Prof. dr. Robert Siekmann,
Director of the ASSER International Sports Law Centre, The Hagne

THE SPECIFICITY OF SPORT: SPORTING EXCEPTIONS IN EU LAW[1*]

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The classical and still and ever current central (legal) question in the debate on the position of sport in the European Union is whether sport is "special", whether it deserves specific treatment under European Law and to what extent and why. In other words should sport be exempted from the EC Treaty? It is the discussion on what is called in the jargon the "specificity of sport" and the "sporting exception".[2][1] In this article the general framework which the EU institutions developed regarding the specificity of sport, is dealt with. What are in fact the basics in this respect? Which sporting exceptions concerned have been accepted and which not and why? What is the result of a comparison of exceptions and justifications, what is the overall picture of the sport specificity practical application by the Commission as the EU day-to-day executive organ and the European Court of Justice as the EU supreme judicial organ? The cases and issues will be categorised according to whether they concern "internal market freedoms (movement of workers and provision of services) or EU competition law in sport organisational matters.

key words: *EU law, sport law, specifity of sport, exceptions*

1. INTRODUCTION

Not everybody knows that the European Union has a fairly extensive record in the field of sport. In 2005 the ASSER International Sports Law Centre published a book containing some 900 pages of selected legal and policy documents (resolutions of the European Parliament, decisions of the European Commission, memoranda, jurisprudence of the European Court of Justice, etc.) and another 900 pages were put on the Centre's website.[3] The EU has dealt with a wide range of subjects since the so-called Walrave case in 1974. The Book provides a detailed insight into what could be called the *acquis communautaire sportive* ("EU Sport Acquis") for the present and future (candidate) Member States. Apart from texts of a general policy character, specific subjects concern Boycott, Broadcasting, Community Aid and Sport Funding, Competition, Customs, Diplomas, Discrimination, Doping,

[1*] This article is an updated and expanded version of: Robert Siekmann, *Is Sport 'Special' in EU Law and Policy?*, in: Roger Blanpain (Ed.), "The Future of Sports law in the European Union - Beyond the EU Reform Treaty and the White Paper", Alphen aan den Rijn 2008, pp. 37-49.

[2 [1]] See in particular, Richard Parrish and Samuli Miettinen, The Sporting Exception in European Union Law, The Hague 2008.

[3] Robert Siekmann and Janwillem Soek (Eds), "The European Union and Sport: Legal and Policy Documents", The Hague 2005.

Education and Youth, Freedom to provide services and of movement of workers, Olympic Games, State Aid, Tax, Tobacco Advertising, Trade Marks, Vandalism and Violence.[4]

The classical and still and ever current central (legal) question in the debate on the position of sport in the European Union is whether sport is "special", whether it deserves specific treatment under European Law and to what extent and why. In other words should sport be exempted from the EC Treaty? It is the discussion on what is called in the jargon the "specificity of sport" and the "sporting exception".[5] In this article I will deal with the general framework which the EU institutions developed regarding the specificity of sport. What are in fact the basics in this respect? I will deal with the following items: 1. the initial position of sport in the European (EC and EU) Treaties; 2. The 1997 Declaration on Sport in the Treaty of Amsterdam; 3. The Helsinki Report on Sport and the 2000 Declaration on Sport in the Treaty of Nice, 4. *Close reading* the references - general and specific - to the Declarations on Sport (Amsterdam, Nice) regarding the 'specificity of sport,' in the jurisprudence of the European Court of Justice and the decision-making practice of the Commission,[6] 5. The 2007 White Paper on Sport, 6. The specificity of sport in the White Paper, and finally 7. "Sport" in the Constitutional Treaty (Constitution for Europe) and the Reform (Lisbon) Treaty, and 8. Specificity of sport in the 2011 White Paper-plus. 9. An overview of the practice of application regarding the "sport specificity" concept in the European Commission's decision-making and the European Court of Justice's jurisprudence before and after the Lisbon Treaty, in which an explicit "sport provision" (Article 165 TFEU) is incorporated (for the first time in the history of the EC/EU basic treaties), is added. Which sporting exceptions concerned have been accepted and which not and why (cf. the *ratio*, objective justifications for the sporting measures and their proportionality)? How the test of proportionality precisely is executed by the ECJ and the Commission is not separately scrutinized in this article. Generally speaking, it may be observed that if and when a sporting measure is justified, but not proportional, the additional question is whether and if yes, which alternative, proportional measure(s) would be available. Pending cases will not be dealt with and nor will possible, potential issues be discussed. What is the result of a comparison of exceptions and justifications, what is the overall picture of the

[4] The White Paper on Sport pays attention to additional marginal, "soft law" themes - also from a sports law perspective - like volunteering, social inclusion and integration, prevention of and fight against racism and violence, the environmental dimension of sport, supporters.

[5] See in particular, Richard Parrish and Samuli Miettinen, The Sporting Exception in European Union Law, The Hague 2008.

[6] Cf., "Close reading" describes, in literary criticism, the careful, sustained interpretation of a brief passage of text. Such a reading places great emphasis on the particular over the general, paying close attention to individual words, syntax, and the order in which sentences and ideas unfold as they are read. It is now a fundamental method of modern criticism. Close reading is sometimes called *explication de texte*, which is the name for the similar tradition of textual interpretation in French literary study. In the present, legal research context, "close reading" for example would imply an answer to the question whether the words "specificity of sport" are explicitly used in the decision-making practice the European Commission and the case-law of the Court.

sport specificity practical application by the Commission as the EU day-to-day executive organ and the European Court of Justice as the EU supreme judicial organ? The cases and issues will be categorised according to whether they concern "internal market freedoms (movement of workers and provision of services) or EU competition law in sport organisational matters.

2. SPORT NOT IN EUROPEAN TREATIES

In the European Treaties up to the Constitutional and Reform (Lisbon) Treaties there was not any general legal basis, no competence for the Communities/ European Union to deal with sport, as it was the case for culture. So, there was no section on sport nor are there any provisions on sport in the Treaties. This at the same time implied that sport was not exempted from the Treaties. Since the Walrave case[7] it is clear that as far as sport is an economic activity European Law in principle is applicable to it. This is steady European jurisprudence. In their decisions the Commission and European Court of Justice have considered to what extent this is the case. Two of the basic freedoms of the Communities/ EU are essential in this respect: the freedom of movement for workers and fair competition. I will not go further into that here.

