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# Sport and the European Union

## GUEST EDITED BY:
## David Allen & Borja García

CONTENTS:



BOOK REVIEWS:





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**Guest Edited by:**
David Allen & Borja García

# Contents



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# Sport and the European Union: Foreword

David Allen

Whilst academics have researched the relationship between sport and politics and sport and international relations for some time now, sport as a focus of interest to scholars of European integration is a more recent phenomenon. Research was most obviously stimulated by the far reaching consequences of the *Bosman* judgement (1995) that related to the free movement between two EU member states of a footballer out of contract with his club. Although *Bosman* was initially of interest to students of EU law, its wider impact on various aspects of sports governance soon attracted the attention of political scientists and, to a lesser extent, economists and sociologists. In 2001 the European Union Studies Association (EUSA) meeting in Madison (Wisconsin) included a panel on the EU and football which was, I think, the first time that the issue of sport was seriously considered at this biennial conference of the leading international academic organisation for the study of the EU. Sport has also featured at UACES annual conferences, with a round table in 2003 in Newcastle and a panel on professional sport at Zagreb (Croatia) in 2005. In 2007 the EUSA conference in Montreal included two very well attended panels (on EU sports law and on EU football governance) sponsored by Sport&EU - the newly established Association for the Study of Sport and the European Union (www.sportandeu.com). In this special issue of the JCER there are contributions from two of the founding members of Sport&EU.

This is a particularly appropriate moment for the publication of a special issue on the EU and Sport as it marks the culmination of a number of significant developments in the area. In July 2007 the European Commission adopted its White Paper on Sport which builds on the Independent Review of European Sports initiated by the 2005 UK Presidency of the EU and, in October 2007, the leaders of the European Union adopted the Reform Treaty which, like its rejected predecessor (the Constitutional Treaty), includes, for the first time, sport amongst the list of EU competences. This requires the EU to 'contribute to the promotion of sporting issues, whilst taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'. The objectives for EU action laid out in the Reform Treaty relate to all the issues discussed in the articles in this special edition, namely the development of the European dimension in sport, the promotion of fairness and openness in sporting competition, cooperation between bodies responsible for sports and the protection of the physical and moral integrity of those participating in sport.

The growth in the academic interest in sport and the EU has also led to an encouraging qualitative development in the work that is being produced which is also reflected in the articles included in this special edition. Whilst it is the case that law and political science remain the dominant subject areas and, whilst football remains the dominant sport in EU related studies, the work produced is now much better integrated with mainstream EU studies (utilising concepts such as Europeanisation or multi-level governance) than it was in the early days when it was, perhaps, the interest in a particular sport rather than EU studies that predominated. It can only be a matter of time before the editors of one or two of the leading compilations focusing on EU policy-making studies (such as *Policy- Making in the European Union* edited by Helen Wallace, William Wallace and Mark Pollack or *European Union; Power and Policy-Making* edited by Jeremy Richardson) recognise that it would be appropriate to include an EU sports related case study in their next editions.

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In this special issue we present six peer reviewed articles and one commissioned commentary article. Two (Brand and Niemann and García) focus on football, one (Owen-Pugh) on basketball and three (Kustec-Lipicer, Vermeersch and Rincón) on sport more generally. Four of the pieces take a political science perspective, two draw specifically on an understanding of EU law and one presents a sociological view of sport. Two (Brand and Niemann and Kustec-Lipicer) focus on developments in specific EU member states and two (García and Kustec-Lipicer) seek to utilise the EU-related concept of multi-level governance. Brand and Niemann seek to use football case studies to develop an understudied aspect of europeanisation – the societal/transnational dimension sometimes referred to as 'cross-loading' to distinguish it from the more familiar notions of 'uploading' and 'downloading'. García and Moorhouse and, to a lesser extent, Kustec-Lipicer and Owen-Pugh, seek to identify and analyse the actors that are increasingly engaged in, or emerge from, the relationship between the EU and sport, whilst Vermeersch and Rincón focus on the legal arguments associated with articulating the important and relevant notion of the 'sporting exemption' based on an attempt to distinguish between and thus separate out the 'economic' and 'sporting' aspects of sports governance issues at the EU level.

Our last contribution (Moorhouse) was specially commissioned and asks some searching and fundamental questions about the real structure of power in European football and about how academics approach this subject. Moorhouse's critique of the self ascribed roles played by both Deloitte and UEFA in the governance of European football and of the uncritical acceptance by academics of these roles demonstrates that a proper understanding of sport in the EU requires both a critical eye and input from economics and sociology as well as law and political science. It is an indication of the growing maturity of the subject area that a special issue on the EU and sport should conclude with a piece that is concerned with fundamental social science questions about power, authority and influence.

Finally a word of thanks to my co-editor of this special issue. Borja García has been the driving force behind this edition and, along with JCER editor Eamonn Butler, has borne the brunt of the editorial work. Borja García is one of the leading young researchers in this area, he is a founder member of Sport&EU and the organiser of its inaugural workshop at Loughborough in 2006. His article in this special issue was subjected to the same peer review process as all the other contributions.

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# Europeanisation in the Societal/Trans-National Realm: What European Integration Studies Can Get Out Of Analysing Football

Alexander Brand & Arne Niemann

**Abstract**

This article combines our empirical analysis concerning the impact of EU- and European-level developments on socio-economic patterns in the field of German football with the growing Europeanisation research agenda in EU Studies. Going beyond the traditional top-down (and bottom-up) approaches dominating this field of study, we seek to contribute to this debate by focusing on what we term the 'societal/trans-national' dimension of Europeanisation. This allows us to draw attention to *societal spheres* and *transnational agency* as important aspects/properties of change in Europeanisation processes. Through analysing five cases within the area of German football, we not only want to shed some light on an under-researched field of study for political scientists interested in Europeanisation. We also aim at exploring the applicability of systemising factors of the Europeanisation process derived from the analysis of political contexts to other areas of social interaction in order to capture hitherto neglected processes.

'EUROPEANISATION' HAS BECOME A FOCAL POINT OF DISCUSSION IN EUROPEAN integration studies. Although the term is used in different ways to describe a variety of phenomena, its meanings have usually been restricted to (in a strict sense) processes of domestic political changes caused by European integration. Most studies have emphasised top-down dynamics inherent in this particular notion of Europeanisation, whereas bottom-up and/or transnational processes and attempts to analyse their interplay have entered the debate only recently. We seek to contribute to this debate by focusing on what we describe as the 'societal/trans-national' dimension of Europeanisation: this dimension encapsulates (1) the *level and sphere* of change; and (2) the *type of agency* generating or resisting change.

In this paper, we seek to analyse the impact of European-level governance – the case law of the European Court of Justice and the Community's competences in the area of competition policy – on German football. More particularly we will look at the nationality issue related to the *Bosman* ruling (*case 1*), the new transfer regime resulting from the *Bosman* ruling (*case 2*), and the issue of broadcasting rights (*case 3*). In the broader context, additional factors are considered which less clearly relate to the European integration process, such as the development of the Champions League (*case 4*) or the emergence of transnational groupings like the G-14 (*case 5*). Taken together, these processes add up to the ongoing 'Europeanisation' of (German) football.

Earlier versions of this paper have been presented at the Workshop "Sport and the European Union, 10 Years After Bosman: Situation and Perspectives", Loughborough University (UK), 30 June & 1 July 2006, and the European Union Studies Association (EUSA) conference, Montréal, 17-19 May 2007. We would like to thank the participants of the above events, Frank Schimmelfennig, Osvaldo Croci and two anonymous referees for their comments on previous drafts.

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By analysing five cases within the realm of German football, we not only want to shed some light on an under-researched field of study for political scientists interested in Europeanisation, but we also want to explore the general applicability of Europeanisation factors (sources, dynamics and level of change), which have been derived mainly from the analysis of more politico-economic contexts, to explain dynamics in societal, that is rather non-political, contexts.[1] This way we may also clarify potential 'blind-spots', for example dynamics and interrelated mechanisms in Europeanisation processes that have been largely ignored by traditional analyses). Our empirical focus is salient as it represents a social context, which forms an important and conscious part of citizens' lives (rather than an abstract and inaccessible sphere). This may enable us to gain a deeper understanding of Europeanisation regarding citizens' life worlds.

Our article will first elucidate the concept of Europeanisation and specify our understanding of the term. Secondly, we will outline the societal/transnational dimension of Europeanisation. The third section attempts to formulate some systemising factors of the Europeanisation process which guides our empirical analysis of five sub-cases related to German football that will follow thereafter.

## The concept of Europeanisation

Research on Europeanisation has gradually increased since the mid-1990s and has developed into an academic growth industry over the last decade. In the field of political science alone, the term Europeanisation is used in a number of different ways to describe a variety of phenomena and processes of change (Olsen 2002). Most frequently Europeanisation is referred to as domestic change, in terms of policy substance and instruments, processes of interest representation and policy style, as well as (political) structures and institutions (Radaelli 2000). As a field of inquiry, Europeanisation merits continued systematic academic attention. The Europeanisation research agenda arguably focuses on a set of very important research questions, related to *where*, *how*, *why*, and *to what extent* domestic change occurs as a consequence of EU integration and governance at the European level. In addition, compared to several decades where European integration studies has focused on explaining and describing the emergence and development of a supranational system of European cooperation, research on Europeanisation is still in its infancy.

As a starting point, Europeanisation is understood here as the process of change in the domestic arena resulting from the European level of governance. However, Europeanisation is not viewed as a unidirectional but as a two-way-process which develops both top-down and bottom-up. Top-down perspectives largely emphasise vertical developments from the European to the domestic level (Ladrech 1994; Schmidt 2002). Bottom-up accounts stress the national influence concerning European level developments (which in turn feeds back into the domestic realm). This perspective highlights that EU member states are more than passive receivers of European-level pressures. They may shape policies and institutions on the European level to which they have to adjust at a later stage (Börzel 2002). By referring to Europeanisation as a two-way process our conceptualisation underlines the interdependence between the European and domestic levels for an explanation of Europeanisation (processes). In contrast to a unidirectional top-down usage of the concept, studying Europeanisation as a two-way process entails certain disadvantages in terms of (waning) conceptual parsimony and methodological straightforwardness. However, we argue that these problems are outweighed by a greater ability to capture important empirical phenomena. It has convincingly been shown, for example, that Member States responses to Europeanisation processes feed back into the European level of decision-

[1] 'Football' certainly constitutes a 'non-political' sphere from the perspective of much International Relations and Political Science literature, i.e. it is still an 'exotic' topic to deal with as a political scientist. This by no means implies that *we* regard football as constituting a non-political sphere, to the contrary. Most works on the political nature of football (and sports generally) are, however, written by sport scientists, historians and journalists, see for instance Shaw (1987), Wagg (1995), Havemann (2005).

making. European/EU policies, institutions and processes cannot be taken as given, but are, at least to some extent, the result of domestic political preferences and processes which are acted out on the European level (Börzel 2001, 2002; Dyson 1999).

However, as will be further specified later on, framing Europeanisation processes as the interplay between the European and the domestic realm still constitutes a considerable simplification, largely because transnational (non-EU)-level developments may provide important properties of Europeanisation. In addition, it should be pointed out that for us Europeanisation does not equate 'EUisation'. Rather the EU is only part (albeit an important one) of the wider fabric of cross-border regimes in Europe in which other (transnational) institutions and frameworks, also play a role. Hence the EU is not the monopoly source and channel of Europeanisation (Wallace 2000). This may include institutional arrangements at the European level which are related to European cooperation in a broader sense, such as the Council of Europe (COE) or the Organisation for Security and Co-operation in Europe (OSCE) on the political level, but also organisations such as the Association Européenne des Conservatoires (AEC) and the European Football Association (UEFA) on the societal level.

While working with a fairly wide notion of Europeanisation, it is important to clearly delimit the concept in order to avoid the danger of overstretching it. For instance, we would reject 'the emergence and development *at the European level* of distinct structures of governance' as an appropriate definition of Europeanisation (Risse *et al.* 2001: 3; emphasis added). Although our conceptualisation relates to multi-level processes, the core focus remains on the process of change *in the domestic arena*. In addition, Europeanisation should not be confused with 'harmonisation' and also differs from 'convergence'. Europeanisation may lead to harmonisation and convergence, but this is not necessarily the case. Empirical findings indicate that Europeanisation may have a differential impact on national policy-making and that it leaves considerable margin for domestic diversities (Héritier *et al.* 2001; Caporaso and Jupille 2001). Moreover, as pointed out by Radaelli (2000: 5) there is a difference between a process (Europeanisation) and its consequences (e.g. potentially harmonisation and convergence).

**The societal/trans-national dimension of Europeanisation**

The societal/trans-national dimension of Europeanisation encapsulates two elements: (1) the *level and sphere* of change; on other words, that regulation and jurisdiction from Brussels is likely to induce some adaptational pressure not only at the political level but also in societal contexts (e.g. the realm of sport, and for our purpose, football); (2) the type of *agency* generating or resisting change. This latter dimension aims at capturing some trends, which can be traced in analysing how societal actors are either reacting towards attempts of regulation by the EU or creating transnational spaces that in turn impact on the governance of football.

As pointed out in the previous section, highlighting the societal/transnational dimension contributed to our rather broad conceptualisation of 'Europeanisation'. Concept-stretching has to be justified, given the potential loss of analytical clarity (Radaelli 2000). We argue that accounting for the societal and transnational dimension is justified, as otherwise interesting fields of study and important dynamics between the European and the domestic levels would go largely unnoticed.

As for the *sphere* of change, in contrast to most studies we chose to study a subject (football, or sports in general), which is seemingly 'non-political'.[2] What makes such a case interesting, besides the fact that it constitutes a more politicised realm than commonly assumed, is that it represents a social context, which forms an important and conscious part of citizens' 'life world'. It is therefore a context, which is realised by many people as part of their lives – not a supposedly abstract and inaccessible sphere of politics. To study processes of

[2] See n. 1

Europeanisation at this *societal* level thereby should allow for a deeper understanding of any Europeanisation regarding citizens' life worlds. Although this is not a major theme in our paper, the question of a Europeanisation of life worlds could lead to interesting insights in the eventual formation of a common European identity; a subject much debated in the current literature (Risse 2004; Mayer and Palmowski 2004). Aside from these considerations, to study Europeanisation dynamics within a societal field like 'football' may be salient for two reasons. First, it allows us to explore the applicability of Europeanisation concepts (sources, dynamics and level of change), which have been derived mainly from the analysis of more political contexts to non-political (societal) contexts. Second, our study may clarify potential 'blind-spots', such as dynamics and interrelated mechanisms in Europeanisation processes that have been largely ignored by traditional analyses, which have mainly dealt with political issues.

Although it would be wrong to assert that 'transnational dimensions' of Europeanisation have only rarely been *mentioned*, the concept of 'transnationalism' itself is less frequently *specified* and *illustrated* empirically in *Europeanisation studies*.[3] The transnational quality of relationships is often merely stated or an ongoing transnationalisation within EU-Europe is simply assumed (see Menz 2003, Winn 2003, Feron 2004). Yet, it is questionable whether the debate on concepts of transnationalism and transnational actors in the discipline of International Relations[4] offers any sensible starting points for our approach, mainly because this debate is 'still primarily concerned with proving against a state-centered picture of world politics that [transnational actors] matter' (Risse 2002: 268). In the context of (European) integration studies, scholars working in the transactionist, neofunctionalist or supranational governance perspective have of course somewhat gone beyond that and developed accounts of transnational dynamics (see for example Deutsch 1957; Haas 1958; Stone Sweet and Sandholtz 1997; and Niemann 2006). However, their focus was above all on the development of cooperation, institutions and policies *at the supranational level* that is (European) integration, rather than Europeanisation with its primary focus on change in the domestic arena.

While not diverging from a common definition of 'transnationalism', our concept also encompasses actors that have been less analysed in the current literature which heavily focuses on either non-profit NGOs or profit–driven multinational corporations. We define 'transnational actors' as societal actors in a broad sense, who coordinate their actions with societal actors from other national contexts in Europe, thereby creating common, trans-national reactions towards EU institutions and/or creating trans-national institutions. Transnationalism within Europe in our approach therefore rests on transboundary networks of actors, whose interests and perceptions are either aggregated or amalgamated within these networks and institutions. Societal governance networks across states have undoubtedly preceded the Europeanisation processes described here. That is, there have been supranational sports bodies – the European Football Association UEFA (founded in 1954) and its global counterpart FIFA (1904) – formed of delegates from national associations. However, as we aspire to show, Europeanisation processes from the 1990s onwards have induced a new quality of transnational agency.[5]

To speak of a 'societal/transnational dimension' of Europeanisation in the end means to pay tribute to the interrelatedness of the sphere of change and the type of agency: football as a societal sphere is characterised by a growing transnationalisation, as will be shown. Opening Europeanisation as a field of inquiry up to this dimension further adds to the awareness of the complexity of Europeanisation processes and may also incorporate the consciously perceived 'Europeanised' life worlds of European citizens into the academic debate.

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[3] But see Kohler-Koch (2002), who sketches out several dimensions of transnationalism within the complex system(s) of European governance.

[4] For an overview of this debate see Risse (2002).

[5] At times, these associations were used as infrastructures for the articulation of certain goals, at other times they were consciously ignored. Indeed, it would be an interesting study on its own to analyse more thoroughly the relationship between the national associations, the supranational associations and political as well as juridical decision-making on the European level.

**The Europeanisation process: some systemising factors**

Different typologies can be introduced in order to systematise Europeanisation processes. This section will formulate several systematisations, which are to some extent derived from the existing literature. Subsequently, our empirical analysis will explore to what extent such typology of the Europeanisation process makes sense, also in terms of the more transnationally driven sub-cases. To begin with, the *basic sources* of Europeanisation – top-down, bottom-up and transnational/societal – have already been sufficiently pointed out above and thus require no further explication here. Although these sources of Europeanisation often substantially interact, certain tendencies in terms of these dimensions can usually be ascertained (Lodge 2002).

Secondly, we can differentiate in terms of the *level of strength* of Europeanisation sources and pressures. As for top-town processes, a number of indicators can be suggested. The legal bindingness of EU provisions probably constitutes the best indicator for the force of top-down pressures (Vink 2002: 9-10). Yet, Europeanisation is not confined to legally binding EU provisions. It may be carried by more cognitive or ideational mechanisms. Although termed the 'weakest' Europeanisation trigger (Knill 2001: 221), the 'framing of domestic beliefs and expectations' still seems to drive Europeanisation processes forward to some extent (Knill and Lehmkuhl 2002: 258). In addition, the degree of clarity, both in terms of legal argumentation (concerning ECJ rulings) and in terms of legal competence (regarding exclusive or shared competence in the case of Commission involvement) influences the weight of downwards adaptational pressures. Ambiguity in these respects adversely affects Europeanisation dynamics. Moreover, the level of uniformity of reaching a decision at the European level – for example, in the Council or between the Council and the European Parliament on legislative acts, or in the Commission concerning decisions in the area of competition policy – also impacts on the strength of top-down Europeanisation sources and pressures. It can be assumed that, generally speaking, more uniform and consensual decisions at European level may have a more significant Europeanisation effect than rather contested EU decisions. As for bottom-up or transnational/societal Europeanisation, indicators regarding the strength of processes seem less obvious and perhaps more limited at this stage of inquiry. However, for example the existence of alternative (policy) venues or of credible exit options from prevailing arrangements and, more generally, the possibility of challenging existing regimes (when undesired policy externalities arise) condition the strength of such Europeanisation dynamics (Lodge 2002).

Our third categorisation concerns *reactions* to initial Europeanisation pressures. Broadly speaking, one can distinguish between reactions on two levels: the level of policy formulation and the level of implementation (Bugdahn 2005: 183). The type of reaction in terms of formulation and implementation depends on several factors, such as prevailing norms and preferences on the part of those affected or addressed by the initial Europeanisation pressures – and partly overlapping with actors' preferences – the goodness of fit, that is the compatibility between the (domestic) status-quo and newly induced (EU) requirements. On the level of (policy) formulation, we suggest that reactions to primary Europeanisation can take on different forms: (1) 'support', when affected/addressed actors back new requirements; (2) 'acquiescence', when agents simply accept the changes stemming from Europeanisation; (3) 'engagement/intervention', when actors seek to modify or reduce adaptational pressures; (4) 'confrontation', when actors try to resist or escape initial Europeanisation pressures. The degree of misfit can be assumed to gradually increase on this continuum.

Our fourth element systematising the Europeanisation processes is the *strength of reaction* to initial Europeanisation pressures. The impact of such responses will depend on several factors, one of which is access to government/policy-makers and the strategic position in, or 'membership' of, policy/advocacy networks. Another factor is organisational strength, made up, for instance, of material resources, the degree of centralisation and cohesiveness, effective management, etc. (Menz 2003).

Finally, the *degree of change* can be categorised. Drawing on Lodge (2002) and Radaelli (2004) who themselves drew on earlier writings, three main forms concerning the impact of Europeanisation pressures are suggested here: (1) 'system maintenance', which is characterised by a lack of change or the rejection of new requirements; (2) 'adjustment', where existing policy cores are not challenged, but some non-fundamental changes are absorbed and new layers may be added to the regime; (3) 'transformation', which denotes paradigmatic or core policy changes. Our empirical data will subsequently be examined, as far as possible, with regard to the above categorisations making up Europeanisation processes, such as sources, strength of initial pressures, reaction, strength of reaction, and degree of change.

Our empirical analysis is based on process tracing (Keown and George 1985), which has been put into practice through triangulation across different data sources (official documentation, semi-structured interviews, secondary literature and major media). As for the interviews, we conducted ten background/in-depth expert interviews with leading officials of German national as well as club football and leading sport journalists from 2004 to 2005. For our study, we have chosen to examine five different cases. These ensure variation concerning the degree of EU/European level incentives/pressures in order to be able to explore the plausibility of our systematisations across a wide range of different scenarios and so as to be capable of examining the causal relevance of the EU/European level. No or little variation in terms of EU pressures may not allow us to ascertain any positive degree of causality (Collier 1995). Our first three sub-cases – (1) *Bosman I*: the nationality issue; (2) *Bosman II*: the transfer regime; (3) broadcasting – are characterised by rather top-down (EU) pressures, albeit to varying degrees, while the last two sub-cases – (4) Champions League; (5) G-14 – are more induced by bottom-up and transnational rationales.

**Case 1 – The Bosman Ruling I: The Nationality Issue**

Some important trends in German football during the last decade can be interpreted as symptoms of an ongoing Europeanisation. This is because a whole complex of such trends – the increased influx of foreign-born players, attempts to restrict their numbers as well as to promote young German talents, and the search for a new 'transfer regime' – has its roots in the seminal 'Bosman ruling' of the European Court of Justice (ECJ) in 1995.

The provisions in the Treaty establishing the European Community, secondary legislation, Community policies and decisions all had an increasing impact on sport throughout Europe in the last decade, although 'sport' has never been among the core competences of the EC/EU (Ducrey *et al.* 2003: 32). Traditionally, sport as well as football in all its aspects (organisation of events, establishment and enforcement of rules etc.) has traditionally been regulated by a set of autonomous, interrelated organisations, in the case of football by clubs, national leagues and associations, several regional federations and one worldwide football federation (Croci 2001: 2). During the 1990s, however, football increasingly came to be recognised as an economic activity by EU institutions like the Commission and the European Court of Justice, and thus as an activity, which had to be regulated like any other industry according to the rules of the Community.

The *Bosman* ruling of the ECJ in 1995 in its essence consisted of two general findings, which had been derived from EU law concerning the free movement of people within the European Union and competition law, albeit it only drew on the former. The two findings were: first, the traditional transfer system with transfer fees to be paid for out-of-contract players infringed upon the right of every European (worker) to move freely under Article 48 of the Treaty of Rome (TEC) and thus had to be abolished; and second, 'nationality restrictions' as a means to limit the number of foreign players in a football club were ruled illegal in so far as they discriminated against players from countries within the European Union (Foster 2000: 42).

Football in Germany has been affected by both aspects, although one could claim that the latter one has had a more 'visible' effect for the whole football community. To abolish

general nationality restrictions[6] and to open up the market for players from all other countries within the EU already had an in-built tendency to increase the number of foreign-born players. The German Football Association (DFB), however, liberalised even further and expanded the right to play professional football in Germany without being considered a foreigner not only to EU residents (so-called *EU-Ausländer*) but to all players living within the 51 other member states of the European Football Association (UEFA). Thus in German football, after *Bosman* the status of *EU-Ausländer* really meant *UEFA-Ausländer* and EU resident meant UEFA resident, at least concerning the two professional leagues.[7]

How to account for this extension, which has been exceptional in Europe? One line of argumentation refers to the special socio-political situation in Germany after re-unification: the DFB and its leading actors were still influenced and impressed by the dramatic political changes in Europe and the 'unification' of the continent that had taken place a few years before. They simply 'did not want to erect new walls or barriers', especially towards national associations in Central and Eastern Europe, which had strong ties to the DFB.[8] In a similar vein, some actors were convinced that the ongoing process of European integration would render any differentiation between certain types of Europeans meaningless sooner or later.[9] Although the extension may show that 'football sometimes is more political than people think'[10], there was also an element of pragmatic (and even visionary) thinking to it, because the decision taken by the DFB in the end prevented non-EU European footballers from taking legal action against this discrimination.[11] Another explanatory factor is that this extension created a bigger market for German football clubs to sign players, especially players from Central and Eastern Europe.[12] After *Bosman* a central source of financing for clubs – transfer fees for out-of-contract players – ceased to exist. In addition, German clubs are subject to a relatively strict licensing procedure, which means they have to pursue fairly sound economic policies. Hence, opening up the market especially towards Eastern Europe also had a compensatory effect for German football clubs, as signing players from Poland or the Balkans was in general less expensive. Both explanations – the socio-political climate as well as an interest of the clubs to improve their position among European competitors – can be seen as complimentary rather than mutually exclusive.

It is hardly surprising that this decision led to a surge of players coming to Germany from all over Europe; a claim that can be substantiated by looking at the developments of the First Bundesliga. At the beginning of the 1990s – before *Bosman* – the shares of the respective players' groups of the overall number of players exhibit a fairly stable pattern: approximately 80 per cent German-born players, 12-14 per cent UEFA residents (without Germans), 5-7 per cent non-UEFA residents. After *Bosman* and the decision of the DFB to count all players from UEFA member-states as EU residents, we can easily detect some important changes in the composition of the players. Firstly, the share of German-born players has steadily decreased (accounting for 50 per cent in 2005). Secondly, the share of UEFA residents as well as the share of players from other continents has substantially increased, although the share of non-UEFA residents remains relatively small (between 12 and 14 per cent in 2003 and 2004)

[6] Before the transposition of *Bosman*, the so-called '3+2 rule' applied. It allowed European teams to field three foreign players and two 'assimilated players', i.e. who had played in the respective country for at least five consecutive years.
[7] This extension has not become effective for junior or amateur teams, where EU resident really means *EU* resident.
[8] Interview with Dr. Theo Zwanziger, then-Managing President of the DFB, by telephone, January 2005.
[9] Interview with Gerhard Mayer-Vorfelder, then-President of the DFB, by telephone, January 2005.
[10] Interview with Theo Zwanziger, Managing President of the DFB, January 2005.
[11] Only recently, the ECJ has issued a ruling concerning the discrimination of a European but non-EU professional player (from Russia), who had been restricted from playing by a nationality clause in Spain. The ECJ ruled this discrimination illegal on the grounds of the Partnership and Cooperation Agreement between Russia and the EU, see e.g. *Frankfurter Allgemeine Zeitung,* 13 April 2005. The 'Simutenkow ruling' from 2005, from this perspective, can be regarded as the logical extension of the 'Bosman ruling'.
[12] In general, *Bosman* of course led to increased commercialisation and competitive pressure on behalf of the clubs.

compared to that of UEFA residents (up to 38 per cent in 2005).[13] Although the decision to open the market for all Europeans has been rather liberal, the DFB did not fully liberalise until 2006/07, when it decided to abolish any limit on foreign players in professional clubs, while 12 German players have to be signed ('local player rule' of UEFA).

The shortage of young and talented German football players, which became obvious at the end of the 1990s, was at least to some part attributed to *Bosman* and its implementation in Germany. Thus, the carefully directed promotion of young and talented players eligible for German national teams has become a real concern of the DFB in the wake of *Bosman*. What is more, the DFB – in accordance with the German Football League (DFL) – has also tried to steer the development by establishing certain rules for professional and amateur clubs, which aim at developing and protecting young German players as far as possible within the limits of public national and European law. Every club in the Bundesliga has to maintain a training centre for young players (*Nachwuchsleistungszentrum*) in order to comply with the licensing rules. Amateur clubs of professional teams have become full U23-teams since 2005 (which means that only three players aged 23 or older can be fielded). Parallel to these measures, the number of non-EU players in German amateur teams has been cut back from up to six (2002) to three (2004). This kind of 'steering policy' within the association is complemented by the policies of the German Ministry of the Interior, which in 2002 issued a directive that in effect ruled that a non-EU player will not get a work permit in Germany unless he is signed by a team in the (first and second) Bundesliga. In 2003, the follow-up to this directive specified that non-EU players must be signed to play in the first team and must not play in the amateur teams of the professional clubs.[14]

In sum, the nationality-related part of *Bosman* generated strong pressure for change on the German FA. It led to a mixed reaction of the DFB: there have been counter-reactions of course, but no strong, full-fledged counter-pressure to European institutions. Transposition has been varied: progressive (the decision to extend the definition of 'EU resident') and more conservative (measures to promote German talents). Overall, the nationality issue of the *Bosman* ruling (along with the 'progressive' elements of its implementation) changed the structures and the landscape of German football. The make-up of the Bundesliga has become above all less German, more international, and more European in a wider sense. This degree of change is thus most aptly captured by the notion of 'system transformation'.

**Case 2 – Bosman II: The new 'transfer regime'**

As has been said above, the *Bosman* ruling not only dealt with the 'nationality question', it also stated that the traditional transfer system had to be completely revised, since the core of this system – the payment of transfer fees for out-of-contract players – had been found to infringe upon the right of free movement within the EU. Since the transfer system was internationally agreed upon and laid down through FIFA, it became clear during the second half of the 1990s that this part of *Bosman* was not just (EU- or UEFA-) European business, but could and had to lead to a revision of the whole international transfer system. First and foremost the Commission pushed this view and suggested that football constituted a normal business activity to be regulated according to competition law. By contrast, the national and regional associations as well as FIFA tried to promote their view that football and sport fulfil special social functions and therefore had to be treated differently. As Parrish (2003) has shown, these actors as well as others – clubs, leagues, media, and lawyers – have formed 'advocacy coalitions' to promote their views in the negotiation process. The overhaul of the international transfer system has been a long process, in which all actors tried to influence the other side on several occasions. The uncertainties sketched above thereby led to the protraction of this process, since they created some room for manoeuvre for the national

[13] These data concern the number of players fielded in the First *Bundesliga* 1992-2005. Data obtained from IMP AG Ismaning/Germany. For a more detailed account see Niemann and Brand (2008 forthcoming).
[14] *Kicker*, 27 January 2003; EU player in this regard means a player born within a member state of the EU, where the rights concerning the free movement of labour do apply.

associations and FIFA/UEFA. Although the Commission finally pushed them to the table by threatening another ruling through the ECJ in 2000 (Croci 2001: 7), the 'new transfer regime' agreed upon in 2001 suggested that the European Commission in some parts had loosened its demands and abandoned its purism. This is especially true with regard to contract stability (vs. 'normal' periods of notice), which still has to be guaranteed except for narrowly defined situations, and the introduction of a new system of training compensations (as a 'quasi'-transfer fee) for players aged under 23 to encourage and reward training efforts of clubs (Weatherill 2003: 68). This change in attitude of the Commission merits attention and needs to be explained. How was it possible that '[a]fter reaching the compromise agreement with the European Commission [in 2001], FIFA President Blatter, … publicly thanked Competition Commissioner Mario Monti with words that gave the impression that the Commission had simply acted as a consultant to FIFA to improve its transfer rules' (Croci/Forster 2004: 16)?

One could reason that the Commission has been persuaded by the arguments concerning the peculiarities of organising football and the presumed consequences of a fully liberalised transfer regime put forth through FIFA (and the DFB as well). Indeed, some leading German football officials interpret the negotiation process with the Commission to some degree as a successful act of lobbying in the sense of creating more awareness within the Commission for possible disastrous consequences of strict liberalisation; for example, the inoperability of leagues because of highly volatile player markets.[15] There are indeed some indicators that underscore this reasoning, since the Commission gradually reformulated its position throughout the 1990s, as can be seen in the so-called Helsinki Report on Sport from 1999 (Brown 2000: 139). Secondly, several national football associations, not least the German DFB, have lobbied and convinced their respective governments and especially their heads of government in order to exert some political pressure on the institutions of the Community, although mainly in form of public statements. In this regard, the joint statement of Gerhard Schröder and Tony Blair in the run-up to the Nice Summit 2000 – which expressed their concerns regarding a radical restructuring without enough consideration given to the peculiarities of football (Meier 2004: 14) – has been brought about also by several meetings of the DFB, representatives of leading German clubs and the German Chancellor, in which the 'football community' successfully specified possible adverse implications of a fully liberalised transfer regime for the most popular sport in Germany.[16] Access to policy-makers has therefore been a crucial resource for the DFB and other national football associations. Undoubtedly, the common stance of national governments exerted indirect political pressure on the Commission, which can act with some degree of autonomy in competition policy but certainly does not take its decisions in a political vacuum. Thus, one can detect both engagement (attempts to modify the pressure of the ECJ's ruling and the Commission's claims) and more confrontational elements (attempts to resist and oppose pressures through organising political counter pressure) among the reactions of the DFB and FIFA.

Two of the most important aspects of the 'new transfer regime' agreed upon by FIFA and the Commission, besides the rules concerning contract stability, are the fixing of training compensations for players aged under 23 and the principle that clubs involved in training and education of young players should be rewarded.[17] The payment of training compensation is in some ways a continuation of the old transfer fee payments for out-of-contract players, albeit at a lower level and only with regard to young and amateur players. This adds to the judgement that the 'new transfer regime' agreed upon by FIFA and the Commission resembles not a complete overhaul of the old system but rather a case of 'heavy adjustment'. The introduction of compensation payments – crucial for smaller clubs – by the DFB, however, was ruled illegal in 2004 by the Regional Superior Court Oldenburg, which argued that they infringed on the freedom to choose a profession (Article 12, German Basic Law). In essence, this ruling constitutes a 'national Bosman ruling' for the realm of amateur football. Since the Court underscored that the DFB may have complied with FIFA rules, but that the rules of private organisations like FIFA in any case have to abide by national as well

[15] Interview with Gerhard Mayer-Vorfelder, then-President of the DFB, 2005.
[16] *ibid.*
[17] Press Release European Commission, IP/02/824, 5 June 2002.

as European law, one can foresee that this ruling (confirmed by the Regional Court of Appeal in 2005), will not end the debate, which have as their seminal reference the *Bosman* ruling of the ECJ.[18]

In sum, while the '*Bosman* nationality regime' has led to a 'system transformation' in German (and other domestic) soccer, the '*Bosman* transfer regime' has had less far-reaching implications, especially given the fact that contract stability is still maintained under the revised transfer rules. Here, the impact of change resulting from European integration might thus better be described as 'heavy adjustment'. The less significant degree of change in this case can be attributed to both somewhat less forceful top-down Europeanisation pressures (with the Commission soon relaxing its purism) and more considerable counter-pressures (associations and, to a lesser degree, clubs pursuing substantial lobbying efforts).[19] The latter aspect indicates that 'Europeanisation' through European jurisdiction and institutions is far from being a one-way street.

**Case 3 – Broadcasting rights: the Bundesliga marketing system**

Over the past decade, the transformation of the broadcasting sector has had a significant impact on professional football in most European countries, including Germany. The sharp growth in the number of actors on the demand-side of the market with the advent of private television in Germany in the mid-1980s combined with the difficulty of increasing the supply of truly attractive football events led to very considerable increases in the prices charged for *Bundesliga* broadcasting rights (at least until the 'Kirch-crash'[20]), a development that has also been witnessed, to varying degrees, in the rest of Europe. Overall, broadcasting is a key element in the larger scale commercialisation of football in recent times. Broadcasting rights touch upon central power issues related to 'ownership' of the professional game. This commercialisation of sports (and above all football) in Europe has decisively fostered the intervention of EU institutions and Community law in the sector. The Commission's preoccupation with football has been driven by its need to monitor the broadcasting sector, in which it seeks to preclude practices that facilitate incumbents' to impede new entrants to the market (Weatherill 2003: 74).

One of the most contentious issues is concerned with the marketing system of broadcasting rights. An established commercial practice in European football, as well as the European sports sector more generally, is the central marketing and joint sale of broadcasting rights on behalf of individual participants. This system, which currently applies to both free-TV and pay-TV broadcasting of the *Bundesliga*, offers prospective buyers only the opportunity to compete for one package which comprises a league's entire output. Purchasers are unable to conclude deals with individual clubs. Such collective selling is an equalising arrangement through which revenues are distributed more evenly than in a decentralised model. In the latter system the allegedly more attractive clubs would take significantly more of the pie than smaller clubs. The main argument in favour of the collective system is that it helps sustain vibrant (inter-club) competition, a crucial element of any sporting activity. For instance, broadcasting rights for the Bundesliga, the English Premier League and the UEFA Champions League are marketed centrally by the DFB/DFL, the FA and UEFA, respectively.

[18] Ruling of the Regional Superior Court Oldenburg/Urteil des LG Oldenburg, Az.: 13 O 1195/04, 29 October 2004. The Federal Court of the DFB had to abide by this ruling and abolished these compensation payments in August 2006. See *Kicker*, 28 August 2006.

[19] These counter-pressures to some degree resemble what has been termed a 'policy upload' in the Europeanization debate, see Börzel (2002). However, in most instances, policy uploads are framed as being 'national', made by member states of the EU. In our case, however, the upload was conducted by societal actors mostly.

[20] The Kirch Media Group, which acquired the *Bundesliga* broadcasting rights for the period 2000-2004, went into liquidation in April 2002. Only recently, media tycoon Leo Kirch has made a comeback through 'Sirius', a company of his own which will market the *Bundesliga* broadcasting rights for the 2009-2015 period. This agreement between the DFL and Sirius guarantees revenues of 3 billion Euro for the 36 *Bundesliga* clubs over that period, hence about 500 million Euro annually, which means a reasonable increase from the current 420 million Euro per season.

From the perspective of EU law two issues were important here: firstly, whether the prevention of clubs from entering into individual agreements with broadcasters amounts to a restriction of competition and thus falls within the scope of Article 81 (1) TEC; secondly, whether the collective selling of broadcasting rights is necessary to ensure the survival of the financially weaker participants in the league. If the above mentioned solidarity argument is accepted, an exemption under Article 81 (3) from the application of Article 81 (1) TEC may be granted (Parrish 2002: 9).

Although the Commission generally has very significant competencies in competition policy (see McGowan 2000), it had already insisted that it did not aspire to become a general sports competition policy regulator. The Commission also more and more deviated from an orthodox articulation of Articles 81-82 in its communications and became increasingly eager to show respect for the social and cultural benefits of sports in recent years (Weatherill 2003). Hence, overall the level of top-down pressures (exerted by the Commission here) was less significant than in the previous two sub-cases.

The DFB requested an exemption from the application of Article 81 with regard to the central marketing of television and radio broadcasting rights for professional football matches in Germany in 1999. This was an issue of crucial importance to the DFB. The latter was not only concerned about the balance of inter-club competition. If the Commission was to rule in favour of a decentralised model, the DFB and DFL were to lose substantial property rights over broadcasting. Aided by UEFA as well as German policy-makers and backed by a large majority of clubs, the DFB sought to reduce EU level adaptational pressures. Its reaction can thus be described as intervention/engagement. Such response is rational in view of the preferences on the part of the DFB/DFL, UEFA and most Bundesliga clubs and given the substantial misfit between the existing regime and that suggested by the Commission.

Under the German collective selling system the DFB leases the broadcasting rights to the DFL, which markets the rights and redistributes the revenues gained from the broadcasting contracts to the clubs. The contracts in question in the DFB request for exemption from Article 81 concerned the rights to show matches from the First and Second Bundesliga. The application for derogation from Article 81 was substantiated with reference to the solidarity function, which the central marketing system supposedly fulfils, in that funds are redistributed more fairly among clubs than under a decentralised system.

This stance is accepted by most officials from the DFB and DFL as well as the vast majority of clubs. Among the 36 professional German football clubs only Bayern München, Borussia Dortmund and Bayer Leverkusen favoured a decentralised marketing model, in view of their capacity to raise considerably greater revenues. Although these clubs sporadically threatened with exit options, such as a European breakaway league, during the course of discussions all clubs eventually accepted the collective selling system. Later, however it was revealed that Bayern München mainly came on board because of a 'secret' marketing treaty with the Kirch-Group, which had secured the rights for the period 2000-2004. In this agreement Bayern München was compensated for lost revenues by foregoing individual marketing arrangements. As a result, the club *de jure* agreed to the central marketing model, while *de facto* securing the financial status of a decentralised system. This can be regarded as the introduction of elements of decentralised marketing through the back door (Kruse and Quitzau 2003: 13-14).

In the DFB request for an exemption from EU antitrust rules, the DFB and the DFL made a considerable effort to influence matters. They mainly sought to assert their preferences via UEFA. Former DFB President Mayer-Vorfelder was well placed in that respect as a member of the UEFA Executive Committee and the Executive Committee Working Group on matters related to the European Union. Within the UEFA framework DFB officials also participated directly in talks with representatives from the European Commission, members of the European Parliament and national ministers responsible for sport. In addition, top DFB officials cultivated direct relations with the Commissioners Reading and Monti. The DFB mainly used UEFA as a channel also because the latter was – simultaneously to the DFB

case – involved in talks with the Commission as it had applied for an exemption from Article 81 concerning the collective marketing of commercial rights to the UEFA Champions League. Lobbying (via UEFA) has retrospectively been viewed as an effective method.[21] Rather than applying direct (political) pressure, it was important in the discussions with the Commission and other EU circles to bridge certain knowledge gaps and to specify the implications of a vigorous application of Community antitrust rules to professional football in Germany. In addition, a certain amount of political pressure spilling over from the *Bosman* case and the subsequent talks concerning transfer rules[22] provided an additional rationale for the Commission decision to exempt the new system for marketing Bundesliga broadcasting rights. These logics also have to be seen against the background of growing anxieties on the part of the Commission in recent years to show respect for the social and cultural benefits of sport and its decreasing desire to get involved in sport policy (Weatherill 2003).

In January 2005 the Commission closed the case in view of certain commitments made by the DFL. Most significantly, media rights are offered in several packages in a transparent and non-discriminatory procedure. However, the new marketing system for *Bundesliga* broadcasting rights contains core demands of the DFB/DFL. The new model has been described as 'essentially a centralised system of marketing broadcasting rights with some decentralised elements on the fringes'[23]. Even though this interpretation may be slightly optimistic, collective marketing of TV rights will broadly continue in one important aspect: clubs have only limited scope for selling their games.[24] Overall these changes, spurred by EU-level pressures, can be described as 'partial/modest adjustments', since only moderate alterations were made and important policy cores remained (largely) untouched.

**Case 4 – The Champions League**

So far we have predominantly looked at the adaptational pressures stemming from the European Union and the transnational and specifically German responses toward these pressures. In contrast, this section deals more with transnationally and domestically induced changes which have a significant bearing on the policies, structures and attitudes governing German (professional) football. The most important factor in that respect is the UEFA Champions League. Since the early 1990s there has been increasingly strong pressure on UEFA from the big European clubs and media groups to expand European club-level football competition in order to exploit its commercial potential. UEFA welcomed such ideas given the possibility of (further) raising its profile and status. As a result, UEFA enlarged the European Champion Clubs' Cup in 1992/1993 to include a league format, which has subsequently been called the 'Champions League'. Again at the initiative of media companies and the largest European clubs, which at times mildly threatened with the exit option (a European breakaway league), the league format was expanded in 1997, a step that was acquiescenced by UEFA. This allowed for more participants and increased the number of matches played, thus raising revenues.

Once established, the Champions League has itself become a source of Europeanisation, thus setting off a 'second round' of Europeanisation (Bugdahn 2005: 183). It has turned into a real focal point for the more competitive Bundesliga clubs, a development paralleled across other European football leagues. The rationale is two-fold. First, the participation in the Champions League is financially very lucrative. For example, in the season 2002/2003 Borussia Dortmund earned 33.7 million EUR (27.1 per cent of its total revenue) by merely reaching the second group stage in the Champions League. And in the season 2000/2001

[21] Interview with Gerhard Mayer-Vorfelder, then-President of the DFB, 2005.
[22] Statements by Gerhard Schröder and Tony Blair as well as provisions in the Amsterdam Declaration emphasised the need for EU institutions to listen to sports associations when important questions affecting sports are at issue.
[23] Interview with Dr. Christian Hockenjos, Managing Director at Borussia Dortmund, by telephone, January 2005.
[24] Clubs can sell their games for various media only after the match. Time frames for selling these rights differ across the different media. For full details see European Commission (2005).

Bayern München gained 41.25 million EUR – almost twice as much as through total national TV revenues – by winning the Champions League. It can be argued that, due to the less lucrative different domestic TV-marketing conditions, participation in the Champions League is even more important for the top German clubs than for their English, Spanish or Italian rivals in order to stay competitive on the European level. English clubs can draw on huge earnings through their massive national broadcasting contracts. Top Italian clubs can raise very considerable revenue because the pay-TV sector is decentralised.[25] And in Spain both free- and pay-TV is marketed on an individual basis, which benefits the most attractive teams disproportionately.

