most commonly, overly long residency requirements seem to be imposed (see for instance the situation in Austria, where weightlifting requires two years of residence, aquatics, archery, badminton and canoeing 3 years, and shooting even up to 5 years of residence). Moreover, restrictions of freedom of movement may also be caused by the vagueness or complete absence of rules in a given context, or by the explicit discretion given to decision makers (see, for instance, aquatics in Finland, where permission is given on a "case-specific manner"). Even where periods are short, the diversity of periods within particular sports suggests that many rules will struggle to satisfy the 'least restrictive measure' proportionality requirement.

The following recommendations can therefore be made:

- It is recommended to grant EU athletes and their families, as well as non-EU nationals who can rely upon EU rights in this context, equal access to national competitions as that of home state nationals, subject to the exceptions outlined below.

148 *Meca-Medina* para 26.

149 *Deliege* paragraph 56. See also e.g. the recipients of free-to-air broadcast services as persons protected by the Court's freedom of movement for services case law.

150 See below for potential specific exceptions to this finding, in particular where the sport is organized into tiered competitions where athletes are eliminated.

151 See e.g. Case C-441/02 *Commission v Germany* [2006] ECR I-3449 paras 32-35. C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, at p. 480.

152 See also *Deliège*, where the Court even refuses to extend this representation aspect to A-level, international tournaments which directly led to qualification for national representation. For this reason the proposed new sporting exception also cannot be relied upon here.

- As there appear to be quite a few instances where this level of openness is not achieved, and as many national federations or clubs might not possess the legal capacity and know-how to establish EU-compliant rules, this might be an area where the European Commission may be of assistance. For instance the Commission might assist with coordination, dialogue, the drafting and circulation of best practices or model rules, or by supporting training and education events aimed at sports administrators. This would also help to reduce the ambiguity and uncertainty of some rules.
- Nevertheless, it must be outlined that is possible to envisage some factual situations which might warrant specific, and limited, restrictions on access to national competitions:

- *Restrictions inspired by the specific organizational needs of a sporting event and/or the objective of safeguarding space for the training and development of national sportsmen*

First of all, in some disciplines, the *structure and the format* of the competition in question may legitimately warrant the imposition of limits on the number of participants that can compete for sporting glory at a certain level. For instance, in Grand Slam tennis tournaments, a maximum of 128 participants can participate in the main draw. Moreover, to ensure the training and the development of young players, it may be acceptable that a certain number of places in a sporting event is preserved for them. As such a measure must also be proportionate, and may not *de facto* close of an entire sport from the application of EU law, complete exclusion of all foreigners under this aim would not be acceptable. Rather, only a limited amount of places may be reserved. The exact amount of reserved places will have to be scrutinized on a case-by-case basis. These rules, inherent in the organization of a sporting event, would come under the scope of EU law, but would not amount to a restriction of freedom of movement, provided they are also proportionate. Whilst the non-discriminatory limitation of numbers could be classified as an 'inherent' rule under the present case law, the court has not yet expressly accepted that directly discriminatory measures can be justified in this way.[153]

- *Restriction when the national competition forms part of the national championship?*

A second, and more complex, situation arises where the national competition, at least at the highest and economically most relevant level of a given sporting discipline, forms part of the national championship and helps in the determination of who wins the national title. This is for instance the case where points earned during regular, separate competitions together determine the outcome national championship. It could be contemplated - also in the light of what will be said later on the access to national championships and titles - to bar foreigners from competing in these circumstances if their inclusion exerted an unwarranted decisive influence on the national championship. One must also check then whether this exclusion is not disproportionate. In other circumstances, where the results of non-national athletes can simply be disregarded, it will be hard under EU law to bar foreigners from competing in national competitions or even in national championships.

- *Acceptable restrictions inspired by the desire to ensure the regularity of the competition?*

In order to safeguard the regularity of the sporting competition, the uncertainty of outcome and the comparability of results, the Court has in *Lehtonen* accepted in principle the practice of limited transfer windows. This means that restrictions on changes *during* the competition can be acceptable, as the balance should not be altered during the competition. Similarly, the requirement of *membership* of a national club and federation also seems a proportionate requirement to monitor and safeguard the fairness and structure of the competition. Consequently, rules requiring membership, and barring sportsmen access after the start of the season seem justifiable restrictions.

Crucially, however, these rules should apply generally to *all participants* in a competition, as the specific aims involved do not necessitate any form of direct or indirect discrimination. Where membership of a national club and federation is required, these should equally be offered on a non-discriminatory basis. Thus, where long residence requirements (*any* residence requirements) might indirectly favour nationals, these must be justified and proportionate. As in *Lehtonen* the restrictions on access should not be stricter for EU citizens than they are for nationals, or they risk being qualified as unjustifiably discriminatory. There is no basis to require, for example, that an EU citizen has already been resident in a given country for more than two years, or has been registered with a national club for at least a year before he can compete in a sporting competition. To put it sharply, as time limits to access are based on safeguarding the fairness and structure of the competition, there is no ground to refuse access to the Swedish Canoeing competition to a Polish citizen who moves to Sweden on August 31, if registration for the competition is open until the 1st of September.

The immediate practical effects of this conclusion are difficult to assess, as it is not possible to deduce from the empirical study precisely how many of these restrictions on access to the national competition are actually in place. In addition to the many unknowns, and the fact that there frequently are no specific findings under the title 'access to national competition', it often cannot be determined whether residence or membership requirements also apply as regards access to national competitions. Nevertheless, as the best practices allowing open access to national championships and titles illustrate, national competitions should be able to accommodate this openness, especially if the specific exceptions such as knock-out tournaments discussed above are taken into account.

- *A non-justified restriction: qualification for international and external events*

It must also be pointed out that the fact that it is possible to qualify for international representative tournaments at the national sporting competitions, does not entail that nationality discrimination is allowed. The Court of Justice has explicitly rejected this link in *Deliège*, holding that the mere fact that such national selection takes place on such tournaments does not exclude such measures from the scope of the Treaty in the same way that representative games are excluded.

- *Factual limitation: the international calendar*

A coordinated calendar of sporting events at the level of international federations may *de facto* limit foreign participation in a competition. Such a rule could very clearly be regarded as 'inherent' in the organization and proper functioning of sport. As such, disproportionate restrictions might be challenged.

2.2. Exclusion of foreigners from participating in national championships

2.2.1. Introduction

The question of who can take part in a national championship raises a number of complex issues. From one perspective, these championships share in the 'national character' of the national title, and also influence the award of that title. From another point of view, the mere participation of foreign athletes does not necessarily have to diminish the national character of the contest, especially where sufficient places and the title itself are already reserved for nationals. This 'limitation' of the purely national character of the championship, furthermore, has to be weighed against the fundamental free movement rights of foreign athletes, up to and including the substantial rights enjoyed by (permanent) resident foreign EU citizens in a host Member State.[154] In practice, one differentiates in this context between open and closed championships.

In a sense, national championships form a legal border zone between the relatively more clear-cut enclosure of national titles and the openness required in regular competitions. It is suggested that EU athletes and family members of EU migrants should be allowed to compete in national championships, unless there are good grounds for an excep-

153 See further S. Miettinen and R. Parrish, 'Nationality Discrimination in Community Law: An Assessment of the UEFA Regulations Governing Player Eligibility (The Home-Grown Player Rule) 2007 5(2) *Entertainment and Sports Law Journal* points 7-9.

tion. The largest and most important exception in that regard would be the exclusion of foreign athletes from championships in which they exert too direct and substantial an influence on the outcome. This is especially the case in sports which involve direct eliminations, for instance the knock-out system in boxing or judo.

This approach is also supported by current practice, where in some sports which do not involve single duels between competitors, roughly half of the national championships are already opened to participation by foreigners, whereas knock-out sports are more closed. Archery, aquatics, athletics, gymnastics and triathlon, for example, are already relatively open to foreigners.

2.2.2. A rule of purely sporting interest?

It is possible, but legally less than probable, that the Court of Justice of the EU would accept the exclusion of foreigners from participation in national championships as being a rule of purely sporting interest. The same reasons that would probably even exclude the award of the national title from the category of purely sporting interest -see below - thereby apply *a fortiori* where mere participation is concerned. Even though the national championship is clearly linked to the national title and national representation at international level, the economic aspects involved can no longer be qualified as only marginal in the post *Meca-Medina* sense. Be that as it may, in case the award of the national title were regarded as being a rule of purely sporting interest, access to the national championship could also still be considered as such, in view of the particular nature and context of such a sporting event.

2.2.3. Exclusion of foreigners as inherent and necessary?

If this practice cannot be qualified as a rule of purely sporting interest, it must be examined whether the issue of participation in national championships can be qualified under the second category of the general framework as an 'inherent' rule necessary for the organisation and proper functioning of sport. Again, it is not self-evident that this will indeed be the case. After all, the primary objective of participation in a national championship appears linked to that of the award of the national title, being to crown the best national. In principle, this objective does not inherently and necessarily require the exclusion of non-national athletes.[155] It may still be regarded as inherent in the aim to crown the best national to exclude foreigners from competing, but it does not seem necessary to completely ban foreigners from competing when the results of non-nationals may simply be disregarded in the race for the title. Even with foreigners competing, the best national can simply still be crowned as national champion.

In this respect, a number of additional observations need to be made:

- First, the qualification of this rule will ultimately depend upon the level of scrutiny the Court of Justice is willing to exercise. Given the sensitivity of the issue of participation in national championships, it is expected that the Court will not easily substitute a federation's reasoned assessment for its own.
- Secondly, the various individual sports have different characterizing features which possibly have implications for their legal qualification under EU law. In some sports, the presence and participation of foreign athletes impacts only in a secondary and indirect way on the outcome of the championship, whereas in sports with direct eliminations the influence is direct, substantial and immediately measurable. In this latter category, the exclusion of nationals could be seen as inherent and necessary to achieve the objective of crowning the best national. For instance, if current world number one Rafael Nadal were to be able to participate in the Dutch national tennis championship, even if he could not win the title, one could predict with quite a high degree of probability that the winner of the Dutch title would be he who would emerge victorious out of the other half of the draw and would subsequently succumb to the Majorcan in the final.[156] If more than one foreigner would participate, let us assume British Andy Murray, it might even be that no national reaches the final. This may create problems for the award of the title. One would then be forced to devise other means to designate the champion, for example when the last remaining Dutch players in the draw are eliminated in the quarter finals. For this reason, it can thus legitimately be argued that excluding non-nationals from national championships might qualify as a necessary and proportionate consequential restrictive effect of the objective to crown the best national where these non-nationals would seriously undermine the process of this selection. Consequently, in these circumstances the exclusion may not violate EU law.

2.2.4. Exclusion of foreigners a justified restriction?

The exclusion of non-nationals from competing in a national championship clearly restricts free movement rights- when a sufficient economic dimension is present-, or in any case EU citizenship rights to equal treatment. It amounts to a directly discriminatory measure. Therefore, this practice is in need of justification, or it will have to be abandoned. Just as with all other directly discriminatory measures, chances of justification are slim.

Under the orthodox view of justifications for direct discrimination, the available express treaty derogations will not be useful in this respect. Mandatory requirements could only be considered if one adopts a more permissive stance. In that case, of the already accepted grounds of justification in sports-related case law, the objective of ensuring the regularity of the competition could perhaps be submitted in this context. It would then have to be convincingly demonstrated that the participation of foreign athletes disrupts the normal course of the event. This may be clear in knock-out events, but much harder to prove in other situations. A case-by-case analysis will be necessary. A new ground for justification on sporting nationality might also be accepted as a legitimate aim in this respect. National championships are to be seen as events where national identity is celebrated and partially constituted by a competition between nationals only. However, even if a non-treaty justification were to be accepted to justify direct nationality discrimination, it would still have to be demonstrated that the total ban on foreigners is proportionate. That may turn out to be difficult. If these grounds for justification are rejected by the Court, the measure must be abandoned.

2.2.5. Conclusions and recommendations

In sports where the presence and participation of foreign athletes exerts a direct influence on the course of a sporting event, the exclusion of foreigners from participation in the national championship might be seen as an inherent and necessary measure to crown the best national in a given discipline. However, banning foreigners from taking part in national championships when their influence on the outcome is merely marginal or indirect, seems to be a disproportionate restriction of freedom of movement.

This conclusion also seems supported by current practice. Several general factual conclusions are interesting in this regard. First, at least each of the 26 different individual sports has an open championship in at least one Member State. The feasibility of such open competitions may call into question the proportionality of the measures taken in more closed national systems. Second, some sports have open championships in half the Member States. National championships are open to foreigners in aquatics and gymnastics in 11 Member States, archery in 12 countries, and athletics in 13, for instance. Third, sports with knock-out systems indeed appear to be more closed. Boxing, for instance, is only open

154 Directive 2004/38 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

155 To qualify national championships under the second category one would have to argue that along the line that the object of a national competition is not just to crown the best individual, but to have the best nationals *compete* against each other. This does not seem convincing for two reasons. First, it is more convincing to accept that the real aim is to crown the best national, seeing how the championship is linked to the title, and not really to have them compete. Secondly, even if the aim would be solely to have the best nationals compete, this aim could often still be achieved without excluding all foreigners, but by less restrictive means, such as not counting the foreigners. As such, a full exclusion, even if inherent, would not be proportionate.

156 Of course this perhaps "unfair" effect of knock out systems is also present where only nationals are allowed to compete, in the sense that all who have to face the eventual champion in the earlier rounds will not reach the eventual podium, even if they would have defeated the eventual number two or three. This does not interfere, however, with the central objective of crowning the *best* national, which allowing non-nationals would.

in two or three Member States. Thus, the inference of less restrictive measures is even stronger in these sports.

However, the most prominent conclusion is perhaps that the general perception that national championships are closed for foreigners does not correspond with a more nuanced reality.

A number of recommendations can be made in this respect:

- If the participation of foreign athletes in multiple national championships is perceived to be problematic, one could resolve this issue by adopting a uniform international calendar, so that all national championships take place contemporaneously, e.g. on the same day.
- A less restrictive measure, which would not ban foreigners from participating, but would merely impose limits on them taking part, taking into consideration the constraints of the organization of a sporting competition and the specific nature of the event, would be more easily acceptable under EU law.
- It could also be envisaged that foreign athletes can only take part in the national championships of a given sport in a given country on the condition that they reside in the country during a certain period and/or are a member of a sports club and affiliated to the responsible national sporting federation. Such a rule would have the additional advantage of practically preventing athletes from taking part in national championships in different countries. However, it may turn out to be difficult to justify (long) residency requirements where shorter periods achieve the same aims and compulsory affiliations must not establish discriminatory conditions for non-nationals.

2.3. Exclusion from winning the national title

2.3.1. Introduction

The question whether the title of 'national champion' in a given sporting discipline may be reserved for nationals only, or rather whether EU law demands that the award of this title be opened up to all EU citizens or even third country nationals, practically means the following: does ice skating ace Sven Kramer from Holland have the right under EU law to become national champion of other countries as well, for example. Italy?