3. TREATY OF AMSTERDAM: 1997 DECLARATION ON SPORT

The Treaty of Amsterdam amended the Treaty on the European Union and the Treaties Establishing the European Communities. The Declaration on Sport is annexed to the Treaty of Amsterdam. It emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The EU institutions are therefore called on to listen to sports associations when important questions affecting sport are at issue. In this connection special consideration should be given to the particular characteristics of amateur sport, the Declaration states. In 1998 the European Commission published a staff working paper entitled 'The Development and Prospects for Community Action in the Field of Sport.' In this document the educational, health, social, cultural and recreational functions of sport are recognized. It is also stressed however that sport fulfils an important economic role in Europe and that a general exemption of sport from European Law could not be allowed. The Amsterdam Declaration on Sport had no legal force; it clearly was a general policy statement. We will see hereafter how this kind of documents (see below also on the Nice Declaration) were made use of, were taken into account in particular in the decision-making of the European Commission and the jurisprudence of the European Court of Justice.

[7] ECJ, Case No. C-36/74 [1974] ECR 1405.

4. TREATY OF NICE: 2000 DECLARATION ON SPORT

In Nice the Declaration on 'the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies' was adopted. This Declaration which is annexed to the Presidency Conclusions of the Nice European Council Meeting, was based on the so-called Helsinki Report on Sport (1999), which was a Report from the European Commission to the European Council (of Heads of State and Government) "with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework"[8]

In the Introduction of the Helsinki Report on Sport it is said that the report gives pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions. In section 4 of the Report on 'Clarifying the legal environment of sport' it is suggested that sport must be able to assimilate the new commercial framework in which it must develop, without at the same time losing its identity and autonomy, which underpin the functions it performs in the social, cultural, health and educational areas. The Report continues by stating that while the EC Treaty contains no specific provisions on sport, the Community must nevertheless ensure that the initiatives taken by the national State authorities or sporting organisations comply with Community law, including competition law, and respect in particular the principles of the internal market (freedom of movement for workers, freedom of establishment and freedom to provide services, etc.). In this respect, accompanying, coordination or interpretation measures at Community level might prove to be useful. They would be designed to strengthen the legal certainty of sporting activities and their social function at Community level. However, as Community powers currently stand, there can be no question of large-scale intervention or support programmes or even of the implementation of a Community sports policy. If it is advisable, as wished by the European Council and the European Parliament, to preserve the social function of sport, and therefore the current structures of the organisation of sport in Europe, there is a need for a new approach to questions of sport both at European level and in the Member States, in compliance with the Treaty, especially with the principle of subsidiarity, and the autonomy of sporting organisations, the Report continues. The Report proposes the acceptance of a new approach which involves preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment. In terms of the economic activity that it generates, the sporting sector is subject to the rules of the EC Treaty, like the other sectors of the economy. The application of the Treaty's competition rules to the sporting sector must take account of the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of the results. The Report continues by stating that with a view to an improved definition of the legal environment, it is possible to give examples,

[8] COM(1999) 644.

without prejudice to the conclusions that the Commission could draw from the in-depth analysis of each case, of practices of sports organisations. Three types of practices are distinguished in the Report: 1. Practices which do not come under the competition rules, 2. Practices that are, in principle, prohibited by the competition rules, and 3. Practices likely to be exempted from the competition rules. In the Report's Conclusion it is observed that the system of promotion and relegation is one of the characteristics of European sport. In 1998 the Commission's DG Education and Culture under which sport comes, had published a consultation document regarding 'The European Model of Sport' in which the organisation and structure of sport in Europe is described. Basically the structure resembles a pyramid with a hierarchy, it was said. The clubs form the foundation of this pyramid. Regional federations form the next level, the clubs are usually members of these organisations. National federations, one for each discipline, represent the next level. They represent their branch in the European or international federations. They form the top op the pyramid. In the Nice Declaration on Sport it is said that sporting organisations and the Member States have a primary responsibility in the conduct of sporting affairs. Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured. The European Council also stresses its support for the independence of sports organisations and the right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives. It is noted in the Nice Declaration on Sport that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport. While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy, the Declaration says.

Comment

The conclusion must be that it is essential for the Community to take account of the specific characteristics of sport. The Amsterdam Declaration refers to the "social significance of sport", especially "particular characteristics of amateur sport". The Helsinki Report: in its entitlement refers to "safeguarding current sports structures and maintaining the social function of sport within the Community framework" and then stresses *inter alia* "the *specific* characteristics of sport, especially the interdependence between sporting activity and the economic activity that it

generates, the principle of equal opportunities and the uncertainty of the results". And the Nice Declaration in its entitlement refers to "the *specific* characteristics of sport and its social function in Europe" (italics added, RS). This starting-point implies that in principle exemptions from Community law are possible. Apart from that, the rules and regulations of sports organisations without which a sport cannot exist or which are necessary for the organisation of sport or competitions may be completely beyond competition law. The rules which are inherent to sport are first and foremost the so-called 'rules of the game.' (*lex ludica*).Their purpose is not to distort competition, according to the above-mentioned DG X consultation document of 1998. In the Helsinki Report on Sport it is emphasized that the basic freedoms guaranteed by the EC Treaty, generally speaking do not conflict with the rules, regulations and measures taken by sports organisations, provided that these are objectively justified, non-discriminatory, necessary and proportionate.

5. THE DECLARATIONS ON SPORT (AMSTERDAM, NICE) IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE AND COMMISSION DECISION-MAKING

Both Declarations on Sport (Amsterdam, Nice) are important policy statements by the Heads of State and Government of the EC/EU Member States (European Council), which however do not have a legally binding character (*soft law*).The question then is whether these texts which underline the specificity of sport in general terms, were used in concrete cases by the EC/EU when European law was applied to sport and how they were used. In other words, was account taken of these documents in the decisions of the Commission and the European Court of Justice? It is clear that general/specific references to the Declarations would add to their official status and relevance in a legal perspective.