Secondly, the Champions League has also become a focal point for the bigger German (and other European) clubs because it has developed into a top brand. Part of the success story is that it in 2003-04 it contracted eighty-two TV partners in about 230 countries and islands and was able to increase its world-wide audience/broadcasting quota by (another) 9 per cent. In addition, Champions League matches have generated a higher average attendance than games in the biggest domestic leagues.[26] Another indicator for the development of the Champions League brand is the continuity and fidelity of its sponsors: Ford, Mastercard and Amstel have all sponsored the Champions League from the outset or joined shortly after. Sony is also developing into a long-term partner. These companies all seem to regard their substantial contributions as profitable investments. A different sign of successful brand-building is the receipt by the Champions League of the TV industry's 'Oscar' awarded through the Broadcast Design Association for the best European appearance in the sports business in 2004. These 'soft' factors again have substantial positive financial implications for clubs taking part in the Champions League, for example in terms of sponsoring and merchandising, even though the impact of Champions League participation on these areas is difficult to measure. Overall, our interviewing of officials at the bigger Bundesliga clubs has revealed that – due to the above developments – the Champions League brand and its monetary implications have generated substantial appeal to them. Clubs like Borussia Dortmund and Bayer Leverkusen are aware that their performances in the Champions League have considerably raised their images nationally and internationally and that their membership in the G-14 forum is primarily owing to that. Overall the Champions League has altered the economic structure of European club football. Given domestic (broadcasting) background conditions, it is of particular appeal to Bundesliga clubs.

There is another aspect which is fostered by the Champions League (and by the increase of foreign-born players following from *Bosman*): the potential development of a 'European public space' (Brown 2000: 142). It has been noted that in contrast to processes on the level of elites, the general public is still for the most part inward-looking. As noted by Kohler-Koch (2002: 6), language barriers, strong national or local identities and traditions hold back the development of such transnational public space. The argument here is that football plays an important role in forming allegiances and identities at the national, local and supranational level, as it draws on an emotional investment by the supporter. If football is indeed an important expression of supporters' (collective) identities, cultural diversities could be given a more positive expression through football, and more 'European' allegiances could be reinforced. If fans' teams are increasingly composed of foreign-born (European) players, as is the case across the Bundesliga, and as their favourite players are gradually more non-native Europeans – such as the popular Dutch Rafael van der Vaart, the Belgian Daniel van Buyten or the Frenchman Willy Sagnol – this is likely to challenge existing identity patterns. As noted by the *Economist*, 'over the past decade European football teams have turned into a living, breathing embodiment of European integration'.[27] Such tendencies are also reinforced by high audience quotas of Champions League games and the positive imagery and brand as well as high status attached to European-level competitions more generally. As for the

[25] Juventus Turin has allegedly made 93 million EUR through pay-TV during one season in the past: interview with Karl-Heinz Rummenigge, Chairman Executive Board, FC Bayern München AG, by telephone, December 2004.
[26] Between 1992/1993 and 2003/2004 the Champions League has generated an average attendance of 37.073, more than any national football league during that period.
[27] *Economist,* 29 May 2003, 55.

German case, no data or studies examining this argument more closely are known to the authors[28], and the level of change is difficult to measure. Judging from media coverage and preliminary interviewing, it can be suggested that the impact of the Champions League in that respect may be quite substantial. Of course, these tentative findings do not replace proper empirical research on this issue, which would however go beyond the scope of this article.

**Case 5 – The G-14**

Going beyond processes of 'EU-Europeanisation' allows transnational dynamics, which emanate from football clubs, to come into play. Most remarkably, in the context of new technological (broadcasting) and legal (EU) developments and given the new financial dimensions of professional football (Champions League), new forms of European transnational networks have evolved, most prominently the so-called G-14.

The G-14 is a self-selected and self-recruiting interest group of today 18 big European football clubs. Its legal structure is that of a European Economic Interest Group (EEIG), which means that it is embedded in the instruments of the Community for facilitating and encouraging transnational cooperation between firms (as it was originally intended by the Community). That makes it, above all, a lobby group on behalf of the mainly commercial (common) interests of leading European clubs. Of great importance for the formation of the G-14 was the proposal of the Italian media organisation Media Partners in 1998 to establish a European Super League, a break-away league, in order to generate higher revenues from European-wide competitions than under the scheme of the UEFA Champions League (Parrish 2002: 11). Although UEFA countered with a change of format of the Champions League (Kruse and Quitzau 2003: 15) that appeased the big clubs[29], the G-14 took steps to formalise and in 2000, constituted itself officially as the European lobby group 'G-14' with a General Manager who had been a key figure in the logistical organisation of UEFA Champions League before (Ducrey *et al.* 2003: 61).

Three German clubs are members of the G-14: Bayern München from its starting, Borussia Dortmund was invited to join in 1999 and Bayer Leverkusen in 2002. At the Management Committee, the de facto leading organ of the G-14, which generally sets the agenda, the 'German voice' has been for some time Vice Chairman Karl-Heinz Rummenigge, who through his position at Bayern München and his involvements with the DFL and FIFA has sometimes been named the 'ambassador of the G-14'.

The G-14 generated dynamics at three levels – vis-à-vis the European Commission, vis-à-vis UEFA/FIFA and 'inward-looking' among its members – thereby contributing to Europeanisation processes in the realm of football. In 2001, the G-14 opened an office in Brussels. This choice of place also reflected the growing awareness in football circles that the European Union has become a centre of gravity or at least a power centre for football.[30] For the G-14, it also mirrors the fact that the Commission has been regarded by the leading clubs as a potential ally (vis-à-vis the various associations) in reforming football according to the 'business perspective' (Ducrey *et al.* 2003: 34). Interestingly, while the G-14 has not been recognised by either UEFA or FIFA as an official organisation, the European Commission has not acted in a reserved manner and allowed the G-14 to explain its position as 'employer' of footballers in the talks between FIFA and the Commission about a new transfer regime in 2001. Thus, the relationship between the G-14 and the Commission has been characterised to some degree by mutual recognition of the respective positions. It did not generate any discernible pressure or counter pressure, but it certainly has reinforced 'Europeanising'

[28] For the English context, see Brown (2000) and King (2000).
[29] As Kruse and Quitzau (2003: 15) put it, the introduction of more group matches increases the number of matches to be played and thus revenues for participating clubs.
[30] In 2003, the UEFA has also opened an office in Brussels to liaise with the EU.

mechanisms within the G-14 because of the Commission's acceptance of the group as a legitimate football organisation.

The orientation of the G-14 towards Europe can be explained by reference to the creational powers of the EU as well as its members' interest in revenues from lucrative European competitions (the Champions League in reality and the breakaway Super League as a rather implicit threat to UEFA). UEFA, not surprisingly, has a somewhat distanced relationship to the G-14, but recent developments hint at its attempt to strengthen ties with European football clubs either to accommodate the G-14 or to weaken it. In this regard, the UEFA Club Forum was established in 2002 as an expert panel (with the status of an advisory body) with representatives from 102 European clubs as members. Similarly, the European Professional Football Leagues (EPFL), an association of 15 professional leagues founded in 1998, has recently become more vocal as it has been trying to establish itself as the fifty-third association alongside the various national associations within UEFA. These developments also show that German football officials have contributed to some counter trends to the G-14 as well, since the strengthening of the EPFL has been partially caused by leading actors of the DFL.[31]

Important from our point of view is that a more and more complex web of transnational networks and relationships has been established throughout the realm of European football, mainly through and with reference to the G-14 grouping. The G-14 itself thereby represents a qualitatively different type of transnationalism from those of UEFA or FIFA, since the latter are, above all, constituted through national associations (Lehmkuhl 2004: 182). The transnational character of the G-14, on the other hand, is based more on personal relationships between top executives, which have frequent contact with each other and act on the basis of interests which overlap for a good part; moreover, national regards tend to dissolve[32], in contrast to UEFA where national interests from time to time seem to be more important. The G-14, to sum it up, could level some pressure on FIFA/UEFA by promoting the interests of its member clubs vis-à-vis European institutions and the football associations themselves. Attempts of UEFA and other actors to accommodate some demands of football clubs within European football governance have been provoked by the G-14. The grouping itself adds to the growing Europeanisation of football in Europe, because it generates a 'Europeanising', inward-directed dynamic through providing a trans-national platform for the articulation of common interests.

It would, however, be slightly exaggerated to see the G-14 grouping as first and foremost a socialising instance (emitting Europeanising impulses) for the clubs involved. The recent gestures of Bayern München, for instance, make quite clear that the clubs still have a strong instrumental view of the G-14 as a lobbying venue. If it is to be used as a tool to influence UEFA (regarding the selling of broadcasting rights of the Champions League) or institutions of the European Union (regarding the possibilities of a Salary Cap for players), the G-14 seems to be a promising venue. The latter case which articulates a specific German demand – vis-à-vis other European clubs – for reasons of competitiveness, indicates however, that the G-14 has retained strong national bonds. Since most clubs in the G-14 have not shown a noticeable interest in Salary Caps, Bayern München has recently come to criticise the clubs involved for their egoism and moved towards engaging UEFA as a potential ally.[33]

These observations do by no means invalidate our claim that the G-14 is a forum in which the European level of political institutions and sports' associations is actively addressed; it only underscores that the European political and societal sphere has become a focal point of activity for German top football clubs as well.

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[31] See 'Straub fordert direkte Mitsprache bei UEFA', in: *ZDF.de*, 30 November 2004.
[32] Interview Christian Hockenjos, Managing Director at Borussia Dortmund, 2005, see also the Ducrey *et al.* (2003: 60).
[33] See, 'Rummenigge fordert Salary Cap', in *Kicker Online*, 17 November 2006.

**Table 1:** *The systematisation of Europeanisation processes in German football across sub-cases*

| Sub-cases | Source of Europeanisation | Strength of Pressure/Dynamic | Addressee/ Affected Actors | Reaction to Pressures | Strength of Reaction | Degree of Change |
|---|---|---|---|---|---|---|
| ***Bosman I:*** ***The Nationality Issue*** | Top-down through ECJ / Commission | (Medium) to High | DFB, (Football clubs) | *Formulation*: no role *Implementation*: mixture of progressive and conservative transposition | Moderate | Transformation |
| ***Bosman II:*** ***New Transfer Regime*** | Top-down through ECJ / Commission | Medium (to High) | FIFA, national associations (incl. DFB) | *Formulation*: engagement and confrontation | High | 'Heavy adjustment' |
| ***Broadcasting Rights*** | Top-down through Commission | Medium | DFB/DFL | *Formulation*: Engagement | (Relatively) High | Adjustment |
| ***Champions League*** | Transnational / bottom-up *[still privileged actors: big clubs, media]* | Medium (to High) | UEFA | Acquiescence and support | Medium | ('Heavy') Adjustment |
| | 'Champions League' *itself* | Medium | (big) clubs | Support | Medium | (hints at possible transformation?) |
| | | (Low to) Medium | European public | Support | Low? | |
| ***G-14*** | Transnational / bottom-up *[still privileged actors: reps of big clubs]* | Low | EU Commission | Support | Low (to Medium) | Adjustment? |
| | | Medium | UEFA / FIFA | Confrontation and engagement | Medium (to High) | |
| | | High | *inward-directed* | ? | ? | |

## Conclusions

The above analysis indicates that our five sub-cases represent rather different Europeanisation processes (see Table 1). *Bosman I* is characterised by strong top-down EU pressures on the DFB (and German clubs) to change nationality restrictions, which were mediated through a mixture of progressive and conservative transposition, while domestic and transnational actors did hardly intervene in the policy formulation period. As a result, we have a high degree of change, adequately described as 'system transformation', which is indicated not least in the large share of UEFA residents playing in the Bundesliga. The second case, *Bosman II*, can be described as medium to strong European level/EU pressure on FIFA and national associations to alter the transfer regime. Domestic and transnational agents already became involved in the policy formulation phase and built up considerable opposition against the line pursued by the Commission. Hence, it was possible to prevent a complete overhaul of the transfer system, but (heavy) adjustments had to be made. Thirdly, as for the *broadcasting* case, we witnessed medium pressure from the Commission on the German Football Association and the German Football League to change the centralised marketing model. The DFB and DFL effectively engaged and opposed the Commission on this issue and thus managed to reduce Europeanisation pressures, as a result of which the current broadcasting system merely has to be adjusted.

Cases four and five are characterised by rather different sources of Europeanisation, emanating from domestic and above all transnational spheres. The *Champions League* case represents a more complex process in which big football clubs and media companies exerted considerable pressure on an acquiescencing and somewhat supportive UEFA for an

extension and upgrading of European club competitions. The resulting Champions League, especially due to its very significant financial implications, has to some extent altered the economic structure of European club football, acting as a pull factor particularly to German clubs, given domestic (broadcasting) background conditions. However, the impact of the Champions League (together with the increase of foreign-born players following from *Bosman*) is more profound than that; it may also contribute to the development of a European public space, in terms of forming allegiances and identities on the level of ordinary citizens. Finally, the *G-14* case is driven by transnational pressures from the biggest European football clubs with rather different reactions on the EU level, on the level of European/international football associations (UEFA and FIFA) and within the G-14 itself. While the Commission has been rather supportive, the UEFA tends to see the G-14 as a rival institution that needs to be somewhat held in check. Internally, the G-14 has witnessed certain socialisation processes (and the development of common perspectives). G-14 Europeanisation processes have proceeded rather unevenly, but nevertheless had a moderate impact on the German (and European) football regime.

We have aimed at exploring the applicability of Europeanisation concepts and categorisations – mainly derived from the analysis of political contexts – to other fields of social interaction. Overall, our systematisation of Europeanisation into different stages and categories has proven useful for an analysis of different Europeanisation processes in the area of German football. The last two sub-cases, which were characterised by considerable complexity, have indicated the boundaries of utility of our typology, as the variety of dynamics became increasingly difficult to capture. Categorisation (and thus implicitly conceptual parsimony) is always, to some extent, a trade-off with the complexity of empirical 'reality'.

Our analysis also adds to one of the most widely discussed issues in the Europeanisation debate, namely the causal relevance of the EU concerning domestic developments. If we look at the first three sub-cases in isolation, we have some scope for a comparative analysis, as these units are adequately homogenous. Values on the explanatory variable (the level of EU pressures) vary across these sub-cases between high (*Bosman I*) and medium (*broadcasting*). The three sub-cases indicate that the level of EU pressure indeed seems to have causal relevance. High EU pressures in *Bosman I* (accompanied with only medium intervening counter-reactions) have led to a transformation of the nationality regime. By contrast, only medium pressures in the case of *broadcasting* (albeit accompanied by stronger counter-reactions) has only led to (minor) adjustments of the existing broadcasting model. The *Bosman II* case also fits into this sequence: medium to high EU pressures met by strong intervening counter-reactions lead to heavy adjustment of the transfer regime. While this comparison suggests that the EU matters, it also indicates that control/intervening variables, such as domestic and transnational/societal responses, are also important factors to be reckoned with.

European Integration Studies benefit from an analysis of (German) football in several ways. Most importantly, it highlights the under-researched societal/transnational dimension of Europeanisation as a central theme in EU Studies. Our analysis of football has allowed us to draw attention to *societal spheres* and *transnational agency* as important aspects/properties of change in Europeanisation processes. This also enabled us to go beyond the conventional top-down (and bottom-up) approaches still dominating this (sub-)field, thus accounting for the complexity of the process. Needless to say that a more theoretically-driven analysis of sequencing patterns of top-down and bottom-up processes would add further value.

At the same time, our analysis contributed to ascertaining the utility of Europeanisation factors/categorisations – mainly derived from the analysis of political contexts – to explain dynamics in societal, i.e. rather non-political, contexts. In some ways, football confirms the knowledge about dynamics and mechanisms of Europeanisation that recent studies going beyond the conventional (top-down) perspective have gained. However, as cases 4 and 5 have especially indicated, new types of transnational agency might also enhance the need for new analytical instruments/categories.

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# UEFA and the European Union: From Confrontation to Co-operation?

Borja García

**Abstract**

This article investigates the relationship between UEFA, as European football's governing body, and the EU. It assesses the evolution of UEFA as a football governing body since the Bosman ruling (1995) until current initiatives such as the rules on locally-trained players (2005-2006). The paper traces the evolution of UEFA's reactions to the increasing involvement of EU institutions in football matters, with special focus on the regulation of the players' market. It is argued that UEFA's attitude towards the EU has changed in the last ten years. Whilst the EU was seen as a threat for UEFA in 1995, it is now considered a 'long term strategic partner'. Two main reasons can be identified for UEFA's evolution. First and foremost, UEFA has been forced to accept the primacy of European law and its application to the activities of football organisations. UEFA has had no option but to adapt to the impact of European law and policies on its activities. This has lead to a relationship of 'supervised' autonomy between UEFA and the EU institutions. Second, UEFA's strategic vision to preserve its own position within the governance structures of football. UEFA has tried to enhance its legitimacy within football's governing structures by engaging in policy co-operation with EU authorities. This paper draws almost entirely on empirical research conducted through elite interviews and the review of official documents.

IN DECEMBER 1995 THE PRESIDENT OF THE UNION OF EUROPEAN FOOTBALL ASSOCIATIONS (UEFA), Lennart Johansson, considered that the European Union (EU) was trying 'to kill club football in Europe' (quoted in Thomsen 1995). European Commissioner Karel van Miert replied that 'if they [UEFA] want war, it will be war' (quoted in Hopquin 1995). Twelve years later things have changed; UEFA and the European Commission joined forces to celebrate the 50th anniversary of the Treaty of Rome (European Commission 2007a), the European Parliament supports UEFA as the governing body to protect football's future (European Parliament 2007), and UEFA describes its relationship with the EU as 'crucial' for the organisation (UEFA 2007c: 2). It appears that in just over a decade, the EU-UEFA relationship has radically altered. But what has actually changed?

Football authorities have traditionally been hostile to any sort of external regulation, be that by governments or by the courts. This was also the case when the European Court of Justice (ECJ) and the Commission got involved in the regulation of professional football as a result of their duties to adjudicate in freedom of movement and competition policy issues. Football bodies such as the International Federation of Football Associations (FIFA) or the English Premier League remain rather sceptical of any involvement with the European Union other than settling court cases or Commission investigations. However, UEFA now seems happy to engage with the EU in dialogue and wider policy issues. This paper examines the evolution of the relationship between UEFA and the European institutions. It is structured as a longitudinal study of UEFA's engagement (reactive and proactive) with EU institutions,

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mainly the Commission and the European Parliament. Other accounts have extensively analysed almost every one of the EU's incursions in football matters (see for example, but not exclusively, Miettinen and Parrish 2007; Parrish 2003b; Holt 2006; Blanpain and Inston 1996; Gardiner and Welch 2000; Spink and Morris 2000; Weatherill 2005, 2003). This article does not intend to map each and every one of the *conflicts* originated between UEFA and the EU. Neither does it intend to enter into a legal analysis of the EU regulation of football. The objective is to evaluate the main decisions of European institutions with an impact in shaping UEFA's response towards the EU. As such, much stress is put on evolution and perception of the EU within UEFA. The article tries to condense the presentation of the empirical evidence where appropriate and especially when other academic accounts have already dealt in depth with particular decisions. The article has a focus on the regulation of the players market (transfer system, nationality quotas), although it touches in other areas where necessary to provide context and facilitate the analysis.

The paper is written from UEFA's organisational perspective. That is to say, the objective is to understand the organisation's adaptation to the politics of the EU, not to explain the evolution of the EU's policy on sport, football or UEFA. In doing so, the paper constitutes a first step in the process towards a wider analysis of the role of non-institutional actors in the EU policy-making process, as exemplified by the case of football. The article draws on empirical research carried out over a period of 22 months (from January 2006). It consists of a combination of archival research and 43 semi-structured interviews. The archival research covers three types of documents: newspaper reports, European institutions' official documents and UEFA publications and internal documents. Archival research was aimed at identifying the cases that could best represent the evolution of the relationship between the EU and UEFA. A review of the available academic literature was also used for this purpose. Interviews were only undertaken once the cases were identified.

The sample of interviewees was selected to represent the policy decisions singled out for exploration. The sample combined a targeted selection and snow-ball method. The small size of the EU-football policy community makes it possible to construct a representative sample for qualitative analysis with a targeted selection of officials. Individuals were first included in the sample following three criteria: (i) knowledge and expertise about each policy decision, (ii) the sample's overall level of representation (including the majority of actors involved), (iii) triangulation. After the initial selection, the snow-ball method was used to strengthen and complete the sample. Interviewees were asked to identify individuals inside and outside their own organisation/institution that could (i) provide further information and/or (ii) give a contrasting view of the facts.

The interviews cover representatives of EU national governments (3), present and past Commission officials (6), Members of the European Parliament (6), present and past UEFA officials (11), representatives from professional clubs and national leagues (4), officials of national FAs (4), representatives from footballer's trade unions (2), representatives from supporters' organisations (1) and other specialists (academics, lawyers) in the field (6). Whilst the coverage of the sample is fairly extensive, it is necessary to acknowledge some weaknesses. World football's governing body (FIFA) and G-14 are not represented because their officials rejected the interview requests. The case of FIFA is of less importance for this article, as the main focus is on UEFA. Yet, a combination of newspaper articles and FIFA's press releases has been used to map the organisation's positions. Unfortunately, this provides a less detailed level of information than interviews and as such it is acknowledged. The case of the G-14, which represents 18 of the richest professional football clubs in Europe, has been solved by contacting clubs individually and leagues. Whilst this does not substitute G-14's positions as an association, it is considered that the participation of top professional clubs is covered.

The majority of interviews were undertaken in two stages: the first group in Brussels during the spring and summer of 2006 and the second group in Switzerland during February 2007. Some other interviews were also done in Madrid and the UK in between these periods to accommodate for the interviewees' schedule. Interviews were semi-structured, face to face

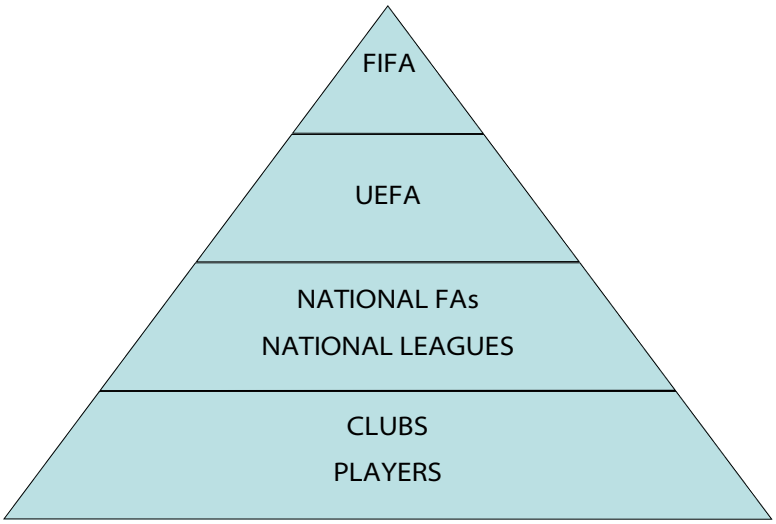
conversations of around 60 minutes each. Interviewees were asked three sets of questions: One related to their general perception of the European Union's involvement in football and their strategy to deal with it (e.g. What does the EU mean for your organisation?); a second one related to the transformation of football governance and the division of labour between European authorities and football organisations; and a third set of questions requesting particular information about their role in individual cases, such as *Bosman* or the negotiations with the Commission on the selling of TV rights.

The article is divided in five sections. It starts with a brief description of UEFA, its status and duties. It then goes on to explain the confrontation between UEFA and European law as the first stage of their relationship. This revolves around the *Bosman* case of 1995 and its antecedents. Section three analyses the transition from the initial confrontation to a more pragmatic realisation of the importance of the EU for UEFA. Section four introduces recent initiatives such as UEFA's rules on locally-trained players (2005). Finally, the fifth section analyses the possible explanations to the evolution of UEFA's strategy towards the EU.

### *What is UEFA?*

UEFA is the governing body for football in Europe. With a current membership of 53 national Football Associations (FAs), its remit is wider that the European Union; however, FAs located within the EU constitute a majority of the association's overall membership. EU-based football federations number 30 out of the total 53 UEFA members[1]. UEFA was founded in 1954 by 28 European national FAs that felt their interests were not being served by FIFA structures (UEFA 2004c). UEFA is part of the so-called pyramid of governance of European football, together with FIFA and the national FAs (see figure 1).

*Figure 1: The pyramid of European football's governance*




The governance of European football resembles a pyramidal structure where each layer takes on different responsibilities with a different geographical scope. The international federation (FIFA) sits at the apex, followed by European football's governing body (UEFA) and national FAs. Clubs and players form the base of the pyramid. The remit of FIFA as world football's governing body is wider than UEFA's, but the former has still to be considered part

[1] For historical reasons England, Northern Ireland, Scotland and Wales are recognised as separate FAs. Thus there are four different football federations in the UK.

of the pyramid of European football for three reasons. Firstly, it has regulatory powers over football in Europe. Secondly, FIFA statutes contain provisions obliging UEFA (and all continental confederations) to comply with and enforce compliance with FIFA regulations and decisions (FIFA 2007: Article 20). Similar requirements apply to national FAs (Article 13), which are moreover obliged to ensure that clubs and leagues comply with the statutes, decisions and regulations of FIFA (Article 13.1 (d)). And thirdly, some of the rules adopted by FIFA have come under scrutiny by the ECJ and the European Commission.

The pyramid of European football is a hierarchical structure. There is a top-down channel of authority, where governing bodies have authority over the lower levels. Thus, a decision by FIFA will be passed down the line to UEFA and then to the national level. Thus, professional clubs and players, at the bottom of the pyramid, are subject to the regulations of governing bodies if they want to take part in their competitions. This is a major cause of conflict because those in the lower levels in the pyramid could question the legitimacy of the federations' regulations if they do not feel included in the decision-making process.

Although it is still valid, the concept of the pyramid of European football needs to be approached with some caution. Holt correctly points out (2007; 2006) that the tensions created by the commercialisation of European professional football in the last decade have facilitated the transformation of the pyramid. This contribution fully agrees (and indeed reinforces) Holt's point of view (see Figure 2 in the concluding section). Yet, that transformation should not be taken as the total dismissal of the pyramidal structure. The top-down vertical channel of authority has been weakened particularly since the 1995 Bosman ruling. However, the formal structures of the pyramid are still in place, even if it is only in the statutes of FIFA, UEFA and the national FAs. Thus, the pyramid of European football needs to be understood as a governance structure in constant evolution. However, it is an important concept because it helps to explain some of the dynamics in the UEFA-EU relationship that this article explores.

UEFA is a politically and religiously neutral society, 'entered in the register of companies under the terms of Art. 60 et seq. of the Swiss Civil Code', whose headquarters shall be in Switzerland (UEFA 2007a: Article 1.1). UEFA is a confederation of national Football Associations:

> Membership of UEFA is open to national football associations situated in the continent of Europe, based in a country which is recognised by the United Nations as an independent state, and which are responsible for the organisation and implementation of football-related matters in the territory of their country.[2] (UEFA 2007a: Article 5.1)

National FAs are required to comply with and to enforce UEFA statutes and regulations in their jurisdiction (UEFA 2007a: Article 7bis); they are also required to observe minimum standards of internal democracy, having a freely elected executive body (UEFA 2007a: Article 7bis (2)). UEFA's organs are the congress, the executive committee, the president and the organs for the administration of justice (UEFA 2007a: Article 11). The congress is the supreme controlling organ of UEFA (UEFA 2007a: Article 12.1), where all national FAs are represented under the principle 'one member, one vote' (UEFA 2007a: Article 18.1).

In addition to the formal decision-making organs, UEFA has a network of consultative bodies with the aim of informing the adoption of decisions (UEFA 2007a: Articles 35-38). UEFA consultative bodies are the Professional Football Strategy Council (UEFA 2007a: Article 35)[3];

[2] UEFA statutes provide for a possible derogation of the geographical principle, which has been used to grant membership to the football federation of Israel.

[3] The Professional Football Strategy Council is composed by 4 representatives each of UEFA, professional clubs, professional leagues and professional players (UEFA 2007a: Article 35). It has been recently created by UEFA (UEFA 2007b: 1) and it was only given statutory recognition in June 2007 (Chaplin and Harte 2007: 1). For a full list of UEFA Committees see Article 35bis of UEFA Statutes (UEFA 2007a). Articles 36 and 37 set up

the committees (UEFA 2007a: Articles 35bis-37); expert panels and working groups (UEFA 2007a: Articles 38).

UEFA uses the consultative bodies to build a network for dialogue and consultation with other stakeholders in the governance of professional football (i.e. clubs, leagues and players). UEFA considers itself to be the umbrella association that should be able to represent and govern football as a whole, through negotiation and dialogue (UEFA 2006). Thus, UEFA's objective is to improve consultation, hence minimising the challenges to the legitimacy of its decisions as governing body. UEFA has incorporated stakeholders to its consultative bodies following a process of co-optation (Holt 2006). UEFA has created bodies such as the European Club Forum and the Professional Football Strategy Council to incorporate representatives from footballers' trade unions, professional clubs or national leagues. The objective is that any platform for consultation always remains within UEFA's structure. Whether UEFA's policy of consultation is enough to consider UEFA a legitimate and democratic governing body is a discussion outside the scope of this article. Professional leagues and clubs, for example, would like to be represented in the formal decision making bodies, such as the executive committee, not in the consultative organs (Interview: English Premier League official, July 2006).

UEFA is the football organisation that has clashed most often with European law. Therefore, it is somehow striking that, despite all the problems it has encountered with European law, UEFA only decided to open a representative office in Brussels in April 2003. The Head of the office, Jonathan Hill, acknowledges that UEFA should probably have taken this decision earlier and lists, among the factors causing this delay, the inherent difficulties for change in a large organisation such as UEFA and the fact that there was little representation of sport in Brussels.

The foundation of UEFA, in 1954, precedes the signature of the Rome Treaties in 1957. Thus, UEFA is slightly older than the European Communities. For a relatively long period of time, both UEFA and the EU coexisted in parallel without much interaction. It was the regulation of professional footballers' employment conditions that brought UEFA and the EU together. The first reactions, from the governing body's point of view, where of hostility, hence creating the first period of tension towards European institutions.

### *Round 1: Confrontation*

The first point of friction between European football's governing body and the European institutions related to the employment conditions of professional and semi-professional footballers. Footballers are employed by clubs to form part of their squads in different competitions. However, the control structures of football have traditionally positioned players rigidly at the bottom of clubs' hierarchy (Tomlinson 1983: 173). The contractual relationship between players and clubs presents few particularities due to the organisational structures of football. Clubs have to register their players with their respective national FA or national league, in order to allow the players to participate in the national championships. They also have to register their players with UEFA if they are to participate in European cups. These governing bodies shall issue the footballer with the corresponding license to play only provided he/she fulfils the criteria established in the competition regulations.

A problem emerges when these same governing bodies also have the power to regulate and decide which players can be registered and under what conditions. This gives governing bodies a certain amount of power over the players that any given club can hire. The regulation of the players' market used to rely on two sets of norms: the so-called transfer

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the rules governing the committees' composition and obligations. The detailed composition of UEFA decision making and consultative committees, including the Executive Committee and the Professional Football Strategy Council, for the period 2007-2009, can be consulted in UEFA's website at <http://www.uefa.com/newsfiles/556653.pdf> [Accessed 18-10-2007]

system and nationality quotas. The transfer system regulates the circumstances under which a player can move from one club to another. The transfer system was said to protect the small clubs that dedicate their resources to training and educating young players, thus preventing the richest clubs from *stealing* the players once they had finished their grass-roots education (Roderick 2006: 116). Transfer systems in the past were based, among others, on the principle that clubs were entitled to compensation for the transfer of a player even when the player's contract with the club had expired. This is a principle that clearly restricts any player's possibilities to move from one club to another. Nationality quotas, on the other hand, fix the maximum number of non-selectable players that a club can field in any given game[4]. Nationality quotas were said to be in place to ensure the quality of national teams and to maintain the identification of the supporters with their club.

A system combining transfer regulations and nationality quotas has the potential to heavily condition the number and type of players that any club could hire. In turn, that can of course affect the footballers' choice for work. Thus, if governing bodies have the power to modify these regulations, they can determine a good deal of the players' employment conditions. The disagreements among players, clubs and governing bodies about transfers and quotas provoked the first confrontations between UEFA and the EU. It is to this point that the article turns now.

*The Road to Bosman*

Transfer systems have been historically challenged by football players as illegal, particularly those provisions that restricted footballers from changing clubs even at the end of their contract unless a 'transfer fee' was paid. Indeed, there were challenges at national level well before Jean-Marc Bosman launched his legal action at the EU level. George Eastham, a football player for Newcastle United, successfully challenged, in court, the English transfer system in 1963 (McArdle 2000: 25-27; Greenfield and Osborn 2001: 79-82).

Paradoxically, it was the issue of nationality quotas that was first dealt with at the Community level. In 1976, the ECJ was required to deliver a preliminary ruling in the case of *Gaetano Donà v. Mario Mantero* (Case C-13/76, ECR [1976] 1333, hereinafter Donà). The Court was asked whether nationality quota rules, preventing nationals from another Member State playing in Italian club competitions, where legal under European Community (EC) law. The ECJ considered that such rules were discriminatory, thus not permitted under EC law. The ECJ's decision in *Donà* (1976) could have been a severe blow for nationality quotas in club football competitions. However, the reaction of other European institutions and football authorities was rather slow and nationality quotas remained in place for 20 more years.

It was not until 1991 that UEFA, after negotiations with the European Commission, started to lift nationality restrictions for club football. UEFA adopted the so-called 3+2 rule (Parrish 2003a: 92), allowing for three non-selectable players to be fielded at the same time in any given game, plus two 'assimilated players'[5]. This was branded as a 'gentlemen's agreement' between UEFA and the Commission. The governing body had the conviction that it was a stable and durable agreement:

[4] Before the Bosman ruling of 1995, non-selectable players were generally defined as those that could not play for the national team of the country in which their club was based. For example, Ivory Coast national Didier Drogba is a non-selectable player at Chelsea because he cannot play for England. Lanfranchi and Taylor point out (2001), however, that the definition of what constituted a non selectable player varied from one country to another in European football.

[5] Assimilated players were defined as those who had played in the country in question for five years uninterruptedly, including three years in junior teams (Parrish 2003a: 92) Thus, under the 3+2 rule, clubs were allowed to have a maximum of 5 non nationals in their squad. Players with nationality from another EU Member State counted towards that quota. For example, at that time David Beckham would have been considered non national at Real Madrid, hence counting as one of the 3+2 players, despite his British nationality.

> At the time of the 3+2 agreement, we concluded the agreement with the commissioner that was responsible for the area. It was [Commission vice-president and responsible for internal market] Martin Bangemann. Who else could we have talked to? We were convinced that we were right because we had an agreement with the person responsible for our dossier. For us it was a deal, it was there to last and we believed this because it was good for football. (Interview: UEFA official, February 2007)

It is disconcerting, to say the least, how the Commission acceded to such agreement in the light of the ECJ's ruling in *Donà*. It is even more surprising that UEFA believed the agreement could resist legal scrutiny under EC law. UEFA's belief on the durability of the 3+2 formula might have been based on a combination of three different motives. First, it could be interpreted as a clear lack of understanding about the structures of the EU and European law. Agreement with one institution does not mean the other institutions will accept it. More so when the EU's political system has a judiciary branch overseeing the correct interpretation of European law. Second, UEFA felt over-confident because up to that date it had never suffered the regulatory power of EU law:

> I really not know whether the view of this agreement by UEFA was a mistake or just a misunderstanding. There was an opinion that this was a political agreement, and therefore UEFA was not active on any other parts of the European institutions than the Commission. (Interview: Former UEFA official, February 2007)

Third, UEFA probably relied too much on the political power of football. As a MEP puts it: 'Football is sexy for politicians; it gets votes and they want to be seen during the World Cup for example. People within the game, in federations, clubs… they are aware of that power' (Interview: MEP, March 2006). However, arguments that may work with politicians do not necessarily work with judges that do not need to seek votes for election.

By the time of the 3+2 agreement (1991), UEFA was starting to learn to deal with Brussels. This period cannot be considered entirely as confrontational. The rather mild approach of the Commission was counter balanced with the more assertive position of the Parliament, though. The Parliament repeatedly called on the Commission to ensure that football federations ended discrimination on the base of nationality (see European Parliament 1989b, but especially 1989a).

In any case, the future of the 3+2 rule and the relationship between UEFA and the EU was about to be transformed when, on 15 December 1995, the ECJ handed down its decision on the Bosman case.

### *Bosman Shakes It All*

Jean-Marc Bosman was a virtually unknown Belgian footballer of rather modest talent. When his contract with Belgian club, RC Liège, expired in June 1990 the player agreed terms with French club, Dunkerque. However, the transfer collapsed because the Belgian FA, at the request of RC Liège, did not issue the mandatory transfer certificate necessary to complete the move. As a result, Bosman was not allowed to undertake work at Dunkerque even when his contract with RC Liège had expired. Bosman decided to take legal actions against RC Liège and the Belgian FA. He also included UEFA and FIFA in his lawsuit because the rules regulating the international transfer system had been adopted by FIFA. Moreover, he also challenged UEFA's nationality quotas. The case was finally taken to the ECJ for a preliminary ruling on the legality of FIFA's international transfer system and nationality quotas.

In *Jean-Marc Bosman* v. *Union Royale Belge des Sociétés de Football Association* (Case C-415/93, ECR [1995] I-4921, hereinafter Bosman) the ECJ ruled that FIFA regulations on players'

transfers were in breach of article 39 EC.[6] Moreover, the ECJ observed that the same article also precludes 'the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States' (*Bosman*: Operative part of the judgement, paragraph 2).

It was in the aftermath of the Bosman ruling that the real confrontation between UEFA and the EU started. For the governing bodies, especially UEFA, the ruling was an attack on football. It was considered 'nothing short of a disaster' (Johansson 1995), a decision taken 'by people that do not know anything about football' (Gerhard Aigner, then UEFA General Secretary, quoted in El País 1996). UEFA president, Lennart Johansson, was adamant to accuse the European Union of 'trying to destroy club football' (Thomsen 1995).

Football authorities appeared to be shocked by the far reaching consequences of the ruling. The attitude of UEFA and other football organisations is difficult to understand. There were enough precedents to assume the ECJ could rule in Bosman's favour. There was a clear misinterpretation by UEFA of the court's case-law in *Donà* (1976) and, perhaps, there was also an inability to understand new trends in European football in the 1990s:

> Admittedly, and with the benefit of hindsight, I must admit that at UEFA we did not help when saying that sport has no economical consequences. This did not help us in putting our message across, because it was clear that more and more money was coming into the game and football was having an impact in other sectors (Interview: UEFA official, February 2007).

After the ECJ's ruling, the Commission, as guardian of the treaties, took a proactive approach to the liberalisation of the players market. DG Competition Policy and its commissioner, Karel van Miert, took the leading role in the pursuit of football authorities. Van Miert warned that UEFA had to evolve 'whether they like it or not' (quoted in Hopquin 1995).

The abolition of nationality quotas in club competitions was the first direct consequence of *Bosman*. UEFA Executive Committee meeting in London on 19 February 1996 decided to scrap the 3+2 rule with immediate effect and lift all nationality quotas for European club competitions (Goodbody 1996). The FIFA transfer system, as challenged by Bosman, however, remained in place for some time. A second consequence of *Bosman* was to facilitate the rise of sport (and football in particular) as an important issue in the European institutions' agenda: *Bosman* enhanced the visibility of football as a sector that could be in conflict with European law (García 2007). The European Commission was particularly invigorated by the ECJ ruling. The Commission wanted to make sure that football governing bodies respected the court's ruling in Bosman (European Commission 1996). Moreover, the Commission also explored the application of Competition Policy to the sport sector (European Commission 1999), which had an impact on its relations with UEFA. The Commission's activism, paradoxically, resulted in what could be termed a 'normalisation' of the institution's relations with UEFA. For example, in the negotiations between the Commission and FIFA to reform the international transfer system, it was UEFA that emerged as the broker of the agreement. The next section takes a look at the second stage in the relations between UEFA and EU institutions. This is a period that started with the Commission investigation on FIFA's transfer system and finished with UEFA successfully adjusting to the regulatory power of European law.

## Round 2: Dialogue, Adjustment and Transition

Following the ECJ's ruling in *Bosman,* the Commission notified FIFA and UEFA that unless they proposed reforms to their transfer regulations it would have no other option but to start formal infringement proceedings (European Commission 1996; Parrish 2003a: 140).

[6] For a full legal analysis of the case see for example Blanpain and Inston 1996; McArdle 2000: 38-50.

Frustrated with the lack of action by the governing bodies, the Commission sent a formal statement of objections on 14 December 1998 (Reding 2000: 2; European Commission 2002c: 1).

Initially, FIFA decided that it should conduct its own negotiations with the Commission. However, the progress in the reform of the transfer system was slow. The disagreements among football stakeholders, including clubs, leagues and players, made it very difficult to present a 'consensus' proposal to the Commission:

> Most of the problems we [UEFA] had in the dossier of the transfer system were not with the Commission, but with FIFA. FIFA tried to strike its own deal with the players directly, whereas we tried to negotiate with the leagues, which represent the clubs (…) Of course, we also wanted to talk to the players, but we learnt one day that FIFA and the players had been secretly negotiating on their own, so the players were not willing to talk to UEFA (…) This indicates how difficult was to talk to the European Commission when in the football side we were playing tricks. So you can imagine what impression we made to the European Commission (Interview: Former UEFA official, February 2007).

Given the lack of proposals to reform FIFA's international transfer system, the Commission gave FIFA and UEFA a firm deadline of 31 October 2000, threatening them with a formal decision to enforce changes and, if the case might be, impose fines (Parrish 2003a: 141).

The renewed pressure from the Commission prompted UEFA to take a leading role, both in the internal discussions within the *football family* and in the dialogue with the European Commission:

> We believe that a constructive and positive dialogue with the EC is both possible and necessary. We accept that change is inevitable but the form and pace of that change must be subject to a much wider dialogue than that conducted so far by FIFA with the world of professional football (UEFA 2000a: 1).

This comment, from a UEFA press release, represents a noticeable change in UEFA's tone towards the European Commission. The confrontation that ensued the aftermath of Bosman appeared now to have transformed into a 'constructive and positive dialogue'. UEFA officials recognise that, of course, they were forced to react by the Commission's powers under EU law:

> It is not that our dealings with the Commission changed overnight; it is that we had to be pragmatic. If it is the law, we have to adapt to it, we have to go and talk to them. We had no other option. (Interview: Former UEFA official, February 2007)

However, they also acknowledge that dialogue with the Commission facilitated understanding on both sides, which contributed to a more positive approach towards the EU from within UEFA:

> I think that with time, with the dialogue, with negotiations, we have come to a mutual understanding. It has been a long process, bit by bit, but also smoothly. It has been a natural evolution towards an understanding of each other's positions and towards constructive solutions (…) Do not take me wrong, it was not easy, some meetings were frustrating, for us [UEFA] and I can imagine that for them [Commission] as well. But there was mutual understanding. I would say that even if we could not advance our positions to bring them closer, that meeting was beneficial because we could know each other better. (Interview: UEFA official, February 2007)

The negotiations to find a settlement in the FIFA transfer system finally ended in March 2001. The agreement was formalised in an exchange of letters between Mario Monti and Joseph

Blatter, President of FIFA (European Commission 2001b). FIFA agreed to amend its existing regulations on international transfers (1997) on the basis of the following points[7]:

- Training compensation fees will be allowed in the case of transfers of players under 23 years. The training compensation fee replaced the transfer fees.
- Creation of solidarity mechanisms that would redistribute income to clubs involved in training and education of football players.
- The creation of one transfer period per season and a further limited mid-season window.
- Minimum and maximum contract duration for players would be 1 and 5 years, except where national legislation provides otherwise.

The agreement is certainly short of a total liberalisation of the transfer market. It has been interpreted as a compromise between the initial positions of FIFA and the Commission, although it has been considered as beneficial for the governing bodies (Parrish 2003a: 147).

For UEFA the settlement over the international transfer system represents a turning point in its relations with the European institutions. First, the agreement with the Commission was satisfactory for the governing body:

> It was a very good agreement, we are very happy with the outcome, but also with the way in which the negotiations ended, because I think we built some trust in both sides and this is important for the future. (Interview: UEFA official, February 2007)

Second, meetings with Commission officials facilitated a change of attitudes towards the EU from within UEFA:

> I would say that after Bosman there was a clear hostility towards the EU. Even for some years after Bosman. The EU was seen as a problem, as something external. I would say that now we have much better dialogue and even collaboration. We see now the EU as a useful partner (…) It has been a process of dialogue, building trust on both sides, especially with the Commission (…) When we managed to get agreements such as the transfer system or the Champions League [see below], people in UEFA realised that one can talk to the Commission. They realised that they are human beings one can discuss and reach agreements with. (Interview: UEFA official, February 2007)

UEFA's move towards engaging in a more positive relationship with European institutions was further cemented when the Commission adopted a favourable decision in the investigation on the sale of media rights for UEFA's Champions League (European Commission 2003b, 2003a). It is important to note that the FIFA-UEFA negotiations with the Commission on the transfer system ran in parallel with the Commission investigation on the collective selling of media rights for the Champions League.

UEFA notified the Commission of the selling arrangements for the Champions League's broadcasting rights in February 1999, requesting clearance under EU competition rules (European Commission 2003b: paragraph 18). The 1999 arrangement consisted of UEFA selling on behalf of the participating clubs a bundle of *all* the free-to-air and pay-TV rights on an exclusive basis[8] to a *single* broadcaster per territory for a period of up to four years (European Commission 2001a; Parrish 2003a: 123) [author's emphasis].

Representatives from UEFA and the Commission's DG Competition engaged in protracted negotiations that included a statement of objections, issued by the Commission in July 2001

[7] For more details on the agreement between FIFA and the Commission on the structure of the new transfer system see European Commission 2002b, Parrish 2003a: 147-149. For an extensive analysis of the implementation of the new transfer system, see Drolet 2006.
[8] The rights were normally sold to a free-to-air operator that was allowed to sub-license some of the rights to pay-per-view operators.