Evidently, this is one of the crucial and most sensitive questions raised by this research. On the one hand, to many it seems 'common sense'[157] that the title of national champion of a given country is reserved to nationals of that particular country. Furthermore, the exclusion of foreigners seems to have widespread support: there seems to be no pressing need to undermine this popular and even loved custom. This is especially so in this sensitive post-Lisbon era, in which the social and political climate is characterized by national and anti-European sentiments. Deconstructing this traditional structure of sports might, therefore, not be the best use of EU legislative capacity and legitimacy: people do not seem to be waiting for changes in this respect, nor are they wanting any changes. By the same token, the intrinsic logic of EU law, centered and evolved around the notion of non-discrimination, has a hard time accommodating this straightforward case of direct discrimination on grounds of nationality. Especially with the increased economic dimension of sports, bringing it closer under the economic focus and logic of the EU Treaty, the question therefore arises to what extent the EU legal framework can accommodate a perhaps rare instance of socially acceptable or even desirable discrimination based on nationality. Would it not be possible, for instance, to envisage opening the title race to people resident in the country?

2.3.2. National titles and the rules of purely sporting interest

It is still possible, although legally speaking since *Meca-Medina* perhaps no longer very likely, that the Court of Justice would accept a rule excluding foreigners from the national title as a rule of purely sporting interest. The argument to place rules on acquiring the national title in this first category would be based on extending the logic underlying the qualification of matches between national teams as events of purely sporting interest. The Court of Justice has after all consistently allowed discrimination based on nationality as far as these matches are concerned. According to an established line of case law, the free movement provisions 'do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.'[158] It could be argued that national titles should be qualified in the same way as matches between national teams, as they ultimately both concern the direct representation of the nation. The national champion in the sporting discipline also represents that country on the international level. If the national title is in this way qualified as of purely sporting interest, it does not fall under the scope of the Treaty, and direct discrimination would therefore be allowed.

However, as discussed in the general framework, the Court in *Meca-Medina* seems to have reduced the scope of the purely sporting exception in a way that appears to prevent qualifying rules concerning the award of the national title as a rule of purely sporting interest. The significant economic interests that are often involved, for instance in terms of sponsorship money, name recognition and invitations to lucrative tournaments and events, mean that the economic dimension cannot really be qualified as merely marginal. This analysis leads to the result that these rules come under the scope of the Treaty.

2.3.3. Exclusion of foreigners from national titles: inherent and necessary?

The second category in the abovementioned framework seems the most plausible legal categorization for a restriction on eligibility for the national title. This would mean that such rules do fall under the Treaty, but do not form a restriction to freedom of movement, and therefore do not violate EU law. As a result, it would remain possible to reserve the award of the national title to nationals of a country. This qualification is firstly based on the objective pursued by awarding a national title, which concerns *selecting and crowning the best national* sportsman in a specific discipline.[159] It is the quintessential goal of a title to find and honor the 'best' within a specific group of contestants, and in the case of a national championship this group of competitors is formed by the nationals. Crucially, the consequential restrictive effect of excluding non-nationals could be seen as *inherent* in the pursuit of the objective to select and crown the best national, as required under the *Meca-Medina* line of reasoning. Also, such an exclusion might be considered *necessary* as there simply is no less restrictive way to crown the best *national* than to exclude non-nationals from the title. Lastly, such an exclusion also remains 'limited to its proper objective' and does not 'exclude the whole of a sporting activity' from the scope of the Treaty, but remains limited to the specific contest or race for the national title.[160]

2.3.4. Exclusion of foreigners: a justified restriction?

If conversely, a rule reserving the national title to only nationals were to be qualified as a restriction of free movement and other Treaty rights, it could only be saved from non-application by a standard justification. This would require a legitimate aim that must be achieved in a proportionate manner, and also that the Court should revisit and revise the orthodox view on the justifiability of directly discriminatory practices. The previously accepted legitimate aims of maintaining a fair balance in the competition or training of young athletes do not seem to apply in this regard. It also cannot be seen why excluding non-nationals from the national title would be necessary or even suitable for achieving those aims. Conversely, a new 'sporting exception', recognizing the positive role of nationality in sports, could perhaps be capable of justifying discrimination based on nationality. If this would be accepted as a legitimate aim, the exclusive award of a national title to a national could be a suitable and necessary means of achieving the objective of crowing and honoring the best national athlete in a discipline.[161]

2.3.5. Exclusion of foreigners: unacceptable discrimination?

If the Court qualifies the rule excluding non-national EU citizens from the national title as a directly discriminatory measure which cannot be justified by any of the express Treaty derogations and also does not want

157 Or 'obvious and convincing' in the words of Lenz AG in *Bosman*, para. 139.

158 *Walrave*, par. 8; *Donà*, par. 14, *Bosman*, paras 76 and 127; *Deliège*, para. 43.

159 In that sense the concept of a national champion is inherently discriminatory.

160 *Donà*, paras 14 and 15; *Bosman*, paras 76 and 127.

161 Also see the discussion below on the less restrictive *access to compete* in the national championship, without being eligible for the title.

to accept the proposed sporting exception as a new ground of justification, the rule violates EU law and should therefore be disapplied.

Considering the sensitivity of the issue, the relative remote impact on the economy of restricted national titles, and the far-reaching intrusion into the realm of sport, the Court may think twice before going down this road. In addition to the possible reasons for finding such a limitation justified, there are also significant, albeit not fully legal, reasons for at least *not finding a violation*. This would be especially so where Member States are sensitive and open to citizenship and free movement rights in other areas, such as the allocation of prize money and participation in national competitions. In that regard, it would be wise for Member States and federations not to overreach by trying to exclude too much of a sport from EU law, as such an attempt might provoke or force the Court to require a more far reaching opening of the sporting scene. Ultimately, in order for sporting bodies to have legal certainty regarding the justifiability of direct nationality discrimination, the Court must develop its case law on this issue. In practice this will require a future test case.

2.3.6. Conclusion and recommendations

It seems likely that the exclusive eligibility of nationals for the national title can and perhaps also should be accepted under the second category of the general framework as inherent and necessary in the selection and crowning of the best national and therefore does not constitute an infringement of EU law.

However, it must be observed that some national titles are open to non-nationals in a number of Member States: for example aquatics in Germany, biathlon in Cyprus, Estonia and Finland, or gymnastics in France, Greece, and Slovakia.

In addition, rule makers are recommended to have due regard of the status of legal residents. Under EU law, EU citizens and their family members who have acquired the status of residents under Directive 2004/38 are to be treated equally to host Member State nationals. The question could therefore be asked whether sporting federations might not consider allowing them to win the national title in a championship as well. This would then of course involve a change in the ultimate goal of the championship: it would no longer be to crown the best national in a given discipline, but the best national and/or person residing in the country. This may not be required by EU law, but it might do justice to these EU citizens, and the spirit of EU integration.[162]

2.4. Exclusion from winning national medals and setting national records

2.4.1. A rule of purely sporting interest

Under the EU law framework set out above, the exclusion of foreign athletes from winning medals at national championships and setting national records might be qualified under category one as a 'rule of purely sporting interest'. This qualification is inspired by the predominantly symbolic nature of national medals and records: principally the award of a medal or recognition of a record is the official honour and recognition for an outstanding sporting performance.[163]

It is not disputed that medals and records, especially in the more commercialised sports, can have an economic dimension as well. Such sporting honours may, for instance, lead to more sponsorship or offers to compete in lucrative events. In order to attract more attention to a sporting competition, organisers and sponsors generally try to present an attractive list of famous and high-level participants. Despite this potential economic dimension, a strong argument can still be made to qualify medals and records as purely sporting, the economic dimension being truly secondary.[164] Such an argument also partially rests on the normative claim that such sporting honors *should* perhaps remain of purely sporting interest. Furthermore, as will be discussed further below, retaining the purely sporting qualification of medals and records also becomes more tenable once other, more economic aspects, such as prize money, are more accessible to free movers.

As outlined in the general framework, once an aspect has been qualified as a non-economic, purely sporting interest, it does not fall under the scope of the Treaty, and therefore does not have to conform with the rules on non-discrimination, citizenship or free movement. As a consequence, under this qualification medals and national records may be exclusively reserved for nationals in some sporting disciplines. This means that, where medals are to be qualified as of purely sporting interest, the rules for the award of medals and recognition of records may directly discriminate between nationals of a Member States and all foreigners including EU-citizens.

2.4.2. No restriction of free movement

If the exclusion of foreigners from winning national medals and setting national records is not to be accepted as a rule of purely sporting interest, the question then becomes what consequence would this entail under EU law? It could be argued that such a rule would fall under the second category of the abovementioned EU legal framework, and as a result would not constitute a restriction of the free movement rights.[165] It could legitimately be submitted that in the specific context of national championships, which have as their objective to crown the best national in any given discipline, it is inherent and necessary that prizes are awarded exclusively to nationals of that country. This would entail that sporting federations can therefore still exclude foreigners from receiving medals and establishing records under the economic free movement provisions.

2.4.3. Restriction and justification

Thirdly, should the exclusion of foreigners be qualified as a restriction on free movement, such a restriction might be justified. Justifying a directly discriminatory measure would require, as described in the general framework, a legitimate aim that is furthermore proportionately achieved by the measure. The express Treaty derogations cannot be used in this context and mandatory requirements will not be allowed if the Court adheres to the strict orthodoxy. As regards medals and records, none of the generally accepted legitimate objectives such as maintaining a fair and balanced competition, or training the youth, would seem to apply, as these simply do not necessitate such a restriction. Were the exclusive award of medals and records to be qualified as a restriction on free movement, therefore, this restriction would only seem to be justifiable under a possible newly conceived mandatory sporting requirement in the general interest (i.e. positive representation of nationality through sports). Again, the fact that the economic dimension of medals, although present, is and should be secondary to the sporting laurels and symbolism, would provide a central argument to allowing the restriction of medals and records since neither derogations[166] nor objective justifications[167] can generally be used to serve economic purposes.

2.4.4. Infringement of EU law

Lastly, should such a ground for justification be rejected, the exclusion of non-nationals from medals and records would violate the rules on free movement, and must as such be abandoned. This would mean that at least EU citizens should have the right to be awarded medals and set national records.[168]

2.4.5. Conclusion and recommendations

It is concluded that a rule restricting the award of medals and the recognition of national records to national athletes could best be classified

162 One could e.g. consider stipulating that apart from the host State nationals, also permanent legal residents under Directive 2004/38 (i.e. after five years of continuous residence) can win the national title in a given discipline.

163 On the basis of a kind of 'Titanium Dioxide' like reasoning, it could be argued that if the sporting interest clearly outweighs the economic aspect, a rule might still be qualified as being of purely sporting interest: Case 300/89 *Commission v Council* [1991] ECR I-2867.

164 On the difficult exercise of "severing the economic aspects from the sporting aspects" also see *Meca-Medina* paragraph 25 a.o.

165 *Meca-Medina* paragraph 42 and 45-47.

166 See e.g. Case 352/85 *Bond van Adverteerders* [1988] ECR 2085 para 34

167 On the case law and limited acceptance of what Hatzopoulous calls rules serving structural purposes, see Hatzopoulous, V., 'Recent developments of the case law of the ECJ in the field of services (2003) 37 *Common Market Law Review* 43.

168 And in addition perhaps also the family members of a migrant EU citizen on the basis of Directive 2004/38 and the third country nationals who can rely upon equal treatment rights conferred in international agreements concluded by the EU with certain third countries.

under EU law as a rule of purely sporting interest, falling outside the scope of the EU Treaty, and should thus be allowed to persist.

In this context, the following recommendations are being made:
- Record setting performances of foreign athletes in national championships of any given country may not be required to be officially recognized as national records in that host country.
- If foreign athletes can take part in national championships, but are in principle prevented from winning an official championship medal, one could envisage the introduction of a separate, 'open' podium ceremony, which would premium the best three athletes of a competition, and the national championship podium, which would premium the best three nationals. In France e.g., there is such a separate national podium in aquatics. And in Romania, foreigners who come first in the national championships in aquatics and pentathlon receive a special diploma.

3. Conclusions and Recommendations

3.1. Rules which prevent or hinder foreign athletes' access to national sporting competitions

3.1.1. Conclusions

The blanket exclusion of foreigners from participation in national competitions is a directly discriminatory measure which amounts to an unjustifiable infringement of EU athletes' free movement rights. These overly restrictive rules will have to be dismissed so as to allow foreign EU athletes access to these competitions.

Rules containing residence requirements affect predominantly foreign athletes. They are thus indirectly discriminatory and must in all likelihood also be dismissed as contrary to EU law unless they can be justified, which appears unlikely.

Athletes from countries outside the EU may benefit from free movement rights if they enjoy some form of legal protection as family members of an EU national or under an international agreement concluded between the EU and their country. Those third country nationals who are not protected by EU law can in theory continue to be excluded from participation in these tournaments.

Current practice in many sports and in several EU Member States does not seem to comply with the general level of required openness. Most commonly, overly long residency requirements seem to be imposed (see for instance the situation in Austria, where weightlifting requires two years of residence, aquatics, archery, badminton and canoeing 3 years, and shooting even up to 5 years of residence). Moreover, restrictions of freedom of movement may also be caused by the ambiguity or complete absence of rules in a given context, or by the explicit discretion given to decision makers (see, for instance, aquatics in Finland, where permission is given on a "case-specific manner").

3.1.2. Recommendations

It is recommended to grant EU athletes and their families, as well as other non-EU nationals who can rely upon EU rights access to national competitions in the same way as home state nationals, subject to the exceptions outlined below.

As there appear to be quite a few instances where this level of openness is not achieved, and as many national federations or clubs might not possess the legal capacity and know-how to establish EU-compliant rules, this might be an area where the European Commission may be of assistance. The Commission may assist for instance through coordination, dialogue, the drafting and circulation of best practices or model rules, or support for the education of national sports administrators. This would also help in reducing the ambiguity and uncertainty of some rules.

Nevertheless, it must be outlined that is possible to envisage some factual situations which might warrant specific, and limited, restrictions on the access of non-nationals to national competitions.:
- Restrictions inspired by the specific organizational needs of a sporting event and/or the objective of safeguarding space for the training and development of national sportsmen
- Restrictions when the national competition forms part of the national championship
- Restrictions inspired by the desire to ensure the regularity of the competition
- Factual limitation: the international calendar

3.2. Rules which prevent or hinder foreign nationals' access to national championships

3.2.1. Conclusions

In sports where the presence and participation of foreign athletes exerts a direct influence on the course of a sporting event, the exclusion of foreigners from participation in the national championship might be seen as an inherent and necessary measure to crown the best national in a given discipline. However, banning foreigners from taking part in national championships when their influence on the outcome is merely marginal or indirect, seems to be a disproportionate restriction of freedom of movement.

This conclusion also seems supported by current practice. Several general factual conclusions are interesting in this regard. First, at least each of the 26 different individual sports has an open championship in at least one Member State. Second, some sports have open championships in half the Member States. National championships are open to foreigners in aquatics and gymnastics in 11 Member States, archery in 12 countries, and athletics in 13, for instance. Third, sports with knockout systems indeed appear to be more closed. Boxing, for instance, is only open in two or three Member States.

However, the most prominent conclusion is perhaps that the general perception that national championships are closed for foreigners, does not correspond with a more nuanced reality.

3.2.2. Recommendations

If the participation of foreign athletes in multiple national championships is perceived to be problematic, one could solve this 'problem' by adopting a uniform international calendar, so that all national championships take place contemporaneously, e.g. on the same day.