In the Deliège case[9], the Court states that it is to be remembered at the outset that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC (with the Court's explicit reference to the Walrave and Bosman cases). In the Bosman case - the Court continues to argue - it had also recognised that sporting activities are of considerable social importance in the Community. That case-law - it is said - is also supported by the Declaration on Sport (Amsterdam), which emphasises the social significance of sport and calls on the bodies of the European Union to give special consideration to the particular characteristics of amateur sport. In particular, that Declaration is consistent with the above-mentioned case-law (Walrave, Bosman) in so far as it relates to situations in which sport constitutes an economic activity. This formula is literally repeated in the Lehtonen case[10] and Meca-Medina case (2004, First Instance)[11] It is

[9] ECJ, Case No. C-51/96, [2000] ECR I-2549 paras. 41-42.

[10] ECJ, Case No. C-176/96 [2000] ECR I-2681 paras. 32-33.

[11] CFI, case No. T-313/02 [2004] ECR II-3291 paras. 37-38.

additionally stated in Meca-Medina that the Court's considerations on the nature of the IOC anti-doping rules are *echoed* (!) in the Community support plan to combat doping in sport (1999), according to which "doping symbolises the contrast between sport and the values it has traditionally stood for", in the Commission's working paper entitled "Development of and prospects for Community action in sport", which states that "sport plays a morally elevating role in society" through "the values associated with fair play, solidarity, fair competition and team spirit" which it brings, and in the Helsinki Report on Sport, according to which "the rules inherent to sport are, first and foremost, the "rules of the game" and "the aim of these rules is not to distort competition".

It is interesting to observe that the Amsterdam and Nice Sport Declarations are used by the Court for the support of argument. It is even said that the Declaration of Amsterdam is consistent with case-law in so far as it relates to situations in which sport constitutes an economic activity. So, the basis for the argument already was laid down by the Court itself previously in Walrave and Bosman the ECJ decisions on which date are pre-Amsterdam and -Nice.. In the Court's reasoning it looks like the Declarations "codified" the case-law and for that reason could be referred to by the Court again. The Court was not influenced by the Declarations, but the Declarations were "dictated" by the Court's case-law.

The explicit reference to the Amsterdam Declaration on Sport and the Helsinki Report on Sport (cf., the Nice Declaration on Sport) however is not repeated in the appeal decision by the Court in Meca-Medina.[12] My possible explanation for this is that the appeal decision in Meca-Medina in fact rejected the traditional, extensive concept of the "sporting exception" which excluded so-called *purely* sporting rules like the Laws of The Game (*lex ludica*) and others from being tested against EU law, in advance. If this analysis would be correct, the references to the Sport Declarations in the Court's previous sports jurisprudence are now part of history, outdated. Apart from that and however, the Amsterdam and Nice Declarations in fact now have been substituted by the "sport provision" in the Lisbon Treaty (see below in paragraph 8) which mentions "the specific nature of sport" to be taken account of by the EU when contributing to the development of the European dimension in sport. For the first time, reference to Article 165 TFEU is made in the Bernard (Olympique Lyonnais) case where it is said (in para. 40) that account must be taken of the *specific* characteristics of sport in general, and football in particular, and of their social and educational function; the relevance of those factors is also corroborated by them being mentioned in the second subparagraph of Article 165(1) TFEU. In the "White Paper plus", it is said that in the Bernard case, in particular the Court mentioned two elements included in the Treaty as being constitutive of the EU's action in the field of sport: the social and educational function of sport as well as its specific nature. These two aspects are interlinked, the social and educational values of sport being among the characteristics which make sport special and set it apart from other sectors of the

[12] ECJ, Case No. C-519/04 P, OJ C 224/8, 2006.

economy.[13]

In Commission practice, explicit reference was made to the Nice Declaration in UEFA Champions League[14]. The Commission fully endorsed the *specificity of sport* (sic!), as expressed for example in the declaration of the European Council in Nice in December 2000. On that occasion the Council encouraged the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. The Commission understood that it is desirable to maintain a certain balance among the football clubs playing in a league because it creates better and more exciting football matches, which could be reflected in/translate into better media rights. The same applied to the education of new players, as the players are a fundamental element of the whole venture. The Commission recognised that a cross-subsidisation of funds from richer to poorer may help achieve this. The Commission was therefore in favour of the financial solidarity principle, which was also endorsed by the European Council declaration on sport in Nice in December 2000. So, financial solidarity is one more specific characteristic to be added to the list.

Some other, particular characteristics were mentioned above under *Comment*, such as: current sport structures, the position of amateur sport, the principle of equal opportunities and uncertainty of results (balanced competition). We will see below in section 10 what will be the findings in this context on the basis of the practical application of the sport specificity principle in EU practice.

6. THE 2007 WHITE PAPER ON SPORT[15]

On 11 July 2007 the European Commission adopted the White Paper on Sport which is its first comprehensive strategic initiative in the field of sport. On average, the Commission adopts only two or three white papers per year, and the fact that the communication on sport got this status is therefore an acknowledgement of the comprehensive nature, longer-term value and political weight of the document. The White Paper has to be seen in the overall context in which sport has been addressed at EU level. It is the culmination of a long process: the Amsterdam

[13] Commission Staff Working Document "Sport and free movement", Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, SEC(2011) 66/2, p. 6.

[14] Case 27398 Joint selling of the commercial rights of the UEFA Champions league, OJ 2003 L 291/25. Paras. 131 and 165.

[15] A *green paper* released by the European Commission is a discussion document intended to stimulate debate and launch a process of consultation, at European level, on a particular topic. A green paper usually presents a range of ideas and is meant to invite interested individuals or organisations to contribute views and information. It may be followed by a *white paper*, an official set of proposals that is used as a vehicle for their development into law. In preparing the White Paper on Sport (COM(2007) 391 final) the Commission had held numerous consultations with sport stakeholders on issues of common interest as well as an on-line consultation. Cf. also, Stephen Weatherill, "The White Paper on Sport as an Exercise in 'Better Regulation", in: The International Sports Law Journal (ISLJ) 2009/1-2, pp. 3-8.

Declaration of 1997, the Nice Declaration of 2000, and then the agreement of the Intergovernmental Conference in 2004 to include sport in the Treaty (see hereafter in connection with the Constitutional and Reform (Lisbon) Treaties), coupled with the positive results of the European Year of Education through Sport 2004, all reflect the European framework that already existed for sport. This framework put the accent on the special characteristics of sport, and in particular its social and educational values.