(European Commission 2003b: paragraph 18).[9] The interest of the television rights case in the context of this article is twofold. Firstly, as mentioned earlier, the negotiations on television rights ran in parallel with the negotiations over the transfer system. Thus, UEFA was involved in discussions with the Commission on a regular basis. Certainly, UEFA did not choose to negotiate with the Commission. It was forced by the regulatory powers of the European executive under competition law. Secondly, the resolution of this Commission investigation added to UEFA's positive feeling towards the EU after the outcome of the transfer system dossier.

UEFA and the Commission reached an agreement on the sale of Champions League TV rights in 2002 (European Commission 2002a), less than a year after closing the transfer system dossier. After some further amendments and fine tuning to the UEFA proposals, the Commission was happy to close the case with a formal decision in July 2003 (European Commission 2003b).

UEFA was extremely satisfied with the agreement. The then Director of UEFA's legal services, Markus Studer, was even enthusiastic when he reported to the organisation's congress in 2004:

> UEFA is very satisfied with the outcome of this case, which marks the first occasion where the European Commission has approved central marketing arrangements for a major sporting event. The decision gives legal security for UEFA to sell the commercial rights of the competition until at least 2009. At the same time, the decision provides a modern and balanced solution, opening up further possibilities for technological innovation and maximising variety and choice for football fans to follow Europe's flagship competition. (UEFA 2004b: 53)

But UEFA was satisfied beyond the settlement itself. After sorting out the issue of the international transfer system, it was the Champions League case that confirmed the importance of the EU for UEFA:

> [The turning point in our relations with the EU] was the agreement on the central marketing of the Champions League rights. That was a huge success, but a huge success for both sides. It was a mutual agreement; it was a compromise where both sides were happy. We had lots of meetings; many of them were very long and normally well spirited. We met every day, literally every day and always with lots of dialogue. Yes, we had different positions, but it was not dogmatic, we rather tried to find solutions. I think they saw that we were willing to move, so they accepted they could move as well to find a good solution for every one. (Interview: UEFA official February 207)

On the other side of the table, the change of attitude is also recognised:

> I would tend to agree with the vision that the image of football federations has improved overtime since the 1990s. Personally I was not here after the Bosman ruling, but I can see, from the documents I have seen that certainly at the time it was a shock even for someone like UEFA or FIFA. So it was an adaptation period for them and now they got used to us, they now our powers, so they have an interest to keep us informed of their intentions and I tend to agree with you, I think there has been an improvement. (Interview: European Commission official, May 2006)

This version from the Commission's side highlights once again the fact that UEFA had really no other option than to get used to the institution's powers, especially under competition law.[10] Although the dialogue was more civilised than in the aftermath of *Bosman*, UEFA had no option but to engage and try to defend its position as best it could, particularly as the

[9] For a detailed description of the Champions League case see European Commission 2003b.
[10] See An Vermeersch's article in this special issue for extended details on the application of EU competition law to sport.

Commission has the institutional and legal setting to its favour in competition policy investigations.

The second stage in the evolution of the UEFA-EU relations was characterised by the Commission's regulatory impetus in the application of competition law. The investigations on FIFA's international transfer system and UEFA's sale of television rights for the Champions League forced UEFA to hold lengthy negotiations with Commission officials. This period extended from 1996 to the settlement of the Champions League dossier in 2003. Once arrived at this point, UEFA recognised that it was possible to find compromises with the Commission (Interviews: UEFA officials, May 2006, February 2007). As a result, UEFA could opt for a pragmatic relationship with European institutions, whereby it restricted itself to manage negotiations and do undertake damage limitation in the application of European law to the organisation's activities. On the other hand, UEFA could opt for further engagement with European institutions to establish links beyond the mere reaction to EU institutions' requirements. The next section follows on from the above cases with an analysis of UEFA's choice when presented with this dichotomy.

**Round 3: Co-operation or Instrumentalisation?**

Following the positive resolution of the Champions League case, UEFA officials recognised the necessity to re-orientate their strategy towards the EU:

> I think that we recognised a necessity to change our communication with the EU. We abandoned our reactive stance. We became much more proactive and engaged in dialogue with different institutions. We talk now about ideas, strategies… Not only about facts. We want to inform the Commission and the Parliament well before we plan to take any decision in the executive committee. A good example of this is the adoption of the rules on locally-trained players [see below] (…) We see the EU now as an ally that can help us achieve our policy objectives to maintain football in good health. (Interview: UEFA Official, February 2007)

Thus, in recent years UEFA has increased its dialogue with European institutions. The opening of a representative office in Brussels in 2003 might be seen, perhaps, as the final turning point in UEFA's search for a more positive relationship with European institutions. The work of the Brussels office has been instrumental in building bridges between both sides:

> My feeling is that the work of the UEFA representative office in Brussels is extremely good and efficient because it seems that people working here in Brussels are also being able to change attitudes within the organisation back in Switzerland. I think the office in Brussels is managing to improve the understanding of the EU inside UEFA and, vice versa, our own understanding of football and the activities of UEFA. I really think that there has been a positive evolution in their discourse and their attitudes. This is why we have been able to reconciliate our positions through the years, and the work of their office here has been very important. (Interview: Commission official, May 2006)

This section focuses on contemporary developments in EU-UEFA relations. In particular it focuses on UEFA's rules on locally-trained players (2005). This initiative features a great deal of dialogue between UEFA and EU institutions. Yet, it also shows some tensions where, curiously, the issue of quotas and the players' market surfaces again.

*UEFA's rules on locally-trained players*

UEFA senior officials started to consider around late 2003/early 2004 the possibility of making a political case for a rule that would encourage football clubs to actively train new young talents (Interview: UEFA official, May 2006). This was the origin of the rules on locally-

trained players, adopted by UEFA in 2005 (UEFA 2005a). Basically, these rules establish that clubs participating in European competitions are required to register a maximum of 25 players in their A List, their top squad. From the beginning of the 2006/2007 season, four of those 25 players should be 'locally trained', a number that would rise to six from the beginning of the 2007/2008 season and eight from the beginning of the 2008/2009 season (UEFA 2005b).

*Table 1: Rules on locally trained players for UEFA club competitions*

| **Season** | **Players in the A squad** | | |
|---|---|---|---|
| | ***TOTAL*** | ***FREE*** | ***LOCAL TRAINED (of which a maximum of half can be ASSOCIATION TRAINED)*** |
| 2006/2007 | 25 | 21 | **4** |
| 2007/2008 | 25 | 19 | **6** |
| 2008/2009 | 25 | 17 | **8** |

Source: (UEFA 2005b)

These locally-trained players may be either 'club-trained' or 'association trained'. The former are defined as those players that have been registered for 3 seasons/years with the club between the age of 15 and 21. Francesc Fabregas, for example, qualifies as club-trained for Arsenal. The latter are defined as players that have been registered for 3 seasons/years *with the club or with other clubs affiliated to the same national FA* between the age of 15 and 21 (author's emphasis).[11] In both cases, the nationality of the player is not relevant. These rules only apply to clubs playing in UEFA club competitions. Although UEFA has encouraged national FAs to adopt similar regulations at national level, it has not obliged them to do so (Interview: English FA official, April 2006).[12]

UEFA devised a dialogue/lobbying strategy to introduce the new ideas on locally-trained players to European institutions that was comprised of contacts at all levels, from the high politics of the national leaders, Commissioners and MEPs to the more technical representatives, such as officials in DG Competition, DG Employment and Social Affairs and DG Education and Culture (Interview: UEFA official, May 2006). Over the summer 2004 UEFA made public its first set of ideas on the subject of locally-trained players (UEFA 2004d), which were presented to the Commission and the European Parliament later in the autumn of that year (Chaplin 2005).

UEFA cleverly framed the rules on locally-trained players not as a regulation of the footballers' market, but as an attempt to contribute to the training and education of young people[13] through football (UEFA 2004a, 2004d). The main idea behind UEFA's message is that if professional clubs are obliged to field more locally-trained players, then they will invest more money in football academies, which in turn will benefit local communities. This, of course, can be conceptualised as an *irresistible message* on the part of UEFA. An idea dressed with social and cultural values which is certainly easier to accept than to reject, even if one may have doubts about its legality.

[11] For example, Frank Lampard qualifies as 'association trained' player at Chelsea because he was registered with West Ham United (another club affiliated to the English FA) between the ages of 16 and 23. He then moved to Chelsea in 2001.
[12] The English FA does not apply these rules to the domestic club competitions.
[13] An objective recognised as legitimate by the ECJ in Bosman (paragraph 102).

The strategy of UEFA, therefore, was threefold. Firstly, it needed to frame the rules on locally-trained players as an *irresistible message* combining elements of public policy and competitive balance in football. UEFA has been very careful to avoid any reference to players' nationality throughout. Secondly, it had to follow an internal process of consultation that included the main affected stakeholders within football. As result of this internal consultation, UEFA decided not to impose the rules on national FAs. Finally, it had to intensify its political efforts as a means to explain and generate backing for the proposals, both at high and low political levels in Brussels. The result has been rather interesting.

The rules on locally-trained players have been in place since the beginning of the 2006-2007 season and there has been little dissent. UEFA has apparently succeeded in framing and wining the political debate on locally-trained players. The clearest message in support of the rules has come from the European Parliament:

> [The European Parliament] Expresses its clear support for the UEFA measures to encourage the education of young players by requiring a minimum number of home-grown players in a professional club's squad and by placing a limit on the size of the squads; believes that such incentive measures are proportionate and calls on professional clubs to strictly implement this rule. (European Parliament 2007: paragraph 34)

The European Commission has not formally endorsed the rules on locally-trained players, although it has expressed a sympathetic view. Of course, it is very important to stress that this falls short of ensuring the legality of the rules, as UEFA should be aware by now after the experience of the 3+2 rule. The European Commission, as such, has not said that the rules on locally-trained players are legal under EU law. However, the recently adopted White Paper on Sport explained in which conditions such rules could be accepted:

> Rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players (European Commission 2007b: 6).

This is a timid message, for the Commission does not clarify whether the rules, as drafted by UEFA, meet these requirements or not. On the other hand, this is certainly not a plain negative. Moreover, Commission officials have heralded UEFA's proactive engagement in the development of the rules:

> In the Commission people have welcome the new approach from UEFA. They provided us with a lot of information and they have kept us up to date of their plans on home-grown players (…) A lot of contacts and constructive dialogue went on. I think this has been very well received in the Commission, definitely. (Interview: Former Commission official, June 2006)

It is important to note the positive perception of Commission officials towards UEFA. Those that have been in contact with UEFA in recent years think that the organisation has, at least, learnt from the past:

> They have learnt and it is easier to talk to them now. They changed their approach, they are more proactive and constructive. Our working relationship has improved a lot. We have also good personal contacts. I think you can see an evolution in their way of thinking. I hope this will last. (Interview: Commission official, May 2006)

Therefore, it can be argued that Commission officials perceive a new approach towards the EU from within UEFA. This is reflected in their consideration of the rules on locally-trained players. The Commission is very prudent in this respect, but it is safe to say that, at least, the

Commission's approach is less belligerent than Karel van Miert's position back in 1996. It is also plausible to assume that UEFA's co-operating attitude has won at least some hearts and minds within the Commission and the European Parliament.

For the sceptical viewer, however, there is always room to question whether these rules are a return to quotas through the back-door or not. It is not totally clear if the rules on locally-trained players, as currently implemented by UEFA, meet the criteria to be considered lawful under EU law. Miettinen and Parrish consider that, although not a direct discrimination in the base of nationality, the rules might be not proportionate to the objective pursued, hence creating an indirect discrimination that cannot be justified (Miettinen and Parrish 2007; see also Wathelet 2007: 13-14). Furthermore, FIFA president, Joseph Blatter, has created additional concern for the EU by making a recent call to European politicians to allow for the reinstatement of nationality quotas in club football:

> When you have 11 foreigners in a team, this is not good for the development of football. Football has never had the courage to go against this practice but it must now. The EU say that this [nationality quotas] is not possible based on free circulation of workers but in football principles are different (…) You cannot consider a footballer like any normal worker because you need 11 to play a match - and they are more artists than workers. (quoted in Spongenberg 2007; see also BBC Sport 2007)

UEFA President, Michel Platini, recently stated that he agrees with FIFA's attempt to limit the number of foreign players in clubs, but he also added that a return to quotas is unrealistic and 'impossible' because of EU law (Blitz 2007). Platini, instead, would like to strengthen football academies through rules such as the ones discussed above (Blitz 2007). It will be interesting to see UEFA's reaction if FIFA intends to press forward with its campaign for nationality quotas. UEFA might be caught in the middle of a new fight between FIFA and the European Union: 'The EU is just a regional organisation, which does not even represent all the countries in the European continent' (FIFA President Joseph Blatter, quoted in Maroto 2007). UEFA's reaction to a possible conflict between FIFA decisions and European law in the issue of quotas will measure European football's governing body commitment to co-operation with the EU. In theory, UEFA is bound to enforce FIFA regulations, as explained earlier in this article. However, UEFA is aware that the reintroduction of nationality quotas will be vigorously opposed by the European Commission. Even the European Parliament, which has supported UEFA's rules on locally-trained players (European Parliament 2007: paragraph 34), is very clear about nationality quotas: 'This is impossible, we support the plans on home-grown players because they are not discriminatory, but we are also very clear that nationality quotas are unacceptable' (Interview: MEP, June 2006).

So far, UEFA has not expressed support for Blatter's idea, but the combination of these recent noises around quotas, coupled with the rules on locally-trained players might be enough for those with a sceptical view of UEFA's policies. It is certainly legitimate to ask whether UEFA is just instrumentalising the dialogue with European institutions for its own benefit. One could also wonder whether UEFA is simply trying to un-do *Bosman*. Yet, in the light of the results of this research, this seems to be a slightly harsh judgement on UEFA. Certainly, it is necessary to follow the development of this issue in the near future, for it can reveal a great deal about UEFA's policy towards the EU. But, at this point, it is safe to argue that, for now, UEFA is happy to collaborate with European institutions:

> I think that today UEFA sees the EU increasingly as a partner, a long term strategic partner for the organisation, and this is for several reasons. First, because over time, the relationship between sport and the EU has become closer and closer. Moreover, I see UEFA being able to support the policies and the policy objectives of the EU. I think we can do this through football, because people talk all the time about the power of football to integrate different groups in society, to teach important values such as the rule of law, team work, effort… We can also contribute a great deal in the current debate on the necessity of a healthy lifestyle and healthy habits, which is now featuring in the EU initiative to combat obesity. Then there is of course the issue of racism. It is both a problem for us, because we want to kick it out of football, and an

> opportunity, because we can help to combat racism in many ways. (Interview: UEFA official, May 2006)

Probably, the main difference nowadays is not the readiness of UEFA to engage with EU institutions, but rather the positive perception of the EU held by UEFA. This is a major contrast with the past:

> Actually, I think we [UEFA and the EU] are organisations that could be said to have very similar objectives. I do not think we are that different. The aim of the EU is the same of UEFA, albeit in different fields, but there are similarities. Here at UEFA our main objective is to preserve competition in football. If the competition is not perceived as fair, then we lose our stakeholders and we lose our legitimacy. This is our most important duty when we are here. If we understand that, then you realise that we are not so different to the European Union. The EU also aims to provide equal opportunities and fair competition, in that case economic competition for companies and consumers, but they also try to achieve a level playing field (Interview: UEFA official, February 2007).

This even refers to the effects of EU decisions on football:

> My personal opinion is that it is not fair to blame the EU for all the changes that football is undergoing. It is the reality of our world, it is the increasingly more difficult and global legal and economic framework in which we live… I do not think it is the EU's fault the many problems football is facing right now, neither I blame on the EU the changes in the relations of power and structures [in football] (Interview: UEFA official, February 2007).

This is a change that is perceived on the other side of the table, as it has been explained above. Commission officials, MEPs and representatives from national governments praise UEFA's new strategy. Of course, UEFA is now at a juncture in which it has to prove it is willing to maintain this policy of co-operation and engagement. It has also to show that it is happy to go beyond words and observe European law. There are tensions and challenges ahead that will measure the strength of UEFA's commitment. It is undeniable, though, that UEFA has grown and matured as a governing body. In a way, it is probably not untrue to say that the conflicts with EU institutions have helped UEFA to evolve.

## Conclusion

The relationship between European institutions and European football's governing body has fundamentally changed in the last decade. Before the ECJ's ruling in the Bosman case (1995), UEFA mainly ignored the EU. Following the ruling, UEFA felt that it had come under attack from European institutions, particularly the ECJ and the Commission. In reality, the institutions were just fulfilling their roles under freedom of movement and competition policy provisions within the EU's legal framework (its Treaties). With time, UEFA's confrontational attitude towards the EU has been substituted with a more positive approach. The governing body has slowly accepted the role of the EU in terms of the regulation of European football. This change in UEFA's strategy towards the EU can be explained in the three ways noted below.

First, and foremost, UEFA had to accept the regulatory powers of the ECJ and the Commission. There is no denial that UEFA had no other option but to bring its regulations into line with European law. Foster (2000) argues that there are three possible models for the regulation of sport by the EU: (1) Regulation through the enforcement of private rights by the ECJ (Foster 2000: 46-52), (2) self-regulation by sporting bodies under the so-called sporting exception[14] (Foster 2000: 60-61) or (3) supervised autonomy (Foster 2000: 53-59). The latter recognises the role of governing bodies in formulating policies to regulate sport.

[14] See Alfonso Rincón's contribution in this special issue for a detailed explanation of the sporting exception.

However, 'self-regulation should only be permitted subject to a proper rule of law system of governance' (Foster 2000: 64). Foster's conception of supervised autonomy recognises that sport authorities are best positioned to regulate their area of activity and ensure that sport as a business 'is still run partly for the love of the game' (Foster 2000: 64). However, public authorities (the Commission in this case) have to ensure that law is respected, so there is 'legally based protection of the widest constituencies' (Foster 2000: 64).

Thus, the EU offers to FIFA and UEFA a degree of supervised autonomy in exchange for a clear commitment to transparency, democracy and protection of the values of sport. The primacy of EU law remains uncontested, but there is room for dialogue between the two sides. If UEFA wants to maximise this supervised autonomy, it needs to engage with European institutions and demonstrate that it can be trusted. This idea has been perfectly summarised by Richard Corbett MEP:

> The law of the land applies to all, including football. Make no mistake about that. It is futile to seek complete exemption from European law for sport. But sport has some especial features that require a particular application of the law. Therefore there is a space we can work with. The exact delimitation of that space is to be debated. However, to get this more space that sport requires, it needs –and I am thinking of UEFA and other football governing bodies in particular- to show that it can be serious. That they will govern football in a fair and democratic way (Author's notes: Intervention of Richard Corbett MEP in the Conference 'Play Fair with Sport', organised by UEFA and the Council of Europe, Strasbourg 29 September 2006).

This article does not affirm that UEFA has unconditionally embraced the EU or the European ideals. Quite to the contrary, it is acknowledged that European law obliged UEFA to change its strategy towards the EU. This is very clearly admitted by UEFA officials: 'We had no other option'. Yet, there is a difference between accepting the regulation of European law and engaging in further co-operation. Perhaps, UEFA could have just resorted to a mere exercise of damage limitation in the application of European law. It is suggested in this article that UEFA has gone further in terms of actively engaging with the European integration process; even going so far as to organise a football match to celebrate the 50th anniversary of the Treaty of Rome (European Commission 2007a). Furthermore, UEFA is currently working in collaboration with the Council and the Commission to look at ways to improve safety and security at sporting events (UEFA 2007d). While these are just small initiatives, they do show a willingness on the part of UEFA to engage with European institutions in different areas.

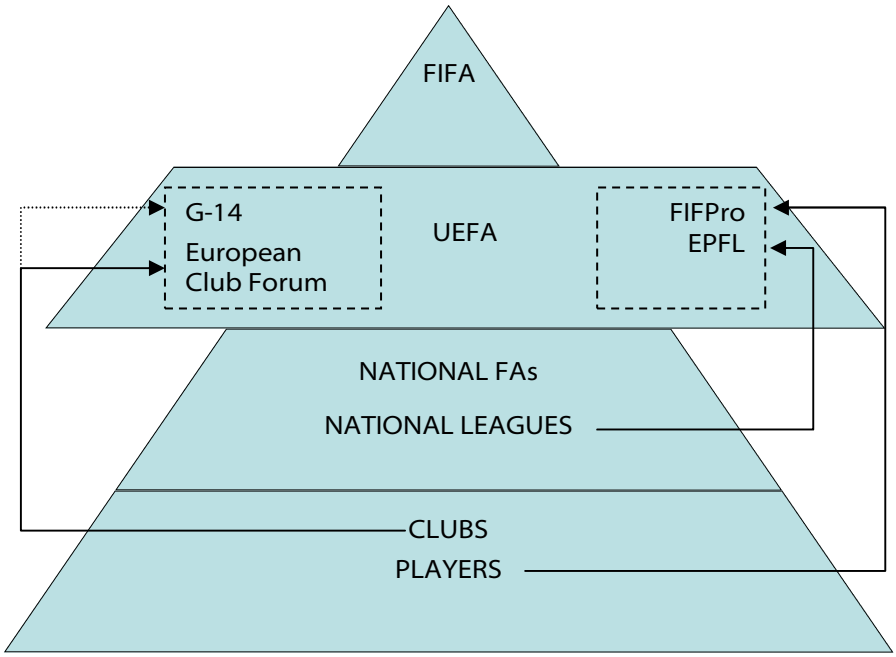
Second, there is also a degree of *socialisation* in the evolution of UEFA's policy towards the European Union. The numerous meetings between UEFA and Commission officials, dealt with in the sections above, contributed towards a mutual understanding between both parties. The dialogue with the members of the European Parliament also reinforced a change in the organisation's perception of the legitimacy of public authorities to intervene in football maters:

> We have to admit that there is a legitimate right for the politicians to ask what is going on, to know where the money goes, to request transparency and to see that money is properly used. If you accept this principle and you accept that there has to be some control of the [football] industry, then there is room for agreement. Unfortunately, many football people have been working against this for several reasons, but always using the autonomy of football as their motive, which is in my view immature and it is not realistic either. (Interview: Former UEFA official, February 2007)

Of course, the positive outcomes of the negotiations with the Commission and the European Parliament in the dossiers analysed through this article helped UEFA to be more positive towards the EU. If these decisions had been negative for UEFA, the governing body would surely have a different opinion.

Finally, there is a third motive that can also explain UEFA's willingness to engage with European institutions. This relates to the organisation's position in the pyramid of European football. In recent years, UEFA's legitimacy to govern European football has been challenged by other stakeholders, including clubs, leagues and players (Holt 2006). The intervention of the EU has contributed to the changes within football's pyramid of governance. The vertical channels of authority from FIFA to the national FAs have been weakened. The governance of football in Europe is now populated with new stakeholders (see figure 2 below) in an structure more similar to a horizontal axis of distributive networks (Holt 2006).

*Figure 2: The transformed pyramid of European football*




UEFA has had to adapt to keep pace with the modernisation of football and to maintain its central role as governing body. First, UEFA overhauled its internal structures to deal with the realities of the commercialisation of modern professional football (UEFA 2000b). Second, UEFA had to modify its top club competition, the Champions League, to avoid breakaway threats by the richest football clubs in Europe (Holt 2006: 24-37, 2007; King 2003: 97-166; Morrow 2003). By engaging with public authorities, such as the EU, UEFA might find a way to regain the legitimacy contested by other stakeholders. If UEFA manages to gain support from governments, the Commission or the European Parliament to act as European football's governing body, it would be in a much better position to preserve its central role in the governing structures of the game.

However, the engagement with the EU represents a necessary trade-off for UEFA. UEFA will never win the EU's approval if it is not seen to respect European law. Thus, the supervised autonomy offered by the EU imposes a certain limit on UEFA's powers to formulate policies in the regulation of football. If UEFA is genuinely looking to form a partnership with European institutions, it will have to find a compromise. UEFA needs to find a balance, which may end up with a reduction of the organisation's independence. In return, UEFA would be able to retain its central position as umbrella organisation in European football. Curiously,

the intervention of the EU was initially felt as a threat to UEFA's independence. However, the interest of European institutions in developing a policy on sport (see for example European Commission 2007b) could benefit UEFA in the long-term, but taking this opportunity does include a trade-off. UEFA's response to these new challenges will measure the real position of the governing body in this juncture and define its relationship with the EU for the years to come.

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# EC Competition and Internal Market Law: On the Existence of a Sporting Exemption and its Withdrawal

Alfonso Rincón

**Abstract**

Some authors argue that there is no such a thing as a sporting exemption under EC law. However, an in-depth analysis of the case law reveals that thirty years ago the European Court of Justice ("ECJ", or "Court") created an exemption specifically relating to sport. The judgment of the ECJ in Walrave established the basis for this exemption, which was confirmed and extended in Donà. Since then the exemption has been subject to the vicissitudes of legal interpretation. First of all, the Court endeavoured to contain its use, although the consequence of this was the expansion of the exemption from internal market to competition rules. This led to uncertainty and inaccuracy in the assessment of sporting practices. The ECJ reacted to the atmosphere of confusion created by the interpretation of the Walrave case and withdrew the exemption in Meca Medina. The correct test for assessing whether a sporting practice is contrary to EC law is now the proportionality test; however, further clarification is required.

THE ASSUMPTION INFORMING THIS ARTICLE IS THAT, IN CERTAIN CASES, there is a conflict between the rules governing sport and the rules regulating the internal market and competition of the European Community (EC). Two conflicting sets of rules therefore exist that have to be taken into account in the analysis set forth.

Firstly, there are the regulations of the national or international sporting bodies. Regulations imposed by these bodies are based on general principles common to all sports. FIFA, for example, has four core values: authenticity, unity, performance and integrity.[1] These main values, and others, could be said to be pursued, in one way or another, by all sporting bodies. They are, however, not universal values, so each organisation, body or association will have its own variations on the theme.[2] The world of sport has to be understood as one in which

[1] FIFA's mission, available at: <http://www.fifa.com/aboutfifa/federation/mission.html>.
[2] Even small organisations such as the French Community of Belgium have their own. Its 'Charte Éthique' states that the main values of sport are 'fair-play, le respect de soi et de l'autre, le respect de l'arbitrage, le refus de tout produit dopant, l'acceptation des différences, la solidarité et l'esprit d'équipe'. See <http://www.sportethique.be>. See another example on the website of the Canadian organisation True Sport, <http://www.truesportpur.ca> (inclusion, fairness, excellence and fun).

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competing and sometimes contradictory values and ethics are debated and idealised.[3] However, it is essential to ensure the sporting competitions are genuine and free from any improper influence that might cast doubt over the authenticity of results.[4] In order to achieve these objectives, sporting bodies issue common rules[5] and international sports associations create a set of norms concerning the practice of the particular sport under their supervision (the 'rules of the game' where they establish the norms that have to be followed in every confrontation between teams or athletes). For example, FIFA considers itself to be the guardian of football and as such is bound to safeguard the Laws of the Game.[6] In general all sporting bodies believe that one of their main objectives should be to adopt necessary uniform rules and regulations to hold competitions.[7] Such rules are approved in order to regulate, for example, the size of the court, the composition of the ball or the design of the players' apparel.[8] International federations, furthermore, have a wider remit and adopt rules concerning other areas such as the eligibility of the players for competitions[9] or the transfer of players.[10]

The other set of rules that has to be taken into account in this analysis are the laws of the European Community concerning the internal market and competition policy. The norms of the sporting bodies may conflict with the provisions of the EC Treaty that provide for the free movement of people (Art. 39 EC), the freedom to provide services (Art. 49 EC), the prohibition of restrictive practices (Art. 81 EC) or of abuse of a dominant position (Art. 82 EC). To give an example, rules that prevent or limit a sportsman from being signed by a club may in certain circumstances conflict with the rules of the EC treaty. This conflict could result in three different scenarios. Firstly, sporting regulations could prevail over EC law. In this case, sporting associations would be able to infringe internal market and competition rules with impunity, and would benefit from the so-called sporting exemption. Secondly, EC rules could supersede sporting regulations, and sporting regulations would have to be adapted to the treaties. Thirdly, it is possible that in certain circumstances EC rules could prevail while in others sporting rules could be enforceable. The present research is focused on analysing to what extent the first option outlined above has been the case within the application of EC law to sport through the creation of a sporting exemption. An analysis will also be made as to whether there is evidence of a significant and logical shift towards the third option.

The European Court of Justice (ECJ) in the seminal Walrave (1974) judgment established what could be called a sporting exemption. Its application/existence is a major issue for the sporting bodies. This is so because while sometimes a minor change in sporting rules can be enough to comply with EC law, at other times sporting rules have to be changed quite significantly. Community institutions have already exerted a considerable indirect influence on sporting affairs when assessing the compatibility of sporting rules with the Treaty provisions on freedom of movement or competition law.[11] For example, in 2002 FIFA was forced to modify its rules regarding international transfers to comply with the provisions of the EC Treaty.[12] Moreover there is a very important case pending before the Court of Justice in which FIFA's rules governing the release of players for international representative

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[3] Eitzen (1999), quoted by Wachs, Faye, Berkshire, 'Values and Ethics', (2005) *Encyclopaedia of World Sport 4*, p. 1662.
[4] Arnaut, J.L. (2006),*Independent European Sport Review*, p. 37.
[5] See McFee G., (2004), *Sport, Rules and Values: Philosophical Investigations Into the Nature of Sport* (Routledge) for a critical analysis of the regulation of sport.
[6] FIFA's mission, n 1 above.
[7] FINA Constitution (2001), C.5.4 for Swimming, Open Water Swimming, Diving, Water Polo, Synchronised Swimming and Masters.
[8] International Handball Federation, Rules of the Game, (2005), rules 1, 3 and 4.
[9] International Handball Federation, Player Eligibility Code (2006).
[10] See FIFA, Regulations for the Status and Transfer of Players (2005); or International Handball Federation, Regulations for Transfer between Federations (2006).
[11] Van den Bogaert, S. and Vermeersch, A. (2006), 'Sport and the EC Treaty: a tale of uneasy bedfellows?', *European Law Review* 31, p. 826.
[12] European Commission, 'Commission closes investigations into FIFA regulations on international football transfers', (2002) IP/02/824.

matches are being scrutinised.[13] Besides, Regulation 1/2003 could bring more cases in which sporting practices are challenged on the basis of competition rule infringements. In this connection the sporting movement has pushed for the recognition of the autonomy of sport, whereby sport, as a civil and social movement that emerged at the margins of public authority regulation, should remain self-governed by the structures and bodies that have done so over the years.[14] The sporting bodies want to avoid a 'juridification' (judiciarisation, in French) of sport.[15] Some authors have identified, within the EC, an advocacy coalition of protectionists (including sports federations) who want sport to be partially or fully exempt from EC law.[16] The sporting exemption created by the ECJ in Walrave accords with what the sporting bodies have in mind when they ask for autonomy.[17] The substantiation of this line of reasoning would place the sporting bodies out of the reach of the EC Treaty. The case law nevertheless does not give a clear indication of the conditions that have to be met for the exemption to apply. Through the years, the exemption framed in Walrave has been subject to various interpretations. Firstly the European Court of Justice tried to conceal it or contain its expansion (phase 2 below). Then, however, the European Commission acknowledged the existence of the exemption and used it in its competition law analysis (phase 3 below). Recently the European Court of Justice reacted to the atmosphere of confusion created by the interpretation of the Walrave case and withdrew the exemption (phase 4 below). However the way forward is not clear and there is a need for further clarification. In this connection the international sports federations and other incumbents are calling for legal certainty regarding the application of the acquis communautaire. However, legal certainty should not be seen as a synonym for exemption. Legal certainty means that people are able to plan their lives, secure in the knowledge of the legal consequences of their actions.[18] This should not be confused with being secure in the knowledge that their actions will not have any legal consequences. The following pages contain a description of the various phases specified above. In addition, an explanation is given of the evolution of case law towards a more sophisticated appraisal based on proportionality.

## Phase 1: Creation: Once Upon a Time the ECJ Created a Sporting Exemption

*The Configuration of the Exemption*

In 1974 the ECJ was for the first time confronted with a case in which the compatibility of the sporting rules with the EC Treaty was put into question. The rules of the Union Cycliste Internationale, relating to medium-distance world cycling championships behind motorcycles, provided that the pacemaker must be of the same nationality as the stayer. Mr. Walrave and Mr. Koch considered that the norm was contrary to the rules of the internal market (now Arts. 39 and 49 EC). The answer seemed to be clear. Sport should be subject to EC Law. However in certain cases sporting rules have to engage in forms of discrimination for the benefit of sport. International federations can be said to have a kind of special legitimacy when adopting rules for the good of the game that may be contrary to EC law. These rules are justifiable and on this basis cannot be challenged successfully. The judgment of the ECJ in Walrave, despite recognising that sport is subject to Community law in so far as it constitutes an economic activity, established the basis for the sporting exemption, stating that European Law 'does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has

[13] Case C-243/06, *SA Sporting du Pays de Charleroi, G-14 Groupement des clubs de football européens/ FIFA (Oulmers)*.
[14] Garcia, B. (2007), 'From regulation to governance and representation: Agenda-setting and the EU's involvement in sport", *Entertainment and Sports Law Journal*, vol. 5, nº 1.
[15] Dubey, J.P. and Dupont, J.L. (2002), 'Droit européen et sport: Portrait d'une cohabitation', *Journal des tribunaux, Droit Européen* 85, p. 15. For an analysis of the process of juridification see Gardiner, S & Felix, A., 'Juridification of the Football Field: Strategies for Giving Law the Elbow', (1995) *Marquette Sports Law Journal* 189.
[16] Parrish, R. (2002), 'Football's Place in the Single European Market', *Soccer and Society*, vol. 3, issue 1, p. 3.
[17] Greenfield, S & Osborn, G. (2003), 'The Role of Law within Sport', available at <www.idrottsforum. org>.
[18] Craig, P. and de Búrca, G. (2003), *EU Law. Texts, Cases and Materials* (Oxford), p. 380.

nothing to do with economic activity'.[19] The exemption was confirmed and extended in Donà (1976), were the Court affirmed that the Treaties '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, such as, for example, matches between national teams from different countries'.[20] The wording of the ECJ rulings is not unambiguous. Notwithstanding it can be interpreted as establishing a sporting exemption.

*The Nature of the Exemption*

The Framework

It is firstly necessary to distinguish between the sporting exemption and the case law of the European Court of Justice on the existence of an economic activity. It is assumed that any activity is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.[21] The analysis of the reasoning in Walrave and Donà could lead to the conclusion that the ECJ had considered that the sporting rule was not subject to EC law because there was no economic activity.[22] However the judgment of the ECJ cannot be construed in this way. In fact, the Court is not talking about the existence of economic activity but about a question of purely sporting interest (Walrave) or reasons which are of a particular nature (Donà). The Court therefore does not analyse the economic content of the sporting activity. It analyses the basis upon which the sporting rule was approved. The assessment is based on the interests and reasons of the sporting bodies, not on the economic effects of the rules or on the economic content of the sporting activity. In this connection it is interesting to look at the case law of the ECJ relating to the existence of an economic activity, to see how far these judgments are from the findings of Walrave. In Levin (1982) the Court affirmed that the concept of 'worker' in the sense of the EC Treaty should include any employed person even if such person is paid a remuneration lower than the minimum guaranteed remuneration in the sector.[23] Accordingly the Treaty only does not cover those activities that are on such a small scale as to be regarded as purely marginal and ancillary[24]. The cases of Walrave or Donà could not be seen as having a marginal and ancillary economic content. The exclusion from the scope of the Treaty of Walrave was not based on a detailed analysis of the economic content of the activity but in the conviction of the European Court of Justice that the sporting rule could not be eliminated. By this time sporting activities already had an economic content; sport was already a show business.[25] It has been reported that in the UK players were authorised to receive a payment as early as 1885.[26] In the early 1960s, football players' average wages in the United Kingdom were £20 per week. In 1968 Manchester United had a transfer value of £110,000.[27] The Court could not have said that the sport was not an economic activity. The analysis of the case law by Advocate General Lenz in Bosman supports the view that the ECJ created an exemption, as he affirmed that the Walrave and Donà cases had established 'a sort of limited exception as to scope'.[28] In fact, the link between the sporting exemption and the concept of economic activity can only be found in Walrave whereas the remaining case law on the sporting

[19] Case 36/74, *Walrave* [1974] ECR 571, § 8.
[20] Case 13/76, *Donà* [1976] ECR 479, § 14.
[21] Case 36/74, *Walrave*, n 19 above, § 4.
[22] O'Keeffe, D. and Osborne, P., 'L'affaire Bosman: un arrêt important pour le bon fonctionnement du Marché unique européen', (1996) *Revue du Marché Unique Européen* 1, p. 23.
[23] Case 53/81, *Levin* [1982] ECR 1035, § 16.
[24] *ibid*, § 17. See also cases 139/85, *Kempf* [1986] ECR 1741 and 196/87, *Steymann* [1988] ECR 6159.
[25] See Forlati Piochio, L., 'Discriminazioni nel settore sportivo e Comunitá Europee', (1976) *Rivista di Diritto Internazionale*, vol. LIX, fasc. 4, p. 753 and Telchini, I., 'Commento: La Sentenza 12 dicembre 1974 nella causa 36-74 e le attivitá sportive nell'ambito comunitario', (1975) *Rivista de Diritto Europeo* 2, p. 133.
[26] McArdle, D, 'One Hundred Years of Servitude: Contractual Conflict in English Professional Football before Bosman', (2000) *Web Journal of Current Legal Issues* 2.
[27] Dart, T. (2000), 'Playing in a different league', in Hamil, S., Michie, J., Oughton, C. and Warby, S. (eds.), *Football in the Digital Age*, available at http://www.football-research.org/fitda/footballinthedigitalage.htm.
[28] AG Lenz opinion in case 415/93, *Bosman* [1995] ECR I-4921, § 139.

exemption, including Donà[29], does not link the possibility of exempting the sporting rules with the economic content of the activity.

The Basis of the Exemption

The discussions about the existence of the sporting exemption have been centred very much on the concept of the purity of the sporting activity. In Walrave the Court made reference to 'purely sporting interest' whereas in Donà the Court talked about 'sporting interest only'. However it is difficult, if not impossible, to assess whether an activity is 'purely sporting', 'sporting but not economic' or 'economic but not sporting'. Furthermore, the Court does not say what should be analysed in order to grant an exemption - the specific activity, the reasons on which the sporting practice is based or the nature of the sporting activity. It can be said that the sporting element does not preclude in any way the possibility of any practice having economic effects. The definition of 'pure' is, according to the dictionary, 'free from anything of a different, inferior, or contaminating nature; or free from extraneous matter'. It is wrong to say that the non-existence of economic effects could be based on purity of interests.[30] In fact these days it is very difficult, if not impossible, to find a rule which is in this sense pure. The analysis should be focused only on the existence or not of an economic element, as the Court did in Levin, Kempf (1986) or Steymann (1988).[31] Other options are contrary to an ordered analysis of sporting practices under EC law.

**Phase 2: Contention (confusion)**

Since Walrave and Donà, the European Court of Justice has refused to apply the sporting exemption and rejected the application of the Walrave doctrine. In fact, as has been widely recognised, Bosman[32] ended an age of innocence when football [we could say, sport[33]] blithely assumed that it was immune from the intervention of law.[34] However, the view of the Court of Justice is not straightforward. The ECJ recognises that Walrave and Donà had established a restriction on the scope of the provisions concerning freedom of movement for persons.[35] This amounts to affirming that the free movement rules can be overruled in certain specific cases; or at least that in certain circumstances the Treaty does not apply to sport activities. The key is therefore in finding out exactly when the conditions for granting the sporting exemption are met. But the court is silent on this. It repeats again and again the extract from Donà. There is no explanation or definition of the necessary elements for determining the existence of a limitation of the scope of the Treaty. In the judgments adopted after Donà the Court rejects the application of its previous case law without giving a well founded reasoning. In fact, the main problem with the wording of its analysis is that the Court does reject the use of the sporting exemption, but on the basis of different arguments, none of them convincing. It employs ambiguous reasoning that does not clarify the question.

[29] In *Walrave* the Court said that the practice had nothing to do with economic activity. Case 13/76, *Donà*, n 20 above, § 14 refers only to the economic nature of the reasons, not to the economic content of the activity.
[30] There are however some similarities between *Walrave* and case 344/87, *Bettray* [1989] ECR 1621, § 17, where the Court affirmed that 'work under the Social Employment Law cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned'.
[31] n 24 above.
[32] Case 415/93, *Bosman* [1995] ECR I-4921.
[33] Schmeilzl, B., 'Lilia Malaja and Maros Kolpak: Unrestricted professional Athletes within Europe and beyond? Current Developments and Future Perspectives in the Area of Freedom of Movement in Sports', (2003) available at www.grafpartner.com, p. 21, affirms that after *Bosman* most sports organisations – while grinding their teeth – modified their rules to comply with the judgment.
[34] Foster, K. (2000), 'European Law and Football: Who's in Charge?', *Soccer and Society* 1, p. 39.
[35] Case 415/93, *Bosman*, n 32 above, § 127.

The Court affirms that the exemption must remain limited to its proper objective.[36] Case law, according to the Court, cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.[37] It is clear that one cannot place a sporting activity outside the limits of EC law. But the Court does not say what the objective of the exemption is, making it impossible to define the limits of the exemption. On the other hand the Court links Walrave and Donà with the task of severing the economic aspects from the sporting aspects of football.[38] As has been said, in these two cases the limitation of the scope of the Treaty was based on the interests of and reasons given by the sporting bodies. The existence of the economic element was not discussed. The same happens in Bosman, where the Court does accept the existence of an economic activity. Moreover in Deliège the Court analysed the concept of economic activity as a completely different issue from the evaluation of the sporting exemption. In paragraphs 41 to 44 of the judgment the Court made references to Walrave, Donà and the Declaration on Sport (Declaration 29) annexed to the final act of the Conference which adopted the text of the Amsterdam Treaty. Its conclusion was that such competitions could not be treated as events which might fall outside the scope of Community law.[39] In paragraphs 49 to 59 it verified whether an activity of the kind engaged in by Ms Deliège was capable of constituting an economic activity within the meaning of Article 2 of the Treaty. The concept of economic activity is not therefore related to the sporting exemption as analysed in Walrave.

The Court has used another argument to reject the application of the exemption which has introduced more uncertainty as to its scope. In Bosman it considered that the exemption could not be used in the case of nationality clauses because these did not concern specific matches between teams representing their countries but applied to all official matches between clubs and thus to the essence of the activity of professional players.[40] The sporting exemption therefore applies only in cases concerning national teams. This is the reasoning in Deliège. The Court rejected the application of Walrave and Donà because the competition could not be treated as an event between national teams.[41] However, in Donà, the reference to 'matches between national teams from different countries' was used as an example. Here, again, a new argument used to reject the applicability of the exemption only caused more confusion. What is, however, unmistakable in the wording of the judgments is that the ECJ was trying to hide its own findings. It seems that the Court wanted Walrave and Dona not to be taken into account. It tried to contain the use of the exemption. Lehtonen is a clear example of this behaviour. The Court did not even consider the application of the sporting exemption to the case. It only mentioned its previous case law (Donà) and rejected its use without giving any explanation.[42] It seemed that the Court did not even want to talk about the subject; all it wanted to do was to forget it.

**Phase 3: Expansion**

During the eighties, the nineties and the first years of the new century, the Commission had to deal with many cases related to the application of the rules of the Treaty, in particular Articles 81 and 82 EC, to sporting activities. In 1999 the Commission recognised that it was examining sixty pending cases on the application of European Union competition rules to sports.[43] DG Competition was not sure of the correct way to deal with these cases. There were two main approaches to analyse the behaviour of sporting bodies. On the one hand sport could be considered to fall outside of the Treaty (Walrave). On the other, sporting practices could be subject to a proportionality test (DLG and Wouters and the case law on

[36] *ibid*, § 76 and 127.
[37] *ibid*, § 76, see also Cases 51/96 and 191/97, *Deliège* [2000] ECR I-2549, § 43.
[38] Case 415/93, *Bosman*, n 32 above, § 76.
[39] Cases 51/96 and 191/97, *Deliège*, n 37 above, §§ 44.
[40] Case 415/93, *Bosman*, n 32 above, § 128.
[41] Cases 51/96 and 191/97, *Deliège*, n 37 above, § 44.
[42] Case 176/96, *Lehtonen* [2000] ECR I-2681, §§ 34 and 36.
[43] European Commission (1999), 'Commission debates application of its competition rules to sports', IP/99/133.

objective justifications, see below). The Commission did have a trail to follow. As has been pointed out, in the case law the first option had been in retreat since Donà. Besides the trail left by the Court, the Walrave doctrine lacks a logical basis. The Commission should therefore use the proportionality test. However it did not have a clear view of what test should be used. There was no legal certainty in the application of EC law to sport. Although some clues can be ascertained, the practice of the ECJ created confusion in the way EC law should be applied to sports associations. The line of reasoning followed by the ECJ was not clear enough. This ambiguity generated a process of expansion of the sporting exemption to other areas of EC law, for the European Commission introduced the sporting exemption in its analysis concerning EC competition law.

*The European Commission Doubts but Finally Embraces the Sporting Exemption*

The use of the Walrave case law was one of the possible choices while applying EC law to sport. The Commission affirmed that there were various categories of sporting organisations' practices[44]:

> '1) rules to which, in principle, Article 85(1) of the EC Treaty does not apply, given that such rules are inherent to sport and/or necessary for its organisation;
>
> (2) rules which are, in principle, prohibited if they have a significant effect on trade between Member States;
>
> (3) rules which are restrictive of competition but which in principle qualify for an exemption, in particular rules which do not affect a sportsman's freedom of movement inside the EU and whose aim is to maintain the balance between clubs in a proportioned way by preserving both a certain equality of opportunities and the uncertainty of results and by encouraging recruitment and training of young players […].'[45]

It could be affirmed that the first category concerns the application of the proportionality test that will be explained below, whereas the third category concerns the application of the exemption included in Art. 81(3) EC. Here the sporting exemption based on Walrave is not considered as a possibility. However, successive decisions taken by the European Commission will reveal that the Commission had endorsed the sporting exemption.