A less restrictive measure, which would not ban foreigners from participating, but would merely impose limits on their participation, and which would take into consideration the constraints of the organization of a sporting competition and the specific nature of the event, would be more easily acceptable under EU law.

It could also be envisaged that foreign athletes can only take part in national championships of a given sport in a given country on the condition that they reside in the country during a certain period. However, required periods of residence amount to restrictions that require justification. It may be particularly difficult to demonstrate the proportionality of long required periods of residence. Where membership of a sports club or affiliation to a national sporting federation are required, these must also be offered to non-nationals on a non-discriminatory basis if they are to be objectively justifiable. Such rules, if proportionate, would have the additional advantage of practically excluding athletes from taking part in multiple national championships in different countries.

3.3. Rule which deny foreign athletes the possibility to win the national title in any given sporting discipline

3.3.1. Conclusions

It seems likely that the exclusive eligibility of nationals for the national title can be accepted under the second category of the general framework as inherent and necessary in the selection and crowning of the best national and therefore does not constitute an infringement of EU law.

However, it must be observed that some national titles are open to non-nationals in a number of Member States: for example aquatics in Germany, biathlon in Cyprus, Estonia and Finland, or gymnastics in France, Greece, and Slovakia. This may raise an inference that since particular national federations are able to open their national titles to non-nationals, more restrictive measures in other federations may not be proportionate.

3.3.2. Recommendations

Rule makers should have due regard of the status of legal residents. Under EU law, EU citizens and their family members who have acquired the status of residents under Directive 2004/38 are to be treated equal-

ly to host Member State nationals. The question could therefore be asked whether sporting federations might not consider allowing them to win the national title in a championship as well. This would then of course involve a change in the ultimate goal of the championship: it would no longer be to crown the best national in a given discipline, but the best national and/or person residing in the country. This may not be required by EU law, but it might do justice to these EU citizens, and the spirit of EU integration.

3.4. Rules which deny foreign athletes the possibility to win medals or set national records

3.4.1. Conclusion

A rule restricting the award of medals and the recognition of national records to national athletes should best be qualified under EU law as a rule of purely sporting interest, falling outside the scope of the EU Treaty, and should thus be allowed to persist.

3.4.2. Recommendations

Record setting performances of foreign athletes in national championships of any given country may not be required to be officially recognized as national records in that host country.

If foreign athletes can take part in national championships, but are in principle prevented from winning an official championship medal, one could envisage the introduction of a separate, 'open' podium ceremony, which would premium the best three athletes of a competition, and the national championship podium, which would premium the best three nationals. In France e.g., there is such a separate national podium in aquatics. And in Romania, foreigners who come first in the national championships in aquatics and pentathlon receive a special diploma.

[…]

Executive Summary

Non-discrimination is a general principle of EU law. One of the best known rules derived from this principle is the EU prohibition against nationality discrimination. The rule against discrimination on the basis of nationality is reflected in Treaty articles which prohibit nationality discrimination in all situations which fall within the scope of the EU Treaties. These rights are also granted to non-nationals who are protected by EU law. EU law currently grants freedom of movement rights of equal treatment to EU citizens but also to certain third country nationals such as non-EU family members of EU citizens and third country nationals who derive rights from international agreements between the EU and their non-EU member state. Equal treatment requires the abolition of both direct discrimination and rules which, whilst not framed in terms of nationality, in fact lead to unequal treatment.

Thus, nationality should not, as a matter of EU law, be a valid way to distinguish between domestic citizens and non-nationals. Yet sports within Europe generally remain organised on the basis of nationality. Under the 'European model of sport', national sports governing bodies are responsible for the organisation of sport within the national territory. As a consequence, sport is often inherently based on nationality. This creates tensions between the requirement to treat all EU citizens without regard to their nationality, and the pre-existing structures based on nationality and national territories by which many European sports are organised.

Even where rules are not expressly based on nationality, they may be prohibited under EU law. Restrictions to freedom of movement are considered discriminatory where nationals and non-nationals are governed by identical rules but where these indirectly favour nationals over non-nationals. For example, since residency requirements are more likely to be satisfied by nationals than by non-nationals, the Court has held that these are indirectly discriminatory, and therefore unlawful, unless justified and proportionate. Furthermore, EU law requires not only equal treatment of non-nationals but in fact prohibits all unjustified rules which hinder or render less attractive the exercise of free movement rights. Thus, when sports rules restrict the freedom of movement of non-nationals, they must be justified.

The Court of Justice of the European Union has in its case law sought to strike a balance between protecting EU citizens' rights to free movement and non-discrimination, and the specific characteristics of sport and the autonomy of sports governing bodies to organise sporting competitions. It has accepted that nationality rules in national team sports are matters of 'purely sporting interest' which have 'nothing to do with economic activity' and are therefore outside the scope of EU law. It has in later cases considered that some rules are 'inherent to the organisation and proper functioning of sport' and therefore do not in law constitute restrictions of EU free movement rights even where the situation is otherwise within the scope of the EU treaty. Where the Court has found that a sporting practice has restricted freedom of movement rights, it has carefully considered the justifications put forward to examine whether such rules are both justified and proportionate. In so doing the Court of Justice has accepted a number of sports-specific justifications such as the need to educate and train young players and the need to ensure the regularity of competitions. It may even be argued that the Court might accept justifications for nationality rules in sport which would not be acceptable in the context of other activities, thereby recognising that the specific characteristics of sport require specific treatment within EU law.

Despite such guidance from the Court of Justice, it has maintained that neither sporting activities nor nationality discrimination in sport can be categorically excluded from the scope of EU law. Although the Lisbon Treaty has conferred a supporting, coordinating and supplementing competence to the EU in the field of sport, its references to "openness and fairness" as guiding principles suggest that no significant exemption will be forthcoming solely on the basis of Article 165 of the Treaty on the Functioning of the European Union. In its recent case law, the Court has confirmed that issues regarding the compatibility of sporting practices with EU law must be resolved on a case by case basis. Although sports governing may wish that the EU institutions should provide legally certain guidance as to whether various such practices are considered acceptable, it is difficult to extrapolate firm guidance applicable to all sporting practices from the body of cases which has thus far been decided. When guidance issued in the past has been contrary to EU law, the mere fact that it has been issued by an EU institution has not protected sporting practices from being declared unlawful by the Court of Justice of the European Union.

Although the full legal framework applicable to sport has not yet been definitively settled, a presumption now exists that the general EU law rules apply to sport just as to any other activity within the scope of EU law unless a limited exemption can be identified. Within the general framework, it is clear that non-nationals are entitled to equal treatment and that restrictions to their freedom of movement between Member States must be justified and proportionate. According to settled case law, free movement rights include rights to equal treatment and unrestricted access to leisure activities such as sport even where the sport is not organised on a professional basis. Since citizens and their family members enjoy equal treatment in Member States other than their state of origin, they also enjoy as a matter of EU law equal access to both amateur and professional sport regardless of whether the citizen is also enjoying rights as a worker or a provider of services. Thus, non-nationals protected by EU law have a legal right to access sport in Member States other than their state of nationality. Even if the Court's exemption for nationality rules in national team sports were to be extended to individual sports by analogy, such rules would need to be carefully reasoned and limited to their proper function in order to escape censure. Other methods of analysis also require a proportionate justification in order to ensure that restrictions to non-nationals' free movement rights escape censure under EU law.

This study examines restrictions to the access of non-nationals to individual sporting competitions in the EU Member States. Its national experts have compiled data on the rules in all Member States as regards twenty-six Olympic sports in which competitors are individuals rather than teams. These include the triathlon, modern pentathlon, tennis, table tennis, badminton, rowing, canoe/kayak, athletics, aquatics, archery, boxing, judo, shooting, weightlifting, wrestling, taekwondo, equestrian sports, gymnastics, skating, luge, biathlon, bobsleigh, cycling, skiing, fencing and sailing. The data includes both rules that distinguish on the basis of nationality and rules which, whilst based on criteria other

than nationality, hinder or make less attractive the freedom of movement of non-nationals.

Any rules which hinder or make less attractive the exercise of non-nationals' freedom of movement rights must be justified under EU law. This study therefore also seeks to comprehensively list the justifications put forward by sports governing bodies for those rules. However, although national experts have requested information on both the rules themselves and any justifications for those rules, relatively few justifications were put forward to explain restrictive sports rules. This raises the inference that the many substantially unjustified restrictions to the access of non-nationals to sporting competitions are unlawful under EU law. There are also instances of justifications which are difficult to accept in the context of the established legal framework and which therefore as a matter of law seem unlikely to survive a legal challenge. For example, it is not settled law that access to domestic competitions can be restricted on the basis of nationality solely because the competition is organised by the national governing body.

An examination of the rules of specific sports organisations by country also demonstrates that a single sport can be subject to very different rules across the EU Member States. This suggests that some national rules are more restrictive than necessary. In some cases, the difference arises because even some Olympic sports have no national governing bodies in certain Member States. Although this study was limited to the twenty-six identified individual Olympic sports, a further investigation beyond Olympic sports may reveal a significant additional number of these situations. In cases where sports did have domestic governing bodies in all EU Member States, the national rules governing access to sports were also not always uniform. Even where such sports had European-level governing bodies, their rules often left domestic governing bodies with significant margins of discretion regarding the access of non-nationals to domestic competitions. The diversity of rules regarding access may suggest that some of those rules are more restrictive than is necessary. For example, if one governing body does not require a long period of prior residence, it may be more difficult for another governing body within the same sport to demonstrate that its longer residence requirement is proportionate and thus acceptable under EU law.

After identifying the rules governing access of non-nationals to individual competitions in the selected sports, the study then maps rules and those justifications which have been offered against the general framework of EU free movement rules in an effort to determine whether the rules could, if challenged, be declared lawful by the Court of Justice of the European Union. Four categories of sporting rules emerge from this analysis. The first category of rules which do not fall within the scope of the Treaties and are thus not subject to EU law includes 'purely sporting' rules. The second category involves rules that do not in law constitute restrictions to free movement such as those rules which are 'inherent to the organisation and proper functioning of sport'. The third category involves rules which, whilst constituting restrictions, may be justified and proportionate. Finally, the study observes that some rules cannot be considered justified or proportionate and would therefore be unlikely to survive a legal challenge in their current form.

'Purely sporting' rules are outside the scope of EU law. EU law does 'not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only'. However, such rules must be 'limited to their proper objective'. It may be difficult to demonstrate that the exclusion of all non-nationals from all sporting competitions constitutes a 'purely sporting' rule. Furthermore, since the Court has clarified that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down', the exclusion of a specific restriction does not imply the exclusion of all restrictions within that sport. The most likely candidates as 'purely sporting' rules may include rules regarding the distribution of national representative honours and nationality rules in national team sports. It may even be argued that the distribution of medals has so marginal an economic dimension that it could fall within this category of rules.

Some sporting rules do not in law constitute restrictions to freedom of movement. Since they are not restrictions, they may not always need detailed justification. Some rules have been considered inherent in the organisation and proper functioning of sport by the Court of Justice. These could include rules limiting the number of participants in a judo tournament. Other hindrances to free movement may be so 'uncertain and indirect' that they are not in law considered restrictions and therefore do not require justification. In some cases, the Court has distinguished between non-discriminatory rules which hinder access and must be justified, and non-discriminatory rules which affect issues other than access and which therefore do not require justification. Any rule which as a matter of EU law does not require justification is likely to offer a wide margin of appreciation to sports governing bodies.

However, rules which constitute restrictions to freedom of movement must be justified and proportionate. These include all rules restricting access to sporting competitions as well as any rules involving the unequal treatment of non-nationals. Several sport-specific justifications, such as the need to ensure the regularity of competitions and the need to educate and train young players, have in principle been accepted by the Court of Justice. However, it remains doubtful whether directly discriminatory rules can be justified other than by reference to Treaty grounds of public policy, public security and public health. In such cases, it may be difficult to find a justification which the Court will be prepared to accept. Furthermore, all restrictions must be proportionate: they must be suitable for achieving the lawful aims but also the least restrictive measures which will achieve those aims. Thus, rules established by national bodies which are more restrictive than the rules of other national bodies within the same sport may be difficult to justify since the existence of less restrictive measures in other domestic systems implies that less restrictive measures can achieve those aims.

The final category of rules identified by the study includes those restrictions which are not justified and proportionate and therefore breach EU law. Prominent past examples of these include the 3+2 rule, which restricted the access of non-nationals to professional football and was declared unlawful in the *Bosman* case. Even if the Court could be argued to offer a wide margin of appreciation to sporting rules in some cases, there is also a body of modern case law that demonstrates careful examination of the proportionality of such rules. The onus will be on governing bodies to demonstrate the justifications and proportionality of restrictions. In the absence such evidence, which in the context of this study was often not forthcoming despite direct requests addressed to sports governing bodies, restrictions on the access of non-nationals will be contrary to EU law.

It is clear that the principles of fairness and openness which are reinforced by Article 165 of the Lisbon Treaty have not yet been uniformly implemented by sports governing bodies within the European Union. There are many sports where the access of non-nationals is restricted by reference to nationality even in cases where no element of national representation can be identified. In some sports, access even at an amateur level is restricted by rules such as residence requirements that restrict the equal access of non-nationals. Organising bodies have not always clearly articulated the reasons for restricting the access of non-nationals, and where reasons have been articulated, they are not always in compliance with EU law. The diversity of practices also suggests that some practices within the same sport are more restrictive than others, and that the more restrictive practices may not be proportionate and are therefore not justified under EU law.

There are several ways to ensure the greater compliance of sporting rules with EU law. It may be that many sports bodies lack the expertise and specialist knowledge required in order to ensure that their practices comply with EU law and in particular that non-nationals are able to access sport where appropriate. In such cases, sports bodies, Member State administrations and non-nationals themselves would mutually benefit from the exchange of good practices and from training specifically targeted at ensuring awareness of and compliance with EU law. However, where national associations fail to make adjustments required by EU law and where Member States fail to protect the rights of non-nationals to access sports, it may be necessary for the Commission to consider more direct approaches such as infringement proceedings.

Infringement proceedings and domestic legal challenges which result in preliminary references to the Court of Justice of the European Union would also offer opportunities to clarify the legal framework in those areas where sports governing bodies are legitimately concerned about a lack of legal certainty. Whilst the Court of Justice remains committed to a case-by-case analysis, a greater body of case law would provide a greater degree of certainty. in particular, where the Commission has already investigated practices and raised doubts about their restrictive effects, it may be necessary for the Court of Justice be given an opportunity to directly consider such issues. The resulting legal certainty will assist sports governing bodies to develop practices that both protect the specific features of sport whilst complying with the rights of non-nationals under EU law.