The White Paper has focus on three domains: the societal role of sport, the economic importance of sport, and the organisation of sport. The Commission was well aware that some actors, especially those representing professional sports, expected it to go further in terms of regulatory measures and seeking exemptions for the sport sector from the application of EU law. It is important to point out that the White Paper respects the principle of subsidiarity, the autonomy of sport organisations and the current EU legal framework. When developing the concept of specificity of sport, the Commission could not go beyond the limits of existing EU competences. The White Paper takes full account of this European context for sport: the initiative does not weaken the application of EU law to sport, but it provides further clarity on the application of EU legal provisions in this sector. A comprehensive initiative on sport appeared to be appropriate at this particular point in time for several reasons. In general, the political landscape was favourable to the launch of a broad EU initiative on sport. Several processes took place during the last year in parallel with the preparation of the White Paper, such as notably the debate on governance in European football, which resulted in the Independent European Sport Review ("Arnaut Report")[16] and the European Parliament's reports and resolution on the future of professional football in Europe and on the role of sport in education. The White Paper was driven by high expectations from sport stakeholders, who wished to see their concerns addressed in EU policy making, including the need to better promote sport and to achieve more legal certainty. Social and economic developments in and outside the field of sport have brought about new challenges for sport, some of which need European responses. The White Paper proposes a mix of instruments to address the role of sport in Europe, such as studies and surveys, platforms and networks, enhanced cooperation dialogue structures, recommendations, and mobilisation of EU programmes. It

[16] A publication of May 2006 by MR José Louis Arnaut, former Portuguese Foreign Minister, at the initiative of the UK Sports Minister and financed by UEFA. See also - in reply to the "Arnaut Report" - the "Wathelet Report": *Sport Governance and EU Legal Order: Present and Future*, by Prof. Melchior Wathelet, Universities of Louvain-la-Neuve and Liège (Belgium) and a former Member of the European Court of Justice, in: The Intyernational Sports Law Journal (ISLJ) 2007/3-4, pp. 3-9 and 10-11. The Wathelet Report was amongst others supported by Professor Stephen Weatherill, Jacques Delors Professor of European Community Law, University of Oxford, United Kingdom; Professor Roger Blanpain, Universities of Leuven, Belgium and Tilburg (The Netherlands), and co-founder and first President of FIFPro; Professor Klaus Vieweg, Director of the German and International Sports Law Research Unit, University of Erlangen-Nuremberg, Germany; and Dr Richard Parrish, Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom. The report was distributed also in its original French language version throughout Europe by means of a press-release of the ASSER International Sports law Centre (T.M.C. Asser Instituut, The Hague, The Netherlands; see: www.sportslaw.nl/NEWS.

should be stressed that the emphasis is on "soft" measures, not on regulatory or legislative action, for which there is no specific EU competence.

The chapter of the White Paper on the organisation of sport addresses a number of aspects of the governance of sport and of the *specificity of sport*. First, it should be noted that the word 'specificity' as such does not appear in earlier official EU texts. In the Helsinki report of 1999 reference was to the need to 'take account of the specific characteristics' of sport, white in the Nice Declaration of 2000 reference was made to how the Community must take account of the functions which make sport "special". The White Paper devotes a section to the issue of specificity, thus shedding light on the Commission's position regarding this concept. Regarding the repeated requests by stakeholders for more legal "certainty", it should be stressed that the White Paper text provides more legal clarity for European sport within the limits of the EU's current competencies. For the first time ever the Commission takes stock of the European Court's case law and Commission decisions in the area of sport. However, in the current absence of a specific legal competence for sport, a case-by-case approach remains the basis for the Commission's control of the implementation of EU law in the sport sector, in line with the current Treaty provisions, and taking full account of the Nice Declaration - the Commission stated..

At its meeting in June 2007, the European Council gave a mandate to the Intergovernmental Conference which lead to the signature of the Lisbon Treaty in December 2007. The Commission welcomed the fact that the mandate set out that the provisions on sport agreed in the 2004 Intergovernmental Conference (regarding the 'Constitution for Europe') would be inserted into the new Treaty. These provisions on sport, giving the Union "soft". supporting competences in this area, were inserted into the text of the then Article 149 of the EC Treaty, which also dealt with education, youth and vocational training (see below). It was the intention of the Member States to ratify the Reform (Lisbon) Treaty by mid 2009. This meant that it seemed likely that additional important developments would occur at EU level in the area of sport in the next few years. Ratification of the Reform (Lisbon) Treaty would give the EU the possibility to define a sport policy, to incorporate sport into the work of the Council of Ministers, and to create an EU Sport Programme.[17] The White Paper should thus be seen as an instrument to pave the way for the implementation of a possible future Treaty provision on sport. The White Paper would remain the basis for the Commission's involvement in the sport sector until after the entry into force of the Reform (Lisbon) Treaty - the Commission stated in 2007.

[17] The Lisbon Treaty (TEU and TFEU) went into force on 1 December 2009.

7. THE SPECIFICITY OF SPORT IN THE WHITE PAPER

Over the years, the EU has produced some colourful jargon to describe various concepts and operating principles, such as the principle of "subsidiarity", whereby matters so far as possible are dealt with not at the Community level, but at the Member States' level. The term "specificity of sport" has entered into common parlance in practice to refer to the special characteristics of sport recognised in the Nice Declaration on Sport (2000). In a separate paragraph the White Paper contains for the first time some guidance – but not an exhaustive one – on the meaning of the 'specificity of sport,' based on the case law of the European Court of Justice and the decisions of the European Commission in previous cases. Before setting out this guidance, it should be noted that the paragraph clearly states in its first sentence that 'Sport activity is subject to the application of EU Law.' Particularly, in so far as it constitutes an economic activity (cf., competition law and internal market provisions). According to the White Paper, the specificity of European sport can be approached through "two prisms":

– The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competition;

– The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.