In the following years the Commission expressed its intention to give the sporting bodies room for manoeuvre. In a case concerning the "at home and away from home" rule of UEFA, the Commission considered that UEFA had 'exercised its legitimate right of self-regulation as a sports organisation in a manner which cannot be challenged by the Treaty's competition rules'.[46] The rule stated that each club must play its home match at its own ground. According to the Commission, this was a sports rule that did not fall within the scope of the Treaty's competition rules. In 2002, Commissioner Monti stated that '[s]porting regulations such as the way championships are organised, the way a coach structures his football team, how a referee rules the field, whether a judo player is selected to represent his or her country at the Olympic Games or the suspension of a swimmer for having taken doping substances is not the business of the Commission's competition department and when we have received complaints we rejected them'.[47] The text reveals that the Commission does not want to interfere in the activities of the international federations. The last words of the sentence lead us to another seminal case concerning the issue of the sporting exemption, Meca Medina. In Meca Medina the Commission analysed the anti-doping rules of the International Swimming

[44] Parrish, R. (2003), *Sports Law and Policy in the European Union* (Manchester University Press), p. 152 considers the Commission paper to be a representation of the separate territories approach.
[45] European Commission, 'Commission debates application of its competition rules to sports', n 43 above.
[46] European Commission, 'Limits to application of Treaty competition rules to sport: Commission gives clear signal', (1999) IP/99/965.
[47] Monti, M. (2002), 'Competition and the Consumer: What are the aims of European Competition Policy?', SPEECH/02/79.

Federation. It affirmed that the rules did not fall foul of the prohibition under Article 81 EC. This finding was based on Wouters (see below).[48] The Commission analysed whether the anti-doping rules were linked to the development of the competition and whether they were necessary.[49] It concluded that the rules were justified, reasonable and well-balanced.[50] However, during the procedure before the European Court of First Instance (CFI), the Commission stated that its decision was based on Walrave and Donà, and therefore on the purely sporting nature of the anti-doping rules at issue.[51] The sporting exemption had been accepted by DG Competition.

*The Alternative Method for Analysing the Compatibility of Sporting Practices with EC Law: The Proportionality Test*

In the introduction three possible outcomes of the conflict between EC law and sporting rules were pointed out. The third option could be formulated as follows: The sporting rules are not contrary to EC law if they are reasonable. If they are not, the rules are illegal and shall be modified or eliminated. This proportionality test is followed regularly in the application and analysis of the restrictions of the internal market and EC rules on competition. In competition law the test is recognised as the qualitative appreciability test. In relation to internal market rules the test has been framed in the form of mandatory requirements of general interest or objective justifications. The rationale for this is that many rules which regulate trade are also capable of restricting trade, yet some of these rules serve objectively justifiable purposes.[52]

The Proportionality Test in Competition Law

In February 2002 the Court adopted a very important judgment that will influence the analysis of sporting practices. It affirmed that a regulation adopted by the Bar of the Netherlands, concerning partnerships between Members of the Bar and members of other professions, did not infringe Article 81(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the restrictive effects on competition that are inherent in it, was necessary for the proper practice of the legal profession, as organised in the Member State concerned.[53] One of the judgments in which the Court based its findings was DLG. In that case the Court analysed a provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organised cooperation. The Court held that the agreement was 'not caught by the prohibition in Article 85(1) of the Treaty, so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers'.[54] The findings of the Court in DLG and Wouters have been considered as the test of qualitative appreciability by which the Court assesses whether a restriction is objectively necessary to protect certain rights recognized as legitimate. If this is so the agreement escapes the application of Art. 81(1) EC.[55] Some authors have established a link between the findings of Wouters and the idea of ancillarity, under which restrictions of conduct do not infringe Article 81(1) EC where they are ancillary to some other legitimate purpose.[56] This appraisal is very much related to the rule of reason analysis.[57]

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[48] Dec. *Meca Medina y Majcen / CIO*, case COMP 38158 (2002), § 43.
[49] *ibid*, § 44.
[50] *ibid*, § 53.
[51] Case T-313/02, *Meca Medina v Commission* [2004] ECR II-3291, § 62.
[52] Craig and de Búrca, n 18 above, p. 659.
[53] Case C-309/99, *Wouters* [2002] ECR I-1577, § 110.
[54] Case C-250/92, *DLG* [1994] ECR I-5641, § 45.
[55] Ritter, L. y Braun, W.D. (2004), *European Competition Law: A Practitioner's Guide* (Kluwer Law International), pp. 131-132.
[56] Whish, R. (2003), *Competition Law* (LexisNexis), p. 122.
[57] Marquis, M. (2007), '*O2 (Germany) v Commission* and the exotic mysteries of Article 81(1) EC', *European Law Review* 32.

This reasoning has already been applied to the analysis of sporting practices by the Advocates General in the Bosman, Deliège and Lehtonen cases. In Bosman, Advocate General Lenz asked himself about the existence of a rule of reason analysis in EC Competition Law. It was held that '[a] glance at the case-law shows […] that in interpreting Article 85(1) [now Article 81 (1)] the Court of Justice does not proceed from a formal concept of restriction of competition, but carries out an evaluation'.[58] Quoting DLG, Mr. Lenz affirmed that in view of the special features of professional football, it could be possible that certain restrictions may be necessary to ensure the proper functioning of the sector.[59] In such a case the restrictions would not fall within Article 85(1) EC [now Article 81 (1)]. Further, in Deliège, Advocate General Cosmas affirmed that the legal construction of DLG must be transposed to the relationship between sport and Community competition law. He held that:

> 'Applying that reasoning to this case, I also take the view that, even if they were to be regarded as reducing competition, in the sense that they prevent certain judokas from taking part in certain international tournaments, the contested rules do not fall within the scope of Article 85 [now 81] of the Treaty because they are indispensable for attaining the legitimate objectives deriving from the particular nature of judo.'[60]

In Lehtonen Advocate General Alber affirmed that the reasoning of DLG could be transposed, at least partially, to that case.[61]

Although these findings have not been confirmed by the Court (it did not answer the questions concerning the applicability of competition law to sport in Bosman, Deliège nor Lehtonen), there were basis to use the rule of reason analysis in relation with sport practices. This was what the European Commission did in ENIC. In 2000 ENIC lodged a complaint against European football's governing body UEFA concerning its 'Integrity of the UEFA Club competitions: Independence of clubs' rule. This rule, which was adopted by the UEFA Executive Committee in 1998, states that no club participating in a UEFA club competition may, either directly or indirectly, control any other club participating in the same competition. The Commission had to analyse whether the rule was contrary to EC Competition Law. On the basis of Wouters the Commission affirmed that:

> 'Thus the question to answer in the present case is whether the consequential effects of the rule are inherent in the pursuit of the very existence of credible pan European football competitions. Taking into account the particular context in which the rule is applied, the limitation on the freedom to act that it entails is justified and cannot be considered as a restriction of competition.'[62]

Thus the sporting rules were not contrary to EC law because they were reasonable.

## The Proportionality Test in the Rules of the Internal Market

In relation to internal market rules the Court applied this reasoning in Bosman[63], Deliège[64] and Lehtonen[65] when looking for justifications of sporting rules. What is interesting in this connection is the parallel between the analysis of restrictions on competition and restrictions on free movement.[66] As has been seen in Wouters, the reasoning of the Court is based on assessing whether the consequential effects that restrict competition are inherent in the

[58] AG Lenz opinion in Case 415/93, *Bosman*, n 28 above, § 268.
[59] *ibid*, §§ 269-70.
[60] AG Cosmas opinion in Cases 51/96 and 191/97, *Deliège* [2000] ECR I-2549, § 112.
[61] AG Alber opinion in Case 176/96, *Lehtonen* [2000] ECR I-2681, § 108.
[62] Dec. *ENIC/ UEFA*, case COMP/37 806 (2002), § 32.
[63] §§ 105-114 and 121-137.
[64] §§ 64-68.
[65] §§ 51-59.
[66] See Mortelmans, K. (2001), 'Towards Convergence in the Application of the Rules on Free Movement and on Competition', *Common Market Law Review* 38.

pursuit of the objectives of the rules.[67] An identical analysis can be found in those cases were the Court studied the existence of an infringement of the rules of the Treaty on free movement by sport associations. In Bosman, within the analysis of the objective justifications, the Court affirmed that the nationality clauses could not be deemed to be in accordance with Article 48 [now 39] of the Treaty because, among other things, a football club's links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town or region.[68] In Deliège the Court held that:

> 'In that context, it need only be observed that, although selection rules like those at issue in the main proceedings inevitably have the effect of limiting the number of participants in a tournament, such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 59 [now Article 49] of the Treaty.'

To be inherent to the organisation of sport was enough for a sporting practice to comply with the rules of the treaty. The reasoning is similar to the reasoning followed by the Court in Wouters. Contrary to what some authors have said[69], Deliège cannot therefore be compared with the findings of the Court in Walrave. In Deliège the Court applied the proportionality test, which is something that is missing in Walrave.

What is important for the purposes of this paper is that the Court has the same tool for analysing the compatibility of sporting practices with competition and free movement rules. It has been argued that in Wouters the Court was deliberately trying to reach a similar outcome under Art. 81 EC to what which would have been achieved under Art. 49 EC.[70] It could be said that the Advocates General in Bosman, Deliège and Lehtonen were trying to reach a similar outcome under competition rules to what they had achieved under internal market rules. In fact, their analysis under competition law followed the same reasoning as their analysis under the internal market rules. In both cases they applied the proportionality test. They even used the same justifications for the analysis of the possible infringement of both sets of rules.[71]

*The Judgment of the CFI in Meca Medina: An Impossible Assessment*

Meca Medina could be seen as the epitome of the confusion in which the European institutions find themselves when they have to deal with sporting issues. The conduct of the Commission, modifying, before the CFI, its opinion on the test to be applied, was patent evidence of this confusion. The judgment of the Court of First Instance in Meca Medina could be considered, thus far, as the apex of the misleading analysis of the behaviour of sporting bodies under EC law. The core of the problem is in the choice of the CFI. Instead of using the proportionality test, the CFI chose the Walrave doctrine. Within this framework the Court is trapped in a labyrinth of words without real meaning, the most tricky of which being 'sporting purity'. The Court stated that the question was whether the rules were purely sporting in nature or whether they covered the economic aspect of the sporting activity. Therefore it chose to use the Walrave test. As has been seen, the ECJ had refused to apply this analysis in Bosman, Deliège and Lehtonen. The CFI did not understand the message and erred in its interpretation. This is so not only because it was going against the case law of the

[67] Case C-309/99, *Wouters*, n 53 above, § 97.
[68] Case C-415/93, Bosman, n 32 above, § 131.
[69] Fonteneau, M., 'L'exception sportive en droit communautaire', 2001 *Gazette du Palais*, juillet-août, p. 1276.
[70] Whish, n 56 above, p. 122. See also Szyszczak, E. (2007), 'Competition and Sport', *European Law Review* 32, p. 106; and O'Loughlin, R. (2003), 'EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ *Wouters* Decision', European Competition Law Review 24.
[71] AG Lenz opinion in Case 415/93, *Bosman*, n 28 above, § 217.

ECJ[72] but also because its reasoning lacks clarity. Walrave and Donà were not the result of logical reasoning; rather, they were based on an idea which was not correctly explained. The acceptance of sporting practices which, in principle, are contrary to EC law (but may be justified) cannot be based on a derogation of the Treaty but rather on a flexible interpretation of the rules.

This melange was patently exposed in the judgment of the CFI. The court starts with a false assumption, this is, the existence of purely sporting rules. This type of rules was not acknowledged by the European Court of Justice in any of its previous cases. The Court had only supported the existence of purely sporting interests or made reference to the particular nature of matches. What is therefore a purely sporting rule? The CFI has its own answer: 'rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity (Walrave, § 8)'.[73] However Walrave never said that there were no economic effects at all. The ECJ has taken much care avoiding referring to any sporting activity as not having economic effects. As has been said, Walrave was based on the sporting interest, and it did not extend its recognition of purity to the whole activity. Further, if every sporting rule was analysed, the vast majority, or perhaps even all, of them would have effects in the economic sphere. In fact, some authors have affirmed that rules which initially were drawn up for sporting reasons may have assumed greater economic importance.[74] Moreover the 'rules of the game', which are sometimes considered to be the perfect example of purely sporting rules[75], carry inescapable economic implications.[76] Notwithstanding this, the CFI held that 'the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration'.[77] As has been seen, pure means 'free from anything of a different, inferior, or contaminating kind'. As the Court itself will recognise, the prohibition of doping is far from being considered to be pure.

The Court follows its reasoning by stating that '[t]he fact that purely sporting rules may have nothing to do with economic activity, with the result, according to the Court, that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC'.[78] If the first premise is wrong, and it is, then it could be affirmed that the inference of the Court is not accurate. Even the Court contradicts its findings when it says that '[i]t is precisely because sporting rules have economic repercussions for professional sportsmen and sportswomen and because those rules are considered to be excessive by some of those professionals that the dispute arises'.[79] Thus, if the dispute arises it is because the rule has economic repercussions. The CFI however does not accept this view and goes against its own reasoning by rejecting the allegations of the parties concerning the existence of economic factors. As has been seen, the Court affirmed that the prohibition of doping had nothing to do with any economic consideration. The parties alleged however that the International Olympic Committee (IOC) had an economic interest in approving antidoping regulations. The Court, surprisingly, affirmed that the 'IOC might possibly have had in mind […] the concern […] of safeguarding the economic potential of the Olympic Games'.[80] However the CFI stated that this was not sufficient to alter the purely sporting nature of those rules. And, more surprisingly, that even were it was 'proved, quod non, that the IOC acted exclusively on the basis of its purely economic interests, there [was] every reason to believe that it fixed the limit at the level best supported

[72] Weatherill, S. (2005), 'Anti-Doping Rules and EC Law', *European Competition Law Review* 26, p. 420 supporting the use of the Court's formula in *Wouters*.
[73] Case T-313/02, *Meca Medina v Commission*, n 51 above, § 41.
[74] Parrish, n 44 above, p. 118.
[75] The CFI refers to the rules of the game 'in the strict sense, such as, for example, the rules fixing the length of matches or the number of players on the field, given that sport can exist and be practised only in accordance with specific rules'. Case T-313/02, *Meca Medina v Commission*, n 51 above, § 41.
[76] Weatherill, S. (2003), 'Fair Play Please: Recent Developments in the Application of EC Law to Sport', *Common Market Law Review*, nº 40, p. 81.
[77] Case T-313/02, *Meca Medina v Commission*, n 51 above, § 47.
[78] *ibid*, § 42.
[79] *ibid*, § 53.
[80] *ibid*, § 57.

by the scientific evidence'.[81] To simplify, what the Court says is (1) that there is no economic activity; (2) that the concern of safeguarding the economic potential of the competition is not relevant; and (3) that even if it was proven that there were purely economic interests, the rule had been correctly drafted. It is clear that one cannot say at the same time that something is purely sporting if it has been conceived on the basis of purely economic interests. It is either purely sporting or not. As has been said, any attempt to present the rules as 'sporting' and not 'economic' is unhelpful, because they are both.[82] The concept of sporting purity should be erased from the wording of the judgments of the Court. As mentioned above, there are very few, if any, rules that can be considered as purely sporting in nature. What the courts should do instead is to analyse if the sporting rule is justified.

**Phase 4: Withdrawal?**

The judgment of the CFI in Meca Medina reflects the ambiguity of the basis for recognising the sporting exemption. There are no clear limits within which the sporting bodies or the EC institutions could take their decisions and develop their activities. Therefore there is a need to either clarify the scope of the exemption or withdraw it. In our view the first possibility should be rejected since the Walrave doctrine cannot have a rational explanation. The judgment of the ECJ in Meca Medina could be seen as an answer in line with the second option. It could be said that the ECJ has withdrawn the sporting exemption. However the wording of the judgment is not clear enough to clarify the issue. It has shed light on certain aspects but others are still unresolved. Anyhow, the Court was conscious of the importance of the subject and, relying upon Article 61 of the Statute of the Court, gave a judgment on the substance of the case.[83]

The judgment can be welcomed in part. The Court finally recognised that the sporting exemption has nothing to do with the concept of economic activity. What it represents, in fact, is a rejection of the sporting exemption as framed in Walrave. The ECJ affirmed 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'.[84] Further, '[i]f the sporting activity in question falls within the scope of the Treaty [i.e. because it constitutes an economic activity within the meaning of Article 2 EC], the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty'.[85] So the Court is virtually saying that the interpretation of Walrave and Donà can no longer be sustained. The message of the Court is that the concept of economic activity has nothing to do with the sporting exemption. If the activity is economic, then the exemption cannot be granted. The notion of sporting purity is therefore irrelevant to the question of the applicability of EC competition rules to the sporting sector.[86] Furthermore, a general exemption of sporting rules or of activities of sports associations is therefore neither possible nor warranted.[87]

The findings of the Court are also relevant in relation to the use of the proportionality test. The Court confirmed that in order to analyse the compatibility of sporting rules with Art. 81 EC there is a need to resort to Wouters and DLG:

> '[…] the compatibility of rules with the Community rules on competition cannot be assessed in the abstract (see, to this effect, Case C-250/92 DLG [1994] ECR I-5641, paragraph 31). Not every agreement between undertakings or every decision of an

[81] *ibid*, § 58.
[82] See Weatherill, S. (2006), 'Anti-doping revisited-the demise of the rule of 'purely sporting interest'?', *European Competition Law Review* 12, p. 648.
[83] Szyszczak, n 70 above, p. 104.
[84] Case C-519/04, *Meca-Medina* [2006] ECR I-6991, § 27.
[85] *ibid*, § 28.
[86] European Commission (2007), *White Paper on Sport*, COM 391 final, p. 14.
[87] European Commission (2007), *Commission Staff Working Document. The EU and Sport: Background and Context*, SEC 935, p. 69.

> association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters and Others, paragraph 97) and are proportionate to them.'[88]

This finding, which is in accordance with the line of reasoning of the Advocates General in Bosman, Deliège and Lehtonen, has been acknowledged by the European Commission in its White Paper on Sport. As the Commission explains, there are organisational sporting rules that are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued.[89] The consequence of this is that the assessment of whether a certain sporting rule is compatible with EC competition law can only be made, under a rule of reason analysis, on a case-by-case basis.

The judgment however lacks clarity in a number of matters. On the one hand the Court makes a reference to its first seminal judgments (Walrave and Donà). However its conclusion is that the fact that a rule is purely sporting is not relevant in relation to removing it from the scope of the Treaty. Does this mean that being purely sporting is no longer relevant at all? Or does it mean that being purely sporting is not relevant in this particular case? If being purely sporting is not relevant, why does the Court then quote its findings in Walrave and Donà? Furthermore, what is, for the Court, a purely sporting rule?

In addition, the Court introduced more uncertainty in relation to a subject which, until then, had not been brought into question. According to the practice of the Commission, the sporting exemption applied equally to internal market and competition rules. The ECJ however affirmed that 'therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (Walrave and Donà), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles'.[90] What this means is that the sporting exemption will be applied differently in the competition field than in the internal market area.[91]

## Conclusions

In 1974 The European Court of Justice adopted a decision which would influence the treatment of sport by the European institutions. The Court might not at the time have been aware of the consequences of its judgment. Now, more that thirty years later, it could be said that the Court has to a greater or lesser extent acknowledged its error. Walrave had far-reaching effects that the Court tried to contain; but this reaction came late. Indeed the Court confirmed its findings in Donà before taking action. Furthermore the Court did not choose the best way to contain the effects of the sporting exemption. Instead of modifying its line of reasoning, the ECJ tried to cover up the effects of its case law by not applying its principles to the cases that arose subsequently. This behaviour had two effects. Firstly, the sporting exemption was considered as a real possibility. The fact that the Court made reference in its 'contention cases' (Bosman, Deliège and Lehtonen) to the principles established in Walrave and Dona led the Commission and the sporting bodies to believe that sport was, to a certain extent, out of the reach of the Treaty. Consequently the sporting exemption extended from internal market to competition rules.

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[88] Case C-519/04, *Meca-Medina*, n 84 above, § 42.
[89] European Commission, *White Paper on Sport*, n 86 above, p. 13.
[90] Case C-519/04, *Meca-Medina*, n 84 above, § 31.
[91] See Weatherill, n 82 above, pp. 649 and 650 for a different opinion.

Walrave might be based on a logical assumption but the explanation behind it was wrong. An ex post analysis of the circumstances leads us to affirm that in 1974 the ECJ acted instinctively. It saw where the conflict lay and the proper solution but did not construct an appropriate discourse. It is true that, in certain cases, the rules of the Treaty cannot be applied. This is clearly the case if they are going to jeopardise the very existence or the fundamental principles of the sport. However one cannot say that this is necessarily so because the rules are purely sporting and this means that there are no economic elements involved. The analysis to be implemented should be based on the necessity and adequacy of the sporting rule. The test to ascertain which sporting practices are compatible with the Treaty articles on free movement and competition law should be the proportionality test. In relation to internal market rules this could amount to the analysis of the existence of mandatory requirements of general interest or objective justifications. In the case of EC competition law this will amount to the use of the Wouters formula (qualitative appreciability or rule of reason). The case law should address these issues, and clearly reject the existence of a sporting exemption. Meca Medina could be seen, in this connection, as a first step in the converging analysis of sporting practices under internal market and competition law. The findings of the Court are remarkably similar to the analysis performed to assess the compatibility of sporting practices with the rules of the internal market in other cases related to sport. In fact, Deliège and Meca Medina are strikingly similar. In this connection Deliège is an example of how the Court should act when analysing the compatibility of sport rules with the Treaty when using the proportionality test. A flexible interpretation of the objective justification test is indeed the way to deal with this issue. It is interesting to see how flexible the view of the ECJ is in this case in comparison with the strict analysis adopted in Bosman.

The Court should give a definite decision. In the analysis of the CFI in Meca Medina it has been seen how difficult is to adopt a correct answer when dealing with the principles established in Walrave and Donà. It is impossible to find a logical outcome if one tries to fit together the findings of the Court on the sporting exemption, the internal market and competition regimes and the reality of the sporting world. Oulmers could be a good opportunity to reject the sporting exemption, as, although the case deals with 'matches between national teams from different countries' (Donà), the Court cannot claim that there are no economic elements involved. However, in this case and others, the Court should be open minded, and should assume that the sporting bodies have the necessary knowledge and experience, being best placed to adopt adequate rules.

In any event, since Meca Medina the sporting associations do at least have more legal certainty than before. Now they should be secure in the knowledge that, in relation to the compatibility with EC law, their actions will be assessed on a case-by-case basis. That is the view of the European Commission in its White Paper on Sport. Whether sporting bodies will be happy with this is, of course, another question altogether.

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# All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport

An Vermeersch

**Abstract**

The commercialisation and internationalisation of sporting activities alongside ongoing European integration has put the relationship between the European Union and the sports world under strain. The *Bosman* case marked the start of an intense debate on an appropriate regulatory framework for this evolving relationship. Whereas the Community judges in previous sport related cases had consistently opted for settling the dispute on the basis of free movement provisions, the *Piau* and the *Meca-Medina* & *Majcen* cases entail the first rulings on the application of EC competition law to sport. This paper tackles the difficulty of separating the economic aspects from the sporting aspects of a sport and the consequences of anti-trust law for sporting associations. Whether the Court of Justice provided satisfactory guidelines to deal with upcoming legal actions and more generally, whether these guidelines on the application of competition law might influence the governance of sport in Europe, is also considered.

AS A GROWING ECONOMIC SECTOR, SPORT CANNOT ESCAPE THE APPLICATION OF European Community (EC) law. As early as 1974, the European Court of Justice (ECJ) issued the fundamental statement that 'the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'.[1] Concurrently, it held that the rule of non-discrimination 'does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity'[2], suggesting that sport has some peculiarities and that purely sporting rules could be subject to a 'sporting exception'. Likewise, the Court emphasized that 'this restriction on the scope of the provisions in question must however remain limited to its proper objective'.[3] While these principles were confirmed in later 'free movement cases', the precise scope and the concrete effect of the 'sporting exception' together with the question of whether these principles also applied in connection with competition law, remained unsolved.

The concept of the *sporting exception* is fundamental to understand the debates about the application of European Community (EU) law to the area of sport. However, the *sporting exception* has proven so far an elusive concept that is extremely difficult to define; particularly as those (sports governing bodies and other sporting organisations) that should be, in principle, most interested in identifying what the sporting exception is have not produced to date any intellectually compelling argument and/or definition of such a

[1] Case 36/74 Walrave and Koch v Union Cycliste Internationale [1974] ECR 1405, para 4.
[2] *ibid*., para 8.
[3] *ibid*., para 9.

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concept.[4] In legal terms, the idea of a *sporting exception* stems from the first sport-related cases ruled by the ECJ, such as *Walrave* (1974) and *Donà* (1976). In those rulings, the Court considered sport subject to EC law, but, as explained above, it did also open a door to doubts. Therefore, in which cases is European law applicable to sport? If there is a sporting exception, does this mean that certain activities of sporting organisations are not subject to EC law? In brief, the idea of the *sporting exception* revolves around whether European law could/should/must be applied to the area of sport or not.[5] The argument in favour of the sporting exception considers that sport, despite the economic dimension of the professional levels, is still different from other industries and, therefore, it merits (at least) a tailored application of European law, if not a total exemption. Those advocating for a special treatment of sport *vis-à-vis* EU law consider that the full application of the treaty provisions could endanger the socio cultural dimensions of sport.[6] On the other hand, those negating the existence of the sporting exception are of the opinion that professional sport shall be subject to the full rigour of EU law. However, even if one agrees that sport deserves some kind of special treatment by EU law, it would be necessary to explain why and under what circumstances. So far, arguments in that regard are few and far between.

Those who are not familiar with the relationship between sport and the European Union will soon find that the *sporting exception* or similar ideas are constantly present in the discourses of EU institutions and sporting organisations. The *sporting exception* is a legal concept whose origins can be found in the case law of the ECJ. However, this concept has become politicised over time as European institutions had intervened in the debate on the application of EU law to sport. The political debate is normally focused around the so called *specificity of sport*. The *specificity of sport* refers to those characteristics that would make sport different from other industries[7] and, therefore, meriting an exception from EU law. In a way, the *specificity of sport* is the political version of the *sporting exception*. If one recognises the specificity of sport, then one should also consider the application of the sporting exception and *vice versa*.

Elsewhere in this special issue Alfonso Rincón discusses the existence of the sporting exception from a legal point of view. In the article, Rincón analyses the case law of the European Court of Justice to try to find out whether the Court can be said to recognise the exception or not. This article deals with the specificity of sport in the application of Competition law to this sector. It analysis the application of competition rules to the sport sector so far.

For a long time, the ECJ judges refrained from ruling on the application of EC competition law to sport. In *Bosman* (1995) the Court of Justice did not consider it necessary to pronounce on the interpretation of the competition law provisions after it had found that the nationality clauses and transfer rules under consideration were contrary to the free movement rules.[8] Both in *Deliège* (2000) and *Lehtonen* (2000) the Court also declined to rule on the matter because it had not been provided with sufficient information on the factual

[4] B. García (2007), 'From regulation to governance and representation: agenda-setting and the EU's involvement in sport', 1 *Entertainment and Sports Law Journal* 5, 8

[5] Sporting governing bodies advocated for quite some time that sport should be totally exempted of the application of EU law via the creation of a protocol on sport in the European treaties. See for example UEFA (2001), *A Vision for European Sport: The Case for a Sport Protocol* (UEFA)

[6] See for example R. Parrish (2003), *Sports Law and Policy in the European Union* (Manchester University Press) p. 68-71.

[7] These include the need for a balanced competition (Opel would be happy to see Renault disapear in the market, but Manchester United *needs* Liverpool to keep creating an exciting competition), the role of sport in the education of young athletes, the solidarity conection between professional and grassroots sport. In theory, sporting suceess should be decided on sporting merits on the court/pitch/track, not on financial strength.

[8] Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 138.

and legal background of the dispute.[9] The Court's reluctance to tackle this issue was perhaps understandable, but at the same time, regrettable.[10] However, the silence of the ECJ suited the sporting world, which was not keen on getting a 'Bosman II' judgment from Luxembourg. This was plainly illustrated by the *Balog* case (1998).[11] This Hungarian professional football player had been playing between 1993 and 1997 for a Belgian first division team. After the expiry of his contract, he refused the new contract that his club offered him because the club had stated in the local press that Balog did not fit in the future plans of the club. Balog was put on the transfer list. Initially, no club was prepared to pay the transfer sum and when a Norwegian club wanted to engage Balog, the transfer could not be completed because the Belgian federation did not deliver the international transfer certificate requested. After having played for half a year on a loan basis in the Israeli first division, Balog challenged the transfer rules before a Belgian Court (in 1998). Because of his Hungarian nationality (non-EU at that time) he could not rely on the *Bosman* ruling.[12] Consequently, he challenged the transfer rules (the abolition of transfer payments for out-of-contract third country national players within the EU/European Economic Area (EEA) which was to enter into force only as of 1 April 1999) on the basis of EC competition law.[13]

As the Belgian Court referred the case to the ECJ, the *Balog* case was deemed to become the Court's first ruling on the application of competition law to sport. However, the sporting world managed to escape the verdict because, on the day Advocate General Stickx-Hackl was expected to deliver her opinion on the case, the football world and the player came to a settlement and agreed to drop the case. Consequently, for a long time, the only guidelines as regards the application of EC competition rules to sport resulted from the European Commission's handling of sport related competition cases and the opinion of some Advocates General, including Stix-Hackle's as she published her point of view in the aftermath of the *Balog* case.[14]

Already in 1999 the Commission tried to set some guidelines on the application of competition law to sport. The executive considered that from the perspective of EC competition law, practices/rules of sporting federations could be grouped into three categories: (1) practices which, in principle, do not come under competition rules, because they are inherent to sport and/or necessary for its organisation; (2) practices that are, in principle, prohibited by competition rules; (3) practices which are restrictive of competition but likely to be exempted from the competition rules.[15] This framework was a useful starting point but in practice the borderlines between the different categories proved to be far from straightforward.[16] Confirmation and fine tuning by the Community Courts (Court of First Instance and ECJ) was needed. The recent cases of *Piau* (CFI ruling in 2005 and ECJ's in 2006) and *Meca-Medina* (2004 and 2006) presented an excellent opportunity to the European Courts to clarify the criteria guiding the application of EU competition law to sport.

Moreover, the rulings in *Piau* and *Meca-Medina* have also been awaited because they provided the Court with a possibility to clarify what the *special characteristics of sport* are. A

[9] Joined case C-51/96 and C-191/97 Deliège v Ligue francophone de judo et disciplines associées e.o. [2000] ECR I-2549, paras 36-38; Case C-176/96 Lehtonen en Castors Canada Dry Namur-Braine v Fédération royale belge des sociétés de basketball [2000] ECR I-2681, paras 28-30.
[10] A. Bell and P. Turner-Kerr (2002), 'The place of Sport Within the Rules of Community Law: Clarification from the ECJ? The Deliège and Lehtonen Cases', *E.C.L.R.* 256, 256.
[11] Case C-264/98 Balog v Royal Charleroi Sporting Club ASBL (removed from the register on 2/4/01).
[12] S. Van den Bogaert (2005), *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International) p 105.
[13] Case C-264/98 Balog v Royal Charleroi Sporting Club ASBL (removed from the register on 2/4/01), Rapport d'audience, para 8.
[14] A. Egger and C. Stix-Hackl (2002), 'Sports and Competition Law: A Never-ending Story?', *E.C.L.R.* 81.
[15] 'Commission debates application of its competition rules to sport', IP/99/133; Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework ('The Helsinki Report on Sport'), COM (1999) 644.
[16] S. Weatherill (2003), ''Fair Play Please!': Recent developments in the application of EC law to sport', *CML Rev.* 51, 82.

distinction can be drawn in the approaches of EU institutions to the special characteristics.[17] On the one hand, there is a political/theoretical/sociological approach that relates to the multifunctional role of sport (health enhancing, educational). This approach has been followed in a number of policy documents, such as the Nice Declaration (2000).[18] On the other hand, there is a more legal/pragmatic side, followed by the Community Courts and by the European Commission when dealing with the application of EC law to sport, according to which some specific characteristics of sport are taken into account. There are many examples in which the ECJ rulings and Commission decisions have taken into account the characteristics of sport to apply Treaty provisions to the sector. Examples relate to the equality between participants and the uncertainty of the results.[19] This is closely linked with the idea that there is a difference '[…] between the way competition works in sport and in economic sectors'.[20] In addition, the primary role of the sports federations in the regulation of sporting competitions has been also explicitly acknowledged by the Courts (transfer windows were considered legal in *Lehtonen*; selection criteria for international competitions in *Deliège*; and doping rules in *Meca-Medina,* all of them laid down by governing bodies in fulfilment of their roles as *guardians* of their respective sports, a role recognised in the judgements).

In addition, the *Piau* and *Meca-Medina* cases provided the possibility to take away some doubts regarding the correct application of the 'sporting exception'. The reason for this uncertainty was two-fold. First, the Court's reasoning in *Walrave* that competitions between national (football) teams have 'nothing to do with economic activity' seemed hard or even impossible to justify. Arguably, this can only be understood as a confirmation of a general feeling that the competition between national teams is a matter of 'national pride and identity'.[21] Second, it remained unclear what the concrete legal effect of the recognition of a 'purely sporting' rule was. Whereas the Court in *Walrave* made clear that the rules at issue fell outside the scope of EC law[22], in *Bosman* the purely sporting context was only mentioned as a possible justification to a rule which was caught by EC law.[23] The possible confusion arising from the divergence between *Walrave* and *Bosman* was strengthened by the Court's ruling in two later cases.[24] The *Walrave* approach seemed to be endorsed in *Deliège*, where the selection criteria from the Belgian judo federation to participate in international tournaments were scrutinised. The Court held that although the selection rules at issue 'inevitably have the effect of limiting the number of participants in a tournament, such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore be regarded in themselves as constituting a restriction on the freedom to provide services prohibited by Article 59 of the Treaty'.[25] Conversely, in *Lehtonen*, the Court found that the transfer deadlines set by the Belgian basketball federation constituted an obstacle to the free movement of professional basketball players that could be justified by the objective of ensuring the

[17] C. Miège (2006), 'Le sport dans l'Union européenne: entre spécificité et exception?', *Etudes Européennes*, available at : <http://www.etudes-europeennes.fr>.
[18] Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, annexed to the Conclusions of the Nice European Council (7,8 and 9 December 2000), *Bulletin EU* 12-2000.
[19] Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 106; Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991, paras 43-45.
[20] Mario Monti, Competition and Sport the Rules of the Game, SPEECH/01/84.
[21] Weatherill, 'Discrimination on Grounds of Nationality in Sport', in A. Barav and D.A. Wyatt (eds), *Yearbook of European Law 1989* (Clarendon Press, 1990) p 60.
[22] Case 36/74 Walrave and Koch v Union Cycliste Internationale [1974] ECR 1405, paras 8-9.
[23] Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 76.
[24] P. Ibáñez Colomo (2006), 'The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca-Medina and Piau cases', 2 *ESLJ 3*, available at: <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/colomo/>.
[25] Joined case C-51/96 and C-191/97 Deliège v Ligue francophone de judo et disciplines associées e.o. [2000] ECR I-2549, para 64.

regularity of sporting competitions.[26] Even if one could explain the (seemingly) mystified case-law by the fact that the Court showed more clemency towards international competitions between national teams and non-discriminatory rules, [27] further guidance from the Court on the concrete application of the 'sporting exception' was still needed.

**Meca-Medina & Majcen: *Wouters* confirmed, 'sporting exception' curtailed**

David Meca-Medina and Igor Majcen are two professional long distance swimmers who tested positive for nandralone. The international swimming federation suspended both athletes for a period of two years. Meca-Medina and Majcen filed a complaint with the European Commission, challenging the compatibility of the International Olympic Committee's (IOC) anti-doping regulation with the Community competition rules. In other words, the swimmers argued that the IOC was abusing its dominant position as a sport governing body by adopting unilaterally rules on doping. The Commission concluded that the anti-doping legislation did not fall foul of the prohibition under Articles 81 and 82 EC and rejected the complaint.[28] Meca-Medina and Majcen brought their action before the Court of First Instance (CFI), which stipulated that 'the principles extracted from the case-law, as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition'.[29] The CFI stated that purely sporting legislation may have nothing to do with economic activity, and as such does not fall within the scope of Articles 39 and 49 EC. This means also that it has nothing to do with the economic relationships of competition and therefore that it also does not fall within the scope of Articles 81 and 82 EC.[30] Contrary to the Commission, the Court of First Instance did not examine whether the sport at issue could be qualified as an economic activity within the meaning of Article 2 EC. Nor did it examine whether the IOC (or the international swimming federation) had to be considered as undertakings or associations of undertakings. The CFI directly assessed the 'purely sporting' nature of the anti-doping regulation. It acknowledged that high-level sport has become, to a great extent, an economic activity, but pointed out that the fight against doping does not pursue an economic objective. As the campaign against doping intends to safeguard the health of athletes and to preserve the spirit of fair play, 'it forms part of the cardinal rule of sport'.[31] The CFI emphasised that 'sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport'.[32] Therefore, it concluded that the prohibition of doping and the anti-doping legislation concern exclusively 'a non-economic aspect of that sporting action, which constitutes its very essence'.[33] Consequently, the rules to combat doping 'are intimately linked to sport' […] and do not come within the scope of Articles 49, 81 and 82 EC.[34] The CFI rejected the two arguments brought forward by Meca-Medina and Majcen on the economic nature of the contested anti-doping regulation. In its opinion, the eventual economic repercussions for the athletes and the fact that the IOC might possibly have had in mind the economic potential of the Olympic Games when adopting the anti-doping legislation, 'is not sufficient to alter the purely sporting nature of that legislation'.[35] On these grounds, the Court of First Instance dismissed the swimmer's action.

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[26] Case C-176/96 Lehtonen en Castors Canada Dry Namur-Braine v Fédération royale belge des sociétés de basketball [2000] ECR I-2681, paras 47-60. In reality, the Court questioned the stricter deadlines for players from the European zone compared to players from others zones.
[27] P. Ibáñez Colomo, 'The Application of EC Treaty Rules to Sport', n 24 above.
[28] COMP/38.158, Meca-Medina et Majcen v CIO.
[29] Case T-313/02 Meca-Medina & Majcen v Commission [2004] ECR II 3291, para 42.
[30] *ibid*., para 44.
[31] *idem*.
[32] *ibid*., para 45.
[33] *idem*.
[34] Remarkably, the CFI emphasised that if the anti-doping legislation would be discriminatory in nature, it would not escape the Treaty provisions (paras 47-49).
[35] *ibid*., paras 51-57.

Whereas the final outcome of this case could be defended in the sense that anti doping rules should be accepted because they try to protect the integrity of sport, the reasoning of the Court of First Instance to reach that conclusion seems less convincing. Admittely, the exclusively sporting nature of drug control rules was recognised in English case law.[36] Conversely, the Swiss Federal Court has stated that the suspension from international competitions exceeds a simple rule/sanction assuring the smooth progress of sporting competitions.[37] What is at stake, is the problematic attempt to make a clear distinction between purely sporting and economic rules.[38] Whereas anti-doping rules are not primarily aimed at profit making, they clearly have economic repercussions. Therefore, they can be regarded as both 'sporting' and 'economic' in nature.[39] Moreover, by qualifying anti-doping rules as rules of a purely sporting interest which therefore fall outside the scope of Community law, it appears that the Court of First Instance did indeed granted too much room for manoeuvre to the sporting federations.[40]

On appeal, the Court of Justice set aside the Court of First Instance's judgment.[41] The Court of Justice largely relied on its longstanding case law on sport but added two new elements of great consequence.[42] It started by recalling that sport is subject to Community law in so far as it constitutes an economic activity. Again referring to *Walrave*, the Court continued that the prohibitions enacted by the Treaty provisions do not affect rules concerning questions which are of purely sporting interest.[43] With regard to the difficulty of severing the economic aspects from the sporting aspects of a sport, the Court confirmed, referring to *Donà*, *Bosman* and *Deliège*, that the provisions on free movement of persons and the freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events. However, such a restriction on the scope of the provisions in question must remain limited to its proper objective.[44] So far this only confirms the established case law on sport. In paragraph 27 of the Meca-Medina judgement, the ECJ introduces a first new element. Contrary to the Court of First Instance, the Court does not try to make an artificial distinction between the economic and sporting aspects of the sporting activity at stake. The Court draws a distinction between the activities of sportsmen and the rules governing these activities. According to the Court, '[…] it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.[45] In other words, a sporting case can involve both economic and non-economic aspects and the non-economic elements do not (always) suffice to remove the case from the scope of Community law. Moreover, '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'.[46] Thereupon, the ECJ ruled that the Court of First Instance made an error of law by holding that rules could automatically be

[36] English High Court Edwards v the British Athletic Federation and the International Amateur Athletic Federation [1998] 2 CMLR 363-371. See also I. Blackshaw. (2005), 'Doping Is a Sporting, Not an Economic Matter', 3-4 *ISLJ* 51.
[37] Ligue Suisse de Hockey sur Glace contre Dubé [1994] BGE 120 II 369, available at: <http://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>; G. contre Fédération Equestre Internationale et tribunal arbitral du Sport [1993] BGE 119 II 271, available at: <http://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>.
[38] S. Weatherill (2005), 'Anti-Doping Rules and EC Law', *E.C.L.R.* 416.
[39] ibid., 420.
[40] S. Van den Bogaert and A. Vermeersch (2006), 'Sport and the European Treaty: A Tale of Uneasy Bedfellows?', *E.L.Rev*. 821, 834.
[41] Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991.
[42] *ibid*., para 22.
[43] *Ibid*., para 25.
[44] *Ibid*., para 26.
[45] *ibid*., para 27.
[46] *ibid*., para 28.

excluded from the scope of EC competition law (Articles 81 and 82 EC Treaty) on the sole ground that they were regarded as purely sporting with regard to the application of the free movement provisions, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 and 82 EC.[47] When an activity must be assessed under EC competition law, it will be necessary to determine whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States.[48] It is unclear whether the Court's statement should be interpreted as a general rejection of the trend towards convergence – to a certain extent – that some authors see between the provisions on free movement and the competitions rules.[49] The Court does not elaborate on this, but it seems apparent that the Court of Justice firmly criticised the half-hearted analysis of the Court of First Instance, rather than turning down the convergence theory.[50] The latter would need further confirmation by the Court of Justice. As Weatherill convincingly advocates, with regard to the application of EC principles to sport, it seems appropriate to plea for a 'convergence in outcome'.[51] What is or is not acceptable under free movement provisions should also be acceptable or not under EC competition law, and *vice versa*. This is not to say that the legal reasoning under both strands of Community law should be identical.

When judging on the concrete questions at issue in *Meca Medina*, the Court of Justice added a second new element to its previous sport related case-law. The Court relied on the *Wouters* judgment to examine the contested anti-doping rules.[52] According to the Court, 'the compatibility of rules with the Community rules on competition cannot be assessed in the abstract'.[53] Therefore, the Court investigated whether the anti-doping rules are intimately linked to the proper conduct of sporting competition, whether they are necessary to combat doping effectively and whether the limitation of athletes' freedom of action does not go beyond what is necessary to attain that objective.[54] The Court stated that the Commission rightly took the view that the contested rules served the objective of guaranteeing fair competitive sport. By this means, the Court recognised the significance of safeguarding equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and the ethical values in sport.[55] Moreover, 'given that penalties are necessary to ensure enforcement of the doping ban, their effect on athletes' freedom of action must be considered to be, in principle, inherent itself in the anti-doping rules'.[56] The Court did not explicitly state that the anti-doping rules at issue were to be regarded as a decision of an association of undertakings that limits the freedom of action, but asserted directly that they were justified by a legitimate objective. However, this does not automatically put the contested anti-doping rules outside the prohibitions in Article 81 EC. The Court acknowledges that the penal nature of the anti-doping rules and the magnitude of the penalties applicable 'are capable of producing adverse effects on competition'.[57] If penalties were ultimately to prove unjustified they could result in an athlete's unwarranted exclusion from sporting events and accordingly in lopsided conditions. Therefore, the Court of Justice

[47] *ibid*., paras 29-34.
[48] *ibid*., para 30.
[49] K.J.M. Mortelmans (2001), 'Towards convergence in the application of the rules on free movement and on competition', *C.M.L.Rev*. 613; R. Nazzini , 'Article 81 EC between time present and time past : a normative critique of « restriction of competition » in EU law, (2006) *C.M.L.Rev*. 497; R. O'Loughlin (2003), 'EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ Wouters Decision', *E.C.L.R*. 62.
[50] S. Weatherill, 'Anti-doping revisited – the demise of the rule of 'purely sporting interest?', (2006) *E.C.L.Rev*. 645, 649.
[51] *idem*.
[52] Case C-309/99 Wouters e.o. v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577.
[53] Case C-250/92 Goettrup-Klim e.o. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AMBA [1994] ECR I-5641, para 31. Hereinafter, *DLG*.
[54] Case C-309/99 Wouters e.o. v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577, para 97; Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991, para 42.
[55] Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991, para 43.
[56] *ibid*., para 44.
[57] *ibid*., para 47.

ruled that 'in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport'.[58] According to the Court, the contested doping rules could be excessive in two ways: first with regard to the conditions underlying the dividing line between circumstances that amount to doping, in respect of which penalties may be imposed and those which do not, and second with regard to the severity of those penalties. The Court refrained from making a detailed analysis. Concerning the former, the Court referred to the scientific knowledge as it stood at the time the anti-doping rules were adopted and applied to Meca-Medina and Majcen. On this basis and because the appellants did not specify at what level the threshold in question should have been set, the Court found that the restrictions that follow from this threshold for professional sportsmen were not excessive.[59] On the severity of the penalties, the Court's assessment remained shallow: as the appellants did not bring this element up, the Court stated that 'it has not been established that the anti-doping rules at issue are disproportionate'.[60]

The Court's reticence towards a more elaborated assessment can be deplored,[61] but is comprehensible. It seems logical that it is not the task of judges to enter into the details of the specific and technical anti-doping regulation. Along these lines, the confirmation of *Wouters* in *Meca-Medina* can be seen as an 'important and welcome development in the light of the tendency towards greater self-regulation in the EU'.[62] However, the Court's ruling illustrates that a marginal assessment can be carried out by the Community judges. Moreover, by simply raising the issue of the severity of the penalties, the Court leaves future doping offenders the possibility of challenging the doping penalties on the basis of EC law. The sporting federations are warned: the proportionality principle must be taken into account when setting doping penalties and it is not excluded that the Court of Justice will assess the issue in greater detail when it would be raised in future litigation.