Recommendations

On the basis of the EU Treaty provisions on citizenship, non-discrimination on grounds of nationality and freedom of movement, the relevant secondary legislation and the case law of the Court of Justice of the EU in this respect, the following suggestions are made:

1. As far as access of foreign athletes to national competitions is concerned, it is recommended as a rule under EU law to encourage and allow the participation of foreign athletes (EU citizens and also third-country nationals to the extent that they may benefit from EU rights) as much as possible, while taking into account the constraints imposed by the organization of a specific sporting event and respecting the need to ensure the training of young players and the regularity of the competition.
2. As far as participation of foreign athletes in national championships is concerned, it is in general recommended under EU law that these athletes be allowed to compete in the national championship of a given sporting discipline, provided that they do not exert a direct and substantial influence on the outcome of the competition. In sports which involve direct eliminations, it is accepted in principle that foreigners may be excluded from participation in the national championship, as they exert too direct and substantial an influence on the outcome of the tournament.
3. As far as the award of national titles is concerned, under EU law winning the national title may remain the exclusive prerogative of nationals of a given country. This can be classified as a rule which comes under the scope of the EU Treaty, but does not form a restriction to freedom of movement as it is inherent to the organisation and proper functioning of national titles and proportionate and therefore does not violate EU law.
4. As far as the award of medals in championships and the setting of national records is concerned, this is likely to be a matter of purely sporting interest which does not come under the scope of application of the EU Treaty.
5. The European Commission is invited to enter into a constructive dialogue with national federations who still apply unacceptable discriminatory measures on grounds of nationality, so as to have these measures removed. If necessary, the Commission may have to undertake enforcement action so as to preserve the equal treatment rights of athletes.

[…]

Implementation of the WADA Code in the European Union

Introduction

The fight against doping has become an increasingly important theme on the European agenda.

On this subject, the White Paper on Sport published by the European Commission on 11 July 2007 stated the following:

The EU would benefit from a more coordinated approach in the fight against doping, in particular by defining common positions in relation to the Council of Europe, WADA and UNESCO, and through the exchange of information and good practices between Governments, national anti-doping organisations and laboratories. Proper implementation of the UNESCO Convention against Doping in Sport by the Member States is particularly important in this context.

The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States.

In the past few years, activities in this field have essentially concentrated on the Code of the World Anti-Doping Agency (WADA) which is the subject of the Copenhagen Declaration and the UNESCO Convention against Doping in Sport. Naturally, the work of the informal European working party, the 'EU Working Group on Anti-Doping', actively contributes to this.

Despite the increased interest in this subject, in practice the central objective of the Code, i.e. to ensure harmonised, coordinated and effective anti-doping programmes at both an international and national level with regard to the detection, deterrence and prevention of doping, is still far from being realised for a variety of reasons. The necessity for a European framework for cooperation in the fight against doping, on the basis of the Code, therefore requires further study.

An initial requirement for the achievement of strict agreements on a European level is that reliable information is available about the state of affairs in each Member State.

With a view to the Belgian Presidency of the European Union in the second half of 2010, the Flemish Minister for Sport, Philippe Muyters, has asked the T.M.C. Asser Institute of International Law in The Hague to carry out a thorough study of the application of the Code within the European Union and to catalogue its findings.

In this report, the T.M.C. Asser Instituut presents the results of its study. Its inventory was undertaken on the basis of the attached questionnaire which was distributed amongst the relevant government departments and/or agencies with primary authority in the area of sport in each Member State and amongst the National Anti-Doping Organisations (NADOs) in the European Union. Included with this study is a CD-ROM containing the text of the Code, the International Standards, the UNESCO Convention against Doping in Sport, as well as national legislation and sports rules and regulations governing anti-doping which were received and collected as supplements to the answers.

As far as Belgium is concerned, a distinction should be made between the four different authorities authorised to fight doping, namely: the Flemish Community, the French Community, the German-speaking Community and the Joint Community Commission.**

The study was concluded on 6 August 2010.

Conclusions

A. Relationship between the national rules and regulations and the WADA Code

A.1 In what way has the UNESCO Anti Doping Convention been implemented in your country?

One EU country is not yet a State Party to the UNESCO Convention against Doping in Sport.

Implementation of the WADA Code

- *in a Doping Act:* *10 EU countries*
- *in a Sports Act:* *5 EU countries*
- *in other Acts:* *9 EU countries*

Doping rules in regulations of sports authorities: *3 EU countries*

No implementation: *1 EU country*

A.2 On which points do the anti-doping rules and regulations in your country differ from the WADA Code?

- *In 20 EU countries no differences exist between the WADA Code and the anti-doping rules;*
- *In 5 EU countries the anti-doping rules differ from the WADA Code on some points;*
- *3 EU countries are in the process of bringing the law into conformity with the principles of the new version of the WADA Code;*
- *In 1 EU country the process of implementation has been abandoned.*

A.3 On which points does your country's practice differ from the prevention of doping envisaged in the Code?

- *In 15* EU countries practice does not differ from the prevention of doping envisaged in the Code;
- *In the remaining EU countries practice differs on some points, namely:*
  - *contracts on doping controls concluded with sport organizations;*
  - *the cost of transfer and analysis of doping samples;*
  - *dissemination of personal information;*
  - *frequency of in- and out-of-competition doping controls;*
  - *the modality of doping sanctions;*
  - *the publication of doping sanctions;*
  - *quality of doping control officers;*
  - *the right to appeal;*
  - *the use of ADAMS;*
  - *the whereabouts issue.*

A.4 Have your rules and regulations been declared WADA compatible with the present WADA Code, 2009 version?

- *WADA has declared the rules and regulations of 15 EU countries to be compatible with the present WADA Code;*
- *The rules and regulations of 13 EU countries have not yet been declared compatible with the present WADA Code;*
- *The rules and regulations of 1 EU country have been declared incompatible with the present WADA Code.*

A.5 Does your country make use of the Anti-Doping Administration and Management System (the ADAMS database), which the WADA makes available to all stakeholders?

- *11 EU countries make unrestricted use of ADAMS.*
- *This means that ADAMS is used for whereabouts, Therapeutic Use Exemptions, mission orders and results management.*
- *7 EU countries make restricted use of ADAMS.*

* Report on *The Implementation of the WADA Code in the European Union,* commisioned by the Flemish Minister responsible for Sport in view of the Belgian Presidency of the European Union in the second half of 2010 to The T.M.C. Asser Institute, the Hague, The Netherlands..

** For practical reasons, in the Conclusions of the study the Communities of Belgium were counted as separate countries, whenever differences were found in the replies of those Communities.

- *6 EU countries are currently in the process of implementing ADAMS.*
- *5 EU countries do not make use of ADAMS.*

A.6 Has a TUEC or Therapeutic Use Exemption Committee been established in your country?
Only in 3 EU countries a Therapeutic Use Exemption Committee has not been established.

A.7 Are all five International Standards of the WADA and the 2009 Code fully applicable in your country?
- *All five International Standards of the WADA and the 2009 Code are fully applicable in 13 EU countries.*
  - *The Standard for Laboratories is not applicable in 5* EU countries.
  - *Work on the implementation of the International Standard for Protection of Privacy is ongoing in 5* EU countries.
  - *In 2 EU countries the International Standard for the Protection of Privacy is only applicable to the extent that it does not infringe Directive 95/46/EC or national legislation for privacy protection.*
  - *In 2 EU countries the International Standard for Protection of Privacy is not applicable.*
  - *In 1 EU country two International Standards are applicable (laboratories and the list of banned substances).*
  - *In 2 EU countries none of the Standards are applicable.*

B. Specific points of attention

B.1 With which anti-doping organisations (ADOs) - both national and international - are you currently exchanging information?
- *Apart from communicating with other NADOs and WADA, which NADOs are obliged to do in case of a positive finding, all NADOs have their own specific circles in which information is exchanged.*
- *Only 1 EU country reports that it does not exchange information.*

B.2 Are the doping sanctions imposed by other ADOs recognized and fulfilled in your country?
- *18 EU countries recognize and carry out doping sanctions imposed by foreign ADOs.*
- *7 EU countries conditionally recognize and carry out doping sanctions imposed by foreign ADOs.*
- *4 EU countries do not execute foreign doping sanctions.*

B.3 What is your opinion concerning a mechanism for reciprocity (mutual recognition) of doping sanctions between the 27 EU Member States?
- *All EU countries are in principle in favour of the idea of mutual recognition of doping sanctions between the 27 EU Member States.*
- *Some EU countries are only in favour provided that, inter alia:*
  - *the sanctioning bodies operate according to the WADA Code;*
  - *the rights of the defence are respected.*
- *Other EU countries are in favour of the idea of mutual recognition only if all EU countries would have harmonized rules and identical sanctions.*

B.4 Do you ever carry out doping controls at the request of another Member State or NADO?
- *The NADOs of 26 EU countries carry out doping controls at the request of another Member State or NADO.*
- *1 EU country is not in a position to carry out tests for another NADO.*

B.5 Which rules and regulations apply in your country concerning trade and distribution of doping products?
- *The trade and distribution of doping products is a criminal offence prohibited and sanctioned by:*
  - *the Criminal Code in 8 EU countries*
  - *drugs laws in 10 EU countries*
  - *the Sports Act in 4 EU countries*
- *5 EU countries have no existing laws and regulations relating to trade and distribution of doping products.*

B.6 What are your NADO's statutes?
NADOs in EU countries can be bodies that are subordinate to a Ministry or acting independently. Besides public bodies, they can be foundations under private law or have corporate status.

B.7 How has your national registered testing pool for doping tests been defined and what does it consist of, and what is the number of sportsmen assembled in the registered pool on 1 February 2010?
Because NADOs are free to decide which athletes will be included in its national registered testing pool the composition of these pools differs widely from country to country.
The number of sportsmen included in the registered pool on 1 February 2010 differs widely from country to country.

B.8 What is the relationship between the sport federations, the public authorities and the NADO in your country?
- *In nearly all EU countries the relationship between the NADOs, the sport federations and the public authorities has been defined in some way.*
- *Cooperation between the sports federations and the NADOs is determined by either:*
  - *a legally subordinate position of the sport federations (5 EU countries);*
  - *the allocation of state funding (14 EU countries); or*
  - *agreements (5 EU countries).*
- *The situation in 3 EU countries is not clear.*

B.9 Does your NADO already apply the WADA's Athlete Biological Passport programme in the fight against doping?
- *The NADOs in 5 EU countries apply the WADA's Athlete Biological Passport programmes.*
- *3 EU countries will introduce the programmes in 2010.*
- *The NADOs in 2 EU countries use programmes which are similar to WADA's Athlete Biological Passport programmes.*
- *In 2 EU countries the programmes are the object of study.*
- *The NADOs in 14 EU countries have not yet implemented the Athlete Biological Passport programmes.*

Modern Sports Law

by Jack Anderson
2010 Hart Publishing Oxford UK & Portland Oregon USA
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According to the Author, Dr Jack Anderson, who is Senior Lecturer in Law at Queen's University, Belfast, Northern Ireland, the aim of this Book is to "*provide an account of how the law influences the operation, administration and playing of modern sports*." Including, presumably, '*Wiff-waff*' according to Boris Johnson, Mayor of London, looking forward to '*Ping-Pong*' coming home to the London Olympics in 2012!

In its Eight Chapters, the Book covers the historical development of Sports Law; national and international issues on the operation and administration of sport; matters relating to the playing of and participation in sport; and the commercial aspects of the evolving professional sports industry, which is big business globally and nationally.

Within these general themes, the Book deals with such vexed legal questions as challenges to the decisions of sports governing bodies; civil and criminal liability in sport (I note particularly that there is good coverage of boxing, a subject on which Anderson is something of an expert!); doping in sport; sports-related contracts of employment; and, a subject particularly close to your reviewer's heart, the settlement of sports disputes by ADR, including a useful review of the activities of the Court of Arbitration for Sport, based in Lausanne, Switzerland, whose influence on the '*extra-judicial*' settlement of sports-related disputes at the international level continues to increase year on year. The actual choice of the topics covered in the Book is, in the words of its Author, "*somewhat eclectic*…. [reflecting] … *the assorted nature of the subject matter*."

The Book opens with a manful and laudable attempt - as it should bearing in mind its title! - to define what 'Sports Law' is; or whether we should - perhaps more strictly - refer to 'Sport and the Law' - an academic 'hoary old chestnut', if ever there was one! The Author, I think quite rightly, settles for the term 'Sports Law'!

The Book also covers the application of European Union Law (EU) to sport - an important and, again, evolving topic, which no self-respecting Book on Sports Law can possibly omit. Needless to say, there is a fairly comprehensive analysis of the landmark decision of the European Court of Justice (ECJ) in *Bosman* and its ongoing repercussions and implications for the further development of 'Sports Law' at the EU level.

However, there is one glaring omission from the Book, especially as it is aimed primarily at students, and that is the absence of any Bibliography - not even a 'Select' one. The Book, however, is complimented by a workmanlike Index, as well as useful and comprehensive Tables of Cases, including Commonwealth and other Jurisdictions and ECJ Decisions, Statutes, International Treaties and - the nowadays obligatory - Court of Arbitration for Sport (CAS) Awards - to the extent, of course, that they have been placed in the public domain, one of the weaknesses, from a precedents point of view, and one of the strengths, from an ADR point of view, of the CAS.

The Law is stated as at 30 April, 2010.

All in all, this is a well-researched and well-written Book on 'Sports Law' and one that I would heartily and unhesitatingly recommend to students and practitioners alike!

Ian Blackshaw

Sport and the Law: A Concise Guide

by Laura Donnellan
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The aim of this Book is to provide "*an overview of the law relating to sport in Ireland and other common law jurisdictions, namely, England, the United States, Canada and Australia*."

From the title of this Book, it is clear that the author, Laura Donnellan, who is a Lecturer in the School of Law of the University of Limerick in the Republic of Ireland, seems to be a disciple of the late Edward Grayson. Although in her Introduction, she broaches and gets close to the subject of 'Sports Law' in the following terms:

> "*In recent years we have seen an increase in the involvement of the law in sport. The professionalisation and commercialisation of sport has brought with it a plethora of legal issues. In recent years, sportspersons have seen an increase in earning potential. If an athlete suffers a career-ending injury or is involved in a contract or sponsorship dispute, or a doping allegation, he or she will be more likely to seek redress in the courts. In short, sportspersons are demanding higher standards of justice. As a result of these sporting cases, a cohesive body of law pertaining to sport has developed*."

Leaving aside this issue of whether there is such a thing as 'Sports Law', on which opinion is widely divided, the Book covers a wide range of legal issues. These include: participator violence and civil liability in sport; doping and gender testing in sport, including a brief reference to the infamous Caster Semenya case; commercial issues in sport, including the application of the Common Law Doctrine of 'Restraint of Trade' and, in particular, the Dwain Chambers' eligibility issue, which, quite frankly, is a scandal; European Law and sport (I would quibble with the use of this term instead of European Union Law, as 'European Law' also includes a range of sporting issues arising under the European Convention on Human Rights of 1950, which is not mentioned at all in this Chapter and only briefly referred to elsewhere in the Book, despite its increasing importance!); and, of course, ADR and sport, and, in particular, the importance and ever-developing role of the Court of Arbitration for Sport (CAS) in the settlement of sports-related disputes '*within the family of sport*'.

The Book also deals with the fascinating and controversial topics of the legality of boxing and other fighting sports, namely so-called 'mixed martial arts'; and animals in sport, including the controversial UK Hunting Act of 2004, which banned fox hunting with dogs, and the Hansen case, decided by the CAS on appeal from the FEI, which involved the doping of his horse competing as part of the Norwegian team in the jumping event at the Beijing Olympics in 2008.