The White Paper points out that the specificity of sport has been recognised and taken into account in various decisions of the European Court of Justice and the European Commission over the years. In Bosman for example, the European Court of Justice stated that: "In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate." And the White Paper adds that, in line with the established case law, the specificity of sport will continue to be so recognised, but it cannot be construed so as to justify a general exemption of sport from the application of EU law. The White Paper then goes on to give some examples of organisational sporting rules that are not likely to offend EU competition law, provided that their anticompetitive effects, if any, are inherent and proportionate to the legitimate objectives pursued (see in more detail below in section 9 on the "Practical application of the "sport specificity" concept in Commission practice and ECJ jurisprudence"): "rules of the game" (rules fixing the length of matches or the number of players on the field); rules concerning the selection criteria for sports competitions; rules on 'at home' and 'away from home' matches; rules preventing multiple ownership in club competitions; rules

concerning the composition of national teams; rules against doping; and rules concerning transfer periods.

The White Paper adds that, in determining whether a certain sporting rule is compatible with EU Competition Law, an assessment can only be made on a case-by-case basis, as confirmed by the European Court of Justice in the Meca-Medina case. In that case, the Court dismissed the notion of "purely sporting rules" as irrelevant for the question of the applicability of EU competition rules to the sport sector. The Court recognised that the specificity of sport must be taken into account in the sense that the restrictive effects of competition inherent in the organisation and proper conduct of competitive sport are not in breach of the EU competition rules, where these effects are proportionate to the legitimate genuine sporting interest pursued. In other words, the proportionality test requires that each case is assessed on its own merits according to its own particular features or characteristics. Thus, it is not possible to formulate general guidelines on the application of EU Competition Law to the sports sector.

8. SPORT IN THE CONSTITUTIONAL AND REFORM (LISBON) TREATIES

What exactly did the provisions on sport in the Constitution for Europe entail? In the first place it must be established that the pertinent Article 282 was part of Part III of this Treaty concerning Internal Policies and Action, more especially, Chapter V of Parr III, concerning 'Areas where the Union may take coordinating, complementary or supporting action'; in other words, it shall have competence to carry out such type of actions in relation to the actions of the Member States. In this context, Article 282 was part of Section 4 concerning 'Education, Youth, Sport and Vocational Training.' Article 282 was therefore 'soft law' by nature and this was reflected by its paragraph 4 which determined that 'in order to contribute to the achievement of the objectives referred to in this Article (a) European laws or framework laws shall establish incentive actions, excluding any harmonization of the laws and regulations of the Member States' and '(b) The Council, on a proposal from the Commission, shall adopt recommendations.' Although therefore regulations (European laws) and directives (framework laws) could be adopted in the field op sport, this could only be the case for the purpose of establishing 'incentive actions' and moreover with the exclusion of the harmonisation of national legislation. It must further be remarked that, as appeared from paragraph 3 of Article 282, the EU and the Member States should foster cooperation with third countries (non-Member States) and the competent international organisations in the field of sport, especially the Council of Europe.

Apart from and next to the legal instruments available, what were the objectives of the EU in the field of sport according to the Constitutional Treaty? Paragraph 1, second sentence, of Article 282 indicated 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.' Paragraph 2 added that "the Union action shall be aimed at ... (g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sport, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen."

The sport provisions in Article III-282 'codified' in fact the philosophy and phraseology of the Sport Declarations of Nice and Amsterdam, referring to the social and educational functions of sport and taking account of its specific nature. Promoting "fairness" and "openness" in sporting competitions as such is a newly introduced element in this context. Are "fairness" and openness" new principles of EU sports law and what precisely is meant by them? In fact there is not available any substantial preparatory work (*travaux préparatoires*) from negotiating Lisbon regarding the "sport provision".[18] In the EP-commissioned Study on *Lisbon Treaty and EU Sports Policy* (September 2010)[19], the possible impact of the words "fairness" and "openness" in relation to a number of ongoing issues in European sport is discussed: collective sale of sports rights; local training of players (FIFA 6+5 and UEFA home grown players rules); status and transfer of players; anti-doping rules; player release rule (national team sports); licensing, financial fair play and salary capping; players' agents; sports betting; multiple club ownership; participation of EU non-nationals in individual national championships; the rights of third-country nationals; national territorial tying; selection criteria; composition of national teams; the protection of sports associations from competition. According to the White Paper, with reference to the Helsinki Report on Sport and the Nice Declaration, one of the basic elements of the so-called European Sports Model is "a system of open competitions based on the principle of promotion/relegation".

In Article 149 of the Reform Treaty (Title XI: Education, vocational training, youth and sport' and Article 165 of the Lisbon Treaty (TFEU)) the foregoing is repeated again:

'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.' (Para. 1)

'Community action shall be aimed at: – developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.' (Para. 2)

'The Community and the Member States shall foster cooperation with third

[18] See, Stephen Weatherill, "Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?", in: The International Sports law Journal (ISLJ 2010/3-4 pp. 11 and 14-17.

[19] The Study was executed by the T.M.C. Asser Instituut, The Hague, The Netherlands, and Edge Hill and Loughborough Universities, United Kingdom.

countries and the competent international organisations in the field of education and sport, in particular the Council of Europe': (Para. 3)

9. SPORT SPECIFICITY IN THE 2011 "WHITE PAPER PLUS"

The so-called White Paper-plus contains the following statement on the "specificity of sport":

"The specific nature of sport, a *legal* concept established by the Court of Justice of the European Union which has already been taken into account by the EU institutions in various circumstances and which was addressed in detail in the White Paper on Sport and the accompanying Staff Working Document, is now recognised by Article 165 TFEU. It encompasses all the characteristics that make sport special, such as for instance the interdependence between competing adversaries or the pyramid structure of open competitions. The concept of the specific nature of sport is taken into account when assessing whether sporting rules comply with the requirements of EU law (fundamental rights, free movement, prohibition of discrimination, competition, etc.).

Sporting rules normally concern the organisation and proper conduct of competitive sport. They are under the responsibility of sport organisations and must be compatible with EU law. In order to assess the compatibility of sporting rules with EU law, the Commission considers the legitimacy of the objectives pursued by the rules, whether any restrictive effects of those rules are inherent in the pursuit of the objectives and whether they are proportionate to them.