**Wouters approach not new in sporting context**

On the basis of the foregoing analysis, the Court of Justice dismissed the action brought by the appellants and confirmed the Commission's rejection of their complaint. Even if the outcome of both rulings was identical, the analysis of the ECJ is to be preferred to the approach of the CFI. Arguably, by applying the *Wouters* approach, the ECJ found an appropriate way of tackling the difficulty of severing the economic from the sporting aspects of a sporting case. This approach has the double advantage of not *a priori* excluding sport related cases from the application of EC law and, at the same time, taking into account the peculiarities of sport. Even if the precise scope and implications of the *Wouters* judgment remain unclear,[63] and even if the judgment was heavily criticised, it seems to provide a plausible basis for reconciling EC competition law with sport.

This can *inter alia* be deduced from the fact that in the past a *Wouters* like approach was followed on several occasions. In sporting cases that predate the *Wouters* judgment (19 February 2002), reference was made to the *DLG (1994)* case which is considered to be the predecessor of the *Wouters* judgment.[64] The *DLG* case concerned the statutes of a co-operative purchasing association in the agricultural sector. The Court of Justice stated that a provision in these statutes forbidding the association's members to participate in other forms of organised cooperation that are in direct competition with it, was not caught by the

[58] *idem*. The Court referred to paragraph 35 of the case *DLG*.
[59] Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991, paras 49-54.
[60] *ibid*., paras 49-55.
[61] J.M. Sluijs and M.C.A. Van Woerkom. (2006), 'Meca-Medina en Majcen (hogere voorziening): Convergentie gepreciseerd, Wouters bevestigd', *NTER* 248, 253.
[62] E. Szyszczak (2007), 'Competition and sport', *E.L.Rev*. 95, 106.
[63] For an overview see e.g. J.W. Van de Gronden and K.J.M. Mortelmans (2002), 'Wouters: is het beroep van advocaat een aparte tak van sport?', *Ars Aequi* 441.
[64] Case C-250/92 Goettrup-Klim e.o. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AMBA [1994] ECR I-5641, para 31; E. Szyszczak, 'Competition and sport', n 62 above.

prohibition in Article 81(1) EC, 'so long as the abovementioned provision is restricted to what is necessary to ensure that the co-operative functions properly and maintains its contractual power in relation to producers'.[65] The *DLG* case, which forms an example of the ancillary restraints doctrine,[66] was referred to by several advocates general when dealing with sporting cases. In *Bosman*, Advocate General Lenz mentioned *DLG* as it was brought up by UEFA.[67] The Advocate General emphasised that the case showed that only those restrictions of competition which are indispensable for attaining the legitimate objectives pursued by them do not fall within the prohibition of Article 81. Finding the nationality clauses and transfer rules at issue not necessary or indispensable for the proper functioning of the football sector, he held that the possible beneficial effects of those provisions could therefore be examined only in the context of Article 81(3). This view was confirmed by Advocate General Stix-Hackl in her *informal* opinion in the *Balog* case.[68] The Advocates General in *Deliège* and *Lehtonen* both relied on *DLG*.[69] Admittedly, their analysis on the applicability of the competition rules was only considered in the alternative as the national judges had not provided all details to make an elaborate analysis. In *Lehtonen* Advocate General Alber held that the transfer periods at stake probably entailed a restriction of competition within the meaning of Article 81(1) EC because they prevent clubs 'from increasing the attractiveness of their product by taking on new players during a certain period'.[70] Simultaneously, these transfer windows guarantee comparability of results of matches within a season. As that objective is decisive for the competition between clubs which consists in increasing the attractiveness of their matches, Alber concluded that the transfer periods were therefore compatible with Article 81 EC, however, only to the extent that they may be reconciled with the freedom of movement for workers.[71] In *Deliège*, Advocate General Cosmans held that even if the contested selection criteria 'were to be regarded as reducing competition, in the sense that they prevent certain judokas from taking part in certain international tournaments, the contested rules do not fall within the scope of [Article 81 EC] because they are indispensable for attaining the legitimate objectives deriving from the particular nature of judo'.[72] In the pre-*Wouters* period, the European Commission also relied on the *DLG* approach in sport related cases, albeit without explicitly mentioning the case. This was illustrated by its statement in the *Helsinki Report on Sport* that some sporting practices do not come under competition rules because they are inherent to sport and/or necessary for its organisation.[73] A concrete application can be found in the *Mouscron* case (1999).[74] The case concerned a complaint from the Communauté Urbaine de Lille who challenged UEFA's decision not to allow the UEFA Cup game between the Belgian club Mouscron (a town near the French border) and Metz to be played in Lille (France). In practice, this meant that Lille was unable to hire out its stadium to Mouscron. The decision was based on an UEFA rule which stipulated that, apart from very exceptional circumstances, every club must play its home match at its own ground. The Commission rejected the complaint because it considered that UEFA's 'at home and away from home' rule is needed 'to ensure

[65] Case C-250/92 Goettrup-Klim e.o. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AMBA [1994] ECR I-5641, para 45.
[66] A. Jones and B. Sufrin (2004), *EC Competition Law* (Oxford University Press) p 216-220.
[67] Conclusion Advocate General Lenz in Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, paras 268-270.
[68] A. Egger and C. Stix-Hackl, 'Sports and Competition Law', n 14 above.
[69] Conclusion Advocate General Cosmans in Joined case C-51/96 and C-191/97 Deliège v Ligue francophone de judo et disciplines associées e.o. [2000] ECR I-2549, paras 89-114; Conclusion Advocate General Alber in Case C-176/96 Lehtonen en Castors Canada Dry Namur-Braine v Fédération royale belge des sociétés de basketball [2000] ECR 2000, I-2681, paras 94-110.
[70] Conclusion Advocate General Alber in Case C-176/96 Lehtonen en Castors Canada Dry Namur-Braine v Fédération royale belge des sociétés de basketball [2000] ECR 2000, I-2681, para 105.
[71] *ibid*., para 108.
[72] Conclusion Advocate General Cosmans in Joined case C-51/96 and C-191/97 Deliège v Ligue francophone de judo et disciplines associées e.o. [2000] ECR I-2549, para 112.
[73] European Commission, *Helsinki Report on Sport*, n. 16 above
[74] 'Limits to application of Treaty competition rules to sport: Commission gives clear signal', European Commission Press release IP/99/965, 9 December 1999. However, the Commission also referred to the lack of Community interest.

equality between clubs', thereby recognising the legitimate right of self regulation of a sporting organisation.[75]

After the *Wouters* judgment, the Commission settled two sporting cases with explicit reference to *Wouters*. In the case of *ENIC* (1999), UEFA's multi-ownership rule according to which a company or individual cannot directly or indirectly control more than one of the clubs participating in a UEFA club competition, was under scrutiny.[76] ENIC, a company that owned stakes in six European clubs in five different countries lodged a complaint with the European Commission stating that the rule distorted competition by preventing and restricting investment in European clubs. According to the Commission, the question to answer was whether 'the consequential effects of the rule are inherent in the pursuit of the very existence of credible pan European football competitions'.[77] In a preliminary conclusion the Commission stated that the rule could be qualified as a decision of an association of undertakings or an agreement between associations of undertakings inside UEFA but that the restrictions imposed by the rule may escape the prohibition laid down in Article 81(1) EC. Before coming to a final verdict, the Commission invited third parties to send observations as to whether the restrictions were limited to what is necessary 'to preserve the integrity of the UEFA club competitions and to ensure the uncertainty as to results'.[78] The Commission referred to the recognition of legitimate objectives in the view of the considerable social importance of football in the Community by the Court of Justice in *Bosman* and the opinion of Advocate General Alber in *Lehtonen*. In addition, the Commission mentioned the decision of the Court of Arbitration for Sport in the case of *AEK Athens and Slavia Prague v UEFA* (1998) where the contested rule was approved because it preserves or even enhances economic and sporting competition.[79] In its final decision, the Commission held that a rule may fall outside the scope of competition rules despite possible negative business effects, provided that it does not go beyond what is necessary to ensure its legitimate aim – *in casu* the protection of the uncertainty of the results – and consequently rejected the complaint.[80] In *Meca-Medina* the Commission quoted *Wouters* for a second time.[81] The Commission came to the conclusion that the anti-doping rules at issue are intimately linked to the proper conduct of sporting competition, that they are necessary to combat doping effectively and that the limitation of an athlete's freedom of action does not go beyond what is necessary to attain that objective. Accordingly, the Commission concluded that these rules did not contravene the prohibition under Article 81 EC.[82] When the case came on appeal before the Court of First Instance, the Commission played down the influence of *Wouters* in reaching its decision. The Commission stated at the hearing, in reply to a question from the Court, that the disputed decision was based on *Walrave*, *Donà* and *Deliège* and therefore, on the purely sporting nature of the anti-doping rules at issue. The *Wouters* based analysis under competition law served only 'in the alternative' or 'for the sake of completeness'.[83] The explicit confirmation of the *Wouters* approach by the Court of Justice in *Meca-Medina* validates the direction that was followed by the Commission and several advocates general in previous sporting cases. Moreover, it confirms several authors' plea to use *Wouters* in a sporting context.[84]

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[75] *idem*.
[76] 'Commission closes investigation into UEFA rule on multiple ownership of football clubs', IP/02/942; Letter from Commissioner Mario Monti to ENIC, Case COMP/37.806; Communication made pursuant to Article 19(3) of Council Regulation No 17 concerning request for negative clearance or for exemption pursuant to Article 81(3) of the EC Treaty (Case No 37.632 – UEFA rule on 'integrity of UEFA club competitions: independence of clubs') [1999] OJ C 363/2.
[77] Case COMP/37.806.
[78] Case COMP/37.632.
[79] CAS 98/200 AEK Athens and Slavia Prague v UEFA; Case COMP/37.632.
[80] 'Commission closes investigation into UEFA rule on multiple ownership of football clubs', IP/02/942.
[81] Case COMP/38.158, para 43.
[82] *ibid*., para 55.
[83] Case T-313/02 Meca-Medina & Majcen v Commission [2004] ECR II 3291, para 62.
[84] S. Weatherill, 'Anti-Doping Rules and EC Law', n 38 above; R. WHISH, *Competition Law* (Butterworths, 2003) p 122-124.

**Sport and EC competition law after *Meca-Medina & Majcen***

As the Court of Justice in *Meca-Medina* unequivocally indicated that sporting rules do not *a priori* escape the application of EC competition law the first step in analysing whether a given sporting rule conflicts with EC competition law, will be to examine whether the sporting rule at stake meets the conditions of Articles 81(1) and 82 EC. In this respect, three major aspects must be taken into account. As many elements of this analysis were recently under consideration in the *Piau* case, the facts of this case are illuminated first.

The case of *Piau*, the second sporting case where the Community judges scrutinised a provision in the statues of a sporting federation under EC competition law, concerned the validity of the FIFA Players' Agents Regulations.[85] Piau, who wanted to become a players' agent himself, had lodged a complaint with the European Commission. He considered that the regulations were contrary to EC competition law because of the restrictions on the access to the profession. Following the opening of a competition procedure by the Commission, FIFA agreed to alter its regulations. The new regulations maintained the obligation to hold a licence issued by the competent national (football) association for an unlimited period, but entailed some changes in order to make the licensing procedure more objective and transparent. The oral interview was replaced by an examination in the form of a multiple choice test and the obligatory bank deposit was replaced by the choice between taking a liability insurance and a bank deposit. Moreover, the regulations stipulated that the relations between the agent and the player must be the subject of a written (renewable) contract for a maximum period of two years, specifying the agent's remuneration (to be calculated on the basis of the player's basic gross salary) and established a system of sanctions for clubs, players and agents. On this basis, the Commission decided to take no further action and rejected Piau's complaint for a lack of Community interest.[86] Piau challenged this decision before the Court of First Instance.

**Undertakings and associations of undertakings**

As Article 81(1) EC applies to 'undertakings' and 'associations of undertakings' and Article 82 EC applies to 'undertakings', these concepts entail a first key element to consider. The term 'undertaking' was given a broad interpretation in the ECJ's case-law. It 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[87] An economic activity is any activity that involves 'offering goods or services on the market'.[88] It is irrelevant that the body is not profit-making or that it is not set up for an economic purpose.[89] As a consequence of this functional approach, sporting bodies can also be considered as undertakings.[90] Already in 1992, in the case on the distribution of package tours during the 1990 World Cup, the Commission held that FIFA, the Italian football federation and the local organising committee carried on activities of an economic nature and consequently, constituted undertakings within the meaning of Article 81 EC.[91] This was confirmed in several sporting cases. Regarding (football) clubs, the Commission confirmed this – inter alia – in *ENIC*, because, through their team, the clubs

[85] Case COMP/37.124; Case T-193/02 Laurent Piau v Commission [2005] ECR II-209; Case C-171/05 P Laurent Piau v Commission [2006] I-37.
[86] Case COMP/37.124.
[87] Case C-41/90 Höfner and Elser v Macrotron GmbH [1991] ECR I-1979, para 21.
[88] Case 118/85 Commission v Italy [1987] ECR 2599, para 7.
[89] Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751, paras 79 and 85; Case C-475/99 Ambulanz Glöckner v Landkreis Südwestpfalz [2001] ECR I-8089, paras 19-21.
[90] A. Jones and B. Sufrin, *EC Competition Law* , n 66 above, p 108-110.
[91] Case IV/33.384 and IV/33.378 Distribution of package tours during the 1990 World Cup [1992] OJ L 326/31. The Commission came to the conclusion that the parties had infringed Article 81(1) EC for restrictive sales terms for tour packages and thus making it impossible for other tour operators and travel agencies to find other sources of supply. However, since it was the first time that the Commission had taken action on the distribution of tickets for a sporting event, and because the case involved complicating factors in view of safety aspects and because the infringement came to an end with the completion of the 1990 World Cup, the Commission decided not to impose a fine.

supply 'sporting entertainment by playing matches against other clubs, usually in the context of a championship. These events are made available against payment (admission fees and/or radio and television broadcasting rights, sponsorship, advertising, merchandising, etc.) on several markets'.[92] The Court of First Instance confirmed this viewpoint in the *Piau* case.[93] National sporting associations can be both undertakings and associations of undertakings. When these associations carry out economic activities themselves, for instance by selling broadcasting rights or by the commercial exploitation of a sport event, they are to be considered as undertakings.[94] In *Piau*, the Court of First Instance considered that the national football associations – 'groupings of football clubs for which the practice of football is an economic activity' – constitute associations of undertakings.[95] The fact that these federations group both amateur and professional clubs does not alter this qualification.[96] In addition, international sporting federations can be both undertakings and associations of undertakings.[97] At the same time, an international governing body can be an association of associations of undertakings.[98]

The question of whether an individual athlete can be considered as an undertaking had not thus far been addressed by the Commission or the Community judges. Whereas Advocate General Lenz found in his conclusion on the *Bosman* case that football players had to be considered as employees and did not constitute undertakings, this does not exclude that individual sportsmen might be considered to be undertakings for the purpose of articles 81 and 82 EC.[99] Reference can be made to the *Deliège* case where the Court of Justice held that a high level athlete (judoka) participating in an international competition exercised an economic activity, although she was not remunerated by the organiser.[100] Therefore, (independent) individual athletes may constitute undertakings within the meaning of EC competition law. Moreover, even if employees are generally considered as acting on behalf of the entity that employs them as a result of which they can not constitute autonomous undertakings,[101] the status of employee does not exclude that a person can be considered as an undertaking. Insofar as the employee pursues his own economic interests, independent of the employer, he may be considered an undertaking in the sense of Article 81 EC.[102] In the case of sportsmen, one may think of a professional football player as one who enters into a sponsoring agreement with a major sponsor.

**Restriction of competition or abuse of a dominant position**

A second key question to address when analysing the applicability of EC competition law, is whether the sporting rule at stake restricts competition within the meaning of Article 81(1) EC or constitutes an abuse of a dominant position under Article 82 EC. Therefore, it must first be analysed whether the rule in question, which normally arises from the statutes of a sporting federation, can be considered as an 'agreement', 'decision', or 'concerted practice'. Although FIFA claimed in the *Balog* case that its regulations could not be considered as an agreement between undertakings or a decision of an association of undertakings,[103] rules set

[92] Case COMP/37.806, para 25.
[93] Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, para 69.
[94] Case COMP/C.2-37.398 [2003] OJ L 291/25, para 106; Case IV/33.384 and IV/33.378, paras 52 and 53; Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, para 71.
[95] Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, para 69.
[96] *ibid*., para 69.
[97] IV/33.384 and IV/33.378, para 47; Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, para 72.
[98] Case COMP/C.2-37.398, para 106.
[99] V. Louri, ''Undertaking' as a Jurisdictional Element for the Application of EC Competition Rules', (2002) *Legal Issues of Economic Integration* 143, 151.
[100] Joined case C-51/96 and C-191/97 Deliège v Ligue francophone de judo et disciplines associées e.o. [2000] ECR I-2549, paras 56-57.
[101] Joined case 40-48, 50, 54-56, 111, 113 and 114/73 Suiker Unie e.o. v Commission [1975] ECR 1663; V. Louri, ''Undertaking' as a Jurisdictional Element', n 99 above, 149.
[102] Case IV/28.996 [1976] OJ L 254/40.
[103] Case C-264/98 Balog v Royal Charleroi Sporting Club ASBL (removed from the register on 2/4/01), Rapport d'audience, para 34.

down by sporting federations are usually considered to be decisions by an association of undertakings. In *Bosman*, Advocate General Lenz held that the nationality clauses and the transfer rules concerned decisions of associations of undertakings,[104] whereas the Court of First Instance came to the same conclusion with regard to the players' agents' regulations.[105] In *Meca Medina*, the Court of Justice held – admittedly only implicitly – that the IOC anti-doping regulations as implemented by the international swimming federation, could be considered a decision of an association of undertakings.[106]

Thereafter, it must be analysed as to whether the rule at stake has an objective to restrict or distort, or an effect upon the restriction or distortion of, competition within the common market. In his opinion in *Bosman*, Advocate General Lenz confirmed the Commission's point of view.[107] According to the Commission and Lenz, the nationality clauses restricted the possibilities for clubs to compete with each other by engaging players. That is a restriction of competition between those clubs. In fact, this can be seen as a way of sharing 'sources of supply' within the meaning of Article 81(1)(c) EC. The transfer rules and the payment of a transfer sum were considered as rules replacing 'the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and the clubs being deprived of the possibility of making use of the chances, with respect to the engagement of players, which would be available to them under normal competitive conditions'. Lenz came to the conclusion that the restriction of competition was not only the effect of the rules in question, but was also intended by the clubs and associations.[108] However, this concept remains rather scantily elaborated in the case-law. In *Meca-Medina+*, the ECJ only briefly touched upon this aspect by stating that the anti-doping rules were capable of producing adverse effects on competition because an athlete's unwarranted exclusion from sporting events would lead to 'impairment of the conditions under which the activity at issue is engaged in'.[109] The analysis of this aspect by the CFI in *Piau* can be criticised because it did not clearly indicate an anticompetitive object or effect to justify the application of Article 81(1) EC.[110] Instead, the Court of First Instance only held that the compulsory licence constitutes a barrier to the access to the economic activity of players' agents, and therefore 'necessarily affects competition'.[111] The test carried out by the CFI closely relates to the concept of 'market access' which is normally used in a free movement context.[112]

An aspect barely taken into account in sport related competition cases is the fact that the prohibition of Article 81(1) EC covers only appreciable interferences with competition.[113] A possible explanation might be that sporting associations often hold a (quasi) monopoly position in their sport. Closely related to this is the concept 'relevant market'. Especially in the context of Article 82 EC, but also within the context of Article 81(1) EC, it is important to determine the relevant market, which entails a geographical and a product market.[114] The geographical market covers the territory of the associations/clubs where a given sporting rule applies. In her *de facto* opinion in *Balog*, Advocate General Stix-Hackl emphasised that the fact that sport has certain particular features which distinguish it from other economic

[104] Conclusion Advocate General Lenz in Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 258.
[105] Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, para 75.
[106] Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991, para 45.
[107] Conclusion Advocate General Lenz in Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 262.
[108] *idem*.
[109] Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991, para 47.
[110] D. Waelbroeck and P. Ibáñez Colomo, 'Case C-171/05 P, *Laurent Piau*, Order of the Court of Justice (Third Chamber) of 23 February 2006, [2006] ECR I-37', (2006) *CML Rev*. 1743, 1749.
[111] Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, para 101.
[112] Case C-384/93 Alpine Investments BV v Minister van Financiën [1995] ECR I-1141, para 38; Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 103; J.W. Van de Gronden, '*annotation Piau*, T-193/02', (2006) *SEW* 31, 34.
[113] Case 5/69 Völk v Vervaecke [1969] ECR 295.
[114] Case C-234/89 Delimitis v Henninger Braeu [1991] ECR I-935, para 16.

sectors does not mean that there cannot be a market, or even several markets.[115] Subsequently, when scrutinising the transfer rules, she indicated that there were three – interconnected – markets.[116] The first is the exploitation market where both clubs and associations act as undertakings and exploit their performances, e.g. by selling broadcasting rights. The second market is the contest market, 'in which the typical product of professional sport is produced: the sporting contest'.[117] The third market is the supply market where the clubs 'sell' and 'buy' players.[118] Although this analysis focused on the transfer rules in football, it seems that it can for the most part be transposed to other major (team) sports. Both in *Meca Medina* and in *Piau*, the concept of relevant market received little attention. In *Meca Medina*, one could suggest that the contest market was at stake, although this was not explicitly stated by the Community judges. In *Piau*, the CFI mentioned that the rules in question affected the 'market for the provision of services where the buyers are players and clubs and the sellers are agents'.[119]

Concerning the analysis of whether a sporting organisation holds a dominant position within the meaning of Article 82 EC, it has already been stated that sporting associations often have a monopoly in their sport and can be considered dominant in the market of the organisation of sporting activities for their particular sport. In its judgment on the applicability of Article 82 EC in *Piau*, the CFI found, contrary to the Commission which had held that Article 82 EC was not applicable as FIFA was not active on the market for the provision of advise of players, that FIFA – although not itself an economic operator that buys the services of players' agents – held a collective dominant position on the market at issue as the emanation of the national associations and the clubs.[120] According to the Court of First Instance, FIFA's agents regulations result in the clubs 'being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity *vis-à-vis* their competitors, their trading partners and consumers'.[121] This decision correlates with the finding of Advocate General Lenz in *Bosman* that the clubs in a professional league are 'united by such economic links' that together they are to be regarded as having a dominant position', although he did not consider UEFA's or FIFA's position.[122]

**Effect on trade between Member States**

A last element that needs to be considered when analysing the applicability of Articles 81(1) and 82 EC concerns the effect of the rule in question on trade between Member States. Again, this aspect received little attention in sport related cases. However, the broad definition of this concept – a direct or indirect, actual or potential, influence on the pattern of trade between Member States suffices –[123] seems to pose little problems in the case of sport. Rules originating from European or international sporting federations are applicable in several countries and are likely to affect trade between Member States; besides, given the international context of professional sport, rules originating from national sporting federations might also affect trade between Member States. Moreover, the reasoning that a sporting rule, e.g. on the transfer of players, would have nothing to do with trade,[124] can be overruled by the fact that also the concept of trade has been interpreted broadly.[125]

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[115] A. Egger and C. Stix-Hackl, 'Sports and Competition Law', n 14 above, 86.
[116] *ibid*., 86-87.
[117] *ibid*., 86.
[118] *ibid*., 87.
[119] Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, para 112.
[120] *ibid*., paras 107-116.
[121] Joined case C-395/96 P and C-396/96 P Compagnie maritime belge transports SA eo. v Commission [2000] ECR I-1365, para 44.
[122] Conclusion Advocate General Lenz in Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 285.
[123] Case 5/69 Völk v Vervaecke [1969] ECR, para 5.
[124] Argument put forward by UEFA in Bosman.
[125] Case 172/80 Züchner v. Bayerische Vereinsbank [1981] ECR 2021, para 18.

**Wouters approach or Article 81(3) EC?**

After *Meca-Medina*, it seems clear that when a given sporting rule meets the conditions of Article 81(1) EC the *Wouters* test should be applied. Therefore, one has to analyse whether the rule at stake pursues a legitimate objective and whether its anti-competitive effects are inherent in the pursuit of this objective and are proportionate. Because several 'sporting' objectives – like maintaining certain equality between participants and the uncertainty of the results or the protection of athletes' health –[126] have been accepted as legitimate, the main assessment will relate to the proportionality principle. This is a factual analysis which has to be carried out by the European Commission and the Community judges.

Once established that a certain sporting rule does not meet the criteria set out in *Wouters*, one might look for justification under Article 81(3) EC.[127] When the four cumulative conditions of this provision – improvement in the production or distribution of goods or the promotion of technical or economic progress; allowing consumers a fair share of the resulting benefits; without imposing restrictions which are not indispensable to the attainment of these objectives; and without affording the parties the possibility of substantially eliminating competition – are met, the prohibition under Article 81(1) may be declared inapplicable. A question arising in the sporting context is whether socio-political motives can play a role in the analysis under Article 81(3). On the basis of the Commission Guidelines on the application of Article 81(3), it seems that the answer should be negative.[128] Following these guidelines, goals pursued by other Treaty provisions can only be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).[129] In reality, these guidelines are to a large extent based on valid economic considerations, what might, as stated by Bourgeois and Bocken, 'result in a too limited and reduced scope of the exception rule of Article 81(3) EC'.[130]

Apparently, the CFI disregarded these guidelines when assessing the FIFA players agents' regulations in *Piau*. Admittedly, the CFI came to the conclusion that the conditions of Article 81(1) were fulfilled without making a detailed analysis. The Court did not apply the *Wouters* test, but directly continued by considering whether the conditions of Article 81(3) EC were met. Again, its analysis was rather vague. Referring to the fact that apart from France, there would be no national regulation governing the occupation of sports agents as well as to the fact that the players' agents would not have a collective organisation, the Court of First Instance came to the conclusion that the mandatory licence system results in a qualitative selection, appropriate for the attainment of the double objective of raising professional and ethical standards for the occupation of players' agents in order to protect players.[131] It should be noted that the analysis of facts of the CFI lacks some nuance. In particular, the Court's finding that there is barely any national regulation on players' agents and that there is no collective organisation of players' agents seems to be inaccurate.[132] On appeal, the ECJ rejected Piau's pleas, without giving much guidance.[133]

Both the case of *Meca-Medina* and the case of *Piau* illustrate that sport does not *a priori* escape EC competition law and that the existing EC legal framework is sufficiently flexible to

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[126] Case C-415/93 Union Royale Belge des Sociétés de Football Association v Bosman [1995] ECR I-4921, para 106; Case C-519/04 P Meca-Medina & Majcen v Commission [2006] ECR I-6991, paras 43-45.
[127] Article 82 EC does not contain a similar paragraph 3, but as Jones and Sufrin highlight, the Commission and the Court of Justice developed the concept of 'objective justification' to distinguish between abusive conduct contrary to Article 82 EC and conduct which is pursued for legitimate commercial reasons. 'If the conduct is objectively justified or 'necessary' it is outside Article 82'. A. Jones and B. Sufrin, *EC Competition Law* , n 66 above, p 282-287.
[128] Guidelines on the application of Article (81)3 of the Treaty [2004] OJ C 101/97.
[129] *ibid*., para 42.
[130] J. Bourgeois and J. Bocken (2005), 'Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction', *Legal Issues of Economic Integration* 111, 119.
[131] Case T-193/02 Laurent Piau v Commission [2005] ECR II-209, paras 102-103.
[132] R. Branco Martins, 'The Laurent Piau Case of the ECJ on the Status of Players' Agents', (2005) 3-4 *ISLJ* 8; A. Vermeersch, 'PIAU t. Commissie: Sportieve competitie eindigt op 0-1, (2005) *NTER* 101.
[133] Case C-171/05 P Laurent Piau v Commission [2006] I-37.

take into account the specific characteristics of sport. However, the approach in both cases differs. One might wonder whether this difference is relevant for the sporting world. From the viewpoint of the sporting federations, the key issue is to avoid getting a 'European red card'. The underlying rationale seems of little importance. However, from a legal point of view, the choice between the *Wouters* approach and the application of Article 81(3) EC has some bearing on the burden of proof. Under Article 2 of Regulation 1/2003 the burden of proving an infringement of Article 81(1) EC rests on the authority or party alleging the infringement.[134] The burden of proving that the conditions of Article 81(3) EC are met rests on the defender.

**Conclusion: Legal certainty and the future of sports governance in Europe**

The application of EC law to sport provokes repeatedly, most recently in the Parliaments' report on professional football, calls for more legal certainty. The *Meca-Medina* ruling from the ECJ might have a double impact on the relationship between EC law and sport. On the one hand, by clarifying that sporting rules do not automatically fall outside the scope of EC law, the *Meca-Medina* ruling might form an incentive for sportsmen and other parties to challenge the role and the action of sporting associations under EC law. A similar development should not be supported as such. In the concrete case of doping offences, for example, the Community Courts seem not to be the most appropriate instances in which to settle these cases. This is not to say that the sporting community should not organise itself without taking into account the requisites of EC law. On the other hand, the application of the *Wouters test* in *Meca-Medina* provides useful guidance for the future application of EC law to sport.

Against the background of the quest for greater legal certainty, several options occur with regard to the future application of EC competition rules to sport.[135] So far, the relationship between sport and EC law has been based on a case-by-case analysis and a soft law approach, with the Helsinki report and the Nice Declaration as the most prominent examples. Other possibilities relate to a Social Dialogue,[136] a Treaty revision or a block exemption. The option of a Treaty revision could take several forms. Theoretically, one could provide sport with exemptions from competition (and free movement) law provisions by amending Articles 81 and 82 (and 39) EC. Arguably, this seems excessive and the Constitutional Treaty did not follow this line.[137] A block exemption seems also unlikely. This technique is used by the Commission (in the form of a Regulation) in order to exempt particular practices or branches from the application of Article 81 EC. The question remains as to what particular sporting practices should be exempted. As a block exemption only relates to competition law, a very generous block exemption for sport might undermine the Court's case law on free movement.[138] In addition, it seems that no consensus exists within the Commission on granting sport such an exemption status.[139]

On the basis of the forgoing, it seems appropriate to maintain the current combination of a case-by-case analysis and a soft law approach. As has already been stated, the existing EC legal framework is sufficiently flexible to take account of the specific characteristics of sport. Both for the Community judges and for the Commission this seems to be a workable tool in order to maintain a balance between the EC 'rules of the game' and the specific nature of sport. Although not all details have been worked out yet, the outcome of future litigation seems fairly 'predictable'. On the basis of the existing case-law, it should be feasible to

[134] [2003] OJ L 1.
[135] See also Project commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament, 'Professional Sport in the Internal Market', Project No IP/A/IMCO/ST/2005-004, September 2005, 92 p.
[136] *ibid*., p 65-73.
[137] [2004] OJ 2004 C 310.
[138] S. Weatherill, 'Limits to the autonomy of sports governing bodies under EC law: legal perspectives on the 'Arnaut Report'', Concluding Conference Social Dialogue, Brussels, 27 November 2006.
[139] 'Professional Sport in the Internal Market', n 135 above, p 83.

predict whether or not a sport related rule is likely to be prohibited under EC (competition) law. The concrete legal reasoning behind such judgments might need further elaboration. The *Oulmers* case, where the Belgian Charleroi football team – supported by the G-14 – challenges the players release system of FIFA,[140] will provide the Court of Justice with the first possibility to do so. More concretely, the Belgian judge referred the following preliminary question to the Court of Justice: 'Do the obligations on clubs and football players having employment contracts with those clubs imposed by the provisions of FIFA's statutes and regulations providing for the obligatory release of players to national federations without compensation and the unilateral and binding determination of the co-ordinated international match calendar constitute unlawful restrictions of competition or abuses of a dominant position or obstacles to the exercise of the fundamental freedoms conferred by the EC Treaty and are they therefore contrary to Articles 81 and 82 of the Treaty or to any other provision of Community law, particularly Articles 39 and 49 of the Treaty?'.[141] Without entering into detail, one might argue that this rule seems to be contrary to EC law, not so much because there cannot be a system of (mandatory) players release as such, but rather because the current system is not proportionate. It seems totally acceptable that clubs can be obliged to release players to participate in international competitions. It seems to be unacceptable that they have to do so without any compensation and bear the risk of potential injuries.[142]

By way of conclusion, one might say that all's fair in sport and competition, provided it is proportionate, or, as Weatherill states forcefully, sporting bodies enjoy a 'conditional autonomy' when setting the rules of the game.[143] In order to maintain the current balance, the dialogue between the sporting world and the Community institutions must be preserved and enhanced. Only on the basis of mutual understanding and respect may the sporting associations keep their leading role.

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[140] Pending case C-243/06 SA Sporting du Pays de Charleroi and Groupement des clubs de football européens.
[141] [2006] OJ C212/11.
[142] S. Weatherill (2005), 'Is the Pyramid Compatible with EC Law?', 3-4 *ISLJ* 3.
[143] *ibid*., 7.

# The Commercialising of British Men's Basketball: Psychological Contracts Between Coaches and Players in the Post-Bosman Game

Valerie Owen-Pugh

**Abstract**

This paper explores the psychological contracts of male players and coaches in British commercial basketball, and the ways in which these might be shaped by the constraining and enabling pressures of athletic talent migration. It draws on qualitative interview data to argue that commercialising changes in the game's recent history have led to the emergence of divergent forms of psychological contract between coaches and players. These have promoted the interests of the game's migrant Americans at the expense of its indigenous athletes. In particular, while the Americans reap the benefits of a high social reputation, material rewards and career development, many indigenous athletes working in the top-flight clubs struggle to gain remuneration and court-time and must fall back on their own resources to build self-confidence and self-respect. It is argued that this marginalising process was intensified following the Bosman ruling of 1995, which led to the exodus of many skilled indigenous players from the UK and prompted the commercial league to make more extensive use of Americans. Interpretation of the study's findings is informed by Elias' theory of established-outsider relations.

IN GAME SPORTS WITH AN INTERNATIONAL FOLLOWING, SUCH AS FOOTBALL, ICE HOCKEY and basketball, the commercialisation of sport is transforming the career opportunities open to talented athletes. Provided they have marketable skills and are able to follow a migrant lifestyle, they can aspire to high salaries, and the opportunity to hone their playing skills in the company of other elite performers (Olin 1984; Maguire 1988, 1992, 1999; Galily and Sheard 2002). Moreover, it is arguable that athletes are gradually gaining bargaining power at the expense of their clubs and national bodies (Stokvis 2000). Such a transfer of power has certainly been taking place in recent years within Europe, where, following the Bosman ruling of 1995, athletes with EU passports have benefited from the loosening of clubs' control over out-of-contract players, and from the relaxing of eligibility quotas restricting non-nationals' access to teams (Maguire 1999; Gardiner and Welch 2000; Parrish and McArdle 2004). However, the freedom of movement won by athletes such as Bosman has been at the expense of player development. Clubs able to hire talent on the open market are less likely to invest in youth training, while indigenous players find themselves having to compete against foreign workers for coveted places on elite home teams (Olin 1984; Maguire 1988, 1999; Gardiner and Welch 2000; Galily and Sheard 2002; Dabscheck 2004, 2006).

The social changes associated with sports migration are currently being debated within two distinct, but overlapping, academic traditions. Writers on sports regulation and public policy have deliberated over issues such as: the increasing internationalisation of national teams; sports organisations' entitlement to exemption from free-market legislation; and mechanisms for promoting the development of commercially marginalised clubs and athletes (Gardiner and Welch 2000; McCutcheon 2000; Parrish and McArdle 2004; Dabscheck

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2004, 2006). In contrast, sports sociologists have highlighted the national struggles associated with migrant flows, showing, for example, how such struggles find expression in the viewpoints and behaviour of supporters and athletes (Olin 1984; Maguire 1988, 1999; Galily and Sheard 2002; Falcous and Maguire 2005, 2006; Klein 2007). However, to date, few authors from either tradition have considered how these commercialising changes might impact on the relationships between athletes and coaches. One notable exception is the work of Stokvis (2000) who argues that free agency is leading to the individualising of athletes' subjectivities and consequently to increasingly impermanent and conflictive forms of coach-athlete alliance. Another is Galily and Sheard's (2002) study of the Americanising of Israeli basketball. Though primarily an account of the manoeuvring between Israeli governing bodies over foreign-player quotas, this study showed how commercialising processes were obliging coaches to apply different discipline codes to migrant and indigenous players. One coach is quoted as saying:

> You cannot really treat all players alike on this kind of team. … It is not just that they are better players with different standards. … In a way they are not expendable, as most players are … If a local player behaved inappropriately, I would have punished him without blinking. However, if an American player acted the same way I was in serious trouble. Even if I wanted to act according to my standards, I knew that the team was very much dependent on the player and therefore I had to think twice … It is definitely not healthy for the team … You can almost talk of two classes of players on your team, after all, they got paid much more than the local players. (Galily and Sheard 2002: 52)

In management terms, this coach appears to have been working to two divergent forms of 'psychological contract' (see Anderson and Schalk 1998; Maguire 2002) in which he applied different sets of professional standards both to his players and to himself, depending on their nationality and commercial value. The aim of this paper is to consider whether a similar dynamic might be present in other national contexts. This aim will be pursued by offering a case-study of British basketball which, like the Israeli game, is heavily Americanised. The paper will seek to make connections between sports policy and regulation, struggles over national identity, individuals' work interdependencies and human subjectivity. In so doing, it will offer an interdisciplinary analysis, drawing on the literatures of sports law, psychology and management as well as sociology.

The paper will commence by showing how recent commercialising changes, including the Bosman ruling, have worked within British basketball to shift the balance of power away from indigenous players and towards their American counterparts. It will then consider how such developments might best be theorised before turning to explore the ways in which this game's top-flight coaches and athletes understand their working relationship; at this point, reference will be made to qualitative interview data. Finally, the paper will seek to reconcile data with theory before final conclusions are drawn regarding indigenous player development in this sport.

## The commercialisation of British basketball

Maguire (1988) describes the early commercialising stages of British basketball, showing how the owners of some top flight clubs in England's National Basketball League (NBL) built interest in the game by attracting North American players and coaches to the UK. In the process, these entrepreneurs transformed it from a white, amateur sport to one in which, in its uppermost men's division, the majority of players were black and 30% were waged Canadians or Americans (the term, 'American', will be used in this discussion to refer to both national groups). For these club owners, the introduction of skilled foreigners made good commercial sense. They did not have sufficient funding to attract elite European players[1], and the pool of 2000 or so skilled graduates produced each year by American colleges

[1] Information supplied by key informant with the BBL, via e-mail correspondence (3 June 2003 - 30 October 2007).

allowed them to employ powerful players at a modest cost. Employing the Americans also offered them indirect marketing advantages: for example, there is a prevalent belief in the game that the American style of play is more entertaining than the European and so more attractive to paying spectators (*Britball* 2000). Despite the expansion of the game, however, the English amateur lobby remained concerned over the presence of so many Americans. Its concerns were not ill-founded. Maguire's statistics imply that, by 1987, up to three out of the five 'starter' players on top-flight teams were likely to have been migrants, while the indigenous players were largely confined to bench roles. The groups did not simply differ in their access to court-time: while the Americans were paid for their services, the indigenous Britons were amateurs. Maguire reports that disputes between the amateur and commercial lobbies over the presence of the migrants became increasingly acrimonious, and led eventually to the launch of a break-away commercial league, the British Basketball League (BBL). The BBL has since co-existed with the NBL in an uneasy interdependency, located above, but detached from, its developmental structure.

Since the Bosman ruling, the game's amateur and commercial lobbies have once more found themselves in disagreement. In the light of this ruling, most EU national bodies, including the NBL, agreed to allow EU passport-holders unrestricted access to their teams while continuing to restrict the registration of other non-nationals to one or two per team.[2] However, anticipating that their British starters would immediately take advantage of the ruling to look for better-paid work in European clubs, the BBL took a non-conformist line. Confident that its decision was unlikely to be challenged in court by EU players seeking access to its teams[3], it adjusted its league regulations to permit teams to register up to five non-national players whilst also reserving five places for players with British passports. The 'brawn drain' anticipated by the BBL did indeed come about; post-Bosman there have been at least 35 British players playing in European leagues every season, an average loss of two to three per BBL team.[4] However by 2002, BBL teams were registering an average of 4.91 non-nationals in their five starter roles.[5] Allowing for the presence of dual nationals and a very small number of indigenous elite performers who preferred to work in the UK, this effectively left only their bench roles still open to British players. The BBL teams had effectively become divided into North American 'haves' and British 'have-nots': salaries, court-time, career choices and free agency belonged almost unequivocally to the migrant group. Unsurprisingly, this decision was subject to considerable criticism by the amateur lobby, and by many spectators who wanted to see more British players on court (Taylor 1999, 2002; *Britball* 2000). Recently, the BBL has modified its position, reducing the number of permitted non-nationals to four in 2004 and three in 2006. However, in 2006, it also abandoned its commitment to reserve places for British players, finally allowing EU passport-holders unrestricted access to its teams.

It should not be assumed that the British bench players are without talent or ambition. Given the paucity of 'grass roots' development opportunities in the UK, indigenous players often only recognise their potential when it is too late to capitalise on it, for example, by negotiating scholarships to American colleges, a typical development path for indigenous youth players (Maguire, 1992, 1999). Furthermore, they are as likely as their American team-mates to subscribe to the conventional sporting values of hard work, achievement and refusal to settle for 'second best' (Adler and Adler 1998; Jones *et al*. 2005; Seippel 2006). However, if they want to develop their skills, these players face an uphill struggle; in the BBL, they will encounter the most challenging match opportunities in the UK but will probably be offered little court-time by their coaches; if they move to an NBL team, they will gain court-time but lose access to the best competition. The option of moving to a paid job in mainland Europe remains outside their grasp unless they can show hard evidence of their competitive skill (e.g. match statistics and video-footage) to commercial agents. Regardless of their

[2] Information supplied by key informant with the NBL, via telephone interview (September 2007).
[3] See n.1
[4] i*bid.*
[5] *ibid.*

potential, therefore, these players can find themselves unable to progress beyond team roles that offer little monetary return or development.

It is arguable that these players' situation is a form of exploitation, comparable to the physical damage that athletes can do to themselves when their love of sport and desire to succeed leads them to develop an obsession with weight or body shape (Jones *et al*. 2005), to use performance-enhancing drugs (Waddington and Murphy 1992; Morgan 2006), or to play through injury (Roderick *et al*. 2000; Roderick 2006; Murphy and Waddington 2007). Writers such as Wilson (1992: 75) would take a Marxist line, stressing that in sport, as in other work contexts, 'the division of labour alienates men from one another and from themselves'. This radical viewpoint obliges us to question the extent to which the 'traditional' sporting values of hard work, loyalty and athletic excellence serve hegemonic interests (Murphy and Waddington 2007). However, while Marxist theory throws much-needed light on the political functions of sport, and the plight of marginalised sports workers, it can be argued that it under-represents the complexity of sports development processes. For example, in reducing subjective experiences of sport to 'alienation', a Marxist interpretation takes no account of the positive experiences it engenders in those who play and watch it (Sabo *et al*. 2005; Seippel 2006). Furthermore, even the negative experiences engendered by commercialised sport, such as the cultural dislocation encountered by migrant athletes (Maguire 1992), can often be difficult to interpret from a commodification perspective. Arguably, also, Marxist theory offers us insufficient purchase on the ways in which sports development can come to be associated with struggles over gender, racial and (as in the present case) national identities (Maguire 1988, 1992). Moreover, the conventional Marxist formula, contrasting human wages with surplus value, is turned on its head in commercial sport, where some labourers can come to wield considerable economic power while (as in British basketball) the clubs that employ them may struggle to break even (Olin 1984; Maguire 1988, 1992, 1999; Stokvis 2000).

An alternative solution is offered by Elias' figurational theory (Elias 1978, 2000), which allows us to view the commercialisation of sport as one among a number of commingling global processes, including processes of pacification, democratisation, individuation and privatisation (Maguire 1988, 1999; Waddington and Murphy 1992; Dunning 1993). It visualises these processes as the 'interweaving of countless individual interests and intentions' (Elias 2000: 312), an interweaving that, though it has no agency of its own, can come to constrain human opportunities and choices and, because of the complexity of the power relations involved, will have unintended and potentially unforeseeable consequences. A key advantage of Eliasian theory is that it can be applied across all levels of social analysis. For example, sports sociologists offer examples of its use at global, national, local and even inter-personal levels (Dunning 1993; Maguire 1998, 1999; Galily and Sheard 2002; Falcous and Maguire 2006; Stokvis 2000). It is also possible to make connections across these levels of analysis, including (if we take the present study as an example) looking at the inter-relationship between national struggles and individuals' work relations.