A feature of the Book, that your reviewer particularly liked, is that every Chapter ends with either a Conclusion or a Summary, which is very helpful to the reader.

The Book also includes a useful Bibliography, complemented by copious footnotes, referring to other helpful materials and resources, and List of Acronyms, of which Sport has spawned so many over the years, as well as the usual Tables of Cases and Statutes. There is also a short but adequate Subject Index.

The Book lives up to its sub-title in providing the reader with a clear and concise guide to the subject of the interface between sport and the law in all its contemporary and wide-

ranging manifestations, for which the Author is to be warmly congratulated!

I would recommend this Book to all those who are involved - in some way or another - in the administration, practice and business of sport!

Ian Blackshaw

International "Lex Sportiva" Conference*

Universitas Pelita Harapan

Djakarta, Indonesia
22 September 2010

Opening address by Dr Andi Alfian Mallarangeng, Minister of Youth and Sport of the Republic of Indonesia

Key-note address by Dr (HC) Rita Subowo, Chairman of the Indonesian Olympic Committee

From left to right: Hinca IP Pandjaitan, SH MH ACCS, Director of the Lex Sportiva Instituta Indonesia, Djakarta, Alexandre Miguel Mestre, PLMJ LaW Firm, Lisbon, Portugal, and Prof. James A.R. Nafziger, Thomas B. Stoel Professor of Law, Willamette University College of Law, Salem, Oregon, United States of America, and co-founder of the Hague International Sports Law Academy, at the signing ceremomy of the Djakarta Declaration on Lex Sportiva.

* In cooperation with the Lex Sportiva Instituta Indonesia and supported by the Minister of Youth and Sports of the Republic of Indonesia, the indonesian National Sports Committee and the Indonesian National Olympic Committee, The Football Liga Indonesia, and the ASSER International Sports Law Centre / opening conference of the Hague International Sports Law Academy (HISLA)

From left to right: the Indonesian Minister of Sport, the Chairman of the Indonesian NOC, and Dr Janez Kocijancic, President of the National Olympic Committee of Slovenia and co-founder of HISLA.

Key-note address by Prof.Dr Bintan R Saragh SH, Dean of the Faculty of Law, Universitas Pelita Harapan, Djakarta, Indonesia.

Key-note address by Dr (HC) Jonathan Parapak, Rector of Universitas Pelita Harapan (UPH).

Prof.Dr Klaus Vieweg, Faculty of Law, Friedrich-Alexander University, Erlangen-Nuremberg. Germany, and co-founder of the Hague International Sports law Academy, signing the Djakarta Declaration on Lex Sportiva.

After the solemn adoption of the Djakarta Declaration on Lex Sportiva, 22 September 2010, and also announcing the official start of the HAGUE International Sports Law Academy (HISLA); from left to right: Janez Kocijancic, Alexandre Mestre, Klaus Vieweg, Rob Siekmann, Jim Nafziger, Bintan Saragih, Franck Latty (Professor of Public Law, Law Faculty of Clermont-Ferrand, University of Auvergne, France), and Hinca Pandjaitan (also chairing the Conference's afternoon session)

The text of the Djakarta Declaration on Lex Sportiva is published in The International Sports Law Journal (ISLJ) 2010/3-4 at pp. 18-19; and see for the text of the opening address by Janez Kocijancic on behalf of HISLA, that was delivered at the Lex Sportiva Conference in Djakarta. ISJ 2010/3-4 at p. 10.

Constitution of the Asian Council of Arbitration for Sports and Sports Arbitration Tribunal of Asia

To,
The President, Olympic Council of Asia
The Secretary General, Olympic Council of Asia,
Executive Board Member, Olympic Council of Asia,
President/s, National Olympic Committee/s of Asia
Secretary General, National Olympic Committee/s of Asia

Sir,

I am pleased to inform you that the 16 World Congress of the International Association of Sports Law, had been successfully organised on 25 - 28 November 2010 at Seoul, Korea. This Congress was organised by the Korean Association of Sports and Entertainment Law. The delegates were all from the Sports Lawyers from the whole globe, including more than 53 Asian delegates. The Congress resolved their resolution as, "Seoul Declaration". Copy of the Declaration is attached for your kind perusal in this regard.

One of the resolution was to constitute an "Asian Council of Arbitration for Sports" here in after referred as 'ACAS'. The purpose for constituting the ACAS was to establish and manage the "Sports Arbitration Tribunal of Asia" here in after referred as 'SATA' .The objective behind the resolution to constitute the ACAS and SATA was to establish the decentralize office of the International Council of Arbitration for Sports (ICAS) in Asia as well as decentralize court of the Court of Arbitration for Sports (CAS). Whose principal bench is at Lausanne, Switzerland. Hence it is pecuniary very difficult for the members of the National Olympic Committees of Olympic Council of Asia to approach CAS at Lausanne.Where as the autonomy of the National Olympic Committee/s and National Sports Federation/s are being interfered by the Governmental Agencies or the Judiciary in a large scale. Where as the Olympic Charter advocates that the disputes between the Sports Organisation shall be resolved with their own mechanism.

Therefore, a foundation Committee consisted of more than 53 Sports Lawyers and Sports Law experts have resolved to constitute the Asian Council of Arbitration for Sports and Sports Arbitration Tribunal of Asia. You being the great stake holder of the Olympic Movement of the Asian continents and of your countries know that most of the Arbitrators and Mediators in ICAS and CAS are being empanelled from the European and American countries. The Sports Lawyers from the Asian countries are hardly given any positions in the ICAS and / or CAS. So it was thought that in order to promote the Sports Lawyers and Sports Law Experts with in from the countries in Asian Continents the constitution of the ACAS and SATA is of a great importance. Because most of the Arbitrators and Mediators involved in the Arbitration or Mediator during the Asian Games and / or any International Sports Tournaments does not know the laws of the Asian Countries and costs heavily on the NOC and NSO of the Asian Continents.

I am attaching the copy of the draft Agreement of the Asian Council of Arbitration for Sports and Sports Arbitration Tribunal of Asia for your kind perusal and comments and suggestions. So that with the help of your good office we can approach the International Olympic Committee and the International Council of Arbitration for Sports to recognize our decentralize office in any Asian Country like Sydney or New York.

Your comments and / or suggestion in this regards is anticipated with in a month from the receipt of this draft Agreement of ACAS and / or SATA, with a recommendation of the Sports Lawyers or Sports Law Experts from your country to become the members of the ACAS.

Thanking you, with kind regards.

Yours Sincerely,

(Prof. Dr. Amaresh Kumar)
Advocate,
Supreme Court of India,
Secretary General, Asian Council of Arbitration for Sport
Hony. Visiting Professor & Research Fellow of ASSER International Sports Law Centre,
The TMC ASSER Institute of International Laws, the Hague,
The Netherlands,
Secretary General, All India Council of Physical Education & Sports Law India
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Asian Council of Arbitration for Sports

Minutes of The First Meeting of the Founder Members of the Asia Council of Arbitration for Sports, dated : 26-27 November, 2010 Seoul, Korea

The 16th Worlid Congress of the International Association of Sports Law was organised by the Korean Association of Sports and Entertainment Law from 24-28, November, 2010 at the Hanyang University, Seoul, Korea. The Congress was inaugurated by Kim, Chong - Yang, the President of the Hanyang University, Korea, at Hanyang Institute of Technology building, 6th Floor of the Hanyang University. Prof. Panagiotopoulos, Dimitrios, the President of the International Association of Sports Law, Athens, Greece, presented the Congratulatory remark after the inauguration and welcome speech of Kim, Chong - Yang. Prof. Yeun, Kee-young, the President of the Korean Association of Sports and Entertainment Law addressed the opening address.

Followed by the inaugural functions and addresses the Key-Note speeches were presented by Pangiotopoulos, Dimitrios (President of IASL, Greece), Ms. Clement, Annie (University of New Mexico, USA), Hunt, Ian (President, Australia and New Zealand Sports Law Association), Colantuoni, Lucio, (University of Degli Studi Di Milano, Iteli), Shevchnko, Vagan (Head, International Sports Law of the Department for Physical Culture and Sport, Moscow, Russia), Liu, Yan (Vice-President of China Sports Law Association, China), BORGES, Mauricio Ferrao Pereia (Felsberg e Associados Lawyers, Brazil), Saito Kenji (Vice President of Japan Sports Law Association, Japan), Prof. (Dr.) Kumar, Amaresh (Advocate, Supreme Court of India & Secretary General, Sports Law India and All India Council of Physical Education, India), Mould, Kenneth (University of Free State, South Africa), Shokri, Nadar (President, Legal Commission of Olympic National Committee of Iran, Iran), Foks, Jacek (Deputy Director, Polish Institute of International Affairs, Poland) and Yeun, Kee - Young (President of the Korean Association of Sports and Entertainment Law, Korea). They all presented their paper on the topic, "Sports Law in the World - Present and Perspective" in relation to their Nation on the first day of the conference on 25, November 2010.

On 26 November 2010 the second day of the session, all together, 60 (Sixty only) papers were presented by the delegates of the several countries as per the schedule and list enclosed with this minute. The topic, "CAS and Sports Jurisdictional Order, Need for Constituting, 'Sports Arbitration Court of Asia' the First Appellate Court of CAS" was by presented Prof. Dr. Kumar, Amaresh was very much appreciated by all the delegates presented in the Conference. It was felt my most of the Asian Delegates that since most of the Sports Law Experts are present in this Congress. A resolution shall be passed to formulate and constitute the, "Sports Arbitration Court of Asia".

As on the request of the Asian delegates present in the present

Congress were called by Yeun, Kee - Young, President of the Korean Association of Sports and Entertainment Law, a meeting was convened at the Lexington Hotel, Seoul on 26, November 2010 at 05:00 PM in room No. 1312. The Following members attended the meeting:

S.No.	Name	Country
1.	Liu, Yan	China
2.	Hon-Jun Ma	China
3.	Lin Zhu	China
4.	Jia-Si Luo	China
5.	Prof. Xiao-Shi-Zhang	China
6.	Zhi-Qiang Wang	China
7.	Zhongqiu Tan	China
8.	Xu-Feng Yan	China
9.	Bing Liang	China
10.	Weidong Tang	China
11.	Bao-Qing Li	China
12.	Zhe Jin	China
13.	Rihun WU	China
14.	Ji Jin	China
15.	Xiaoping Wang	China
16.	Yi Li	China
17.	Li Shen	China
18.	Yuan Gao	China
19.	Sung-Bae Kim	China
20.	Fa-Chao Ma	China
21.	Zhang Ruo	China
22.	Fei Gao	China
23.	Hua - Rong Chen	China
24.	Yan Yan	China
25.	Boyuan Zu	China
26.	Shixi Huang	China
27.	Shuli Guo	China
28.	Yang - Jin Yoon	China
29.	Saito, kenji	Japan
30.	Takuya Yamazaki	Japan
31.	Kimihito Kato	Japan
32.	Yuki Mabuchi	Japan
33.	Felio J. B. Marteorell	Japan
34.	Taisukue Matsumoto	Japan
35.	Tomoyuki Kataoka	Japan
36.	Andy Hall	Japan
37.	Yeun, Kee - Young	Korea
38.	Doo - Hyun Kim	Korea
39.	Hye - Seon Choi	Korea
40.	Seok - Jung Shon	Korea
41.	Woo - Yeul Baek	Korea
42.	Jae - Kyoung Lee	Korea
43.	Sang - Kyum Kim	Korea
44.	Gu - Min Kang	Korea
45.	Dae - Hee Kim	Korea
46.	Yun -Chul Baek	Korea
47.	Jang, Jae - Ok	Korea
48.	Ki - Tae Kim	Korea
49.	Joo - Jongmi	Korea
50.	Shorki, Nader	Iran
51.	Jady Hassim	Malaysia
52.	Adnan Wali	UAE (Ajman, Iraq)
53.	Kumar Amaresh Prof. (Dr.)	India
54.	Panagiotopoulos, President, IASL Dimitrios (Special Invitee)	

The meeting called in order, by the President, of IASL, Panagiotopoulos, Dimitrios, and the motion was moved by Joo, Jongmi, Secretary General of the Organising Committee of the 16th World Congress of the IASL, stating that during the Paper presentation by Prof. Dr. Amaresh Kumar, a need was felt my all the delegates that a fist Appellate Court of Arbitration for Sports was required at the continent level. As the Head of the CAS is at Lausanne, Switzerland. Which become some time very difficult and costly for the National Olympic Committee to approach due to the far off distance and cost effective to reach at Lausanne, for redressal of their disputes. She stated that if the First Appellate Court of CAS is established at every continents the NOC or the Sports Federation will be in the better way to settled their dispute first at their Continent Level Sports Arbitration Tribunal and in case of any party is not satisfied with the award of the Continental Level Sports Arbitration Tribunal then they can approach the CAS as final Court for Sports Arbitration. This will also minimize the interference of the local court to intervene in the disputes related with the Sports.

She further informed that since, the Congress is also resolving to formulate one Law for Sports related disputes, so that the sports related disputes can be resolved in the light of the common law globally, like "Lex-Sportiva world wide". It is the right time to begin with Asia at present since all most more than 50 Sports Lawyers from Asia are present in this World Congress of the IASL.

The House unanimously resolved the move of Ms. Joo, Jongmi, as one of the ardent need of the time.

In this regard Mr. Shorki, Nader of Iran, informed that under Rule - 59 of the Olympic Charter, it is mandatory for all the NOC or NSF to resolve any dispute arising from its execution or interpretation shall be settled by arbitration in accordance with the provision of CAS. But as rightly stated by Ms. Jongmi that, approaching every time to the CAS at Lausanne proves to be a costly matter, hence we shall constitute the, "Sports Arbitration Tribunal of Asia". He further stated that in the list of the CAS Arbitrators and Mediators very few representation has been provided to the people from the Asian Continental region. As it shall be very important that a body shall be constituted at our own continental region. So that more people from Asia shall be included in the list of the Arbitrators and Mediators. He also proposed to constitute a Council to control and look after the SATA.

On the proposal of Shorki, Nader, the House unanimously resolved to constitute a, "Asian Council of Arbitration for Sports" with in this house and elect some important Board of Governors to process the functions of the, "Asian Council of Arbitrator for Sports", here in after named as, "ACAS" in short. The following members were elected in the Governing Body of the, "Asian Council of Arbitrator for Sports":

Prof. Yuen, Kee-Young of Korea was unanimously elected for the Post of the President of the ACAS on the proposal of Kenji, Saito, of Japan.

Prof. Dr. Kumar Amaresh, of India was unanimously elected for the Post of the Secretary General of the ACAS, whose name was proposed by Takuya, Yamazaki of Japan and Lui, Yan of China.

Prof. Yuen, Kee-Young, proposed the name of Shorki, Nader, of Iran for the Post of Secretary Finance, an his name was proposed by Prof. Yan, Xufeng of China. The house unanimously, approved the name of Shorki, Nader to be elected on the Post of the Secretary General.

After the election of the President, Secretary General and Secretary Finance, the house resolved and wish from these three Board of Governors to go through the draft agreement related to the Constitution of the Asian Council of Arbitration for Sports & Sports Arbitration Tribunal of Asia to present before the house and the meeting was adjourned for tomorrow.