Legitimate objectives pursued by sport organisations may relate, for example, to the fairness of sporting competitions, the uncertainty of results, the protection of athletes' health, the promotion of the recruitment and training of young athletes, financial stability of sport clubs/teams or a uniform and consistent exercise of a given sport (the "rules of the game")." (italics added; RS)[20]

10. THE PRACTICAL APPLICATION OF THE "SPORT SPECIFICITY" CONCEPT IN COMMISSION PRACTICE AND ECJ JURISPRUDENCE

10.1. The application of internal market freedoms (movement and services) to sport[21]

The European Court of Justice has taken a number of important decisions in this area:

[20] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels 18.1.2011, COM(2011) 12 final, pp. 10-11.

[21] See Accompanying document to the White Paper on Sport, pp. 43-44, 47-48.

In *Walrave & Koch*[22] and *Donà v Mantero*[23], the European Court of Justice (ECJ) stated clearly that regulations based on nationality which limit the mobility of sportsmen are not in conformity with the principle of free movement of workers.

In its *Walrave*, *Donà* and *Bosman*[24] rulings, the ECJ recognised an exception to the principle of free movement of sportsmen for reasons which are not of an economic nature. The ECJ has since the early 1970s acknowledged that rules which restrict the nationality of players in national teams are to be considered as "pure sporting" rules and thus do not fall under (then) Articles 39 and 49 EC. In *Walrave* the ECJ stated that the rule of the International Cycling Union (Union Cycliste Internationale, UCI) requiring that the pacemaker must be of the same nationality as the stayer in "world cycling championships behind motorcycles" was in compliance with EC law.

In its Bosman ruling the ECJ stated: "Having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty, as in the case of the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service". In its interpretation of the principle of free movement for sportsmen, the Court formulated two types of prohibition. Firstly, the Court prohibited all discrimination based on nationality and declared nationality quotas in sport clubs not in conformity with article 39. Secondly, in order to ensure the full effectiveness of the principle of free movement of sportsmen (after the expiry of a contract) the Court also condemned obstacles to free movement. One consequence was the end of allowances for a transfer at the end of a contract.

The transfer system of players is an example of the specificity of sport. While no comparable phenomenon exists in other economic areas, transfers of players between clubs play an important role in the functioning of team sports, and, in particular, professional team sports. Transfer rules aim to protect the integrity of sporting competition and to avoid problems such as money laundering, but they must be in compliance with EU law. In its Bosman ruling, the Court of Justice unequivocally stated that "nationals of a Member State have, in particular, the right, which they derive directly from the Treaty, to leave their country of origin, to enter the territory of another Member State and reside there in order to pursue an economic activity. Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to free movement therefore constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned." Restrictive transfer rules may also constitute an infringement of EU competition law. The Bosman ruling stated that professional football is an economic activity and therefore subject to EU law.

[22] Case 36/74 of 12 December 1974.

[23] Case 13/76 of 14 July 1976.

[24] Case C-415/93 of 15 December 1995.

The judgement of the Court in the Bernard case[25], is of particular interest as it is the first ruling covering a sport-related case adopted after the entry into force of the Lisbon Treaty.. The ruling provides further insight into the Court's interpretation of the issue of free movement of professional sportspeople. The focus of the ruling concerns limitations to the rules on free movement of workers laid down in Article 45 TFEU, arising from training compensation schemes. The *Olympique Lyonnais* ruling confirms most of the elements and the legal reasoning developed by the Court in the Bosman ruling, at a distance of 15 years.

According to the Court, Article 45 TFEU does not rule out schemes which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of the training period, a young player signs a professional contract with a club in another Member State, on condition that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it. In the Bernard ruling, the Court confirmed an important point raised in the Bosman ruling, namely that the recruitment and training of young players is to be considered a legitimate objective of general interest. The Court also provided additional guidance for assessing whether training compensation schemes can be considered as suitable to attain this objective: according to the Court, such schemes must be related to the actual cost of training. This was not the case of the scheme discussed in the main proceedings, since it linked the payment to potential damages suffered by the clubs and was thus unrelated to the actual training costs. The Court offered another important element in order to assess whether training compensation schemes are inherent and proportionate to their legitimate objective: when carrying out this assessment, account should be taken of the costs borne by the clubs in training both future professional players and those who will never play professionally. The Court affirmed hereby the principle that training costs may be calculated on the basis of the so-called "player factor", i.e. the number of players that need to be trained in order to produce a professional player.

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[25] *Olympique Lyonnais,* case C-325/08, delivered on 16 March 2010.

damages suffered by the clubs and was thus unrelated to the actual training costs. The Court offered another important element in order to assess whether training compensation schemes are inherent and proportionate to their legitimate objective: when carrying out this assessment, account should be taken of the costs borne by the clubs in training both future professional players and those who will never play professionally. The Court affirmed hereby the principle that training costs may be calculated on the basis of the so-called "player factor", i.e. the number of players that need to be trained in order to produce a professional player.

When considering the autonomy of a federation to organize its competitions, two particular cases are relevant. In its *Deliège*[26] ruling, the Court stressed that selection criteria in judo based on a limit to the number of national participants in an international competition does not constitute a restriction on the freedom to provide services, as such a limitation may ensure certain important characteristics of sporting competitions and pursues a sporting interest only.

Furthermore, in 2000 in its *Lehtonen*[27] ruling, the Court considered that the setting of deadlines for transfers of players may meet the objective of ensuring the equity of sporting competitions (transfers late in the season may upset the competitive balance and damage the regularity of the competition). In order to be justified, rules of this type defined by sporting organisations may not go beyond what is necessary to achieve the legitimate aim pursued. In this case the proper functioning of the championship as a whole was 'inherent' to the sports organisation and the "transfer window" which prevented basketball players from joining another club during the season could be linked to the integrity of the competition. The Lehtonen case implied that certain restrictions on labour mobility may be justified in order to ensure certain important characteristics of sporting competition such as transfer windows.

Limited and proportionate restrictions to the principle of free movement, in line with Treaty provisions and ECJ rulings, can thus be accepted as regards:

- The right to select national athletes for national team competitions (Walrave);
- The acceptability of training compensation schemes for young players (Bernard);
- The need to limit the number of participants in a competition (Deliège);
- The setting of deadlines for transfers of players in team sports (Lehtonen).

[26] Case C-51/96 and C-191/97 of 11 April 2000.

[27] Case C-117/96 of 13 April 2004.