Elias' concept of the 'figuration' (the relational networks of obligation that bind individuals together) helps us to conceptualise the professional choices faced by coaches and athletes. For example, both parties can be understood as individuals working for career development within a complex network of enabling and constraining influences, ranging from international legal frameworks and governing body regulations to the social obligations owed to families, teams, clubs, sponsors and media groups. Arguably, coaches face additional constraints created by their professional position, in that they must also reconcile conflictive obligations to their athletes on the one hand and their clubs on the other (Roderick *et al*. 2000; Stokvis 2000; Kelly and Waddington 2006). In Americanised basketball, coaches must also find strategies for managing the power differences between migrant and indigenous players. As we have seen, Galily and Sheard's coach thought twice before offending a migrant player. Figurational theory would predict a similar outcome in the British game. Given the relatively low wages on offer in the UK, migrant players are unlikely to sign

contracts for more than one, or at the most, two seasons[6]; indeed it is not uncommon for them to leave teams mid-season if they believe that they can obtain better pay and conditions elsewhere (a similar situation exists in British ice-hockey, another marginalised and Americanised sport – see Maguire 1999). Unlike some other game sport contexts (Walton 2001; Kelly and Waddington 2006) star players can therefore find it relatively easy to leave their clubs if they are unhappy. If we also take into account the commercial coach's heightened vulnerability to dismissal (Walton 2001, Murphy and Waddington 2007), it is arguable that the parties' opportunities to constrain each other's behaviour are relatively balanced or, in the case of a team's 'star' player, might favour the player rather than the coach. Coaches might therefore be inclined, as Galily and Sheard note, to adopt a light touch when dealing with their Americans. In contrast, coaches want support players to play hard during training and be effective substitutes during matches. Here, the power balance between coach and players will undoubtedly favour the coach since, during matches (as opposed to training), he may make little use of their services. While bench players could improve their power significantly if they were able to develop their skills, it would not be in a coach's interests to allow this to happen (after all, the best bench players can also be hard to replace). In dealing with indigenous players, therefore, coaches might be likely to assert their personal authority and possibly even restrict their players' development. It might be said that, in dealing with their migrant players, coaches would need to prioritise support over control while, in dealing with their indigenous players, they would be obliged to prioritise control over support.

Also relevant to the present study is Elias' 'established-outsiders' (E-O) theory. Although he did not formally develop this theory until late in his career (Elias and Scotson 1994) much of his writing is taken up with historical analyses of established and outsider groups, showing how their manoeuvring for power opportunities could be realised as disputes over the ownership of social values and practices; for example, his writing offers many examples of groups seeking to set themselves apart from others by espousing 'correct standards' of behaviour (Elias 2000). A key criterion for the presence of E-O relations is the existence both of interdependency and a significant power difference between two social groups. Both of these conditions certainly apply to British basketball: while the starters and bench players are interdependent, the Americans have a significant advantage over the Britons in terms of their skill, social reputation, and the social alliances they are able to form with coaches, club owners and sponsors. In the presence of such conditions, Elias would argue that the weaker group (the 'outsiders' – here the indigenous players) will identify with the values and practices espoused by the more powerful group (the 'established' – here the migrants) while the latter will work to defend their interests from unwanted incursions by the former. While it may appear a misnomer to classify the migrant Americans as an 'established' group, Elias' distinction between 'established' and 'outsiders' is not based on historical claims to territory. Rather, it is simply a question of which group has the greater access to power opportunities. Indeed, it is possible for E-O relations to be reversed at different levels of analysis. For example, Falcous and Maguire (2006) offer an analysis of the discursive processes used by America's National Basketball Association (NBA) to promote American basketball in the British media; in their study, the NBA becomes an 'outsider' group working for acceptance by the British sports 'establishment'. E-O theory helps us to understand the ways in which established groups might appropriate community dialogue processes to reinforce their hold on power. For example, Elias and Scotson (1994) refer to the strategic use of 'praise' and 'blame' gossip to reinforce cohesion among the ranks of the established while keeping outsiders at a distance. This theory also offers us insight into the subjective plight of the outsiders. For example, it can be argued that, in aspiring to the social values promoted by the established group, outsiders must also aspire to its rejection of themselves (Elias and Scotson 1994).

We must now consider how Elias' theory might help us interpret the psychological contract. In the mainstream management literature, this contract is conventionally understood as the unspoken expectations of obligation and benefit held by employees and employers (Herriott

[6] *ibid.*

*et al*. 1997; Anderson and Schalk 1998). Since it addresses the employee-employer interdependency, it is, in a sense, already construed in an Eliasian manner. However, it is often interpreted in the literature simply in terms of dyadic exchange. Elias' figurational theory, on the other hand, not only allows us, but requires us, to locate the interdependency of individuals within their wider social context, that is, to consider the enabling and constraining pressures impacting on their relationship.

Models of the psychological contract acknowledge the salience of many different forms of work obligation, ranging from job commitment and career development, to hours worked and salary payable, and loyalty and respect (Maguire 2002). For present purposes, these wide-ranging obligations can be thought of as falling within 'educational', 'managerial' and 'emotional' domains. In sport, the educational domain of the contract can be interpreted as obligations to instruct and learn. Coaches have social obligations to instruct athletes in the technical aspects of their sport, build their fitness and motivation, and enter them in graded competition. In return, athletes have obligations to conform to the vision of their coaches, submit to his/her training regimes, adopt a competitive attitude and work co-operatively with team-mates (Adler and Adler 1998; Potrac *et al*. 2002; Poczwardowski *et al*. 2002; Jones *et al*. 2003; Jowett 2003). The managerial domain is analogous to the commercial deals struck between athletes and sports clubs, in which athletes commit to high performance while coaches adopt managerial responsibility for ensuring the payment of wages and other benefits, and also the presence of safe and satisfactory working conditions (Walton 2001; Kelly and Waddington 2006). The emotional domain includes such things as mutual demonstrations of loyalty, respect and trust, and readiness to agree over values, practices and goals (Adler and Adler 1998; Poczwardowski *et al*. 2002; Jowett 2003; Potrac *et al*. 2002; Jones *et al*. 2003). This model of the contract will now be used, in conjunction with Elias' theoretical ideas, to explore coach-player relations in British basketball.

## A case study of coach-player relations

The research described here was a retrospective case study (Flick 2007: 45) in which players and coaches working in the upper echelons of British basketball were asked to explore their professional interdependency and its influence on their career development. It conforms to a 'post-positivist' or 'naturalistic' paradigm in which realities are assumed to be multiple, constructed and holistic, and time-, context- and value-bound (Lincoln and Guba 1985: 37). The study adopted a 'tight' research design in the sense that procedures for selecting participants were prestructured, and questions asked were chosen with reference to theory (Flick 2007). A 'snowballing' approach was used to maximise the diversity of perspective among participants, a procedure that Guba and Lincoln (1989) refer to as 'maximum variation sampling'. In this procedure, participants were asked to suggest the names of individuals who differed from them in terms of predetermined characteristics, including nationality, race, experience of the game, and current team role. This procedure generated a matrix of potential participants. In drawing up the final pool of participants, care was taken to ensure that these social markers were equally represented. While this sampling procedure does not ensure a representative sample of opinion, it can be the only way of accessing professional sports workers, who are notoriously reluctant to agree to be interviewed by 'outsiders' (Roderick 2006).

Face-to-face semi-structured interviews were carried out between 2004 and 2006 with ten male players and seven male coaches in the BBL and in NBL Division 1. At the time of the study, 12 participants (including five coaches) were working, or had recently worked, for a BBL club while six (including two coaches) had worked, or had recently worked, within NBL Division 1. The decision to include some NBL personnel was taken in order to maximise diversity of opinion but, as it turned out, it also offered the only means of talking to indigenous players who were also regular starters for their teams. Most participants (including those in NBL Division 1) had previous experience of working in other top-flight British clubs. Of the seven coaches interviewed, two were American, and five were British. Out of 10 players interviewed, three were work-permitted Americans, all of them regular

starters for their teams, one was an American with acquired British nationality, and six were indigenous British players varying in their access to starter roles (two were regular starters, two were occasional starters and two were regular bench players).

The interview questions explored participants' understandings of: their work obligations; others' work contributions; the ways in which coaches and players might enable or constrain one another's careers; the strategies used by bench players to gain court-time; the relations between migrant and indigenous, and black and white, players; coaches' and players' obligations to commercial stakeholders; and the ways in which third-party loyalties, including loyalties to sponsors and national and ethnic groups, could impact on the coach-player relationship. Participants were asked to draw on their lifetime's experience of the British game, rather than make close reference to current working relationships.

Analysis of the data was guided by categories generated in advance with reference to theory, previous research and an initial reading of the transcripts; these were modified as analysis proceeded and new themes were identified. This was therefore an example of 'concept-driven', rather than 'data-driven' coding (Gibbs 2007). For the purposes of the present discussion, the data was analysed with reference to two overarching questions:

i. what is the psychological contract between players and coaches at the professional end of British basketball?

ii. how does the contract reflect the polarised power relations between American and British players?

## Findings

*The psychological contract*

The data was initially analysed to clarify participants' understandings of the contract's three domains. Its key findings will now be summarised.

### The educational domain

All participants acknowledged the educational domain of the contract, agreeing over such things as the need for hard work, a commitment to achieve, and a willingness to be honest and constructive when offering feedback. It was widely agreed that coaches should be sensitive to, and build on, players' individual strengths, and that players should be prepared to defer to their coach's vision, systems and style of play. However, all participants understood that the BBL's priorities were commercial rather than developmental. As one BBL bench player put it:

> I'm managed. I wouldn't say I'm coached. ... Professional basketball in this country is man management. It's recruiting in the summer and then it's keeping them all facing the same way. It's not coaching. ... Basically you bring them in, they use you, you use them and then they move on. ... I'm not taught how to screen any more or how to curl, how to dribble the ball. Whatever stage I'm at, if I want to get better I need to go off and do that myself.

Even so, many of the younger players, in both the leagues studied, acknowledged an unmet need for further skills development.

### The managerial domain

The rewards that participants were looking for could not be reduced simply to wages and conditions. All professed their love of the game and several (most notably but not only the

Americans) expressed themselves lucky to be able to 'live the dream'. However, many participants, both American and British, also referred to the need for a 'work ethic' and the need to maintain 'professional standards'. Some stressed the value of a commercial game for player development, arguing that it would raise performance standards in the long run. Many considered that commercialisation was equalising opportunities for white and black players. These participants explained that, in the past, coaches had been inclined to place black players in roles requiring 'athleticism' and white players in roles requiring 'intelligence', but that the pressure to win was increasingly obliging them to see players, not as black or white, but as individuals.

However, it was clear that commercial priorities could also come between players and coaches. Money and payments in kind were a source of frustration for those who felt they were denied them or were not receiving what they were worth. As a consequence, coaches often became caught up in resolving disputes between players and management over unmet expectations. It was widely acknowledged that players could often feel constrained to play through injury, and that coaches could often feel constrained to allow it. Participants also referred to ways in which a club's star players could trade on alliances with club directors and sponsors. In such cases, coaches' careers could be on the line, as in the following account:

> I remember a situation with a player who I've worked with … and he's a difficult player but a very, very effective player. … He had a row with a coach … and pinned him against the wall by his throat. [The coach] went to the club management because he wanted him sacking and the management refused to sack him and so the coach left. Management wouldn't support the coach because he was an outstanding player. They wouldn't do it, but you know I think that was the management's loss. (British coach, BBL)

The emotional domain

There was universal agreement that the foundation of a strong coach-athlete partnership lay in mutual respect, trust, loyalty and honesty. Participants of all backgrounds acknowledged the value of having a coach who was prepared to push players hard, provided that this was done in ways that were constructive and not humiliating. There were many references to coaches acting as 'mentors' and 'father figures', but participants also acknowledged that insensitive coaches could destroy players' confidence. It was understood that both coaches and players could commit abuses of trust. For example, there were references by players to coaches who failed to keep their promises, and by coaches to players who had not lived up to their curricula vitae (CVs). Participants recognised that both parties could abuse their power in subversive ways that were difficult to confront, such as coaches forcing players to do unnecessary additional training or players deliberately missing shots in matches.

Participants also referred to emotional problems associated with their work, such as the 'burn-out' associated with migrant lifestyles, and the need for players and coaches to 'stay confident'.

For many, the ultimate solution to all of these problems was to remain vigilant and be self-sufficient. It was noticeable that, in contrast to the younger British players, who were inclined to apologise for acting in their own interest, the North Americans all appeared to be comfortable with and often proud of their self-reliance. The following comment was typical:

> This is my 14th year of playing … and I like to think of myself as a very self-motivated person. There are some players that need coaches to push them all the way to do everything. There are some players that are just self-motivating. ... I think it's important for a coach to push them but I think for a player or an athlete really - well at the end of the day it's up to that athlete, that player to push themselves. The coach is there to encourage and help. (Veteran American player, BBL)

Summary

This analysis revealed widespread agreement over the terms of the contract. Even so, its inherent complexity appeared to make it impossible for the parties to meet all of their obligations to one another all of the time. The risk of contract violation appeared to increase when coaches and athletes were obliged to take account of their formal commitments to club owners and sponsors.

*The national divide*

For the purposes of this discussion, transcripts were explored for themes relevant to: the relative professional standing of North American and British players, including the ways this appeared to have been influenced by the Bosman ruling and its aftermath; relations between either national group and their coaches, including the strategies open to British bench players to gain court-time; and participants' career development strategies.

The professional standing of British and American players

The majority of British participants, both coaches and players, aspired to American values and greatly admired the skills of the migrant players. There were many references to 'American pedigrees' and the quality players produced by America's National Collegiate Athletic Association (NCAA). They also talked about the valuable role the Americans played as ambassadors for the game, and referred approvingly to the technical advice the migrants often gave to British players – and indeed to some coaches. There was little acknowledgement that the Americans' skills might be exaggerated. However, one young bench player was willing to talk, though only 'off the record' about what he described as a 'conspiracy': he felt that his British coach was so American in his speech, mannerisms and sympathies that he had effectively 'gone over to the other side'. For their part, the Americans were aware and clearly proud of the fact that they were highly regarded.

Few participants referred to the strengths of British players beyond acknowledging that the best British players could do better for themselves in Europe. However, one American coach acknowledged the power of the few British starters still working in the BBL, referring to them as a potential focus for team resistance: 'someone who's been around and who's the local guy can be very powerful influence – he can take on coaches and undermine them!'.

Some older British participants expressed anger at the way in which the BBL had responded to the Bosman ruling. Both players and coaches talked of the damage done to indigenous player development. One British player graphically described how the changed regulations affected his confidence and career prospects:

> When I first started playing at 16 for the senior team, at that point only two Americans were allowed on your team. … I didn't play loads for the senior team because I was just a little kid but I still got to play, as far as I was concerned, enough for me. I was happy with what I was getting. When I moved to [name of club] I was still happy with what I was getting and then something changed. The Bosman ruling came in which dictated that you could have five and in some cases six, maybe seven [Americans], depending on work permits or if your mum or your dad was born in England, all of that kind of stuff. And then it changed, my court time was just gone! And if you're not playing regularly on your domestic team, how do you expect to do well on a national level? It's not going to happen. So, in terms of your career progression, then it's greatly reduced because you're not getting competitive experience week in, week out. You're not getting game fitness, you've only got practice fitness. And once you're not playing regularly your confidence starts to ... you know, if your coach doesn't put you on, eventually you're going to be "am I that bad?" you know, forget how much I was revered or looked up to as one of the top

> three players in the country for my age group, all of a sudden you're not playing at all - "well I must be really not that good any more".

Player-coach relations

All the British players interviewed considered that British and American players were treated differently by their clubs. For example:

> Some English players feel very resentful of Americans. ... They feel they are at least the same ability level, however the Americans still get paid more, they play more, they get treated with more respect. ... If part of the deal on your contract is to get a house and a car, the Americans will get a nicer house and a nicer car and the British players will get something else. If part of your contract is to do ten hours a week coaching, the Americans may get paid slightly more an hour than the English player. And obviously, that's going to spill over into the team dynamics in the changing room. When you're training, there will be resentment there. (British player, NBL)

British players also referred to being treated with disrespect by their coaches. These were the views of two BBL bench players.

> You don't have a real team chemistry because a lot of the time it's the Americans and the English guys and a lot of coaches will talk about the English guys in a basically derogatory way … any time they mention the English players it's not in a good way, it's like "Oh he's an English guy", basically assuming he can't play. It's a slight at English players.

> Sometimes I've been on teams where the coach will talk to the American players totally different to the way he talks to an English player. … He'll *ask* an American player to do something and he'll *tell* an English player to do something. … There's a total change in his respect … as though you're not really as important. And you feel it as well, a lot of times you feel like you're just making up numbers, you're just there to practice and it doesn't matter really what you do in practice you're not going to play [in competition]. It takes a lot of character to stay, stick with it.

These players were adamant that British and American coaches could be equally discriminatory. For their part, none of the coaches interviewed appeared to be aware that they might be conveying differential levels of respect to their British and American players. Given that they were a self-selected group (having agreed to participate in a study on coach-player relations) it is quite likely that they tried to treat all their players as fairly and honestly as they could. A coach that one of these players appeared to be referring to had been asked to participate in the study, but had refused.

Accessing court-time

Participants disagreed over whether or not it was possible for bench players in BBL clubs to gain the court-time they needed for development. Some considered that they could if they give their coaches a reason to play them. These participants considered that it was down to hard work, doing extra training and making the best possible use of any court-time they were given, for example, by being very vocal and playing strong defence. This was the view of a British coach:

> If the players are good enough they can play. If they get to a standard where they are so good that they're too good for the BBL they go into Europe and they earn a lot of money. ... I always say to English players who've got that "well it's all Americans", I say "hey, you get yourself to a standard where you can compete with them and you'll be on the floor".

However, others felt that this was unlikely, for a variety of reasons. Some participants considered that coaches had little room for manoeuvre, given the commercial value attached to winning matches. This was an American coach's view:

> Well, you have to win, so you might have to play guys that you hate. … Everything that they stand for you can't stomach, but if you don't play them you're probably not going to win. If you don't win you don't have a job. … That's the dilemma. And guys that work hard and you want to play maybe just aren't going to cut it. They aren't good enough. So that's a dilemma for a coach.

Some participants pointed out that clubs also needed to justify their Americans' work-permits. For example:

> If you're bringing five Americans over to this country to play on your team, Americans are supposedly better than English players. So in order to justify bringing Americans over here, they've got to show that there's no-one in the British workforce that can do this job as good as this American guy. Traditionally Americans get paid more money than English players and no-one in the BBL is going to pay an American more money than an English player and allow the coaches to put the English players on longer than the Americans. It's as simple as that. Regardless of ability, that's what it boils down to. (Veteran British player, NBL)

Other participants acknowledged that keeping star players on court also kept sponsors happy. Some argued that the only realistic opportunity for bench players to gain significant court-time lay in the 'lucky' chance that the starter players they were covering succumbed to injury.

The importance of the bench players' support role was widely acknowledged. Many participants, both coaches and players, British and American, stressed that it was important for them to put everything they could into developing that role, of 'being the best bench players they can be'. However, at times this view appeared to be offered with a degree of defensiveness. For example, one American BBL player was very forthright:

> I have no control over [allocation of court-time] you know, that's the coach's job. ... But you've got to … know your role on the team. ... For the team to be successful you have to know your role, even if you're on the bench or you're playing. ... When you start to complain about playing time, your problems start, unnecessary problems.

## Career development strategies

Many participants acknowledged that, in sport, career success was often a matter of chance, such as 'being in the right place at the right time', 'knowing the right people' and 'who you are seen by and who that person might know'. They also talked about the ways in which their personal career strategies could be influenced, for better or worse, by the interventions of families, coaches and sponsors. All the American players were confident of being able to further their careers in the game. The younger ones generally talked about selling their services to the highest European bidder, the older ones to moving into developmental careers associated with basketball, such as coaching and teaching. The British players had similar ambitions. While a number of the British veterans were already becoming very actively involved in teaching and coaching, the young players wanted to move to Europe. This was a typical comment:

> My aims are to try and get out to Europe and try and play professionally out in Europe, because playing here in [name of club] was a stepping stone on my way there, to try and develop me as a player to get out there. I've just got to get my name out there, get video tapes from games and stuff and get it out there. And in terms of development as a player, that's something I've just got to work at every day, put the

> hours in the gym, put the hours in over the summer when everyone else is resting and going on holidays and that, just putting the work in to try and get better.

However, while the move into Europe was clearly a realistic ambition for the Americans, who already had commercial agents and strong match CVs, it presented a significant challenge to the indigenous players who lacked both. One BBL bench player described how difficult it could be to access taped performance highlights. Referring to a British coach (also not among those interviewed), he said:

> We played [name of club] … and one of our [American] players asked for a game tape. I heard the coach say "yeah, that's cool". I had a good game that game as well so I've gone up to him and asked him if I can get hold of a game tape and it's "no we haven't got it", straight after I heard him. … I was standing behind a pillar and I've walked around and asked him and it's … "no, no, nobody's recording the game today". ... Now why would [he] say that?

It was suggested earlier that differential power relations might oblige coaches to support their migrants but work to control their indigenous players. This story appears to support that contention. It will be revisited later in this discussion.

### Summary

At the time of this study, the BBL had just begun to reduce its foreign-player quota. However, it was evident that, for the indigenous players interviewed, this regulation change made little or no difference to their situation. As far as they were concerned, the 'returns' offered by the top flight clubs to their athletes still discriminated between players on national grounds. It was not simply a question of the national groups being offered different rates of pay, although differential payment was certainly a contentious issue. Rather, many felt that their personal contribution to the game, and their nationality, were both significantly undervalued. As we have seen, these perceptions of being 'second-class' were voiced by indigenous players both in the BBL and (perhaps more surprisingly) the developmental NBL. For their part, the coaches interviewed were generally prepared to acknowledge (like the coach quoted by Galily and Sheard) that differential treatment did take place but, for a variety of reasons, they felt that their hands were tied.

## Discussion

This study appears to confirm the presence of contrasting coach-player contracts in Britain's top flight basketball clubs. The American players shoulder primary responsibility for winning matches and, in return, are offered good money, guaranteed court time, career development and respect. The indigenous players perform essential support functions but receive little or no money, court time or career development. Sometimes, respect is also hard to come by. It must be stressed that these observations are generalisations. For individual players and individual coaches, the reality is undoubtedly very different. Indeed, key features of the contract, including the differential rates of pay, may be beyond some coaches' power to control. Furthermore, it must be acknowledged that coaches would need to apply differential contracts to starters and bench players even in the absence of a migrant workforce. However, the differential contracts identified here were also identified in the NBL's Division 1, where work-permitted foreigners are currently limited to two per team. Consequently, they could not be explained simply in terms of differing team roles. Indeed, Maguire's (1988) study, which first recorded the divergent reputations and wages of the two national groups, was carried out at a time when just under half of all starter positions were likely to have been filled by British players.

However, this national struggle cannot be understood simply in terms of differential contracts. It must be recalled that some coaches also discriminated between players on racial

grounds but, nevertheless, there appears to be a fair amount of racial harmony within the British clubs. To understand what is going on here, we need to revisit Elias' E-O theory. It will be recalled that, for E-O relations to be present, there needs to be a significant difference in the power opportunities possessed by two interdependent groups. In the case of the two racial groups, it is arguable that there could be little overall power difference between them, and therefore no significant E-O relations, at club level: while club owners and directors are predominantly white, black players outnumber white players overall and dominate the starter positions; starter and bench roles are taken by both racial groups. It must be stressed that this conclusion could only apply at club level, where the black players' athletic skills and their commercial value to their clubs may offer them some respite from their wider social marginalisation (Lawrence 2005; Andersson 2007). It would not apply beyond the confines of club life. Indeed, the group analyst, Farhad Dalal (1998) offers a discussion of global racialisation processes that draws heavily on E-O theory.

In contrast, given their differential access to power opportunities, the contrasting contracts offered to American and British players must be understood as part of a wider national struggle. It will be recalled that, from the perspective of E-O theory, an established group can be expected to force its superior access to power opportunities through politicised forms of dialogue. The interviews carried out here did indeed offer evidence of such dialogue. Eliasian theory refers specifically to established 'charisma' and outsiders' 'disgrace'. In this study, participants made many references to the 'gold-standard' CVs of American players. In contrast, British players not only expressed general frustration at their second-class status but variously testified: to overhearing derogatory comments from coaches and Americans about the skills of British players; to subtle differences in the modes of address used by coaches; and even to a coach's readiness to lie to a British player while being honest with an American. Given that these discursive strategies might be serving a policing function, it is relevant to note that almost all participants made reference in some way to the athletic principle of 'playing to your team role'. In the presence of E-O relations, this could be interpreted as an injunction to 'know your place'. This brings us to the British coach, and the role he may be playing in upholding the interests of the migrant players. From a figurational perspective, it would be argued that British coaches (and many British players too) might see power opportunities in allying themselves with the migrant players. Unlike the indigenous players, however, who have little to offer the Americans in return for their 'protection', indigenous coaches (and the few elite British players in the game) might be accepted as honorary Americans provided they kept the Britons at a distance.

From a non-Eliasian perspective, the idea of coaches 'policing' the interests of a dominant player group may appear unlikely. However, many academic studies have acknowledged the sports coach's role in transmitting community cultures and enforcing athletes' compliance with community norms, including norms of club loyalty, obedience to authority, and maintaining a good professional 'attitude' (Adler and Adler 1998; Jones *et al*. 2005; Kelly and Waddington 2006). Studies indicate, also, that the gate-keeping roles played by coaches accord them considerable power, particularly with regard to athletes in need of development (Jowett 2003; Kelly and Waddington 2006). Writers note that athletes will be inclined to accept their coaches' evaluations without question, and that apparent rejection by a coach can destroy their self-confidence and impair their performance (Walton 2001; Jowett 2003; Jones *et al*. 2005). Indeed, the polarised power relations between coaches and athletes are often implicated in studies of athlete exploitation (Jones *et al*. 2005; Murphy and Waddington 2007). Even so, coaches may not be fully aware of the power they wield. As we have seen, when they feel vulnerable to dismissal, they will feel constrained to act in the interests of their employers, even when this brings them into conflict with their own professional values. Indeed, it may not be necessary for coaches consciously to assert their power over athletes. Since they are taught the importance of maintaining a 'good attitude', athletes will often constrain themselves to remain in destructive relationships through a sense of personal obligation (Walton 2001; Jowett 2003; Murphy and Waddington 2007). This is not invariably the case of course; when an athlete is confident of alternative options, he or she may well walk away from such situations (Viner 2003).

But are the relations between the American and British players likely to change? One means of answering this question is to think of the American dominance of British basketball as a form of cultural colonisation, and to assess the presence or likelihood of cultural resistance. For example, Klein (2007) takes this approach in his analysis of Dominican baseball. Elias (2000: 430) refers to two phases of colonisation, an early phase of 'assimilation' in which, 'the lower and larger outsider stratum is … clearly inferior and governed by the example of the established upper group which, intentionally or unintentionally, permeates it with its own pattern of conduct' and a later phase of 'repulsion' or 'emancipation' in which the outsider group 'gains perceptibly in social power and confidence'. Arguably, at the present time, the Americans' colonisation of the British game is still in the assimilation phase. But is it possible that the indigenous players might find ways of building power? Studies of psychological contract violation show that, when they feel that their employers are failing to meet their obligations, employees will not only under-perform but engage in acts of resistance such as sabotage, theft and even violence (Pate *et al*. 2003). Maguire (1999) makes reference to indigenous player resistance in British ice-hockey taking the form of physical violence during matches. The present study offers no evidence of violent resistance but, even so, it was clear that the British players did not passively accept their second-class status. For example, they expressed their resentment to coaches and fellow-players, and they expressed determination to do the best they could for themselves in the face of difficult circumstances. There are signs of resistance, too, among many British supporters. For example, Maguire (1988) records the mixed reception accorded to the American players by the amateur lobby in the early days of the commercial game. These views continue to be expressed (see Taylor 1999, 2002; *Britball* 2000). It is possible to assess cultural resistance as the readiness of supporters to buy local rather than American club merchandise (Klein 2007). When such a test was carried out among BBL supporters by Falcous and Maguire (2005), 67% expressed a preference for British merchandise.

Even so, it is difficult to see how the dominance of the Americans can be overcome unless the UK can produce many more players of international status. Even then, unless more British players can be persuaded to play in their home country's game, such a development would simply release more indigenous players into the global labour market. Of course, this does not prevent them from building a national reputation and even competing with the Americans in their home game; for example, such a reversal of fortune has been achieved by Dominican baseball players (Maguire 1999; Klein 2007). However, to bring the best British players into the home game would require significant commercial development. At the present time, the BBL may be seeking to promote such development by forging closer links with the NBA; for example, in 2005, they became contractually connected with its marketing arm, Synergie International (BBL 2005). Such a move would, of course, work to reinforce the dominance of the American players rather than reduce it. Even so, as Maguire (1999) emphasises, cultural colonisation does not simply lead to the dissemination of 'established' values and practices among the colonised; rather, as relations between the upper and lower strata develop, the practices and values of outsider groups can be taken up and popularised among the established; sport offers many examples of such contrary cultural flows. Consequently, though British basketball may well continue to be shaped by American interests for the foreseeable future, the game that evolves could become a blend of European as well as American practices.

Finally, figurational theory reminds us that, however powerful, individuals are almost always subject to some degree of constraint. Despite their power, the American players must find ways of handling the cultural disruption associated with a migrant lifestyle. Moreover, there are indications that they may find it increasingly difficult to sustain unchallenged reputations as 'gold-standard' players: as the ex-Yugoslavian states gain entry to the EU, its basketball labour market will become flooded with large numbers of highly skilled players who will have open access to employment in British clubs for the first time, and can reasonably be expected to find UK wages acceptable. Consequently, it appears inevitable that the Americans will lose much of their present dominance in the game. Two outcomes seem likely. Firstly, the bipartite struggle between American and British players will shortly become tripartite. Analogous to player relations in British ice-hockey (Maguire 1999), this struggle will

predominantly be fought between the two elite groups of migrants, converging on the UK from West and East, while British players remain a comparatively marginalised group. Secondly, for the time being at least, elite performance in British basketball will continue to be associated in the national consciousness with foreign role models.

## Concluding comments

It can be argued that the commercial history of British basketball is marked by two phases of migration. The first, described by Maguire (1988), commenced in the mid-1970's when its club owners first made use of American players (this transatlantic flow was not entirely one-way since small numbers of talented British youth players moved in the reverse direction, through winning sports scholarships to North American colleges). The second phase might be said to date from the Bosman ruling of 1995, which precipitated an outflow of skilled British players into Europe and (following the BBL's defensive reaction to the ruling) a heightened inflow of Americans. Since the ruling, migratory movement has been more complex, with many British 'rookies' moving directly from North American colleges to EU clubs, bypassing the British game altogether. At the same time, more American players are able to become naturalised British citizens; many of these dual-nationals will look for work in mainland Europe. In either case, the UK now qualifies as a 'donor' state since its investment in player development arguably works to the benefit of other EU countries (cf Maguire, 1992, 1999; Gardiner and Welch, 2000; Parrish and McArdle, 2004). We can speculate that, even in the first phase of migration, coaches will have offered differential contracts to British and American players, reflecting the Americans' higher levels of skill and commercial value. Such a conclusion would certainly be consistent with Maguire's (1988) study and with the findings of other writers who have documented the struggles associated with the Americanisation of amateur sport; Olin's (1984) study of Finnish basketball and Galily and Sheard's (2002) study of the Israeli game are both relevant here. However, following the Bosman ruling, this marginalising process intensified, with the balance of power shifting significantly in favour of the American migrants at the expense of the game's remaining indigenous players. However, the loss of power has not been confined to the game's indigenous players; British clubs and governing bodies have also lost much of their control over player movement.

The Bosman ruling may also have contributed to the eroding of British players' national identities. Theorists working in academic disciplines such as figurational sociology, social psychology, and psychotherapy suggest that human beings work to develop positive, group-referenced identities. Dalal (1998) draws on all of these perspectives in arguing that individuals gain emotional strength, and enhance their health and well-being, when they create positive mental images of (or 'idealise') the groups they belong to. This would suggest that, in the absence of skilled indigenous role models, British basketball players are left with a difficult identity choice. On the one hand, they could look to their American colleagues for acceptance and support, that is to say, they could aspire to Americanised identities. On the other hand, should they fail to be accepted as honorary Americans, they might have no alternative but to see themselves as either 'victims' or 'freedom-fighters' in an unfair struggle for resources dominated by the Americans. In the current game, therefore, feeling 'British' may well equate to feeling unskilled (the outcome for those who identify closely with their American colleagues) or feeling hard done by (the outcome for those who acknowledge their marginalised status). It is, of course, possible for players' identities to shift from one form to another in a context-dependent way. Indeed, from a figurational perspective, the fragmenting of we-identities is an acknowledged outcome of sports commercialisation (Stokvis 2000). However, whichever form of identity they aspire to, it seems probable that British players would have to work considerably harder than their American colleagues to sustain their motivation, self-confidence and self-esteem.

Given the apparent impact of the Bosman ruling, it is pertinent to consider whether the problems identified in this paper might be eased by alternative forms of legislation. However, it seems that the present situation is being sustained by many factors including: the comparative skills and affordability of the Americans; the enthusiasm of many club

owners and supporters for a commercial game; and the 'pull' exerted on British players by mainland EU clubs. It is difficult to see how all of these developments might be constrained or reversed through regulation. The application of equal opportunities legislation might be one way forward, but could be difficult to apply in sport, where professional players work to individual contracts and, indeed, are arguably on the verge of self-employed status (Stokvis 2000).

This paper also raises other relevant questions. For example, it is pertinent to ask whether a similar situation would exist in more commercialised forms of basketball. It is certainly possible for commercialisation to work to the benefit of marginalised groups. For example, the commercial development of their home game has allowed Dominican baseball players to establish a commanding international presence, to the point of challenging the Americans' dominance of this sport (Klein 2007). We must also question whether this study's findings would be replicated in other European countries where teams are likely to be less polarised in terms of players' national origin, or whether they would be replicated in less commercialised forms of basketball, such as the British women's game which is still largely amateur but has recently begun to employ professional players. Finally, we should, perhaps, place a question mark against the benign race relations reported by many of this study's participants, given that the British game's working context is dominated by white club owners and directors. All of these questions point to the need for further research.

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# EU-Centric Governance in Sport? The Slovenian Experience with the White Paper Process

Simona Kustec Lipicer

**Abstract**

A synthesis of existing academic, expert and everyday practical political literature demonstrates that we can trace many different approaches to the phenomena of governance. Based on the political sciences, particularly policy literature, the governance concept is most frequently connected with an analysis of the relations between actors or institutions of the state and society at different political levels. Use of the governance concept is also becoming increasingly popular when discussing sports issues, especially when the multi-level or global sport perspective is in question. This article aims to confront the national perspectives and understandings of, as well as attempts at, sports governance, in relation to multi-level ones. This refers specifically the EU, because over the last few years, not only have states expanded their traditional concerns with health and social security to encompass leisure and cultural life, including sport, but the EU has also implemented different activities concerning sport issues. This particularly emphasises the extent and importance of the relations that key national policy actors have established with themselves and especially towards supra-national (EU) actors in the processes of creating common EU sports policy directions as part of preparing the White Paper on Sport (2007). It does this by analysing the available official documents, records and statistics relating to the issue, as well as interviews conducted in spring 2007 with representatives of the state and sports-governing bodies in Slovenia. The conclusions of the analysis indicate a predominantly EU-centric type of multi-level governance approach and make some observations about the EU's future development and how this could impact the development of (sub)national sports policy.

A SYNTHESIS OF EXISTING ACADEMIC, EXPERT AND EVERYDAY PRACTICAL POLITICAL literature demonstrates how we can trace many different approaches towards the phenomena of governance, to various fields of social activity. Based on the political sciences, particularly policy literature, the governance concept is most frequently associated with an analysis of the relations between actors or institutions of the state and society at different political levels.

The governance concept is also increasingly used when discussing sports issues, particularly when the multi-level or global sport perspective is in question. Therefore, this article aims to examine the national and sub-national perspectives and understandings of, as well as the attempts at, sports governance, in relation to the supra-national ones. This is done with specific reference to the European Union (EU), and considers that in the last few years the EU has been increasingly involved in different activities concerning sport issues. As Sam and Jackson (2004) emphasise, sport policies are underpinned by particular interpretive

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frameworks or paradigms. These paradigms shape: (a) the construction of policy problems; (b) the alternative approaches to resolving these problems; and (c) what is considered to be an acceptable government intervention. This article seeks to investigate the presence of all three sets of paradigms between the policy actors involved at different political levels. The analysis focuses on recognising the elements of multi-level governance processes that were expressed when preparing the European Commission's White Paper on Sport. The analysis concentrates on the formulation phase of the White Paper, with special attention paid to the (sub)national (Slovenian) type of involvement. When defining the governance idea, a deliberate decision was made not to distinguish in advance between its different aspects because the frequently intertwining nature of governance characteristics enables us to detect a probable specific type of governance approach in the analysed case. The analysis thus involves an understanding of the roles played by policy actors involved in preparation processes at various political levels, along with activities and jurisdictions undertaken to co-operate in these processes.

Multiple methods are used to collect the relevant data to verify the emphasised relations and processes. They include a legal analysis of the roles and jurisdictions of various policy actors in Slovenian sport legislation and in existing EU legal documents dealing with sports policy issues. Official documents, records and statistics relating to the research issue, including reports from meetings organised to discuss the White Paper process are also analysed. Another important source of information was interviews conducted with top Slovenian sports officials who were officially involved in the preparations for the White Paper.[1]

## The Idea of Governance

The idea of governance, although not new, is currently one of the most popular political concepts or ideas in the contemporary academic environment. Scholars from economics, political science, sociology, international relations, as well as public policy and administration have been paying a lot of attention to the new forms of governance and the reallocation of authority (Hooghe and Marks 2001).[2] The roots of the idea can be traced back to the late 1960s when it initially started to develop in the fields of organisation sociology and management sciences and was then extended to almost all branches of the social sciences in the 1980s (Schneider 2004: 25).[3] In the field of political science, governance terminology expanded in the mid-1990s by referring generally to ways of understanding the breadth of political phenomena through relationships between the state and civil society when pursuing collective interests (Pierre and Peters 2005: 6). This emphasis on the state-society relations reflects some sort of common understanding of governance that has been significantly upgraded over time. Today, the synthesis of the governance literature in the field of political science shows that the initial understanding of governance as an idea has been slowly yet constantly transforming from a vague to a solid political science concept and theory (see Mayntz 2004; Héritier 2002; Kohler-Koch 2005).

[1] The interviews were conducted in May and June 2007. Three interviews were conducted at the Directorate for Sport with the Director and the Secretary Generals responsible for EU and Internal Affairs, respectively, two interviews with the Secretary General and the Director of the Top Sports Committee at the Slovenian Olympic Committee – the Association of Sport Federations and one interview with the representative of the EC in Slovenia. The interviewees were chosen according to the criteria of the responsibilities and jurisdictions they undertake in the analysed processes and were all asked the same questions relating to the following: a) the perceptions of the formal legal position and jurisdictions in the processes of preparing the White Paper on Sport; b) their impressions and assessments of their positions and jurisdictions in actual everyday processes; and c) their perceptions of the relations established between the policy actors involved at different political levels.

[2] At first sight, it might be dubious or even surprising that the authors differentiate between the political sciences and public policy and administrative approaches to governance. The reasonableness of this decision is explained later in this article.

[3] Currently it seems that the governance concept is more actively present in the field of organisational management, commonly known as *corporate governance*. For more on this see Aguliera and Cuervo-Cazurra (2004).

Hence, several understandings of governance in political science literature can be detected. On one side, it can be used as a term to describe the prevailing manner of organising political life, while on the other side ('only') as an alternative approach to analysing actors' mutual relations in decision-making processes. Wälti *et al.* (2004: 83) understand it as a concept that can be used to describe various activities within the political sphere, from labelling changes in the management of public policies to the transformation of co-ordination between the state and society; this is very close to the idea of policy networks (Börzel 1997). Given this possible contextual width, Treib, Bähr and Falkner (2007) also stress the institutional aspect of the governance concept, reflecting the hierarchy, centrality and (non-) institutionalisation of interactions. The same authors also point out the policy dimension of governance, which relates to the processes of implementation and policy outputs along with the roles of different types of policy actors in those processes; and to the political dimension of governance which refers to (a) the processes of political management that encompass the normative bases of political rule, (b) the prevailing style of managing public affairs, and (c) public resources. In this sense, it seems that the idea of governance is once again trying to open up the vital issues of the responsibilities, legitimacy and transparency of public authorities in political discourse (Robinson 2004).[4]

In its most broad sense we can therefore understand governance as a new or modern form of state theory which is, according to Schneider (2004), close to the structural and institutional state theories of social co-ordination.[5] Although when speaking about these macro patterns Schmidt (2006) claims that in the case of national policy-making processes, actors' complex relationships still fall within a continuum from the classical political theories of statism or corporatism; while with supra-national arrangements, such as the EU, they come close to a semi-pluralist, but still not an ideal governance system.[6]

The discussed theoretical understandings of governance may clearly convince us that the one and only truth of its understanding cannot be dispelled. Being aware that most theoretical standpoints are based on empirical findings of analysing different systems and/or policy fields, the central question therefore remains whether we can understand governance as an all-binding political-policy-polity idea, or as an independent individual approach of each one. One alternative that can help us solve this academic problem might be found in the spectrum of everyday practical political understandings and definitions of governance. Analysing some of the basic standpoints of the so-called 'codes of governance' (Aguliera and Cuervo-Cazurra 2004) shows that the patterns of academic findings are also very similar when set on more practical grounds. As can be seen in the following synthesis of some of everyday political definitions of governance, their content and, thereby, understandings, are at least as broad and vague, inexact and/or boundless, as the academic ones can be.[7] The whole extension and popularity of the governance terminology on 'practical political' grounds may be found in the idea of so-called 'good governance' stated in various political documents that define it in different manners. The EU for example understands the concept of governance as a power of its citizens in relation to the authorities (European Commission 2001), the United Nations sees it as a process of decision-making and (non) implementation (United Nations 2007), while the World Bank interprets governance as the traditions and

[4] Therefore we can conclude that the concept of governance is wider than the idea of government, which more or less deals (only) with the maintenance of social order within one territory that is being implemented by the executive branch of authority (Aguliera and Cuervo-Cazurra 2004).

[5] Rhodes (1996) similarly connected the understanding of the concept of governance with at least six different meanings: the minimal state, corporate governance, new public management, good governance, social-cybernetic systems and self-organised networks.

[6] The key reason lies in differences in the policy-making process since in the phase of policy formulation private interests have reasonably open access and influence while, in implementation, when regulatory and legalistic enforcement is the rule, they do not (Rhodes 1996: 670-71).

[7] According to Aguliera and Cuervo-Cazurra's findings (2004: 436), countries with more effective governance systems in terms of the overall legal system, that is, a common-law legal system, are more prone to continue improving their systems and to develop codes, although their picture might be understand as only one-sided, while the research has been oriented to a national country's perspectives and it leaves out the crucial aspect of governance that lies in its global emphasis.

institutions via which authority in a country is exercised for the common good[8] (World Bank 2007). Finally governance can also relate to practical guidance for the private sector when co-operating with the state (Governance Hub 2007).

The described understandings of both academic and everyday practical, political, notions of governance point to a variety in its meanings from the very narrow, focusing on special political arrangements, to the very broad, encompassing the whole spectrum of politics. This article reveals the level and nature of governance elements in the case of preparing the White Paper on Sport. It does this through an analysis of the ongoing processes, activities and relations established between the policy actors involved at the sub-national, national and supra-national levels. This means that the idea of governance is intentionally and not exhaustively defined in advance, although it could be argued that in its essence it is closer to the policy perspective.

**Multi-level Governance**

When discussing global political phenomena, the idea of governance is even more popular and fashionable than when it relates solely to the national level. It is frequently expected that this type of new practice should help solve the efficiency and/or legitimation crisis of global or supra-national structures (Aguliera and Cuervo-Cazurra 2004). When it comes to the EU system, the idea of governance has also been seen as crucial when searching for the best possible decision-making system. In the 1970s, when European integration seemed to have come to a halt, the question of who was running the integration process altogether became less interesting, while the revival of the supranational versus intergovernmental debate in the late 1980s no longer helped to fully understand the nature of politics and policy in the EU. This stimulated the need to develop new ideas to explain how the EU works (Cram 2001: 151, 152). In the early 1990s the concept of governance, and specifically multi-level governance, was proposed, mainly by German and Dutch public policy scholars, as an influential theoretical perspective. They saw the EU as a multi-level system of governance where private and public actors at the supranational, national and sub-national levels interact within highly complex networks to produce policy outcomes (Börzel 1997). The initial idea of multi-level governance in the EU thus pointed to a system of continuous negotiations among nested governments at different territorial levels (Marks 1993: 392) in ever more complex policy processes (Richardson 1996; Andersen and Eliassen 2001) consisting of the stages of agenda-setting and formulation, decision-making and, finally, the implementation and enforcement of a policy problem or issue (Cram 2001: 155).

In its broadest sense, the EU functions as a special type of political system because it produces legislation and policies (Hix 1999), and creates a system of governance that can be seen in a range of different policy outcomes produced by policy actors aiming to ensure values and objectives in the cases of market and social integration (Cram 2001: 161). The idea of a complex and frequently messy system of various policy actors that in their mutual relations form a type of a special network of governance has frequently been compared with the idea of 'new medievalism', thanks to its having some similarities with the polycentric forms of government developed at the city level in the United States (Grant 2003). As emphasised by Wright (1996: 148), the crucial predisposition of successful network relationships lies in effective co-ordination between actors from various political levels involved in a specific stage of policy processes. The public policy literature distinguishes various types of co-ordination at (sub-)national and supranational levels from the *anticipatory*, *active*, *reactive*, *formal and informal*, *vertical and horizontal*, *negative and positive*, policy and procedural processes. These distinctions are quite blurred in practice and generally fail to provide a framework which links the various forms (Wright 1996: 148).