On 27, November 2010 the above listed members attended the meeting in the Lexington Hotel, at Seoul, Korea at 08:00 AM. Prof. Panagiotopoulos, Dimitrios suggested that since now ACAS has been constituted with its Board of Governors and Prof. Yeun, Kee-Young is now the President of your ACAS, it will be in order that Prof. Yuen shall preside the meeting of the ACAS. This proposal of Prof Panagiotopoulos was unanimously welcome by the all the members of the ACAS.

Prof. Yeun, Kee-Young, accepted the request of the house and Presided the meeting on 27, November 2010. He calls the meeting in order after expressing his thanks to all the members for showing their confidence in him and his team. He assured all the members that he will work for the cause of Asian Council of Arbitration for Sports in all the possible way.

Prof. Yeun, Kee-Young, the President asked Prof. Dr. Amaresh Kumar to read the draft agreement of ACAS and SATA.

Prof. Dr. Amaresh Kumar, read the draft Agreement of the ACAS and SATA before the members. The house resolved to approve the draft prepared by the three members of the Board of Governors and the same

From left to right: the President elect of the Asian Council of Arbitration for Sport (ACAS) Prof. Dr. Yuen-Kee, Young, Professor of Law, Dongguk University,Seoul, Korea (left); Ms. Prof.Joo Jogmi, Organising Secretary of the XVI World Congress of IASL, Seoul, Korea, 25-28 November 2010, and Secretary General elect of ACAS,Prof. Dr. Amaresh Kumar, Advocate of the Supreme Court of India and Secretary General of the Sports Law India & All India Council of Physical Education.

was approved. Some of the members of the China and Japan stated that the draft agreement of ACAS and SATA shall be circulated to all the ANOC and Governmental Authorities of the Asian Countries to consider the same for their acceptance like the agreement of the International Council of Arbitration for Sports and Court of Arbitration for Sports. For which the house authorized Prof. Dr. Amaresh Kumar to communicate as per the requirement so that every ANOC, ANSF and Government shall agree and accept as the Common Law of the Sports Dispute Redressal Mechanism in the Asia.

The Secretary General assured the members that all the effort would be taken to get the agreement signed by the Asian National Olympic Committees, Government Authorities and Sports Federations affiliated by the International Sports of Sports. The members desired that after receiving the response from all the related bodies the meeting to sign this ACAS and SATA might be organised next year in India.

The Secretary General desired that since the Head Quarter of the ACAS and SATA will be at Seoul in Korea. It is desired that a Joint Secretary shall be appointed from Korea who shall be keeping the entire track between the President and all the members, Specifically the Secretary General. The proposal of the Secretary General was approved unanimously and the house authorized the President to choose the Joint Secretary of his confidence. The President suggested the name of Prof. Joo, Jongmi, and the Organising Secretary, of this Congress, whose work was appreciated in the organization of this 16th World Congress of the IASL to a grand success. The house approved the name of Joo, Jongmi as Joint Secretary of the ACAS.

The President of ACAS Prof. Yeun, Kee-Young, assured the Secretary General to provide all the financial help in the functions of the ACAS as its head. He further stated very soon he will procure a permanent office of ACAS in Korea with all office equipments. He desired that all the members shall co-operate in the promotion of the objectives of the ACAS and SATA, in accordance with the Olympic Charter, so that the Sports shall be promoted in the fullest scene, for human development, protection of the human rights of the Athletes, peace and equality.

The meeting was called to an end by a vote of thanks proposed by Prof. Dr. Kumar, Amaresh, Secretary General of the Asian Council of Arbitration for Sports to the Chair, all the members present and specially to Panagiotopoulos, Dimitrios, President of the IASL.

DATED : 27, November, 2010

PLACE : Seoul, Korea

Signature ……

PRESIDENT
Prof. Dr. Yuen, Kee-Young
Faculty of Law,
Dongguk University
President, Korean Association
of Sports & Entertainment Law,
Pildong 3-Ka 26, Chungku,
100-715, Seoul, Korea
Tel:0082-2-2260-3232
e-mail:kyyeun@dongguk.edu

Signature……....

SECRETARY GENERAL
Prof. Dr. Amaresh Kumar
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Supreme Court of India,
18, Central Lane (Basement)
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Agreement Related to the Constitution of the Asian Council of Arbitration for Sport (ACAS)

between

1. The Olympic Council of Asia
2. The National Associations of Sports Law in Asian Continents
3. The members National Olympic Committees of Olympic Council of Asia represented by their President.
4. The members of National Sports Organisations in Asia recognised by International Sports Organisations recognised by International Olympic Committee by their President.

It will be preliminarily stated that, with the aim of facilitating the settlement of disputes in the field of sport in Asia, an arbitration institution entitled the "Sports Arbitration Tribunal of Asia" (hereinafter the SATA) has been created, and that, with the aim of ensuring the protection of the rights of the parties before the SATA and the absolute independence of this institution, the parties decided unanimously to create a Foundation for Olympic Council of Asia called the "Asian Council of Arbitration for Sports" (hereinafter the ACAS), under the aegis of which the SATA will henceforth be placed.

In View of the above, the Parties Expressly Agree to the Following

Article 1
The parties agree to constitute and set in operation the Asian Council of Arbitration for Sports (ACAS).

Article 2
The founder members of the ACAS are appointed from the Asian continental region in the 16th World Congress of International Association of Sports, on 27th November 2010 at Seoul, Korea, as follows:

S.No.	Post	Name
1.	President	Prof. Yeun, Kee – Young, Professor of Law, Dongguk University in Seoul, & President of Korean Association of Sports and Entertainment Law
2.	Senior Vice-President	To be elected latter in next meeting
3.	Vice-President	To be elected latter in next meeting
4.	Secretary General	Prof. Amaresh Kumar, Advocate, Supreme Court of India & Secretary General Sports Law India and All India Council of Physical Education
5.	Secretary Finance	Shorki, Nader, President, Legal Commission of Olympic National Committee of Iran, Iran.
6.	Executive Members	To be elected latter in next meeting

Article 3
The parties agree mutually and vis-à-vis the ACAS to finance its activities and those of the SATA to the extent determined by the ACAS and according to the following proportions:

1. 50% of the initial funding will be born by the Korean Association of Sport and Entertainment Law.
2. 50% remaining funding will be born out by the membership of the National Sports Law Association of the Asian Continental Regions.
3. The members ANOC of OCA desiring to take the services of the ACAS and SATA will have to pay Euro 500 as membership fee and Euro 100 per annum.

The above-mentioned parties shall be informed of the amounts of the subscription to be paid to the ACAS and this notification shall be accompanied by a copy of the budget duly approved by the ACAS.

Article 4
Any Asian National Olympic Committee of Sport Federation or association of Federations may sign the present Agreement or accede to it under the conditions determined as agreed between the parties.

Article 5
The present Agreement is for an indefinite period; each party has the right to terminate the Agreement at any time for the end of a calendar year, by giving notice two years beforehand by registered letter to the Secretary General of the ACAS and all the other parties. In such case, the present Agreement ends only insofar as it concerns the outgoing party, the other parties agreeing herewith to assume all the obligations and rights of the outgoing party with immediate effect on the day of termination, in proportion to their own rights and obligations, with no further action or formal notice required.

Article 6
The present Agreement is subject to laws of Rule - 59 of the Olympic Charter. Any dispute arising from its execution or interpretation shall be settled by arbitration in accordance with the provisions of the CAS.

Seoul, November 27, 2010
Signed by :

The preamble of the Agreement states that *"with the aim of facilitating the resolution of disputes in the field of sport in Asian Continental Region, an arbitration institution entitled the "Sports Arbitration Tribunal of Asia" (hereinafter the SATA) has been created, and that, with the aim of ensuring the protection of the rights of the parties before the SATA and the absolute independence of this institution, the parties have decided by mutual agreement to create a Foundation for sports-related arbitration in Asian Continental Region, as the it is not pecuniary possible all the National Olympic Committee of the Olympic Council of Asia to approach CAS at Lausanne constituted by the "International Council of Arbitration for Sport" (hereinafter the ICAS),*

Seoul Declaration for Sports Law

16 World Congress International Association of Sports Law

The 16th World Congress of the International Association of Sports Law was held on a topic, "Sports Law in the World - Present and Perspective" from 25to 28November 2010, at the Hanyang University, Seoul, Korea. On the successful deliberation of the Congress following declaration were made the Congress:

1. THAT, Autonomy in the functioning of All the National Olympic Committee and National Sports federations shall be interfered by the Government or Judicial authority of any country. The National Olympic Committee and National Sports Federation shall be permitted to discharge their functions as per their own Constitution, Bye-laws respecting the Olympic Charter and Provisions of their International Federations, for the protection of the Human Rights and dignity of Athletes, Peace, Equality and Promotion of Sports and Physical well being of the humanity in the Globe.
2. THAT, a Globally Common Sports Law, shall be accepted by all the Countries with the aim of ensuring the protection of the rights of the National Olympic Committee and National Sports Federations by maintaining absolute independence of their Institutions of Sports complying the provisions of the Rule - 59 of the Olympic Charter.
3. THAT, with the aim of facilitating the resolution of disputes in the field of Sports in Asian Continental Region, an arbitration Institution entitled the "Sports Arbitration Tribunal of Asia" shall be created. As it is not pecuniary possible for all the National Olympic Committee of the Asian Countries to approach the Court of Arbitration at Lausanne, constituted by the International Council of Arbitration for Sports.

London Seminar 12-13 April 2010: The Legal and Tax Treatment of Sports Image Rights Agreements*

by **Lieke van Berkel**

Day 1: 12 April 2010

1. Introduction

This two-day seminar has been devoted to the legal and tax treatment of sports image rights agreements. The first day has focused on the tax sheltering aspects in a number of selected European territories: the United Kingdom, Guernsey, Spain, Italy, and Luxembourg. Notably the three greatest football countries have been covered as well as two possible European tax efficient territories. On the second day attention was given to the structuring of the arrangements. Under the steering chairmanship of Prof. Ian Blackshaw interaction with the audience added to the practicality of the presentation of the expert speakers.

The introduction to the seminar was of course presented by Prof. Ian Blackshaw. Sport is a very important component of the world economy. In the EU, the money that is earned in the sports world delivers 2% of the GNP of all countries. It is a lot to play for. Branding has played a significant part in this process. This is called the 'commodification' of sport. Sport and the players are more and more seen as 'commodities' that can be commercialized. Sport is also a big part of the entertainment industry. In this industry, sports persons have become celebrities and marketing icons; their personality rights, more specific their image rights, are increasingly being used and exploited by different companies. Therefore it is very important to define these image rights to know how to protect these rights and their exploitation and how they can be used best and described in legal agreements. The discussion is not only on the basis of what sports image rights are but also, who owns these rights. This is even more important in the case of a sports man, who is a professional player and a member of a team for example and most common in the football world. SportsBusiness International therefore kept up a poll on their website, to investigate this. A majority of the sports industry executives, 55%, polled that sports men themselves should have control over their own image rights and their commercial exploitation. 21,6% of the questioned people were of the opinion that the rights should be jointly held by ''all interested parties" and 16,5% said that the club or team, to whom the sports men is a member of, should control the rights. Only 3.7% was of the opinion that the national sports governing body or the league should hold the rights. This article also shows that there is a lack of clarity about the commercial sports marketing contracts and about the ownership of the rights. Therefore there is a need for more clarity about precise provisions or agreements that deal with the exploitation of these vulnerable and, at the same time, very valuable rights. In some countries the market of sports image rights is more developed than in other countries. Each country's image rights are described differently, therefore also protected differently and under different sections of the law. In most European countries the sports image rights market is well developed. But also within Europe, it differs per country. Continental Europe provides a better protection of the image rights in general, than, for example, the United Kingdom does. The UK law does not provide for a specific definition of image rights, while the continental law system does, describing image rights as 'right of personality' and they are mostly protected by the 'right of privacy' and the 'right of publicity'. With this two day seminar, an effort is being made to provide for more clarity, to describe the image rights, to compare the legal and tax treatment of different countries and to see the possible ways to arrange these image rights agreements.

2. The United Kingdom Tax point of view

Mr. Stephen Woodhouse of Deloitte London provided an introduction to the tax treatment of income from sports image rights. In every type of professional sports, legal and tax considerations are important. Substantial amount are paid with tax on these payments being a high cost.

There is no specific definition of image rights in UK law. However, where structured and administered correctly, income earned from the exploitation of image rights is not treated as income of employment, but as a separate income component. Key is that the payment should be for the exploitation of the image and not be connected with the exercise of the employment. The possibility of identifying the image rights income separately from the employment remuneration is a vital key element. Image rights can be used, but sports clubs and players always need to bear in mind that the attribution of income for the exploitation of the image needs to be made in the correct way.

The main element is that the image of a player represents an individual and independent image. The image should constitute a separate value from their playing ability in order to demonstrate its exploitation.

The value of a player's image right can grow or diminish over time, which raises the question of whether you can identify an accurate value in the early stage. Therefore you should set up a structure in which the value of the image is monitored overtime. For example, procedures should be in place to deal with the impact of negative publicity on the value of an image right.

From the audience of the seminar it became clear that in Italy the situation from a tax perspective is relatively unsophisticated. The taxation of sportsmen is not as clear as in the UK. Sportsmen pay taxes on wages as income from self -employment. This tax treatment is also used for the taxation of income from the exploitation of image rights. In Italy the image right is not an enforceable right for a company and Italian citizens cannot transfer this personality right. In Sweden, players do not apparently have any right over their image rights. One reason for this is that in Sweden only a small number of players are involved with relatively low income levels.

3. Guernsey: General principles of tax treatment of image rights

Mr. Jason Romer of Collas Day explained that Guernsey is centrally positioned for the developed and developing international financial centres. It has great big experience in dealing with the important subject of taxation of income from inter alia image rights. Guernsey is on the G20 White list and has a vary favourable tax regime. Guernsey has an internationally recognized specialized finance centre and has a zero % corporate tax rate. Guernsey also has legal, banking and accounting expertise and corporate cell structures facilitating ownership of image rights. Especially because of the Tax regime of Guernsey, the Island is interesting for image rights agreements, but other EU countries look suspicious to the tax regime of Guernsey because of their zero % rate. There is no tax on transfers or what so ever. Guernsey provides for a very transparent system.

Guernsey current offers protection for intellectual property rights under Intellectual Property legislation. The advantages of the IP legislation of Guernsey are:

- Legal protection;
- Cost savings;
- Efficiencies for speed of registration: in small jurisdictions it is faster, approximately 12 weeks for the registration of a trademark. In Guernsey there is an option for a primary trademark, same as in other countries. But also a possibility for a supported registration, this registration takes 6 weeks to register. It is also possible to get the registration in another country and bring it back to Guernsey;
- Tax efficiencies;
- The different legal frameworks for IP exploitation;

* Further information may be obtained by acquiring the conference proceedings. If interested, please contact NOLOT Seminars at erica@nolot.nl.

- The time zone;
- The expertise and relevant knowledge.

Guernsey is not an EU member, and therefore also not bound by the EU legislation. The legislation that Guernsey now provides for is modern and flexible. The legislation enclose design rights, copyright, trademarks, database rights and plant breeders rights.