10.2. The application of EU competition law to the organisation of sport[28]

10.2.1. ECJ case law

Anti-doping rules (Meca Medina)

The economic importance of sport has grown dramatically in recent years and continues to grow. As a result, the Commission has had to deal with an increasing number of cases in the area of antitrust related to the sport sector and has resolved these cases either formally through decisions or informally.

The material provisions of the EC Treaty are [*now: Articles 101 and 102 TFEU, RS*]

- Article 81 which forbids agreements between undertakings and decisions by associations of undertakings that prevent, restrict or distort competition in the common market, subject to some narrowly defined exceptions; and
- Article 82 which prohibits the abuse by one or more undertakings of a dominant position within the common market.

It has long been established by the case-law of the Community Courts and the decisional practice of the Commission that economic activities in the context of sport fall within the scope of EC law, including EC competition rules and internal market freedoms. This has recently been confirmed specifically with regard to the anti-trust rules, Articles 81 and 82 of the EC Treaty, by the *Meca Medina* ruling of the European Court of Justice (ECJ).[29] This judgment is of paramount importance for the application of EC competition law to the sport sector since this is the first time the ECJ has ever pronounced on the application of Articles 81 and 82 to organisational sporting rules. In prior judgments the cases were decided solely on the basis of other provisions of the EC Treaty, most notably those on the freedom of movement for workers and the freedom to provide services. The very existence of an authoritative interpretation of the anti-trust provisions of the Treaty in the context of organisational sporting rules by the ECJ represents a significant contribution to legal certainty in this area.

The Community Courts and the Commission have consistently taken into consideration the particular characteristics of sport setting it apart from other economic activities that are frequently referred to as the "specificity of sport". Although no such legal concept has been developed or formally recognized by the Community Courts, it has become apparent that the following distinctive features may be of relevance when assessing the compliance of organisational sporting rules with Community law:

Sport events are a product of the contest between a number of clubs/teams or at least two athletes. This *interdependence between competing adversaries* is a feature specific to sport and one which distinguishes it from other industry or

[28] See: Commission Staff Working Document "The EU and sport: background and context", Accompanying document to the White Paper on Sport, Brussels, 11.7.2007, SEC(2007) 935, pp. 35-37, 38-40, 49 and 55.

[29] Case T-313/02, ECR 2004 II-3291, and Case C-519/04, ECR 2006 I-6991.

service sectors.

If sport events are to be of interest to the spectator, they must involve *uncertainty as to the result*. There must therefore be a certain degree of equality in competitions. This sets the sport sector apart from other industry or service sectors, where competition between firms serves the purpose of eliminating inefficient firms from the market. Sport teams, clubs and athletes have a direct interest not only in there being other teams, clubs and athletes, but also in their economic viability as competitors.

The organisational level of sport in Europe is characterised by a monopolistic *pyramid structure*. Traditionally, there is a single national sport association per sport and Member State, which operates under the umbrella of a single European association and a single worldwide association. The pyramid structure results from the fact that the organisation of national championships and the selection of national athletes and national teams for international competitions often require the existence of one umbrella federation. The Community Courts and the Commission have both recognized the importance of the freedom of internal organization of sport associations.

Sport fulfils important *educational, public health, social, cultural and recreational functions*. The preservation of some of these essential social and cultural benefits of sport which contribute to stimulating production and economic development is supported through arrangements which provide for a redistribution of financial resources from professional to amateur levels of sport (principle of solidarity).

Controversial discussions in the past have never called into question the recognition of these unique characteristics of sport. Rather, they centered on the question of the precise impact of the specificity of sport on the application of EC competition law. It was argued by some that so-called "purely sporting rules" automatically fall outside the scope of EC anti-trust rules and cannot, by definition, be in breach of those provisions.

The ECJ has unequivocally rejected this approach in *Meca Medina* and held that the qualification of a rule as "purely sporting" is not sufficient to remove the athlete or the sport association adopting the rule in question from the scope of EC competition rules. The Court insisted, on the contrary, that whenever the sporting activity in question constitutes an economic activity and thus falls within the scope of the EC Treaty, the conditions for engaging in it then are subject to obligations resulting from the various provisions of the Treaty including the competition rules. The Court spelled out the need to determine, on a case-by-case basis and irrespective of the nature of the rule, whether the specific requirements of Articles 81 EC or 82 EC are met. It further clarified that the anti-doping rules at issue were capable of producing adverse effects on competition because of a potentially unwarranted exclusion of athletes from sporting events.

In the light of *Meca-Medina*, it appears that a considerable number of organisational sporting rules, namely all those that determine the conditions for

professional athletes, teams or clubs to engage in sporting activity as an economic activity, are subject to scrutiny under the anti-trust provisions of the Treaty.

The landmark *Meca Medina* ruling has therefore substantially enhanced legal certainty by clearly pronouncing that there exists no such thing as a category of "purely sporting rules" that would be excluded straightaway from the scope of EC competition law.

This is not to say, however, that the ECJ has decided not to take into account the specific features of sport referred to above when assessing the compatibility of organisational sporting rules with EC competition law. Rather, it has ruled that this cannot be done by way of declaring certain categories of rules a priori exempt from the application of the competition rules of the Treaty. In other words, the recognition of the specificity of sport cannot entail the categorical inapplicability of the EC competition provisions to organisational sporting rules but it has to be included as an element of legal significance within the context of analyzing the conformity of such rules with EC competition law.

The second aspect of the *Meca Medina* ruling contributing to increased legal certainty, apart from clarifying under which conditions EC competition law is applicable to sporting rules, is the establishment of a methodological framework for the examination of the compatibility of sporting rules with Articles 81 EC and 82 EC [*now: Articles 101 and 102 TFEU; RS*]

The ECJ spelled out that not every sporting rule that is based on an agreement of undertakings or on a decision of an association of undertakings which implies a restriction of the freedom of action is prohibited by Article 81(1). In assessing the compatibility with this provision account must be taken of the *overall context* in which the rule was adopted or the decision was taken or produces its effects, and more specifically, of its *objectives***;** and whether the restrictive effects are *inherent* in the pursuit of the objectives; and are *proportionate* to them.