[8] This includes: (i) the process by which those in authority are selected, monitored and replaced; (ii) the government's capacity to effectively manage its resources and implement sound policies; and (iii) the respect of citizens and the state for the institutions that govern the economic and social interactions among them (Aguliera and Cuervo-Cazurra 2004).

Despite these warnings, the nature and intensity of actors' co-ordination can be very productive for understanding their mutual relations and, therefore, the type of multi-level governance. Based on Selznick's functions of institutional leadership, Wright (1996: 148-149) proposed the following functions of co-ordination that also provide the common thread of the governance arguments used in this study of the White Paper:

1) the definition of the actors' mission and role (the 'creative task of setting goals');
2) the institutional embodiment of purpose (the capacity 'to build policy into an organization's social structure');
3) the defence of institutional integrity ('maintaining values and institutional identity');
4) the ordering of internal conflict ('reconciling the struggle between competing interests').

Hooghe and Marks (2001) go further and propose that it is also sensible to differentiate two types of governance according to the nature of the jurisdiction. The first mode is more oriented towards broader political contents dealing with the dispersion of authority but intended to be permanent and with a limited jurisdiction and number of levels, while, contrary to the former, the second mode is task-specific, overlapping between different levels and as such the number of jurisdictions is unlimited and intended to be flexible (Hooghe and Marks 2001). This last mode, as emphasised by Grant (2003), is closer to the ideal understanding of the multi-level, policy-based, governance approach, for which it is significant that in contrast with more traditional forms of decentralisation the number of jurisdictions is not limited, that the jurisdictions operate on diverse territorial scales rather than a few levels (even across national borders) and are task-specific rather than multi-task (Grant 2003).

In 2001 the European Commission introduced the White Paper on European Governance, which strongly considered the theoretical ideas of multi-level governance by proposing a set of recommendations for how to enhance democracy in Europe and increase the legitimacy of institutions through openness, participation, accountability, effectiveness and coherence (European Commission 2001: 10). This White Paper not only gave a great impetus to translating academic ideas into everyday policy-making, but also encouraged the significance of establishing co-operative relationships between the various types of policy actors involved in policy processes.

While many concrete examples of various analyses confirm the usefulness of the theoretical framework in the case of multi-level governance in the EU, several critics can also be found which claim that, rather than a coherent theory, multi-level governance is only an eclectic collection of points concerned with a static analysis of the nature of the EU (George and Bache 2001: 25). Given these limits, which were exceeded by understanding the EU as a system of supranational governance, it is possible to see the idea of multi-level governance as a useful tool in the following analysis. Based on the emphasised contents, governance arguments or criteria of actors' roles, policy capacities, integrity, conflict reconciliation and jurisdictions would be more precisely considered when assessing the mutual relations between the policy actors involved at various political levels, who were co-operating between themselves within the processes of formulating the contents of the White Paper on Sport, thus creating the embryos of sports policy at the EU level.

## Sport Governance in Multi-level Circumstances

The idea of governance in the political sciences is close to all possible social arrangements and activities established by the state or state-like authorities, including those of sports society. Different types of state-initiated activities extend far back into history and involve various forms (see Houlihan and White 2002, Henry 2004). Most frequently the spectrum of public interest in sport is connected with the belief that participation in sport facilitates social integration and equality, supporting economic development or even helping to build a sense of national identity. From the perspective of the governance idea, the crucial modern

pointers of state-society relations can be seen in the establishment of explicit sport legislation and state-based institutions, the roles and jurisdictions of state and sports society actors as well as the various types of mechanisms used to define and fulfil a public interest in sport. One of the best known comparative examples of combining theoretical governance considerations with empirical findings on national sport governance systems was prepared by Chaker (2004).[9] In this study, the author used the level of regularity and accountability based on statutory provisions as crucial elements of good governance. When classifying the states according to these elements, he concluded that most systems have established and promoted, at least, some sort of indirect state interest in sport, relative to sports organisations.

Currently the position of sport and consequently its role in (public) policies has gained in importance. It has developed mass audiences and effectively become a global phenomenon.[10] Although it seems the traditional nation-state based governance idea is being replaced by global political imperatives, the emphasises frequently remain very similar, given that global political initiatives also need to seek legitimacy for their making (Banchoff and Smith 1999, Houlihan 2003, Crombez 2003, Allison 2006, Gloub 2007). Considering this, there have been many international or even global attempts at regulating sport through common governmental and sports organisation initiatives such as those of the Council of Europe, the World Anti-Doping Agency or the European Union. The common point of these supra-national interventions lies in the idea of so-called 'sport governance'. As defined by the Council of Europe's Recommendation Rec (2005), the principle of good governance in sport equally concerns the public administration sector of sport as well as the non-governmental sports sector. The idea of good governance refers to a complex network of policy measures and private regulations used to promote integrity in management of the core values of sport such as democratic, ethical, efficient and accountable sports activities (Council of Europe 2005). Although this document was the first directly oriented to the issue of sport governance, a majority of the others that were recently established, regardless of the political level, also involves similar elements. The latest in this regard is the EU's White Paper on Sport (2007), published on 11 July 2007.

## Building the EU's Sports Policy

The history of the EU's interest and activities regarding sport is relatively new, although some indirect attempts, mainly in the work of the European Court of Justice (ECJ), have been seen since the mid-1970s (Parrish 2003: 85-107). The first direct political, and hence, legal attempt involving sports policy results from the 1995 Bosman ruling, emphasising calls by EU institutions and some nation-states to grant sport a legal basis within the European Treaty (Parrish 2003: 15). In 1997 a European Parliament Resolution was also adopted on the role of the European Union in the field of sports.[11] This document calls on the European Commission to take account of sport across the entire spectrum of its activities, particularly in regional, social, educational, youth training and health fields (European Parliament 1997a: 252). Following this, the Heads of States and Governments of the EU met in Amsterdam and decided to attach a non-binding Declaration on Sport to the Amsterdam treaty calling on European Union bodies to listen to sports associations when important questions affecting sport are at issue, especially the characteristics of amateur sport.[12] Since then, the Commission's Education and Culture Directorate has undertaken a lot of sports-related work.

[9] Although the title of the study refers to the idea of governance, the criteria employed in comparison are not so directly oriented to the aspects of governance as in classical elements of governmental (in)activities or levels of intervention in sport.

[10] I am aware that we can discuss this statement in relation to the American model of sport, known for its almost complete state absence, as well as for not giving international competition the key focus.

[11] Having referred to its previous resolutions on the relationship between the European Community and sport and in particular its resolution of 6 May 1994 on the European Community and sport (1994).

[12] European Council (1997) Declaration No.29, on sport (Amsterdam Declaration on Sport) was attached to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.

First, the Sports Unit within the Commission's DG emerged, undertaking a key institutional role by initiating a process of dialogue and consultation with the other sports-interested institutions and individuals. As a result of its previous work, in 1998 the Commission issued the paper on 'The Developments and Prospects for Community Activity in the Field of Sport', followed by the Consultation document 'The European Model of Sport' (1998) where sport is identified through its educational, public health, social, cultural and recreational functions. In addition, the organisation of sport in Europe, its features and recent developments were determined (European Commission 1998). A series of European Commission activities involving a broad range of consultations was undertaken and finalised in the Helsinki Report on Sport presented by the European Commission (1999) to the European Council. In 2000, the Nice Declaration on Sport (European Council 2000) was adopted as the European Council's response to the Commission's Helsinki report. It called upon Community institutions to take due account of the educational values of sport in its actions and demanded that the social and cultural dimensions of sport should feature more prominently in national and Community policies. The institutional complexity of the EU's involvement in sport reached its peak in 2004 which is, from the Slovenian perspective, especially important because it coincided with the country's official accession to the EU. It was actually from this point that it is possible to formally begin to search for potential multi-level governance relations. At the highest political level these supranational governance elements can first be seen in the contents of the *Treaty Establishing a Constitution for Europe* (2004) where sport was paid special consideration in Article III-282 g of Section 5 stating that Union action shall aim at developing the European dimension in sport by promoting fairness and openness in sporting competitions and co-operation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen. The treaty also predicted co-operation with so-called third countries and competent international organisations in the field of education and sport (in particular with the Council of Europe) but it has never come into force due to the negative referenda in France and the Netherlands that stopped the ratification process. From the EU sports perspective, it is clear to see that although the whole debate on the constitutionalisation of sport in the EU with the interventions of the European Council and the Commission had an effect on framing the issue 'sport', thus redefining sports policy (García 2007: 37), it has so far failed to be formalised due to the non-ratification of the Constitutional Treaty. Slovenia, as one of the EU member states that ratified the Treaty, therefore indirectly supported the legitimacy of the EU statement on sport with its signature, although no public consultations or discussions on the contents occurred in the period when debates about the Treaty's contents were topical.[13]

The continuing processes of creating the EU's sport policy have, despite the current deadlocks in amending the EU Constitution, been very alive. In the summer of 2007 two more crucial events happened. The EU launched an Intergovernmental Conference (IGC) in Brussels to revise its institutions and power-sharing system thorough the submission of the draft 'Reform Treaty'. As scheduled, the final draft was formally adopted at the Summit in Lisbon in October 2007 and it makes explicit reference to the specific nature of sport once again. Article 124(a) of the new treaty stipulates that 'The Union shall contribute to the promotion of European sporting issues while taking account of its specific nature, its structures based on voluntary activity and its social and educational function' (The Council of the European Union 2007).[14] Almost parallel to these 'constitutional' processes, the Commission released the White Paper on Sport on 11 July 2007. This document may be currently understood as the key EU sports policy document, highlighting the economic,

[13] Although ratification of the constitutional treaty can in the Slovenian case be understood as a high political act which was more or less self-evident and based on the still 'fresh' results of the national referenda for EU accession in 2003, where almost 90% of all participants voted for Slovenia to join the EU. Hence extensive debates on the constitutional contents were not expected. The more active responses of the national and sub-national levels involved in the future, also in individual policy cases, may be expected.

[14] This new wording retains the substance of the proposed text in the aborted project to establish a new constitution for Europe (Article III – 282) and it is also in line with the Nice Declaration (2000), which made reference to the 'specific characteristics' of sport. The agreed text is now being submitted for ratification in all member states and is expected to be completed in time for the June 2009 European elections.

societal and organisational roles of European sport as three crucial areas or functions of its making. In this regard, sport is defined as an area of human activity that greatly interests the European Union's citizens and has enormous potential to bring them together by reaching out to all of them, regardless of their age or social origin (European Commission 2007a: 3). Meanwhile, it is also defined from the economic perspective as a dynamic and fast-growing sector with an underestimated macroeconomic impact that can contribute to the Lisbon objectives of growth and job creation. It is also seen as an alternative tool for local and regional development, urban regeneration or rural development, as well as having synergies with tourism, and stimulating the upgrading of infrastructure and the emergence of new partnerships for financing sport and leisure facilities (European Commission 2007a: 10). It should be noted here that the White Paper's contents will not be debated here since this is not the primary aim of this article; however, it is possible to assess the document from various possible 'governance viewpoints'. In one sense, it is the EU's first real attempt to create some kind of policy interpretations and directions in the broader field of sport in the EU as well as indirectly at (sub)national levels. This appears to see the EU assume the 'traditional' motives of nation-states' interests in sport. On the other hand, the document still remains a non-binding consultative paper, albeit one that sets out the potential means by which the EU could develop more binding policy alternatives in the future (Greenwood 2007: 183). In terms of governance terminology, we may regard the document, in its ideal form, as an example of a multi-task governance approach, pointing to task-specificity, the overlapping jurisdictions between different political and public-private levels, flexibility, and the openness and willingness for the full participation of all interested actors.

It can also be argued that the White Paper undertakes the function of a formal document that formulates policy directions in EU sport policy; but we could also understand it much more broadly. As already stressed by García (2007), the initial sports policy was just regulatory in nature and introduced through the so-called 'low politics route' which saw the EU institutions view the issue purely from the perspective of sport and its rules, however, after the Bosman case this narrow or low politics route evolved to encompass the socio-cultural, educational and economic particularities of sport. In this sense, a clear shift in the EU's institutional interest in sport can also be detected, starting with the ECJ's judgements in cases of sport disputes, followed by the sporting-policy agenda-setting activities of the Commission and its Sports Unit, along with the Parliament's and Council's activities, and finally with the significant development which saw sport given a special position within the EU Constitutional Treaty. However, of all of these activities, it is without doubt, the White Paper on Sport, that is the most important development within EU structures, guaranteeing the potential development of a solid policy framework in the filed of sport at the EU level.

## Multi-level Governance in Sport in Practice: The Slovenian Background

Despite the political activities of the EU in the field of sport, it is unlikely that some sort of binding EU sports policy will emerge in the near future, mainly because of the powerful influence of some international, private, sports organisations and federations. However, this does not mean that the White Paper, as the EU's foremost document on sport, should be overlooked. Rather, it may prove useful to examine the background to the creation of the White Paper, thus revealing the potential of possible future EU governance practices in sport, particularly in relation to the (sub)national governance practices. Therefore, the national governance perspectives are taking on an important role and need to be analysed.

When it comes to Slovenian sports policy, legally speaking, a democratically based sports policy first appeared in 1998 with the establishment of the 'Sports Act'. This was followed in 2000 by the second most important legal document called the 'National Programme of Sport in the Republic of Slovenia'. Despite the quite long period, from the country's independence in 1991 until 1998, of official absence of any kind of sports related legislation, sport itself has received a lot of attention from the state with the establishment of a ministry responsible for sport as well as a share of related public financing guaranteed since the beginning of the country's statehood in 1991. Furthermore, the state ratified various international conventions

on sporting issues, despite the fact that no specific national formal legislation on sport then existed.[15]

With the adoption of both mentioned legal acts, the following fields of normative definitions, regulations and, in some sense, governance elements were also introduced:

a) public interest and consequently national and local programmes and strategies in sport, emphasising the sports education of pre-school children, pupils, youth, youth with special needs, students and the disabled, elite sport (both documents);
b) public tasks in sport, relating to the education and training of sport experts, academic and research activities, publishing, the establishment of an information system for sport, the enhancement of sport events and infrastructure, the fight against doping, and international activities;
c) the actors involved their jurisdictions and legally prescribed relations. A special position is given to the Expert Council of Sport as an expert counsellor of the ministry responsible for sport, sport public institutes, expert workers in sport, private work in sport, athletes and elite athletes, and inspection (Sports Act).

Sport from the nation-state perspective is defined as an important public good and an economic category that needs both state and sports organisations' incentives and support. Sport in this sense is used as a proper mechanism for helping an individual to find the equilibrium between his/her work and leisure, as well as to strengthen his/her health and creativity. It is also understood as an important ingredient of institutional upbringing and education, as well as a tool for shaping national identity (National Programme for Sport 2000). When analysing the contents of both national legal documents, we see that an important part of both is also dedicated to the recognition of the actors and/or institutions involved, with a special focus on their roles and possible mutual relations. Both acts predict in a normative manner a high level of co-operative relations at the local, national and international levels between representatives of the state and sports organisations on one side while, on the other, some types of relationships are even specifically defined. Article 5 of the Sports Act, for example, states that the National Programme of Sport can only be accepted by the National Assembly when the Olympic Committee of Slovenia – the Association of Sports Federations (OCS-ASF), as a key national representative of sports organisations, and the government reach a consensus on the programme. In case this does not happen, the programme can still be proposed to the legislative body but then the governmental Expert Council of Sport, composed of representatives of expertise, private sport workers or organisations, the OCS-ASF and national federations not included in the OCS have to agree with the contents.

These legally prescribed state-civil society relations also confirm that the relations between the state and sports society have always existed, with a growing emphasis given to the role of sport experts[16] in policy-making processes. It emerges that the state applies different forms and mechanisms to foster co-operation with civil society. This may also be understood as an attempt to maintain quite a high level of social sport capital in the national policy. On the other hand, it still seems that the relations between the state and civil society are diffused since the state leaves decision-making processes to be led by civil society players[17] and fosters the social sphere, yet it still legally and institutionally intervenes in the sports field.

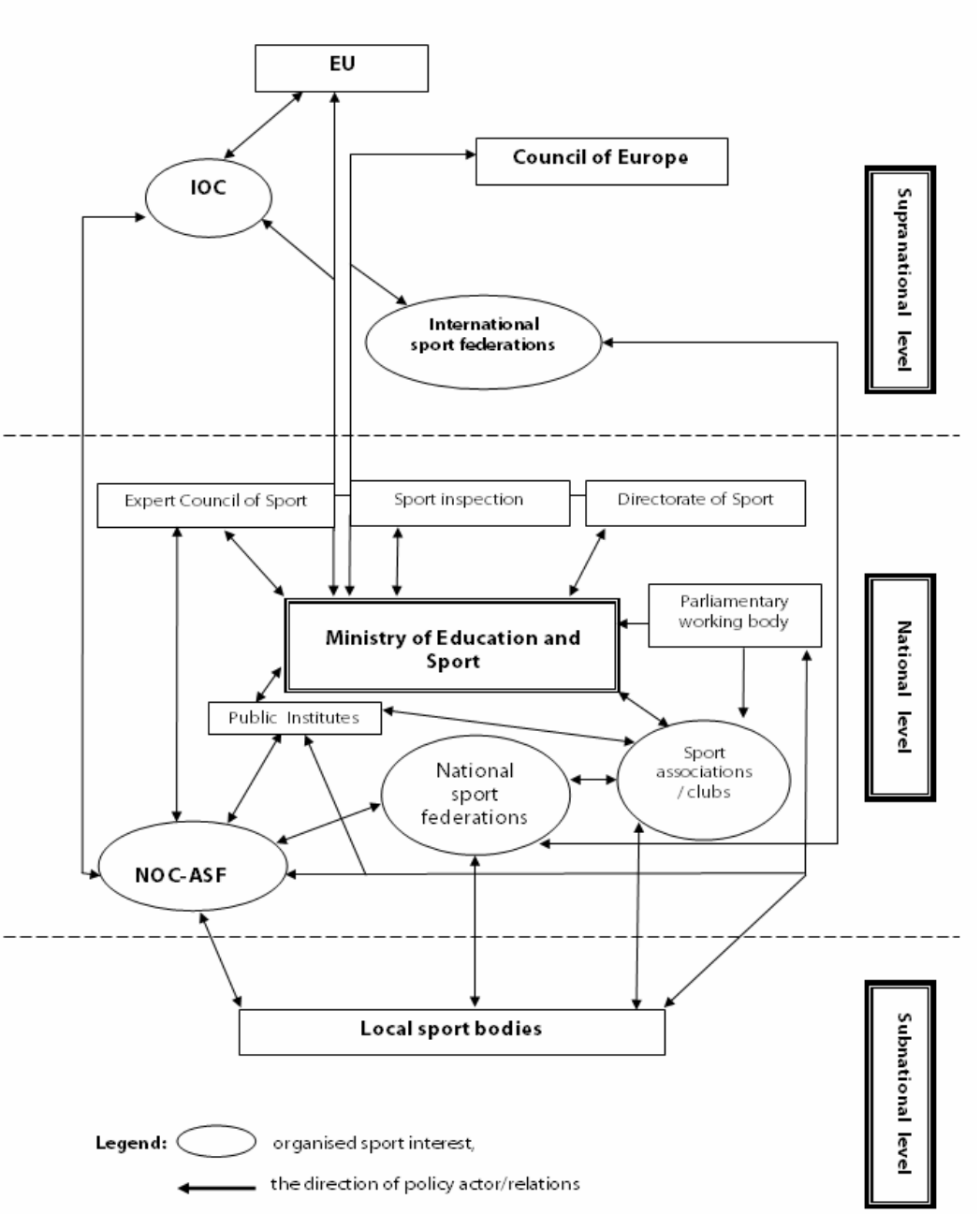
[15] The Act Ratifying the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches (1990), the Act Ratifying the European Convention on Anti-doping (1992), the Act Ratifying the Nairobi Treaty on the Protection of the Olympic Symbol (1998). For more on these see Verovnik (1999).

[16] Although sports experts represent an important special group of policy actors defined in the Sports Act, it is unclear which characteristics and conditions need to be fulfilled to acquire the title of a sport expert. It could be guessed that this category is reserved for those who finish education courses at the Faculty of Sport which then give them a highly privileged and legally protected status compared to other professions where this kind of legal protection is not so self-evident nor accustomed.

[17] Comparative sports policy research results across Europe show that since the beginning of the 1970s governments have engaged more actively in sport and sport policy in many cases as a result of sport organisations' initiatives (Green and Houlihan 2006; Ibsen 2006).

Further, the state is ever increasingly referring to international legislation and is thus giving over much of this area of policy responsibility to a supra-national level, constituted by new (state-type) supra-national policy players. The promotion of policy-making at the supra-national level brings with it many reshaped issues, solutions, aims and mechanisms, as well as different positions, jurisdictions, new policy players and therefore also diverse relations. Likewise, nationally-based governance principles are predicted, international co-operation is also legally limited particularly in the National Programme of Sport. However, formally based supranational connections with regard to the EU, still cannot explicitly be found anywhere. Although this might be seen as surprising or odd when it comes to national activities in the field, at the same time it could be expected when we consider that the beginnings of the ongoing policy-making activities in the EU are still in their early stages (Kustec Lipicer 2007).[18]

***Figure 1: Governance in Slovenian sports policy***




[18] It is just a coincidence that the processes of establishing sports policy coincide time-wise with the current processes of amending the legislation at the national level and it should be expected that this fact would be used as an advantage to make better and more harmonised conclusions.

**(In)Activity in the White Paper Processes: General vs. the Slovenian Perspective**

When processes connected with the preparation of the White Paper on Sport began, the reasons for closer co-operation between the EU, national and sub-national levels were also formally stated. Based on the White Paper on European Governance from 2001, the European Commission used a set of consultation tools, including the establishment of expert groups that reported on three key areas, different types of meetings, and internet consultations through the preparation of a broad and very complex questionnaire for everyone interested (European Commission 2007). As a consequence of the Commission's call to participate in the consultation processes, different representatives at the (sub)national levels were also called on to participate.

In Slovenia, it turned out that few consultation activities had been undertaken at the nation-state and sports society levels. According to the characteristics of the initial phases of the process of adapting the Commission's White Paper, political authorities at both the EU and national levels undertook the role of an official initiator with the prevailing role of the Commission in the EU and the Directorate of Sport within the Ministry of Education and Sport at the national level. The sub-national level in Slovenia was excluded from these processes mainly because the normative legislative basis of this type of political level in Slovenia still does not exist. Despite this, it is worth mentioning that for the consultations relating to amendments to the Slovenian Sports Act that were going on at almost the same time as the White Paper discussions, regional meetings were organised by the government to collect regional comments on the contents. In some sense, this may indicate some sort of inequality in the importance of both acts but, as was pointed out by representatives at the ministry, the national legislation was simply assigned more importance than the Commission's draft White Paper, whose contents was not even known to them at the time the consultations were organised.

The consultation and preparation for the White Paper extended from late 2005 to the adoption of the Document in July 2007. It is possible to classify the preparations for the White Paper according to the actors involved:

1) EU institutions, relating solely to the work of EU institutions;
2) sports-governing bodies, relating solely to the work of private sports organisations' activities;
3) member states, relating solely to the activities of individual states;
4) EU *vs.* member states, relating to relations between EU institutions and member states' representatives;
5) EU *vs.* sports-governing bodies, relating to relations between these two types of policy actors; and
6) member states *vs.* sport-governing bodies, relating to mutual relations between these two types of policy actors.

The available register of official meetings of state actors (ENGSO 2006) reveals that the number of activities initiated by the Commission was greater than activities undertaken solely by member states and quite equally distributed between the state and sports-governing bodies' representatives. Alternatively, the interactions between the sports-governing bodies and EU institutions, particularly the Commission and its Sport Unit, were also similar in number to those of the EU member states. It is also typical that as a rule those private sports initiatives acted according to the supranational (European) organisational and functional logic, meaning that each organisation represented its own sporting interest more than general sports ones. Based on the official timeline records (Reuters 2007), the leading role was undertaken by FIFA and the European Olympic Committees (EOC). A clear public statement on the processes and issue of the White Paper was also given by the European non-governmental sports organisation (ENGSO). This organisation stated that the attention paid to sport at the EU level had grown in recent years, leading to the recognition that sport can play an important role in EU policies and programmes (ENGSO 2006). Regarding the role of the EU and the relations with its institutions, it emphasises its understanding of the White

Paper on Sport as 'an important step towards defining the role of the EU in relation to sport and sporting organisations', where the 'ENGSO has a strong desire to work positively with the EC [European Commission] and will respond in detail to the consultation on the White Paper' (Reuters 2007).

However, in a way this recognition indicates that the general logic of the governance approach in the process at the EU level has been considered, at least in a quantitative manner. This focuses above all on an EU-organised type of sports-governing body and member states although it still does not tell us anything about the qualitative aspects, such as those dealing with the nature of the actual relations and (sub-)national responses. This is considered below.

With regard to Slovenia, the intensity of specific activities was very poor. Constant contact in the period of preparing the White Paper was only established with the Sports Unit of the Commission's DG Education and Culture (which is responsible for providing regular information about the progress of member states at meetings with the directors and ministers responsible for sport on one side and other Commission DGs on the other).[19] As a consequence of this official response to meetings at the EU level, no special meetings were called for policy actors involved and interested at the national level with regard to the White Paper. Thus, only official written or oral notifications about current progress were given to other national actors, namely only to the Expert Council of Sport whose last meeting was held on 20 December 2006 (Expert Council of Sport 2007), which dates to the period before the final consultative activities at the Commission were implemented. From the governmental perspective, the whole process was negatively assessed, claiming that their inactivity could be excused by the independent work of the Commission, seen not only in relation to the nation-state representatives but also private sports-interested publics.

Likewise, as in the case of nation-state actors, an obvious absence of activities in preparation of the White Paper was also seen with regard to national civil sports organisation representatives. As already emphasised, the Commission's Sports Unit held regular consultative meetings with civil sports movements in the EU, but not with the national ones which was, according to the national perspective, another reason for their limited involvement. According to the OCS-ASF's views, they also claimed they had only received very moderate starting points about the White Paper's contents and some kind of recommendations from the European Olympic Committees, which they all discussed and supported, but no other invitation and proposals were sent to them and, therefore, no follow-up consultations were conducted. In fact, a study of the OCS-ASF minutes of their meeting in May 2007 notes that the processes of preparing the White Paper was put on the agenda only for the first time at the session of 17 May 2007, when the deadline for consultations at the EC had already closed (3 April 2007) (OCS-ASF 2007).[20] Similarly, no international connections between the national sports federations' and the supranational level can be detected or publicly recognised. As stressed by the sports organisations' representatives, no individual or collective initiatives were sent from Slovenia in regard to the White Paper and none of the organisations undertook any role within the already stressed EU-organised sports organisation activities.

## National Assessments of the Multi-level Governance Experience

According to Slovenian experiences, quite negative assessments of the EU processes were made by nation-state and civil society actors. The state representatives particularly perceived the role of the EC in the processes of preparing the White Paper as being too centralistic,

[19] Especially those referring to the internal market, health, culture, education, youth, and the legal security of EU citizens were exposed by representatives at the ministry.

[20] Despite this late reaction to the White Paper processes, the OCS – ASF invited the representative of the European Commission in Slovenia to inform them about the ongoing processes in the field of sport in the EU. At their meeting on 21 June 2007 the legal and institutional frameworks as well as the history of sport in the EU were presented to them.

despite considering its formal competencies and procedures in the process of preparing the document. Representatives of the Ministry of Education and Sport also stated there were no demands by the Commission to nominate an official representative for Slovenia. Similarly the processes were also assessed by the OCS-ASF as being very badly communicated since they officially received very few materials for discussion and consideration. Both types of national policy actors also emphasised that they perceived the strength of well-organised European sports interest organisations in the process, although none of the interviewees were aware that any Slovenian sports federation or organisation had participated in these EU sports lobbying activities.

At first sight, it might appear that the decision to analyse the Slovenian perspective in the White Paper's preparation processes was not overly beneficial since there are almost no indications of any kind of national activities connected with the process. It would not be an exaggeration to conclude that no connections between sports representatives at the national level existed as a result of the ongoing White Paper processes, while linkages with state representatives on the topic also reflected their formal obligations as predicted by the national legislation. It is difficult to detect many examples of harmonisation or co-operation between both types of actors at the national and supranational levels. But what is obvious here is a 'dual-track' truth – an important signal not only for the (sub-)national but also supranational level. The absence of the will to search for other ways of addressing the Commission on the national actor's side is undisputed. No type of lobbying can be detected, although at the same time a question of the appropriateness of this approach arose, especially in the case of the state representatives.[21] These conclusions importantly support the already existing ones regarding the paths Slovenia took in the former 'Europeanisation' processes where, according to Fink Hafner and Lajh (2003: 168-169), the predominant adaptation of Slovenian institutions has so far run in the direction of so-called 'policy-taking', which mainly internalised the common EU legal order and policies, reflecting patterns of gradual, pragmatic and flexible adaptations to the challenges of EU integration. Similar conclusions have also been confirmed in the case of a multi-level analysis of policy processes in the case of cohesion policy in Slovenia (Lajh 2006).

It is also possible to identify the gap between the formal and actual or everyday approaches in the policy-making process in the EU. According to the detected characteristics of multi-level practices in sports governance in the analysed case, we can see that in some sense the type of *semi-plural relations* between the actors involved at different political levels are only confirmed in the initial phases of searching for policy alternatives (see Greenwood 2007; Schmidt 2006). On the contrary, in the phase of selecting policy alternatives (preparing the final version of the White Paper) the pluralist approach was replaced by a centralist role of the Commission that, according to information independently collected, prepared the final version of the document. Speaking about the nature of jurisdictions, as one of the crucial elements of the governance concept, it is thus possible to perceive some sort of limited jurisdictions, particularly at the national level and in the stage of preparing the final version of the document.

## Concluding Remarks: Multi-level Governance or a Form of Supra-national Statism?

In responding to the main heading regarding how Slovenia comprehends the multi-level processes in shaping sports policy at the EU level, some more or less obvious conclusions can be set out. This shows the fragmentation of multi-level policy-making in a concrete analysed case. Confirming the theoretical conclusions on multi-level governance; the case of the White Paper processes shows that, it is almost impossible to clearly differentiate between different aspects of governance since they are so intertwined. Regarding sports governance; it is possible to detect many political aspects, like the EU constitutional processes and the absence of the sub-national level of consultation in Slovenia, along with the distinctive

[21] But according to much research data on lobbying this would of course not be understood as a problem but more as an opportunity (see Greenwood 2007).

inactivity of a whole set of actors at the national level. Policy-making practices and the roles of the policy actors involved at both national and supra-national levels also reveal a perceivable change and specifics in the policy-making style at each level in the field of sport. Followed by the emphasised theoretical elements of governance it is concluded that the ongoing EU and national processes in the field clearly include, as well as respond to the idea of governance, but only when analysed individually. The institutions responsible for sports issues are established and their jurisdictions, activities and outcomes are also expressed in various legal documents. But, despite this, it seems that, particularly in the case of the EU, the youthfulness of sports-related policies can be seen by the fact that the value of sport and institutional identity are still being shaped and in the prevailing manner of the co-ordination activities with other actors; just like the modes and mechanisms for adjusting the conflicting interests of those actors that have the potential and reason to express them. When speaking about the EU relationship to the national perspective, it can be concluded that EU policy-making was not so close to the governance idea, and that the EU actors' positions were too centralistic and, at the beginning of the process, also too semi-pluralist. Following this conclusion, the question of the suitability of the current processes of introducing policy initiatives and, along with them, new policies, launched at the EU level are mainly problematic in the case of actors at the national level. This leads to the topical dilemma of the limits of EU jurisdictions (Hix 1999; Hooghe and Marks 2001; Grant 2003). The question therefore remains whether the member states should have a voice in ongoing processes at the EU level or whether it is enough to treat them as one of many other types of interest that compete to be heard, or if it is their own fault for being inactive or only reactive to the EU processes.

What should also be discussed in connection with the former conclusion, but which has not been addressed more precisely in this contribution, is the issue of political management concerning the role of political and organisational changes that can happen and possibly influence the future of policy-making processes at the level of individual territories. In these terms, the role of the central institution at each level has been emphasised by the fact that for the same processes the actors' jurisdictions on one level are far more decisive than on the other. Therefore, the gap between legally defined and actual everyday processes and procedures of the actors can also be seen, with the Commission at the EU level taking a very pluralist approach to the processes at the beginning and an exclusive one at the end. Such a gap can also be observed in the national level that only formally reacted to the Commission's work, even though the national governance elements seemed to be present and exercised at the national level. Speaking about the policy actors involved, an interesting difference can also be seen between them at both levels. At the EU level, the Commission as the representative of the state-like authority, collaborates more closely with powerful European-based, private, sports-governing interests, such as organised sporting bodies like those of UEFA, FIBA Europe, EHF, EOC or ENGSO[22], while the co-operation and co-ordination with the national level is looser, if not only implemented because of the legally-based provisions with the role of state representatives still being more exposed than those of the national sports organisations.

Given these conclusions the central dilemma that remains unresolved is to connect the questions of the broad legitimacy and effectiveness of these processes and the jurisdictions of various types and levels of the actors involved to be able to create a broad consensus on the best possible policy alternatives. Although the multi-level governance idea in the case of EU sports policy is in its early infant stage, it is at the same time also very deliberative since

[22] A few days after the final version of the White Paper on Sport was publicly submitted, the response of the joint EU private sports interests indicated that their interests and positions were not considered enough (Statement of European team sport 2007).

the contents of the White Paper respond to many of the 'classical' elements of the governance 'ideology'.

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# Financial Expertise, Authority and Power in the European Football 'Industry'

Herbert F. Moorhouse

**Abstract**

The paper aims to provoke discussion about two issues. Firstly, how do economic ideas, concepts, theories, principles and information enter into the discourse of the owners and controllers of Europe's most popular sport – football – and into political discussion about the game? It stresses the role management consultants have created for themselves in the new football 'industry'. Secondly, as a specific example of the general concern, the paper considers the role of the Deloitte company in European football. Its publications – especially the Annual Reviews of Football Finance – have been very influential and the company has acted as consultants for UEFA on many of the key issues in contemporary football. The paper critically assesses the approach Deloitte has adopted to the commercialisation of football, and explores difficulties in the way it has analysed some of the key issues in European football. It suggests that some countervailing forces need to be created to limit the authority and influence Deloitte currently exercise.

## Financial expertise and the football industry

In this paper I aim to provoke discussion about two issues.

Firstly, how do economic ideas, concepts, theories, principles and, indeed, information enter into the discourse of the owners and controllers of Europe's most popular sport – football, and into political discussion about the game? There is, of course, a rapidly growing academic literature about the economics of sport. However, my problem is: does this, and if so, how does this, enter into the minds of the practical men of affairs who run or monitor football clubs, national associations and international bodies? What I want to highlight here is the role of management consultants as intermediaries, as brokers, as interpreters, between the academic realm of ideas and the pressing problems of those who run football. I want to argue that their role is especially significant for two reasons:

1. professional football, though actually quite an old economic activity, has only recently started to be referred to as an 'industry', a term frequently deployed to indicate that an old endeavour has been attributed extra economic significance. In this new European 'industry', business practices and perspectives have not been embraced so wholeheartedly or, at least, so overtly, as they seem to have been in American sport for a century and more. A 'gap' is perceived between 'the values of sport' and the values of business. So, even at the elite level, there is still unease about what is seen as a new incursion of 'commercialism' into a more pristine part of social life, and this requires some group to help 'explain' and bridge this 'gap';

2. much of the control of European football still lies in the hands of national and international associations, headed by administrators rather than entrepreneurs and commercially aware managers, officials geared to applying bureaucratic rules and precedents, rather than seeking the entrepreneurial main chance. Such groups are

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> looking for aid and assistance to guide them through all the new problems and opportunities available, as football moves to new cultural and economic positions right across Europe.

This ferment in the fledgling 'industry' has created an opportunity for consultants to step into the structures of European sport as accredited, informed, experts.

Secondly, and as a specific example of my general concern, I want to look at the role of the Deloitte company in European football. For a century and more football was more or less ignored as an economic activity. Now reports from consultants and accountants appear with some frequency, feeding the pages of the financial press as well as the sport sections. These assess the efforts football clubs and sporting associations are making to find new, secure, locations for themselves in a fast-changing world. Especially influential, and not just in England, has been the series of Annual Reviews of Football Finance by the Touche Ross, later Deloitte & Touche, now Deloitte, company - one of the globe's four large accountancy firms. Starting in 1992, these reports have come to be accepted as the base line for the financial state of the game. They are used by university lecturers to provide academic accounts of the economics of football. They are offered as unimpeachable evidence in cases before the European Court of Justice and submissions to the European Commission. Basically, they are unchallenged as the source of what is going on in the finances of football, about the problems the industry faces, and the possible, practical solutions. The review now sometimes refers to itself as 'the bible of the football industry'.

As I have suggested, this influence reflects the fact that football is still in movement between cultural locations and, despite all the rhetoric, remains essentially a small business activity, and small businesses are often not very financially sophisticated. Then, the European leagues and national associations either do not have the resources to monitor the finances of the game themselves, or do not regard such a task as within their remit. This stands in some contrast with the USA where the organisers of professional leagues do produce a range of statistics and reports which detail the financial situation of the activity and, on occasions, discuss the pertinent problems their sport faces. In addition, the sports ministries and units of various European nations and of the European Commission are rather small bureaux, without the means or the authority to investigate the finances of sports to any depth. So both types of bureaucracies display a tendency to sub-contract the investigation of the health, or otherwise, of sports. Management consultancy firms have quickly stepped into this vacuum, claiming to investigate the progress and problems of contemporary football. They wield influence, have authority and, at one remove, exert considerable power, but their role in the development of European sport is little discussed, or even noticed.

## Deloitte and European football

To begin to rectify this, and to outline some of the key issues, the rest of this paper seeks to critically assess the role of Deloitte and the kind of analyses they offer in their annual reviews, and to discuss what my assessment suggests about the role of accountancy and other professional financial 'experts' within the brave new football world. I seek to show that the series of annual reports and various spin-offs, are marked by two fundamental features:

1. reiteration of the commonsense of the owners and controllers of the football world, without critical analysis, and, at crucial places in their arguments, in the teeth of the actual evidence they present. Deloitte tend to legitimate what football people have always believed – basically they have added a veneer of modernisation to the traditional, received, wisdom of the owners and controllers of the game. Deloitte offer old wine, but in glossy new bottles;

2. concentration on labour market restrictions - of various kinds - as *the* solution to various financial problems facing football, without commensurate discussion of the efficacy of other policy options which might also deal with these problems. There is, critically, a notable lack of any sustained comparison and contrast with

the financial arrangements existing in sports in the USA – the more strange an omission, we might think, for a major accountancy and consultancy firm, keen to stress its multinational capabilities on most criteria.

There are many criticisms that can be made of the Deloitte analyses of the financial situation of English and European football, but I will list just six prominent arguments that run right through these reviews, to sketch how their analysis is continually partial, and how advocacy is routinely smuggled into what is presented as dispassionate, expert, analysis. These six arguments are:

1. Deloitte tend to analyse football as a normal business, stressing the significance of, what is a rather untypical status in professional football across Europe, the public limited company, with directors responsible to their shareholders or other investors. The pursuit of profit is taken to be the key objective. This legal form of organisation, in its English form, is taken to be the model, the exemplar, 'the standard bearer' (Deloitte 2007: 2) for what all major European football clubs should aspire to be. Other organisational forms, some much more common in Europe, are mentioned occasionally but never examined as, perhaps, providing more appropriate models for professional football clubs.

2. Deloitte make little reference to the well known point that the fundamental economics of sporting leagues are rather different from most other branches of production. Sporting teams produce a collective, not an individual, product, and this affects the level of free competition it is appropriate to encourage between them *if* sporting competitive balance is to be maintained. Even when this point is mentioned in the reviews its implications are never traced to any depth. Deloitte finds this a difficult issue to deal with, because, basically it is wedded to promoting the free market as providing the best solutions to the perceived problems of contemporary football.

3. However, while Deloitte self-consciously adopt a rhetoric promoting the benefits of market forces throughout their analyses of the finances of English and European football, they are somewhat inconsistent in their application of the benefits of its rigours. In particular, they constantly stress that players' wages should be constrained by mechanisms *other than* the free play of market forces. In the Deloitte world view, the market is basically beneficial in its operation everywhere in football *except* in the determination of players' wages. Deloitte never comment on this intellectual inconsistency in their underlying ideology. Rather football agents are picked out as the villains here, and demonised, as, somehow, better informed, more tightly organised and more ruthless in their negotiations than the owners and managers of even the biggest clubs.

4. Moreover, Deloitte are quite unwilling to trace out the full consequences of the adherence to the free market principles they constantly advocate. Their analysis of European football tends to truncate just as the tensions caused by their constant advocacy start coming into sight. Thus, Deloitte equivocate about issues like the problems of traditionally big clubs based in small media markets, about competitive balance in European football, and find the intervention of billionaire owners like Berlusconi (Milan) and Abramovich (Chelsea) hard to integrate into their analyses. Abramovich's intervention tends to be treated as an 'anomaly', 'exception', 'short term', and even 'the exception that proves the rule' (Deloitte 2004: 43) but quite how this linguistic throwaway is supposed to work, goes totally unexplained.

5. As I have mentioned, Deloitte tend to focus on labour market restrictions of various kinds as the solution to the financial problems they perceive, and do not discuss other ways in which these problems could be dealt with. They do not detail the ways that other sports, in other countries, are organised so as to deal with such problems. Deloitte never outline the full financial arrangements operating in sport in the USA, but rather warren American systems of sport finance for evidence that labour market restrictions can work, without investigation of the comprehensive nature of all the mechanisms deployed in American sport.

6. As one major aspect of this focus on labour market restrictions, Deloitte have consistently misstated the economic effects of the traditional transfer system, and, from this misreading of the past, misrepresent the current situation, and so promote 'solutions' which cannot deal with most of the real economic and sporting problems facing European football.

I would like to add detail to each of my criticisms, but I do not have the space to do that here. I have dealt with Deloitte's inaccurate analysis of the financial effects of the traditional transfer system in two previous papers, discussing material they produced when acting as consultants for UEFA in both the Bosman case in 1995 and the 'Bosman Mark 2' submission to the European Commission in 2001 (Moorhouse 1999; 2004).

So, in the space available to me, I want to provide more detail on just one of these arguments, my criticism 4 – Deloitte's unwillingness to trace out the full implications of their adherence to the free market as the solution for all of football's problems and the difficulties this leads them to with problems of competitive balance and the intervention of men, rich on a global scale, in European football.

**Deloitte: free market football, rich men, and competitive balance**

Deloitte's basic stance on European football is revealed in its 1999 edition. After a suggestion, but only a suggestion, that football is often held to be an unusual kind of business, the analysis continues:

> Football's business continues to develop apace – some welcome that and work to channel that dynamic force into business efficiency which creates profitable activity and generates cash for investment in players, stadia, training facilities and complimentary activities to the core football club. Others bemoan the passing of a more egalitarian age when 'market forces' was an irrelevant concept.
>
> Whatever your point of view, the Pandora's box of business structure and market competition in football has been opened and cannot now be closed. Clubs and governing bodies need to choose between embracing that dynamism – even directing and promoting it in certain areas – with attitudes and structures designed for a modern business age and to get the best result for their organisation against that background; or they can react to events, resist the forces (rather than ride them) and end up being swept along in a reluctant and introspective mode. (Deloitte 1999: 5)

And Deloitte go on to try to reconcile what might be thought to be irreconcilable:

> The figures suggest that most of the smaller countries would still struggle to compete financially with the clubs from the larger European countries. Demographics are not things that can be easily changed. Many national leagues are struggling to maintain competitive balance at a local level…In some leagues competitive balance has never really existed ….

> Polarisation of 'football power' has always existed, it is not a recent phenomenon caused by economic development. We believe that properly structured commercial development enhances competitive balance. We also believe, to that end, in football harnessing the market's power – not in any Authority interfering in it, or with it. (Deloitte 1999: 63-4)

So adherence to the market will, somehow, bring competitive balance. For one thing Deloitte is definitely against is the idea of any attempt, by any state body, by any regulator, to interfere with 'the market's power' except, to repeat, as regards players wages. At one time, it tended to advocate the adoption of 'gentlemen's agreements' between clubs to create caps on the amount of total revenue that could be spent on wages. Indeed, when in 2002 the G14 group of elite clubs announced the adoption of just such a salary cap for the clubs in its organisation (which very little has been heard of subsequently) Deloitte were named as the official monitors of this arrangement, just as the Deloitte reviews continued to praise the 'realism' of the initiative.

In fact, the issue of competitive balance has not featured much in Deloitte's literature on football, but, in the early 21st century, the consultant has had to shed its reluctance to confront the issue of competitive balance within European national leagues and in pan-European competition. So, in the 2004 edition, to those worried about signs of an increasing predictability in European football, Deloitte offer a few ad hoc and mainly irrelevant counter examples (an argumentative device typical of these reviews) and add reassuringly:

> That is the beauty of the game – football remains a game of eleven versus eleven and nothing is certain. This makes it a tough business to manage – plans will go awry – but it is the same magic that draws in the fans and generates the value. That the past few months have shown football still has that magic is of great benefit to the sport in business terms. (Deloitte 2004: 5).