At present in the UK and Guernsey one cannot register (sports) image rights. The closest other right is a trademark, and the distinctiveness of a brand. The image right can be seen under the trademark protection as a *specific distinction of a person or individual* and can therefore be protected under the trademark law. Currently new specific legislation is underway which will enclose; patent, innovation warranty, a real definition on image rights and their protection, which is expected this year.

The forthcoming image right legislation will be a Statutory right in law. A right that needs to be balanced, because otherwise one cannot even publish newspapers anymore without infringing the right of press freedom. The income from image right exploitation will be seen separately from employment income. The closest other right is a trademark, the distinctiveness of a brand. The image right can be seen under the trademark protection as a *specific distinction of a person or individual* and therefore protected under the trademark law. A player could have an employment contact with the club and a separate contract with a company regarding his or her image. In some countries Guernsey is on the black list for income tax purposes, however, it is on the white list of the OECD. Guernsey has internationally accepted and robust IP legislation and the forthcoming legislation is expected to allow for protection at a level that currently does not yet exist.

4. Spain: general tax principles

Angel Juarez of Juarez Associados Abogados (Barcelona and Madrid) explained that for the understanding of the Spanish tax rules for income from the exploitation of sports image rights, Art. 92 of the IITA is important. Article 92 concerns the personal attribution of image rights payments, and establishes a 15% 'safe harbour'. This 15% rule restricts the payment of income from exploitation of image rights to 15% of the total remuneration paid by the employer to the player. This rule was made before the introduction of the Beckham law (providing for a favourable tax treatment for incoming professionals), but it is still in place.

The Art. 92 IITA rule applies only to employed resident taxpayers. If Art. 92 IITA does not apply, then the safe harbour of 15% is thus not available. If Art. 92 IITA applies, the image rights income is attributed to the player and marginal tax rates apply (up to 43%). The test for the applicability of Art. 92 IITA is the aforementioned 15% threshold. The measurement of this threshold is to be made on the level of the employer. The key elements for the measurement are that the payments are made by the employer in respect of:

- Employment services rendered by the employee; and
- The use of the image of the employee:
  - Whether made by the employee or any other third person
  - Whether in cash or in kind.

The 15% safe harbour was set up during a time in which many sports clubs were facing bankruptcy due to tax reassessments because of the fact that the wages and remuneration paid to players were tax wise not properly arranged. The introduction of the 15% safe harbour was part of a recovery plan for the clubs. Different reactions to avoid the safe harbour were made by various clubs. For example:

- Barcelona created a scheme to get around this 15% rule. The income from exploitation of image rights would not be paid to the player by the club but by the TV company exploiting the broadcasting rights of FC Barcelona. The payments from the TV company to FC Barcelona would then be reduced in the amount of the direct payments by the TV company to the players employed by FC Barcelona. The reasoning from FC Barcelona was that the attribution rule in Art 92 IITA because the payment was done by a company other than the players' employer. This scheme was not accepted. The Supreme Court concluded that the TV company acted just as a paying agent on behalf of the club.
- Real Madrid did not pay players for use of their image rights, but they paid for a sublicense of the image rights registered as a trademark in Hungary. Real Madrid got a sublicense from the Hungarian company, this was intended to be seen as a royalty not as an image right. Also this scheme was not accepted and did not work.

The Spanish safe harbour on tax gets a lot of criticism from companies and clubs:

- Clubs are not making money on their activities, thus the 15% is artificial and inconsistent;
- It creates legal uncertainty: image rights are not transferable because they are personal, but in tax law it is possible to transfer these rights via the safe harbour system.

The only way for Spanish resident taxpayers to use the benefit of the 15% safe harbour is to be hired by a Spanish club. It does not even matter if your image is worth anything. Also, players can still conclude other image right exploitation contracts with companies established in their previous country of residence or elsewhere.
2 possible options for circumventing the 15% limitation would be the following:

- Suppose Nike wants to use the image of Ronaldo. Nike pays 1 million to the club of Ronaldo, 40% of the payment goes to Ronaldo; or
- Suppose the payment goes directly to Ronaldo, Nike pays 1 million to the company of Ronaldo, and his company pays 40% to the club. This option is apparently used the most in practice.

5. Luxembourg tax treatment

Luxembourg was presented by Mr. Lars Gosling of AS Avocats from Luxembourg. Mr. Gosling started by mentioning that if Luxembourg would be on any list, it would be on the white list. But as a matter of fact Luxembourg is not on any list.

The Law of Luxembourg makes clear that; 'everybody is entitled to his private life and is protected for this'. Therefore the image right is not a valued right, not material or commercial, therefore you cannot make an agreement regarding it. But what one can do is to make an agreement on the use of it.

The new advantageous tax regime for income from the use of image rights applies from January 2008. Art 50bis of the Luxembourg tax code provides for the two main characteristics of the regime: 5.72% income tax rate and an exemption from net worth tax over the intellectual property. Individuals (resident and non-resident) who carry on a business in Luxembourg and Luxembourg corporate entities are entitled to the application of this regime. The Luxembourg IP regime applies to th following types of property:- software copyrights (important for IT companies), patents, designs, models, trademarks relevant in the sports industry) and domain names. Other conditions for application of the regime include: the qualified IP must have been created or acquired after December 31st 2007, the Luxco must not have acquired the qualified IP from a direct "Associated Company" and the qualified IP related expenses need to be activated.

The IP regime elements that are specifically relevant for Sports image rights are trademarks and domain names. Commercial use of one's image right may be accomplished by first protecting the name by registering it as a trademark. This can also be used to protect a logo, signature, photo or domain name.

The commercial use of the IP by Luxco can be achieved through: the creation of IP by Luxco, by acquisition of legal title over IP or acquisition of IP licence by Luxco. Exploitation of the IP can take place by production of goods, or by licensing of the IP to third parties. Eventually the IP can be disposed of, and several exit strategies may be used. Exit strategies include disposal of Luxco or by migration of the Luxco to a third country.

6. Tax treatment of Italy

The Italian tax treatment of income from image rights was explained by Mr. Marco Ettore of the firm CBA (Milan). Italy does not have a specific tax treatment on sportsmen like Spain. For income tax purpos-

es there is no difference between income from employment and other income. There is a distinction between resident and non-resident taxpayers. An individual is considered to be resident in Italy if he registered as a resident person, if in Italy his domicile (centre of most relevant economic interests) and place of habitual home. Italian nationals who have emigrated to a blacklisted country are deemed to remain resident in Italy unless evidence of the contrary is given.

Resident taxpayers are taxed on their worldwide income. The income from exploitation of image right is then taxed on the normal progressive tax rates. With respect to a non-resident sportsmen, the tax treaties that the country of residence has concluded with Italy (if any) is important. If no tax treaty exists, then the tax rate of income from exploitation of image rights is 30%. If a tax treaty applies, both the rules of the countries need to be matched. The income of sports image rights is the income from independent personal services and will be taxed this way.

An Italian resident sportsman may feel the need to find a structure for lowering the tax burden on their income. As a sportsman you may need to try to set up entities to reduce the amount of taxes that needs to be paid. For example Italian resident sportspersons could set up an entity in Luxembourg in order to have it exploit their image rights. However, Italy does not have exhaustive judgments and case law on this type of structure. It should be noted that the Italian tax authorities have the power to attribute to the taxpayer the income that seems related to other subjects in case of an abuse of law (infringement of constitution in Italy) and in case of fictions (e.g. if the real intention would be a direct contract from A to C, first a contract is concluded with B to go around this). The attribution can be made on the basis of simple presumptions (serious, precise and concordant).

The Italian tax shelter structure that is set up for sportsmen who are resident in Italy has to comply with provisions concerning residence of legal entities, CFC legislation and anti fictitious interposition rules. The consequence is that such structure needs to be effective and localized in non tax haven countries. The tax shelter structure set up for sportsmen who are non resident in Italy, on their side, need, in case of distribution of dividends, to comply with provisions concerning the anti abuse rules applicable to conduit companies. In each case an applicable tax treaty, if any, needs to be analysed for determining the concrete tax treatment.

7. The United Kingdom: Tax aspects

The presentation on the United Kingdom was made by Ms. Debbie Masterton of Deloitte LLP. In the United Kingdom the use of payments for image rights can for tax purposes be advantageous for both players and clubs. If structured correctly, there should be no income tax withholding obligation or social security on payments to the image rights company by the club. Dividend payments by companies owning or exploiting image rights are taxed at effective rates from 25% up to 36.1% in 2010/2011. The income that is received by the image rights company is liable to corporation tax, the rate depending on the size of the company's profit. The income that is left in the company is taxed at (currently) 18% (which has now risen to 28% with effect from 23 June 2010 for higher rate taxpayers) when the company is wound up.

The position for non UK domiciled individuals is slightly different. Generally, if a sportsperson is not born in the UK, the person is not subject to the UK tax on any income that is earned overseas and not remitted to the UK, provided a remittance basis claim is made.

For some time now the UK tax authorities (HMRC) have entered into discussions with the football clubs regarding the taxation of payments for image rights of the players. In many cases the HMRC believes that image rights are simply a 'cover' for normal remuneration. As such, these payments should be taxed as normal income from employment. Their assertion (HMRC) is that the value placed on the image rights is not commercial and that there is not enough done to exploit the image, thus the income from the promotional services performed is not commensurate with the payments made under the Image Rights contract. If HMRC were successful in a challenge the payments under the Image Rights contract would be taxed as normal employment income.

It needs to be clear from the structure of the contract which activities are from image rights and what is normal employment income. One cannot just come up with an amount to be paid under a separate image right agreement without a commercial justification. The parties should undertake a valuation of the image rights, taking into account the expected income the club expects to generate from exploitation of the image plus the value of the ability to control the player's activities in such a way as to both ensure the player devotes his time and energy to sporting activities as well as preventing inappropriate use of the image which the club considers would damage their brand. Furthermore, the club should consider how to exploit the image rights acquired and take steps to do so. If there is no evidence supporting the value and no efforts made to exploit the image rights acquired under the Image Rights contract, the payments will likely be viewed as part of the employment income and also taxed that way. However, if properly structured and exploited, HMRC should not ignore such Image Rights contracts and argue that the agreement is merely a smoke-screen for additional remuneration.

In addition, UK case law demonstrates that genuine payments for image rights should be taxed separately from employment income. For example: Sports club and Ors v HMRC: the case was won by the taxpayer, the income was not taxed as income of the employment because the intention and actual exploitation made clear that the income from the image right was separate and distinct to the payments for playing.

8. Art. 17 of the OECD Model Convention

Mr. Angel Juarez presented his views on the application of Article 17 of the OECD Model Convention to sports image rights. An image right includes the right to privacy, and the right to publicity such as name, image, voice, signature, likeliness, fame, personal characteristics and trademarks. Whether the payments are for an activity or not is the important element for the tax payments. There is no specific article in the OECD model on Image rights payments. Only art. 17 makes a reference on image rights by mentioning the sponsorship fees. Art. 7 and Art. 15 are also relevant for this subject. There is also a small role for art. 12 involving royalties. But Image rights do not fall under the definition of royalties in art. 12 because the definition is a closed definition which does not include personality rights such as image rights. Articles 17 and 15 are based on the place where the activity takes place. Art. 17 involves income derived by entertainers from their personal activities as such, but not from other sources not involving any activity at all (e.g. dividend or interest). If there is no activity then Art. 17 is not applicable. Another criteria is that there needs to be a public performance element in the activity, an entertainment criteria.

The Commentary to Article 17 of the OECD model is not always constituent in its wording. The wording can be read as contradictory. E.g. paragraph 9 of the Commentary to Art. 17 requires a direct link between the income and the public exhibition. But further on the same Commentary describes that also an indirect link is possible and also that just appearances instead of public exhibition are possible. This contradiction is probably the result of the required consensus building process between the OECD countries.

9. Concluding remarks

Prof Blackshaw concluded the first day by mentioning that image rights involve more aspects and elements than thought at first sight. It is a fascinating subject. The model convention, the tax law as well as the national laws are important. There is still no clarity on the protection of the image rights under the UK law. If this uncertainty is solved, it will all become clearer. Guernsey is a very special case and after acceptance of the planned new legislation on image rights Guernsey may be able to compete in this field with other territories such as Luxembourg.

Day 2: 13 April 2010

1. Introduction

During the second day of the seminar attention was mainly given to the practical aspects of drafting sports image rights agreements and putting the structures into place. The importance of properly writing things down in a contract was firmly underlined by Prof. Blackshaw. The second day was also about explaining the agreements on sports image rights from the common law point of view and the European civil law point of view. In the English common law system, the intention of the parties is essential. It is virtually impossible in the common law system to go outside the contract - only in very exceptional circumstances where the intention of the parties is unclear. The continental law does make this possible, because of the fact that next to the contract, a look can be taken at what both parties talked about. Preliminary contractual agreements are important in the continental law system and you can already be bound by pre-contract conversations and negotiations. Therefore it is even more important under the common law system to write everything down. Only in very exceptional circumstances can you circumvent the contract. With some clauses in the agreement, you can fill this gap, for example by adding a good faith clause in the agreement. Parties are then bound to act toward each other in 'good faith':

Prof. Blackshaw explained that drafting a sports image right agreement is not easy to do and there is no one model that fits for every case. Therefore you have to be careful with model agreements, every case has his own facts! The deal supposed to be laid down in the agreement as specific as possible and it needs to have a business essence. It is important to speak well with the client before drafting an agreement and make sure to write everything down. Be careful not to draft in a vacuum. Meet the client, the preparation and the meeting is the essential part of drafting an agreement. Make sure everything is made clear to the client, explain everything. Especially with licensing of a sports image right and territorial issues you have to be secure, because you also deal with EU competition law and in such cases it is even more important to prepare and explain. By studying the model and the conversation with the client, you see the gaps and on this point there is still the possibility to go back to the client and talk about the elements that are still unclear; after that, you can conclude it.

Typically sports image rights agreements have some complex financial provisions, especially in the case of licensing and royalties that are paid for these licenses. Mathematical formula are used to explain these provisions, these formula explain the essence of the financial provision better than words. Use schedules as appendices next to the explanation in words. Also pay attention to any inconsistency between the body of the agreement and the appendices. Be careful with recitals, recitals do not have to be used. Some essential provisions need to be included in a sports image rights agreement. For a trademark licensing agreement, the following provisions should be supplemented:

- Exclusivity provision
- Quality control provisions
- Performance clause: the licensee should promote the product in the territory of the agreement. Be careful to make these clauses realistic and include the right to terminate.
- Distribution channels clause: these clauses are also important for the quality and the image of the trademark you want to protect.
- Assignments and sublicensing: include a provision that the image right can only be assigned with the prior written consent of the licensor.

In the UK it is not possible to withdraw this consent without a reasonable reason. Other European countries do give this option by paying damages. You include in the assigning clause that the agreement can be assigned to an associated company. If these clauses are not drafted properly it can cause a lot of trouble. It is also possible to include a morality clause in the agreement, but again be careful with these, make sure you maintain complete flexibility, because negative publicity is also publicity and it still needs to be possible to deal with it. At the end of the day you want to protect the intellectual property. Therefore the morality clause should be objective. The good faith clause is the umbrella for this counterbalance.

In many commercial agreements you will find also the following clauses:

- Best endeavours clauses: also be careful with these, be reasonable, if you include this clause the other party has a heavy obligation under this clause. "Not to leave any stone unturned".
- Penalty clauses: pre assessment of the breach. Under the continental law system these clauses are enforceable. The common law system does not allow these clauses to be enforceable, they are only for the pre assessment. But because of the fact that image rights are personality rights and therefore fundamental rights, it is difficult to put a penalty on a infringement of them.
- Entire agreement clause: these clauses contain the phrase that this is the agreement and that only this agreement is used. These clauses can be very problematic, because of the fact that oral understandings can differ from the concluding provisions in the agreement. A common law judge does not look further than this clause, so be careful.

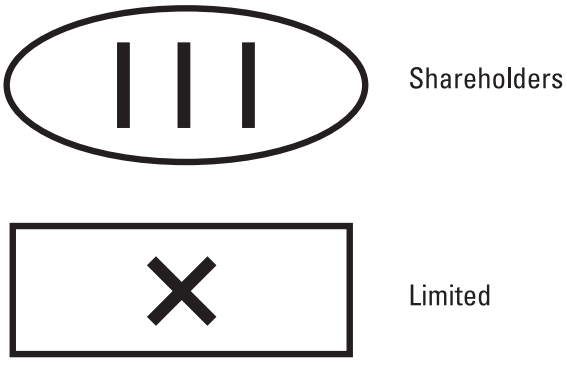
As aforementioned, in continental civil law, the preliminary contractual agreements are important. Parties are already legally bound to these agreements if these agreements are in a certain stage of negotiation. If the parties do not finalise the negotiations, they are liable for damages. In continental law, parties can already go to Court with these preliminary agreements. In the common law system, it is not possible to enforce these agreements which are only preliminary because an 'agreement to agree' is not a legally binding contract.

2. Guernsey

Mr. Jason Romer dealt with the situation on Guernsey. There is no specific definition of sports image rights in the UK. Guernsey also does not have a specific definition yet. However, Guernsey is coming with a new definition this year. In Guernsey the question is if it is possible to register an image right as a trademark. The problem is that an image right is an indisposable right. Via a trademark registration it is made disposable, therefore a conflict occurs. The Guernsey law therefore sees it more as an extra/subsidiary right next to the personality right.

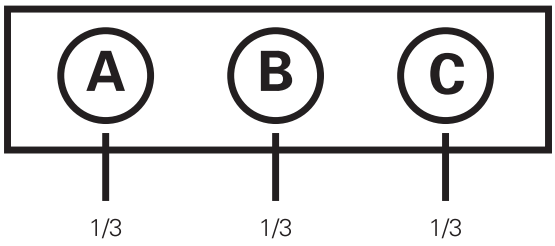
It is difficult to figure out what is the best way to structure an agreement, because there is always a conflict between what the club wants and what the players want. Guernsey comes up with a new way to structure the agreement for a sports image right agreement.

Normal structure



If there occurs a problem, the problem will be shared by all shareholders

New Guernsey structure



Different activities within the company, if there occurs a problem in C, the problem will not be felt by the shareholders of A and B

The new structure of Guernsey is used to go around the CFC legislation. This new structure is used already a lot in the UK and this scheme is also very useful for the arrangement of image rights. It is possible to split the shares within the cell, but from all cells the shares are ordinary shares, thus 1/3 of the share of the company. With 20 cells, the shareholder only holds 5% of the whole company, but the shareholder is 100% in control of his own cell. This structure is set out in different structures and agreements. Option 1, the PCC model, as set out on the sheets, the company is always represented by the cell, the shares in the cell will be held by the trust. It is possible to offer all sorts of products via the cells. This structure is more in the interest of the club than for the interest of the player.

The second option that was set out on the sheets was the ICC model, the incorporated cell model. Via this structure the club can set up the main ICC and then create separate ICC's and take some percentage of these separate ICC's. The benefit of this structure is that it can be easily transferred to another country or club if the player moves. It gives the club more control over the player, the club owns the shares of the company, and the player gives their image right to this company. The royalties are earned by the players cell and these benefits will then be transferred to the player. The trust is led by the trustee, trustees only have to take action when dividend is made.

It depends on what side you are, the club or the player, when drafting an agreement and choosing between the different options and schemes. Option 1 is more in favour of the club; option 2 has more advantages for the player. Both schemes are especially meant to arrange the overseas image rights companies. The specific Image rights legislation in Guernsey is on his way. But next to this upcoming legislation, Guernsey has already a wide variety of suitable structures.

3. Spain

Angel Juarez of Juarez Associados Abogados (Barcelona and Madrid) explained that in Spain the image right is seen as a right of personality. Therefore the right is protected under the Constitution. Art. 18 of the Constitution of Spain and Art. 8 of the Human Rights Convention are the basis of protection is Spain. The right is divided in the right of privacy and the right of publicity. Because of this specific classification of the right, the economic aspects of the image rights are not protected by these articles. The rights of personality are not transferable, but you can license them. An individual can revoke the license, but damages must then be paid. For the arrangement of the agreement the value of the license is important and the way the license is granted to the company.

In practice in Spain, countries that are on the black list are avoided for locating the companies. Trusts are not usually used in Spain. As there is no written law regarding trusts in Spain, a case by case approach is therefore possible. Next to the protection articles mentioned above, it is important to always pay attention to art. 17 OECD and art. 92 IITA for the tax aspects of the agreement as mentioned earlier during the seminar.

4. Luxembourg

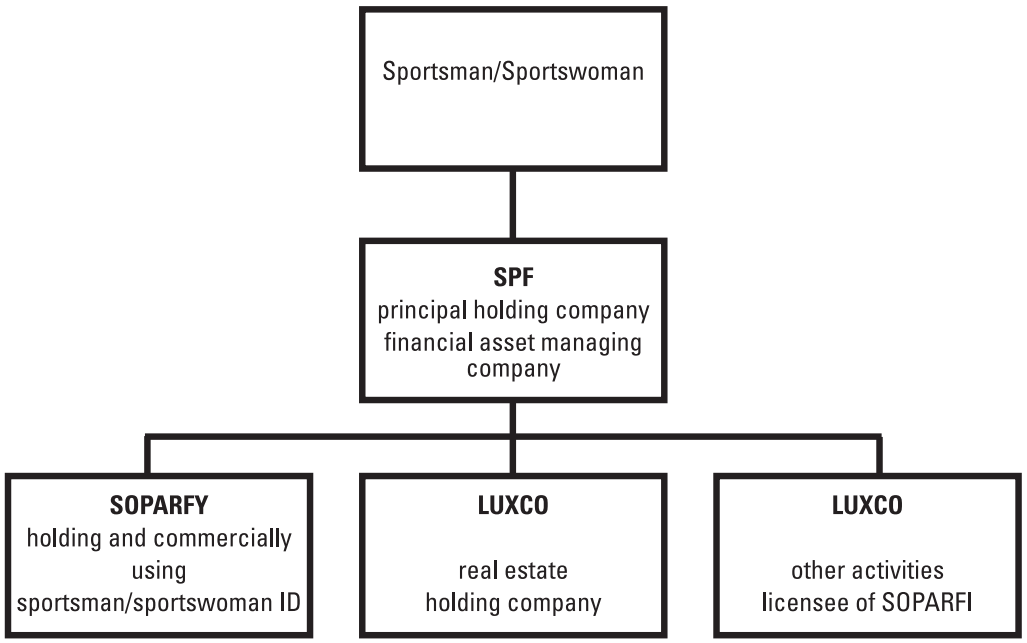
Mr. Lars Gosling of AS Avocats explained that the arrangement of sports image rights in Luxembourg goes via the Intellectual property law. A structure based on IP law is set out for the sports image rights. Benefits of Luxemburg include its membership of the EU, and readily access to the reduced tax rate of 5,72%.

An IP structure may in Luxembourg be arranged through the societé de participations financières (SOPARFI). The SOPARFI is the holding company which can carry out commercial and other operations. The SOPARFI exists in two different legal forms: the societé a responsabilité Limitée (Sarl): Private limited companies and the Societé Anonyme (SA): public limited company. The SA is mostly used.

The IP that can be registered under the IP law in Luxembourg are trademarks and domain names. The SOPARFI can acquire the use of the image right via three different ways: by creating a qualified IP, by purchasing the legal title of the qualified IP or by purchasing the license of a qualified IP.

As parent company of the SOPARFI one can use the so called 'Luxembourg private wealth management company (SPF). SPF is the holding company of the financial instruments and assets. The shareholders of the companies must be individuals and cannot have a corporate structure, therefore a group of individuals or a foundation etc is possible.

As a summary, the structure of the IP scheme in Luxembourg for arranging a sports image right can be drafted as follows:



5. Italy

Mr. Luca Ferrari presented the issue of the protection of image rights in Italy. Image rights, which include all individual's characteristics taken as a whole are recognised as rights of personality. The Universal declaration on Human Rights is one the international declarations that deal with this right. The Declaration describes the concept of name, portrait and identity as elements of the right of personality. The image rights are arranged under the Italian Private international law in Italy. Art. 24 of the law states that; *'an individual's personality rights are defined and ruled by her/his national law'*. For Italian citizens, the application of Italian law is imperative- therefore it cannot be derogated by agreement- (at least) with respect to the nature and content of image rights.

The Italian Courts established the precept that*; the image right cannot be the object of the agreement or of the license, because the right is inherent to the person and, as such, non assignable and non negotiable.* Thus, an agreement that has the image right as the sole or principal object, is null and void and of no effect. But separate from the Courts decision, the exploitation of an image right is still possible with consent of the owner of the image right, via a license for using the image right. There is a possibility to set up a company for the exploitation of the image right, but the image right cannot constitute the asset of a company and the image right cannot form the substance matter of a licensing sponsorship endorsement agreement. Therefore, under Italian law image rights cannot be held in a trust, assigned by a contract or conveyed by deed. The possibility the Italian law gives is managing the right of publicity by an agent or consultant. The agent can set up a company to exploit the image right. The commercial risk can be taken by the agent if the agreement has real business intent. However, for this scheme to work, the consent of the image right owner is essential. Without consent nothing can be down. The consent can be withdrawn at any time. However, in addition to contractual liability for breach of contractual obligations, the exercise of the withdrawal right without good faith entails liability in tort and damages must be paid.

Under Italian law, another possibility is given to arrange image rights, via trademark law. Name and image can be registered as a trademark under Article 7 of the Code of Intellectual Property. But the possibility is limited to substituting a trademark for an Image right licensing. For the use of merchandising the trademark is useful, like for perfume, but this is not a very useful option for the image, because of Art. 19 of the Code. This Article states: *'the individual or entity applying for trademark registration must have at least the intention to use it in the manufacturing or trading of products or in the provision of services'* . The real protection for the image right derives from the joint provisions of Art. 10 of the Civil Code and Art. 96 of the law on Copyright. Art. 96 of the Copyright law states that *a person's likeness cannot be displayed, reproduced or sold without the latter's consent*. Again, consent is the fundamental element. There are some exceptions for this consent, mentioned in Art. 97 of the Copyright law. However, the consent is always necessary if the person's image is used for commercial purposes. Under Art. 10, if the image is displayed without the necessary consent or causes prejudice to the dignity and reputation of the image's owner, the latter can apply to the judiciary to request a cease and desist order and to claim damages.

The exploitation of the image right of sportsmen can be subject of a conflict between the interest of the clubs and that of the player. In principle, the image right is the right of publicity of the player himself, who is free to commercially exploit his own image. Upon conclusion of the employment contract, the club acquires the right to use the player's image as part of the team's image. The sports association can limit the advertising activities which are personally undertaken by the athlete, but this limitation is subject to several criteria that should apply before the club can interfere with this right. The Collective Bargaining Agreement, which is now in force between clubs and football players, unfortunately does not regulate the subject of image rights. The image rights are arranged through the right of publicity by the "Convention for the Regulation of agreements concerning promotional and advertising activities which involve football clubs and their players", whereby the latter are entitled, unless waived, to a part of the club's profit deriving from the promotional activities using the players' image. In practice, however, in most cases the individual contractual forms foresee such a waiver. There is still no case law on this subject; therefore these agreements are still a risk. There is also a possibility to arrange an individual image right contract between the Italian clubs and the player, but this is very rare and not the rule.

6. United Kingdom

Mr. Stephen Woodhouse of Deloitte explained that the use of sports image rights agreements may be advantageous for both the club and the player. The main advantages for the club are: the profit of the image right for the club, no employer social security liability on payments to the image rights company. Certain players insist on image rights arrangements when agreeing to join a club and as a result they can be pivotal in negotiations with top players. Also, with such an agreement the club has control over the image therefore the club can control the time the player devotes to non playing activities and ensure they do not undertake activities which are detrimental to the club.

Where image rights payments operate effectively, there are benefits for the player:

* Opportunity to increase the earnings based on their image rather than on their playing ability;
* Free to concentrate on the employment with the club and be fully aware of the commercial obligations under the Image Rights Contracts;
* The income under the image rights agreement is not subject to employee social security;
* The income can be extracted from the image rights company under the more favourable (at the time of writing) capital gains tax regime if done on liquidation of the company.

The UK does not have a specific definition of image rights and no specific law that protects these rights. Therefore there are some practical difficulties and considerations that occur during the drafting of a sports image right agreement with the key element being the allocation of remuneration for substantive duties. There are no set guidelines for this but the agreement should reflect the commercial substance and reality.

Also, clubs should make sure that they have specific agreed processes in place to be followed when entering into an agreement. Board discussions should agree the commercial rationale for using image rights agreements. The board discussions, with regards to individual players, should demonstrate the decisions regarding payments based on commercial considerations.

Also, the agreements should be professionally drafted for the particular contract being established rather than generic template documentations.

7. European (EC) Law

Angel Juarez of Juarez Associados Abogados then explained that image rights agreements are not only subject to national laws of the country in which players and clubs have their bases, but for EU Member States also European law is important for drafting the agreements. European law provides for 4 basic freedoms: free movement of goods, services, capital and persons. Next to these 4 freedoms, the European citizenship is important. When drafting an agreement, the four freedoms need to be respected. The basis of the four freedoms is the protection against discrimination based on nationality. Always make sure that the agreement is not discriminating or in violation with the European law. Not only the four freedoms of the EU law are important, but also the provisions of competition law are important in a case of sports image rights, because markets are being divided while drafting an image right agreement and several clauses are included in the agreement to arrange the supplying of the image right.

8. Conclusion

Sports law in general, and more specific sports marketing involve a lot of aspects on commercial, legal, tax and practical grounds. It is therefore of extreme importance to arrange everything well in a contract. Especially for a licensing agreement, the most used way to arrange a sports image right, it is important to write everything down and arrange

everything in a business, commercial and financial sense. Always watch the applicable rules of the law and of the taxes, both on national and EU level. Always get advice from nationals of the country or the area in which you want to arrange an agreement. Take an overview and professional advice, especially on taxes, because image rights involve a lot of money! There is a lot to play for!

Keep in mind that sometime the deals you did not close, are better than the deals you did do. Do not always have the feeling that you need to conclude the deal. But watch out in which stadium of negotiations you are if you conclude a contract by continental law and on what point you do not agree on, because you can already be liable for damages on certain preliminary contractual agreements.

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