Here Deloitte appeal to 'magic' but systematic discussion of the economic forces driving contemporary developments in the game and what the impetus of free market football will inevitably lead to, goes undiscussed. What Deloitte do, and, again, fairly typical of their mode of arguing, is to align these growing concerns about competitive balance with an issue that is preoccupying the bureaucratic controllers of football. Once UEFA and Deloitte – both in its reviews and in its material contained in UEFA's submission to the European Court and the Commission – used to claim that the traditional transfer system was the bedrock of football's financial arrangements, its key redistributive mechanism, cascading money 'down' from rich to poor, but in recent years it is the collective selling of TV rights, by UEFA and national associations, that is declared to have that role (UEFA 2005: 10,13,20,23). So Deloitte argue:

> The bigger risk to football's finances is from ill-judged interference in the broadcast market for football from regulators. (Deloitte 2004: 4)

And:

> A particular area of concern to football is any further regulatory attempt to artificially prevent exclusivity by, for example, forcing individual selling by clubs. This is a recipe for disaster – not just for broadcasters and football clubs but also for fans and consumers …….We are pleased regulators now apparently recognise collective selling as the glue that holds football together. (Deloitte 2004: 4 and 11)

Later Deloitte inform readers that the football authorities have apparently been successful in:

> … convincing the European Commission of the specific dynamics of sport and in particular collective selling and its role in providing, among other things, solidarity between rich and poor clubs, and competitive balance within a football competition. (Deloitte 2004: 21)

In contrast to the 'mayhem' the selling of rights by individual clubs has caused in some countries, football must:

> … champion the wide array of benefits that collective selling brings, including solidarity between clubs, redistribution mechanisms to maintain competitive balance, and most importantly providing coherent delivery of a product to consumers and fans. (Deloitte 2004: 21)

The next year Deloitte reiterate the message:

> Collectively, the challenge for clubs, leagues and governing bodies over the coming years will be to continue to ensure competitive balance and uncertainty of outcome in domestic and European competition over the long term….. The collective selling of media rights has a fundamental role to play in that. This promotes solidarity and helps keep the Premiership closer to the National Football League in the USA (an oft-quoted model of competitive balance and economic strength) than the polarised and predictable football leagues in some other European markets. (Deloitte 2005: 3)

It would take a long time to unpack all the half-truths, misleading analogies and empirical inaccuracies contained in this paragraph, but I hope I have begun to make clear how Deloitte now tends to align the issue of competitive balance in European football directly with the mechanism of collective selling, and not even the system of the redistribution of those revenues obtained by collective selling. This is a very important distinction which few of the voices arguing about this issue make, though, thankfully, the European Commission's *White Paper on Sport* does stress this point (European Commission 2007a: 17; 2007b: 53-56). In the UEFA and Deloitte ideology, there has been a swift and unexplained change of main argument here, away from the 'indispensability' of the traditional transfer system to the vital role that collective selling is claimed to play in dealing with the key problems of contemporary football.

I have to sound a warning that what UEFA (aided by Deloitte) argued about the functioning of the transfer system was empirically inaccurate, and their current stress on the importance of maintaining collective selling is similarly misplaced. Later I will show that Deloitte consistently overstates the significance of this particular revenue stream, even for the five major leagues in Europe, let alone for the far more numerous leagues in small/less rich nations, and suggest that it cannot allow that competitive imbalance may be coming, in part at least, from the interventions of extremely rich individuals who control a weight of resources that can 'distort the market' regardless of the, actually quite minor, income redistributions achieved via collective selling.

Deloitte tend to deal with the issue of competitive balance not via an analysis of the likely outcomes for European football of relying on market forces, but through more enigmatic phrases and a consistent refusal to consider the issue head-on. For example, just a few pages on from the last quote I used, the new TV deal for French football is hailed for being 'more meritocratic and less egalitarian' (Deloitte 2005: 14) which seems to be the precise opposite of what it had been arguing earlier. But then, consistency is not a fundamental characteristic of the Deloitte analyses of the finances of European football. Deloitte tends to argue that there are competitions within leagues that keep the public interested regardless of overall domination by a few clubs and that:

> … any team can beat any other team on their day. This uncertainty of outcome maintains interest throughout the season. (Deloitte 2006: 2).

It is notable that maintaining competitive balance has not figured on the 'Strategic Challenges' table for the football industry which has been a feature of recent reviews.

Another aspect of modern football which Deloitte find difficult to deal with is the ownership of teams by men, rich on a world scale, whose wealth easily outstrips the normal finances of even the biggest clubs. It is not easy to fit them into the neat business model for European

football which Deloitte continually advocates. Deloitte argues both that there is nothing new in business men being attracted to football but urge that, at best, such a commitment should be directed to allow a club to:

> … attain a genuine business model to sustain a healthy life for the club at that level, without significant ongoing benefaction. (Deloitte 2005: 56)

Deloitte grapple with these issues directly in 2005 in a special section - "What has Roman ever done for us?" - about the Russian owner of Chelsea who had:

> … transformed the face of football….less than two years later, this hastily arranged transaction is one of the most significant changes of ownership in the history of sport. This is by no means the first sizeable personal investment in a football club, but the speed and scale of it towers above anything previously witnessed. (Deloitte 2005: 42)

Deloitte go onto argue that the rest of the English Premiership:

> has decided to let them get on with it. Previously, competitive urges have always pushed clubs up to and beyond their financial boundaries. Perhaps the scale of Chelsea's spending is simply in another league and all other clubs recognise that? (Deloitte 2005: 42)

Deloitte also welcomes signs that Chelsea had announced plans to 'stand on its own two feet' and run the club 'properly'. This is all very well, but the Deloitte reviews consistently argue that there is a positive link between expenditure on players' wages and sporting success. It is possible to buy championships and cups, and Deloitte currently estimate Abramovich's financial input into Chelsea at about £475 million. Deloitte find this issue - at base a question of why very wealthy men might want to own European football clubs *other than* for a business opportunity – hard to deal with because it cuts across their moral view of the way football should be organised in the contemporary world. Yet questions of the acquisition of status and power through football, rather than a straightforward search for profits, are tangled around the controllers of many clubs all across Europe. Such benefits may well lead onto other profitable opportunities in indirect ways, but Deloitte's whole conceptual scheme is not subtle enough to really grasp the range of personal motivations in play in the modern game.

**The Independent European Sport Review, the Belet Report, and the White Paper**

Similar problems of analysis also occur in the *Independent European Sport Review* of 2006. This is not altogether surprising since Gerry Boon, who was in charge of the Deloitte sports business group and the annual review for its first 13 years, was chairman of the economics sub-committee which helped produce the Independent Review. This curious document – funded by UEFA - stems from the UK Presidency of the European Commission in 2005, which, through the sports ministers of the nations that host the richest Big 5 leagues in European football (England, Spain, Italy, France and Germany), initiated a review that, while purporting to be a review of sport, actually concentrates on European football. It is designed to put pressure on the European authorities, especially the Commission and the Court of Justice, to recognise what is claimed to be the particular place of sport in Europe and to create a special legal status for sporting bodies, especially UEFA.

It seeks to do this by claiming that:

> The European Sports Model has delivered success and earned respect around the world as a system based on social inclusion, financial solidarity and true sporting values. (Arnaut 2006: 13)

However, it argues that this success is threatened by an irreversible trend towards the commercialisation of sport and, at the same time, by the expansion of the European Union to 25 member states. Actually this second factor is scarcely mentioned, and the focus is all on how the European sports 'pyramid' requires strengthening so as to serve the needs of European sport in years to come.

There are many criticisms that could be made of this document. The European Sport Model, for instance, is a highly idealised version of the organisation of sport across the continent, lacking both historical and cultural specificity. Many organisations quickly pointed out that what applies in football does not apply in their sports. And what the European Model is routinely favourably compared to – the American Model of Sport - is similarly stereotyped. But what I want to concentrate on is the kind of economic arguments deployed. In general there is a massive overstatement of the 'solidarity' operating in European football, a misapplication of issues of 'competitive balance', both done with the intent to sanctify and solidify the status of UEFA.

Like the Deloitte reviews, this report is determined to link problems of competitive balance with the central selling of media rights, so:

> … collective selling and the mutualisation of the resulting revenue is a fundamental aspect of sporting organisation and an essential component in the solidarity structure inherent to European sport. (Arnaut 2006: 50)

And:

> Central (or collective) selling is fundamental to protect the financial solidarity model of European football….an essential means to help promote competitive balance and finance the future development of football. (Arnaut 2006: 51)

Like the Deloitte reviews there are three key reasons why this concentration on the central selling of media rights in relation to competitive balance is quite misplaced:

- it tends to imply that a significant amount of redistribution does take place within existing systems of collective selling in club competitions – which is untrue;
- it tends to imply that media rights are the main source of income in most European club competitions – which is untrue;
- it tends to imply that other streams of revenue cannot be redistributed, when they have been in the past in many European countries and are routinely in contemporary American sports.

The Champions League in 2005/06 generated revenues of 610 million euros. Seventy two percent of this total – 437 million euros - went to the 32 clubs in the group stages, clubs mainly from the biggest leagues and biggest media markets. Of this, the four English clubs involved earned a total of 145 million euros. In some contrast, just 60 million euros went to other stakeholders in European football as 'solidarity payments', with the 36 European leagues which had no representative in the final 32 clubs, receiving just 8 million euros or 1.3 per cent of total revenue (Deloitte 2007: 18). Strangely the Arnaut report does not contain this kind of detail, even though in Annex 3 which is devoted to the 'solidarity and redistribution system in European football' the report claims:

> … the UEFA Champions League (UCL) is based on a system of central or collective selling that is fundamental to protect the financial solidarity model of European football (…)In the context of the UCL, central marketing and the resultant re-distribution of revenues serves a crucial role. (Arnaut 2006: 155)

In short, even in the major club competition that UEFA directly controls, redistribution mechanisms are perfunctory and have little or no effect in disturbing market generated

inequalities between clubs and between leagues (Moorhouse 2004). In other club competitions around Europe, traditional mechanisms of redistribution have tended to truncate, rather than develop, in recent decades (Moorhouse 2000).

Then, even in the biggest leagues, income from media rights makes up less than 50 per cent of the total on average (Deloitte 2007: 14). Concentrating on this revenue stream as the solution to growing inequality in football is dealing, at best, with only half the cause of the problem. Moreover, across Europe in leagues outside the Big Five, income from media rights forms a much smaller part of total revenues. In the Netherlands, for example, the most financially successful league outside the Big Five, income from TV rights formed just 20 per cent of total revenues in 2005-06. Given this, then a concentration on collective selling and any revenue redistribution from this source, simply ignores the problems of the vast majority of Europe's leagues. When European MP. Ivo Belet, both a member of the political sub-committee of the *Independent European Sport Review* and the rapporteur of the European Parliament's *Report on the Future of Professional Football in Europe* (basically a totally supportive companion piece to the Independent Review) commented about the *White Paper on Sport*:

> As regards the sale of TV rights, the Parliament asks for a much clearer signal. The financial race that increases the gap between the large, rich clubs and smaller, not so wealthy ones needs to stop. This can only be done by opting for the collective selling of TV rights. (Belet 2007)

Belet simply revealed that he had little understanding of the significant patterns of inequality within leagues and between leagues in Europe. Deloitte's latest report estimates that clubs in the top divisions in the Big 5 leagues take 53 per cent of all the income for football in Europe. The top divisions of the other 47 countries in UEFA's 'family' take just 14 per cent of the total. Such a pattern, with obvious consequences for sporting success in pan-European competition, will not be altered by interventions that concentrate on collective selling within the top divisions of various nations.

Deloitte and UEFA are trying to forge a link between collective selling and competitive balance on the basis of a few selective statistics, and amnesia about the real situation in most of European and pan-European football. But, however often the mantra is repeated, the facts reveal that collective selling is not, of itself, any kind of solution to problems of competitive balance. Only comprehensive and systematic revenue sharing arrangements – a crucial feature of the American sports model – will achieve that.

## Conclusions

There are many points that could be drawn out of my outline of issues around financial expertise in European football. It has implications, for example, for the so-called 'European model of sport', for consideration of Deloitte's position raises rather neglected issues about who actually wields power, authority and influence within European football.

Then Deloitte and UEFA consistently overstate the degree of 'solidarity' that occurs in the European football 'family', and the strength of the 'links' down the 'pyramid' to the amateur level of sport. Through this they have, reasonably successfully, mobilised bias against certain other actors in the football 'industry', groups like G14 and players agents, especially among the political class in the big nations and in the European Parliament. Their mis-statements of the nature of the problems in European football and the simplistic solutions they offer tend to be eagerly swallowed by gullible politicians, all too keen to get a popular headline, but too busy to do the research necessary to really appreciate the true extent of the problems. A realisation that UEFA and Deloitte are essentially lobbyists, rather than a poorly treated and much misunderstood organising body and a dispassionate financial 'expert', needs to be accepted before a sensible future can be devised for football across Europe.

A lot gets written today about teams and players developing themselves as brands, and how consumers are attracted to brands because of the guaranteed quality of service they are thought to provide. But 'the football industry', the European Parliament, the Commission and the European Court of Justice are, themselves, as consumers, easily impressed by brand names. And Deloitte is an internationally recognised brand. Its expertise is largely unchallenged, the brand name alone tends to convince. Because of the lack of counterweights – especially independent or state bodies which could create and analyse statistical information, and produce reports in an open and transparent way a feature of the much maligned American model of sport - Deloitte has achieved a powerful niche role as the financial expert for European football and sport more widely. *De facto* it has almost become the 'the independent regulator' that many believe European football requires. Great dangers lie in this. Countervailing institutions need to be created and supported so as to maintain a balance in discussion about the best future for European football.

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# Book Review

## Liz Crolley & David Hand
## *Football and European Identity: Historical Narratives Through the Press*
## London: Routledge (2006)

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As a sport sociologist, one of my main interests is the impact of sport and sporting successes on European identity-formation. Consequently, the main title of Liz Crolley and David Hand's 2006 book –*'Football and European Identity'*- was definitely an eye-catcher. However, since I am quite skeptical towards contextual analyses of print media texts –in my opinion, these studies rarely depart from well-defined theoretical frameworks and often stick to a descriptive and superficial level- the subtitle *'Historical Narratives Through the Press'* was less attractive. But before turning to these (rather subjective) issues, what is this book about in broad terms? During the 20th century, not only the socio-economic value of football to Europe increased, so did its coverage in the daily press. However, this has not always been the case. Consequently, a *first* broad aim of the book is to track this development towards a burgeoning attention paid to football in European newspapers. Moreover, newspaper reports of international football matches are inextricably linked with wider psychological, cultural and ideological processes which provide information about the nations whose representatives are participating in the match. In this way, a *second* aim of the book is to explore the role of football in the construction of national and cultural identities. Both themes are unquestionably emphasized throughout the book. The methodology used involved the structural analysis of print media texts from the early 20th century to the present day as well as a contextual analysis of the social, political and historical environments in which the newspaper texts were produced, consumed and decoded. The following countries were the focus of the present study: England, France, Italy, Germany, Spain, Africa, The USA and North East Asia. However, football writing was only examined in *'quality daily newspapers'* (p. 9) from England (*The Times* and *The Guardian*), France (*Le Monde*, *Libération*, *Le Figaro*, *Le Temps* and *Le Matin*), and Spain (*ABC* and *El Pais*).

The book is broadly divided into three main parts. The first part, *Old Europe*, analyses the ways in which the national identities of the main European football nations (England, France, Italy, Germany and Spain) are portrayed in print media discourse on football. This is done from the perspective of both autotypification (how they perceive themselves, i.e. how the image of Frenchness is portrayed in sports media texts inside France) and heterotypification (how they are perceived by others, i.e. how the image of Frenchness is portrayed in sports media text outside France). The second part, *Nations within States*, examines the status of Corsican, Catalonian and the Basque identities within French and Spanish football. The third part, *New (Football) Worlds*, explores the ways in which the newly emerged football regions of Africa, North East Asia and the USA are covered in the European press. In all three parts, the richness of stimulating examples is impressive as is the range and the level of detail, which is one of the book's greatest strengths. The authors definitely surprised me by going several steps further than the pure descriptive level. However, the book might have benefited from a synthesis at the end of it or at the end of each chapter to gain better insight into the key principles. In addition, a critical comparison of the different case studies might have been interesting. This, however, was not the primary aim of the researchers.

> Our achievement is less a cross-national comparison of the ways in which national identities are mediated than an exploration of how and why identities are mediated in each context. Identification of similarities and differences in portrayals of national identities –generally considered a principle objective of cross-cultural research- was, therefore, not a primary objective of the research. (p. 11)

Perhaps this might be a suggestion for further research? Despite my initial reservations with respect to the (non-)description of theoretical frameworks, the introductory section of this book provides the reader with a brief but comprehensible overview of the following three issues. First, the authors give a concise outline of 'one of the most important frames to be identified and analysed in print media discourse on football' (p. 2), *national identity*, of which several definitions are discussed. The next session provides a brief summary of the evolution of football journalism from description-based to interpretative journalism in England, France and Spain. A final theoretical frame is related to different playing styles which are perceived as representatives of national identities. The authors rely on the conceptual model of Larsen (2001), who identifies three levels within which the concept of football playing style operates: (1) the preferred playing style influenced by various socio-cultural factors, (2) the chosen team tactics, and (3) the configuration of the match, the match climate and the playing style.[1] According to the authors, 'quality' daily newspaper reports always seem to consider *level 3* events (the match as it unfolds) to the interpretive framework provided by *level 2* choices and especially *level 1* factors. Although this theoretical background section provides an excellent starting point for the research conducted by Crolley and Hand, some readers might have welcomed a more elaborated framework.

Overall, I consider *Football and European identity: Historical Narratives Through the Press* a very welcome addition to the sport, media and communication literature. Moreover, the detailed picture of the used methodology makes this book an excellent example for all scholars with an interest in the field of discourse analysis.

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*Football and European Identity* is a clever, but misleading title for a book which accomplishes much but does at no point refer to what one could call a 'European identity'. As currently debated in European Studies, such an identity might stand for some sense of belonging across different European societies. If 'football' is invoked, this sense of belonging might have been fostered by certain structures such as the Champions League or specific juridical or political decisions (the *Bosman* ruling or the Commission's policies).

A more appropriate title for the book could have been *Football and Identities in Europe*. As the authors state, the focus of their study 'concerns the definition and transmission of shared national identities' (p. 4). This is an interesting starting point, since it acknowledges from the very beginning that football impacts on wider societal and political relationships because it is embedded in socio-political contexts. In analysing press accounts Crolley and Hand want to show how print media 'construct' football in terms of (sub-)national football cultures, styles of play, football's historical moments and places, as well as their meaning(s) for the respective societies. The original sample of print media consists of nine 'quality' newspapers from England (2), France (5) and Spain (2); so it is mostly English, French and Spanish self-images and stereotyping of other nations that is covered. The book itself is divided into three

[1] Larsen, O. (2001). 'Charles Reep: A major influence on British and Norwegian football', *Soccer and Society*, 2 (3), pp. 58-78.

main sections: 'Old Europe', which deals with accounts of football in England, France, Spain, Italy and Germany; 'Nations within States' provides accounts of Catalonia, the Basque country and Corsica; and 'New (Football) Worlds' refers to Africa, the United States and Japan/South Korea. There is a short introduction outlining the plan of the book and discussing methodological issues but no conclusion at the end of the book.

Crolley and Hand describe themselves as 'linguists with an interest in the cultural, social, historical and political environment' (p. 14), which may help explain some of the unease concerning their approach on behalf of a more social science-oriented audience. The authors analyse print media accounts of (mostly, but not exclusively) games of national football teams; in case the subnational level is involved, club football and subnational *selecciones* are included. Since it is their ambition to cover data over a period of a whole century and to offer a structural analysis of media texts (which combines the understanding of various meanings and their contexts), the authors have to be selective. Rather unproblematic is their – acknowledged – focus on quality daily newspapers. Although analysis of football magazines, fanzines and tabloids might have shed some light on the issues as well, one cannot do everything at once. What is problematic is the fact that the reader is left in the dark concerning the question *on what grounds specific accounts* have been chosen. As Crolley and Hand are keen to stress: 'Selecting samples was a challenge, and here we acknowledge a level of subjectivism in our judgement' (p. 10). Indeed, there is – and it is unnecessary prominent, since the authors could have given a hint on the size of their article base as well as the selection criteria instead of referring to some unspecified 'data'. The study clearly is a qualitative one, and I do by no means intend to apply the categories of a quantitative design amenable to statistical analysis. But the approach of Crolley and Hand resembles subjectivism bordering on arbitrariness.

As has been noted, the title of the book arouses expectations it does not fulfil. In a way, it is as if your favourite football club pretends it is about to sign Kaka and two weeks later, Rivaldo is introduced at a press conference. Not that bad, but slightly disappointing. But even measured against the book's aims, the results are mixed. First, the 'identity issue' remains surprisingly under-explored and murky. No doubt, the specific use(s) of language and the meanings conveyed through covering football are of paramount interest to the authors. Needless to say, autotypification, stereotyping, clichés, and the 'othering' of 'other' nations are all processes intimately related to various mechanisms of identity construction, however, throughout the book, there is no conceptual framework that links identity *systematically* with these processes. There is not even a definition of the term 'identity' that is constantly applied. Second, as the authors acknowledge, their sample might produce an uneven distribution of football coverage. But, what is more, some of the author's decisions even aggravate the unevenness of their story. In the Germany-chapter, a few domestic press accounts and some material on self-images are included, while in the Italy chapter both are absent. Sporadically, club football plays a role, but except for the subnational chapters (where their importance is self-explanatory) it is not clear exactly why clubs pop up or not. At some points, players of a certain nationality are mentioned, while other chapters remain silent on them. Third, as Crolley and Hand make clear, they are interested in the societal embedding of football. Of course, football undoubtedly constitutes an important societal discourse which may have formative effects on identity constructions, in that, at least, it resonates with relatively large segments of the respective societies. Indeed, football is eminently political, but what does the book tell us beyond this truism? It certainly illuminates some particular backgrounds (as in the case of Franco's Spain or post-colonial Africa). However, it fails in carving out any recognisable patterns, crucial mechanisms to be identified, which could be abstracted from the specific cases.

Despite these shortcomings, the book is definitively worth reading. It is full of interesting stories and facts, some more, some less perplexing. Its main strength lies in the chapters where sub-national and national contexts overlap as in the case of Spain and France. The chapters on Spain and on Catalonia, the Basque country and Corsica especially make a fascinating read. The reader gets a convincingly structured narrative and learns a lot about the ingredients of (sub-)national football cultures. Spain may be indeed the most interesting

case, since its mixture of a relatively high degree of regional autonomy and the experiences with dictatorship arguably leads to a precarious national identity paralleled by vivid subnational identifications. It thus seems fairly reasonable, for instance, to assume that 'since Catalans do not enjoy official recognition…they must turn to FC Barcelona as an institution to represent them' (p. 125). These accounts of branding, stereotyping etc. and their political implications are interesting; one obviously does not need a larger conceptual framework to find pleasure in reading them. In sum, the book is a rich source of knowledge for people interested in football in general, not least sport journalists. It is also recommendable for academia, if the respective readers are out for interesting narratives on different styles of football coverage.

Puzzling still – in a book on *European* identities – is the inclusion of Africa, the United States and Asia, especially if no interpretative framework is given on how the othering of these football cultures might fit into European 'identity constructions'. Of course, to regard Africans as being mostly naïve, unorganised but technically brilliant players has had an impact on, say, French identity constructions. The same could be said about the othering of the United States' football culture as being just another media-driven and money-obsessed business. Indeed a curious thing given recent developments in European (club) football, since commercialisation surely predates the arrival of Glazer, Gazprom and others. All this is fascinating stuff, but unfortunately the reader is left alone in trying to get the bigger picture. Disappointingly, the book ends with a sentence on South Korean football as seen from a Spanish newspaper – no summary, no conclusion. This, again, leaves the impression of expectations unfulfilled.

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# Book Review

## Jean-Michel De Waele & Alexandre Husting (eds) *Sport, politiques et sociétés en Europe centrale et orientale*

Brussels: Éditions de L'université de Bruxelles (2005)

**Luca Barani**
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This book offers an analysis of the transformation of sport structures and activities in the Central and East European countries (CEECs) after their transition to market economy and liberal democracy in the 1990s. The chapters of the book detail the changes induced by the transition from a state-controlled sport model, based on political accountability of sport governing bodies accompanied by formal and informal public subsidies, to a 'privatised' sport structure, based on economic performance and business logic, forced by the disappearance of political international competition with the 'western bloc' and by the fading of the predominant role of state-directed economic and social activities.

The reader is provided with a kaleidoscopic view of some of the changes experienced by sport structures and organization in the CEECs, with the underlying view that they are not pathological or abnormal developments, but rather interesting cases where certain trends and constraints, experienced elsewhere in the world, are magnified. By adopting such a perspective, the social consequences of underlying characteristics of the sport are under scrutiny. In the view of the authors of this book, competitive sport is more and more aligned to the enterprise and to the pursuit of profit, given its looming economic dimension.

From a theoretical view of point, this book has its main references on the French-speaking literature of sociological analysis of sport phenomena. With this reference in mind, this book criticises the myth of the apolitical nature of the sport phenomenon maintained by the sport governing bodies. This discourse is put into question from a double perspective. On the one hand, the introduction presents the sport phenomena from a international relations perspective. Especially for Eastern Europe, during the Cold war, sport organisation and structures were dependant of international politics. Firstly, major competitive sport events were used for legitimising political regimes, leading to the instrumentalisation and politicization of sporting victories. Secondly, this situation led to perverse effects for athletes: early screening of youth attitudes to sport, emphasis on sport elites over-competitive training techniques and organised doping.

On the other hand, the introduction focuses its attention to the dimension of the political internal dynamics. Two independent variables are highlighted; the first is the general political configuration and the state policy for the sport sector in particular, and the second is the social context, including legal and economic parameters. In spite of this one-way relationship, sport activities are considered to be specific with their logic, structures and actors' configuration. Nonetheless, the lack of references to more western-oriented scholarship, like Pascal Boniface (*Football et mondialisation* 2006; *L'Europe et le sport* 2001; *Géopolitique du football* 1999) is glaring, unless for criticising it for the neglect of sport developments in the CEECs.

As said before, the thread which links the different chapters is the relationship between sport and its social and political context. Sport is the dependent variable in respect of its more

general context. The idea of sport as a factor able to change social reality is rejected. On the contrary, sporting phenomena are considered as a symptomatic of more general social transformations on which they are embedded. This is especially true for the segments of sport activities characterised by a business logic and mass media exposure, which are more sensitive to the changes experienced by societies in Central and Eastern Europe (CEE). The empirical examples used to illustrate the link between sport and society, according to the line of research taken in this book, are drawn from the transition societies of CEE. The chapters can be read in pairs.

The first chapter investigates how football competitive logics in Romania were influenced by change of the political and economic context in the direction of a drift to corruption and lack of competitive balance in the national league. The second illustrates how sport organisation in Poland was transformed by the economic liberalisation in the direction of professionalisation and privatisation, with the consequent shrinking of the associative tissue of sport activities. The third shows the symbolic and nationalist uses of sporting symbols and structures in Lithuania during the Soviet rule of this country and its struggle after the sudden shift to the private sector. The following chapter continues on the same vein presenting the nationalist discourse developing around sport issues in internet chat-rooms populated by Bulgarian supporters, stressing that sport is best understood as a vehicle for debating what nationalism is. The forth piece analyses the linkage of football supporters with political hooliganism in the former Yugoslavia, presenting it as the acceleration of a earlier trend of growing instrumentalisation of sport for political purposes. The fifth tries to unbundle the links between sport business and illicit economic activities in the Balkan region, more specifically in Bulgaria, as part of the general 'privatization' of previously state-controlled activities. The final chapter correlates the general migration trends of eastern Europeans with the presence of football players in West European leagues. The main finding of this chapter is that, notwithstanding the open-door policy represented by the legal regime instaured by the Bosman ruling for citizens from CEECs, economic and social logics are favouring immigration of African and Southern American football players.

The heuristic potential of such an approach overcomes the fact that, as it is often the case with edited books, the collection of articles is of uneven quality. Reviewing the evidence presented in this book, it seems that sport does not produce many social changes, apart from boosting national pride and providing evidence that east European societies became more integrated. A minimum of national pride is necessary to put nations on the map. But Yugoslavia, the USSR and East Germany produced world-class athletes, yet collapsed regardless.

The books presents an introduction to the concrete problems of sport in the societies of CEE without providing a systematic picture of the former 'Soviet bloc', resulting in a publication that as a collection of articles fails to work as a whole and does not present common model for the analysis of sport. The readership for such a book is the general public who want to become more familiar with sport development in CEE.

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**Declan Hill**
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The link between sport and politics goes back a long way in Europe, but arguably the worst example in the contemporary era was in a football match on the 13 May 1990 in the Maksimir Stadium in Zagreb. There had just been an election in Croatia, at that time still a state of Yugoslavia, and pro-independence parties had won a majority of the seats. In the game the Serbian team Red Star Belgrade played the Croatian team Dinamo Zagreb. Both clubs were linked to the ultra-nationalist politicians of either side. During the game the visiting fans

ripped out billboards and began to chant political taunts like 'Zagreb is Serbian'. The home fans pelted them with stones and then charged across the pitch. In the ensuing riot the police fought, the fans fought and the players and team officials fought. It was this football riot that is credited by many observers as the incident that sparked the long series of Balkan civil wars and all their accompanying ethnic massacres. Certainly, the Serbian war criminal and mafia thug Arkan, explicitly boasted of the role played by his gang of football 'fans' in this riot and during some of the worst atrocities of the war in the former-Yugoslavia.

It is this area of sport and its political connections in former socialist countries of Central and Eastern Europe that De Waele and Husting explore in their book *Sports, politiques et sociétés en Europe centrale et orientale***.** The work is available only in French. This is unfortunate because there are parts of the book that deserve a much wider audience. The book is an edited volume, containing a collection of eight chapters linked together by the theme of sports and politics. As it is often the case in collective edited works, there is a variable level of quality in the chapters; some of the articles are extremely good and set a particular standard which other chapters fail to meet.

The book begins with a slightly underwhelming essay by the two editors entitled *'Sport, more than a game'*. It is largely a review of the sociological work on the links between sports and politics and mentions the usual suspects of the Nazis, the Olympics and the Cold War. The second chapter, '*The Organization and Economics of Rumanian Football*', by Michel Raspaud and Radu Ababei is more interesting. It attempts to explain why no Eastern European football team since the fall of the Communist era has done well in UEFA club competitions. The principal strength of this piece is that the authors explain how deeply corrupt the world of sports was in the former Soviet era, which acerbated the current economic problems for sport in the central and east European region.

'*The Influence of the Political Transformation on the Functioning of Polish Sports Clubs'* by Andrezej Smolen continues this exploration. Unfortunately, Smolen's work was completed a few years ago, so he does not mention the widespread match-fraud and corruption that has led observers to estimate that 70 to 80 percent of games played in the Polish professional league in the last few years have been fixed. Much of this corruption is alleged to have been organised by the clubs themselves; it would have been interesting to see what Smolen would have made of this situation.

*'Sport and the Construction of a National Lithuanian Identity'* (Ingvaras Butautas and Rasa Cepaitiene) switches from football to basketball and it shows how matches were regarded as a form of political protest under the Soviet regime and aided the development of national identity after independence in 1991.

*'Loyal until death'* by Maria Iliycheva is a discussion of Bulgarian chat rooms and football fans. She shows that the fans explicitly link sex, nationalism and manliness to the success of their football teams. It is a continuation in the cyber-world of the work of Marsh and others in their analysis of English football hooligan's chants and songs of the 1980s.

*'Football, Politics and Violence'* (Srdjan Vrcan) is an alternatively fascinating and, yet at times, frustrating account of the links between the some of the worst Balkan leaders and football violence. Fascinating, because Vrcan is excellent at showing the direct and explicit links that these leaders made to football to strengthen their regimes. Frustrating because, Vrcan writes badly and at times his ideas disappear into a cloud of overly verbose text. This is unfortunate because the analysis is strong .

The best chapter in the collection is by Philippe Chassagne and Kole Gjeloshaj, '*Sport, Business and Milieu in the Balkans'*. It makes for chilling and terrifying reading. Chassagne and Gjeloshaj keep their prose simple and the tale they tell reads like a section from the archives of a Mafia Godfather. However, it is no lurid re-telling of stories; their analysis is a good explanation of *why* criminals wish to enter into sport. They show that sport in the Balkans provides an excellent vehicle for both extortion and money laundering for criminals.

Chassagne and Gjeloshaj do miss an important motivation for East European criminals to enter the sports world: image laundering. Frequently, politically connected criminals or criminally connected politicians enter sport to wash their own images. They tie their profile to a sporting club and as the club does well so the politician or criminal's image is improved. It is clear that a number of East European criminals, politicians and businessmen are currently using sport for their own benefit.

The final article, Alexandre Husting's '*Sportsmen from Former Communist Countries in European Football*' is a straight-forward description of the numbers of 'foreign' players there are in each of the top European leagues and some of the reasons why they move to play there in the context of European Union legislation.

In general the book is a good read that I would recommend to anyone interested in the sociology of sport. However, there is one important caveat to my recommendation. The methodology used by researchers throughout the book is weak. In the entire volume of eight articles there was only one interview with an athlete – a Lithuanian heavy-weight boxer from the 1940s - cited in the notes. This is an important oversight. Imagine a similar volume on sex workers or business executives that did not feature interviews with the very people that it purports to study. Thus the volume reads like an interesting and intelligent, but not particularly well-informed, commentary on newspaper articles and academic journals. This is a pity because the subject is worthy of a more in-depth analysis.

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# Book Review

## Wladimir Andreff & Stefan Szymanski (eds) *Handbook on the Economics of Sports* Cheltenham: Edward Elgar Publishing (2006)

**Aleksander Sulejewicz**
*Warsaw School of Economics, Poland*

An old story about five blind men attempting to describe an elephant and who end up calling it a carpet (ear), a tree (leg), a snake (tail) and so on, comes to mind when an economist is to define 'sports'. The task is rendered difficult by the heterogeneous nature of activities subsumed under the generic name of *sports* and possibly also by economists' *blindness* to other models of human behaviour than perfect rationality.

The hefty volume assembled by two of the most prominent players in the field does a very good job in broadening the conventional scope of analysis in 'sport economics'. The book covers the most important areas of research of an emerging economic sub-discipline spanning the past half a century. It serves admirably the purpose of an introduction into the rich and growing area of reflection for all concerned. It is organised into seven parts. Part 1, 'Sport in the economy' is a sketch of macroeconomic significance of economic activities associated with the 'business of sport': production of sport competitions, sports goods industry, gambling, sponsorship, international trade in sports goods and it sets the stage by delineating some general aspects of the supply side including an appeal for more assiduous work on 'sectoral' accounting and statistics. The gist moves to the demand side in Part 2 where demand for own sport and observed sport are given first theoretical thrusts in terms of attendance and broadcasting, in particular. Part 3 contains a spectrum of very useful papers united by the attempt to measure the contribution of sport activities to social welfare and evaluating some of the investment projects and policy initiatives in terms of conventional cost-benefit analysis. Given the growing volume of resources channelled into this *filière*, efficiency of public spending needs careful consideration. However, many examples show that technical analysis is unfortunately an insufficient instrument of control in the complex political environment of contemporary sport. Part 4, 'Sporting Governance and the State', provides a spate of topics for investigation: governance (differently understood by participants) of international sports organisations (including the Olympic committees) or central and local government, systemic determinants of sport's place in society – contrasting American and European models, military sport, changes in the post-soviet sport and difficulties of developing countries, international (labour) migration and possible comparative advantage of nations. This appears to be the most interdisciplinary section of the *Handbook* and sport sociologists, political scientists or management scholars should find here the gate way to the other compartments. Parts 5 and 6 are devoted to what many may consider the 'hard core' of sport economics: theorizations on individualistic and team sports respectively. Part 5 contains eleven chapters on tournaments, production of world records, organisation (or not!) of contests among the best, structures in tennis, golf, or cycling, institutionalisation of collegiate athletics give one ample comparative material for analysis and possible application in some other disciplines. Part 6, spanning over more than 300 pages, provides a wealth of theoretical discussions on major problems of sport markets and organisations. Economics of the league are analysed in the contexts of both American 'major' leagues (baseball, football, basketball, and hockey) and European ones (soccer, rugby, basketball, and cricket). In section A one finds interesting mini-monographs on the state of soccer in the main European countries / markets as institutional background for more abstract modelling in section B which contains 21 chapters covering basically all major

theoretical results of the past 50 years. This provides excellent summaries, some extensions, and ample food for thought on their relevance and critique. Finally, Part 7 addresses the thorny issue of discriminatory and unethical behaviour including, of course, doping and corruption.

Altogether 86 chapters of an average length of 9 pages each provide almost everything that is needed for an introductory compendium on an increasingly popular subject in both research and teaching. One can find elementary tools for analysis of almost any topic in the area which makes it an ideal companion for the teachers and students of the subject not only in economics but also in political economy and sociology of sport.

The main advantages of the *Handbook* are, apart from the broad coverage signalled above: restoration of the 'competitive balance' between the foci on American and European institutional set-ups, emphasis on the empirical base and testing of research hypotheses, a healthy mixture of empirical and theoretical investigations, a somewhat modest but nevertheless visible widening of economic penetration beyond the neoclassical mainstream, and richly illustrated thoughts on the involvement of national States and international organisations. The reader will not only find all the important theoretical results of the field presented in an accessible manner, as well as some (informal) extensions, but above all a critical reappraisal of several 'truths' that supposedly have overcome their hypothetical status. For competitive balance and 'uncertainty of outcome hypothesis', 'invariance proposition', salary caps, revenue sharing and other collective practices somehow meriting (so far) exemptions from antimonopoly legislation on both sides of the Atlantic, mutual interdependence of actors on the sports arena – theorised usually in terms of externalities, 'star system', promotion and relegations system versus closed leagues, and numerous other, one finds admirable clarifications and useful hints at further research.

If one might have any qualms with the book, these are the problems of the field itself rather than of the particular set of authors or their papers assembled here. First is the heterogeneity of the subject matter. We would all benefit perhaps from a more clear separation of what appears to be currently the main area of study, that is, economics of *mass sport entertainment* from the adjacent territories of economics of *professional sport* (a major input into the former) or cultural economics of *health* which may bear much weaker relationship (a daily jog versus daily beer-and-chips in front of a pay-per-view sport TV) than is usually claimed. Not to mention the (supposedly) *sport goods* (in Poland, *dresiarze*, i.e. people wearing 'general purpose sport garments' is a socially significant category of young men projecting an intentionally *false image* of healthy persons being in fact members of criminal gangs or less organized groups of local hooligans practicing visibly unhealthy lifestyle). *Fitness industry* is a separate business from *spectator sport industry* even though 'value migration' in the *sport cluster of industries* is facilitated by ubiquitous externalities.

Secondly, someone testing a hypothesis that "at the beginning there were markets" - a famous phrase from Oliver Williamson's important *Economic Institutions of Capitalism* (1985) - is likely to be practicing a form of an extreme sport when the territory it attempts to conquer is sport itself. While the usual and 'correct' interpretation of the proposition is methodological and not historical, if any currently used label seems adequate, it is the 'mixed economy' with its varying components of the 'voluntary sector', 'state production' and 'the market'. One could also venture another view that '*Homo Sapiens*' rather than '*Homo Oeconomicus*', organisations rather than markets, and institutions rather than 'general equilibrium' have been the more theoretically adequate characteristics of the emergence and development of production and distribution patterns in sport. The *Handbook* does move in this direction but more is perhaps going to come. For instance, a lot is made of Coase theorem; while this has been a fruitful line of research, one should not forget the warning of Coase himself that empirical study of "the world of positive transaction costs" is needed. While a number of other topics deserve deeper study, the editors and authors of the *Handbook* have done a commendable job of accumulating sophisticated material for many economists, managers, politicians and self-conscious fans, who are sure to find excellent training ground for the whole heptathlon.

**Samuli Miettinen**
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*The Handbook on the Economics of Sport* (2006) weighs in at approximately 800 pages. Divided into seven themes, it examines 'sport in the economy', 'demand for sport', 'cost-benefit analysis of sport', sporting governance and the state', individualistic sports', 'team sports', and 'dysfunctions in sport'. Its authors include 65 of an estimated 100 economists working in the field including its co-editors Wladimir Andreff and Stefan Szymanski. Their introduction also offers a detailed historical account of research within the discipline of sports economics. Chapters written by the editors account for twenty per cent of the text. These chapters provide additional consistency in the work and often highlight key normative issues that are further examined by other contributors.

The work serves well as a handbook. With 86 separate chapters that are often detailed and generally well referenced, it is possible for a reader with little prior knowledge to easily find and access a detailed account of a particular issue. Some chapters are descriptive and provide data; others offer more general overviews of key theoretical questions that arise. The contributions highlight in some respects a paucity of comparable data or an absence of a workable framework. For example, Andreff's contribution on international trade highlights that there is no detailed database on transnational corporations (key actors in the sporting goods trade). Likewise, in Chapter 1 he observes that global comparisons for sports economics are limited by deficiencies in national accounting systems for sports economies.

A holistic approach to specific issues is typical of many of the linked chapter contributions, exemplified by the treatment of competitive balance and demand for sport. Gouget observes in Chapter 7 that demand for 'sport' is difficult to measure because the notion encompasses a number of divergent economic activities. In the section entitled 'demand for sport' which follows, the contributors consider overall consumer demand for spectator sports in the form of attendance, demand for broadcast programming, and other media coverage. Some surprising findings in the context of the legal arguments for regulatory autonomy are found here, including evidence that competitive equality may in fact lower aggregate league attendance. The literature on televised sport has not directly dealt with the correlation between competitive balance and its effect on demand in sport – a concern mooted in the subsequent contributions.

The work highlights another problem with data on sports economics, namely the differences between particular sports, national, and regional systems. Most of the general interest, data-intensive, contributions both expressly cover this caveat and mitigate overemphasis on a given sport or system by providing data sets including team and individual sports; professional, semi-professional and amateur sports; and North American, European and other regional systems with distinct features. For the uninitiated reader, these surveys make clear distinctions and highlight problems with the data in the many circumstances where all other things are not equal.

Cost-benefit analysis, the third section, offers another example of data issues in the science of sports economics – in this case its wider uses. The opening chapter of this section deals with the economic impact analysis and provides key insights into the analysis of data which is often provided in public debates, and advises to view with caution any economic impact analyses provided by sports leagues or franchises. The subsequent chapters on externalities, as well as the holistic chapters on some large-scale events, provide outline accounts of issues which can often be either misrepresented or under-represented in public debates. Of particular interest for UK readers, Chapter 17 demonstrates the risks of wanting the Olympic Games at any cost whilst Chapters 16 and 19 consider key problems associated with large-scale events and demonstrates that the positive impacts of substantial infrastructure investments are often overstated.

'Sporting Governance and the State' is a natural selection for the fourth topic and read together with the preceding section provides an overview of key ideas relevant at the

intersection of sports policy, law, and economics. A reader interested in that general overview would be well served with tackling first Chapters 28 and 29 on the European and American models of sport, respectively. Many of the themes outlined therein recur in the more specific chapters and while they work well as a conclusion, they would perhaps serve with equal distinction as introductory chapters.

Parts five and six, on individual and team sports respectively, occupy more than half of the main body of the work. The content and format of these chapters varies. Some contributions such as Chapter 34 on the theory of tournaments and Chapter 46 on organisational models of professional team sports offer strong evidence suggesting that from an economic point of view, many of the arguments advanced in support of special legal treatment for sport should be re-examined rather than accepted *a priori* as givens. Other chapters, such as those on golf and horseracing offer brief outlines of current issues in particular sports, whilst yet others offer detailed data and analysis related to broader issues such as the amateur status or otherwise of collegiate athletics. Major individual and team sports are all represented in some capacity, although data is invariably more comprehensive and chapter contributions larger where significant financial interests are involved. Within these two parts, the economic issues in amateur sports receive less emphasis despite recognition that it is precisely there that the paucity of data is not representative of a lack of issues, but rather that the issues have not received a great deal of attention in the literature. A general chapter identifying such areas would provide a welcome addition to the coverage provided in Chapters 15 and 19 on sporting externalities and voluntary work. Section 6B provides case-by-case coverage of principal economic issues which also coincide with many of the principal legal issues arising in sport. Competitive balance, transfer restrictions, salary caps and players agents are also recurring themes in the legal frameworks of sport. These segue seamlessly into the slim final part on 'dysfunctions in sport', concentrating chiefly on the economic analysis of those dysfunctions.

The handbook has some clear emphases. Firstly, some sports are more represented than others, notably European football. This corresponds roughly to the relative commercial value of European football and possibly also to the emphasis in literature. Professional sports beyond the western hemisphere and amateur sports receive less attention. The balance of coverage might benefit from greater examination of those other facets of sport. As the editors observe in the introduction, the handbook 'captures the diversity of views present in the literature' without imposing a strict editorial line but does not always offer uniform approaches to these. This can be unhelpful to a reader seeking to use the handbook as an introduction to those issues, particularly in relation to those few normative contributions that do not expressly examine the evidence base for their assumptions in detail. A preliminary summation of such questions in the context of a dedicated chapter would add much to the value of the handbook to those for whom it is primarily intended. By its nature the handbook requires that chapters are sometimes less than uniform in style and in content. Some chapters, such as that on the theory of tournaments, are deeply rooted in calculus and offer advanced detail for the mathematically literate; others are less so inclined and require little prior knowledge. This is a strength, rather than a weakness. Both approaches are used and highly technical contributions are often also successful in providing a basic understanding for the uninitiated. This book will be invaluable for advanced students investigating professional sport. From the point of view of lawyers, particularly those engaged with the relationship between law and sports governance, the handbook offers invaluable analysis of the economic issues that are alluded to in those debates but rarely examined in detail. It anchors legal arguments in solid empirical research, and questions many of the assumptions that underlie current frameworks of governance. These insights will also prove useful for policy analysts and sports administrators for whom many sections should be considered mandatory reading.

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