In applying those principles to the case at hand, the ECJ found that the objective of the challenged anti-doping rules was to ensure fair sport competitions with equal chances for all athletes as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The restrictions caused by the anti-doping rules, in particular as a result of the penalties, were considered by the ECJ to be "*inherent in the organisation and proper conduct of competitive sport*". The ECJ also carried out a proportionality test examining, with a positive result, whether the rules were limited to what is necessary as regards (i) the threshold for the banned substance in question and (ii) the severity of the penalties.

This demonstrates that the instruments of EC competition law provide sufficient flexibility in order to duly take into account the specificity of sport and illustrates how the distinctive features of sport play an essential role in analyzing the admissibility of organisational sporting rules under EC competition law. Where these features form the basis of a legitimate sporting objective, a rule pursuing that objective is not in breach of EC competition law provided that restrictions contained

in the rule are inherent in the pursuit of that objective and are proportionate to it. It needs to be underscored that the *Meca Medina* ruling excludes the possibility of a pre-determined list of sporting rules that are in compliance with or in breach of EC competition law. Apart from the refusal by the ECJ to recognise purely sporting rules as automatically falling outside the scope of the Treaty competition rules or automatically compliant with them it is the requirement of a proportionality test that prevents any general categorisation. That test implies the need to take account of the individual features of each case. Even for the same kind of rule (e.g. licensing rules for sport clubs) conditions may and do vary greatly from sport to sport and from Member State to Member State (e.g. depending on the national legal obligations relating to financial management and transparency there may or may not be a need to include licensing requirements of a particular type in the statutes of a sport association). In many if not most cases there are many conceivable shapes and forms of any particular type of rule. This, as well as the interrelation with other rules, the assessment of which is often indispensable to judge the proportionality of a certain regulation as a whole, renders it virtually impossible to comment on the compatibility of certain types of rules with EC competition law in general terms.

Nevertheless, the body of existing case law of Community Courts, relating to the application of Treaty provisions other than the competition rules, as well as the decision-making practice of the Commission concerning Articles 81 EC and 82 EC can assist in identifying the types of rules that may normally be considered not to infringe EC competition rules. These decisions will have to be reviewed in the light of the *Meca Medina* judgment but they remain relevant inasmuch as they identify objectives that may be recognized as legitimate within the context of carrying out the examination outlined above. Bearing in mind the proviso that a specific assessment based on the circumstances of each individual case involving, most notably, a proportionality test, is indispensable and that therefore one can only express varying degrees of likelihood of compliance with EC competition law, the following distinction can be made on the basis of existing case law and decisional practice:

Players' agents (Piau case)

As regards the compatibility of federations' rules with EU competition law, even if the restrictions they impose on these sport-related professions are not likely to be considered inherent in the pursuit of a legitimate sporting objective, they may nevertheless be justified under Article 81(3) or Article 82 EC (now: Articles 101 and 102 TFEU). The aim of a football agent is to introduce a player for a fee to a club or clubs to each other with a view of employment. In the Piau case the Court of First Instance considered that this activity clearly does not pursue a purely sporting interest. The CFI questioned the legitimacy of FIFA's right to regulate the profession of football agents – which would normally be the prerogative of public authorities -, a profession which is not specific to sport

and which is of unequivocally economic nature. However, the CFI acknowledged that the players' agent profession needs to be supervised by some entity. It has recognised as legitimate the objective for raising professional standards for players' agents by introducing a qualitative (as opposed to quantitative) selection in the quasi total absence of any national laws or self-regulation in that respect.[30]

The Piau case does *not* represent a sporting exception as is explicitly stated in the CFI ruling (para. 105): "… the applicant's argument that the 'specific nature of sport' may not relied on to justify a derogation from the rules on competition must be rejected as irrelevant. The [Commission's] contested decision is not based on such an exception and envisages the exercise of the occupation of players' agent as an economic activity, without claiming that it should be accepted as falling within the scope of the specific nature of sport, which in fact it does not."

According to the Accompanying Document to the White Paper[31] the *Piau* case concerned a sporting rule adopted in relation to an activity ancillary to sport (football agents) and not relating to the sporting activity itself (football). It may be questioned whether this distinction is reasonable from the perspective of (international) sports law taken as a coherent, comprehensive legal branch of law (cf., the very existence of FIFA Players' Agents Rules; who would and could deny that the agents are members of the football family?!).[32] So, the Piau case in fact was the first time the ECJ has ever pronounced on the application of articles 81 and 82 EC (now: Articles 101 and 102 TFEU) to organisational sporting rules.

10.2.2. Commission decision-making practice

Sports media rights

The Commission has taken decisions in three cases involving the joint selling of rights to broadcast games played by football clubs on the basis of Article 81 EC, namely *UEFA Champions League*[33], *German Bundesliga*[34] and *FA premier League*[35]. The Commission's consistent policy has been that joint selling constitutes a horizontal restriction of competition under Article 81(1) EC. At the same time, the Commission also acknowledges that joint selling creates certain efficiencies and may, under certain circumstances, fulfil the conditions of Article 81(3) EC and therefore not constitute a violation of Article 81 EC. The Commission remedied

[30] CFI and upheld in appeal by the ECJ: Cases T-193/02 and C-171/05P, ECR 2005 II-209 and ECR 2006 I-37 respectively. See also, Roberto Branco Martins, "The *Laurent Piau* Case of the ECJ on the Status of Players'Agents", in: Simon Gardiner, Richard Parrish and Robert C.R. Siekmann (Eds), *EU, Sport, Law and Polic – Regulation, Re-regulation and Representation*, The Hague 2009, pp. 247-258, and previously publisghed in 1-2 The international Sports Law Journal (ISLJ) (2007) pp. 43-51.

[31] At p. 35, n. 99.

[32] Robert C.R.Siekmann, "What is Sports Law? A Reappraisal of Content and Terminology", in: The International Sports Law Journal 2011/3-4 (forthcoming).

[33] Case 37398, OJ 2003 L 291/25.

[34] Case 37214, OJ 2005 L 134/46.

[35] IP/06/356 of 22 March 2006.

the negative effects of joint selling by requiring, e.g., the selling of rights in several individual rights packages following an open and transparent tendering process. Moreover, the duration of rights contracts should not exceed three years and unsold rights would fall back for individual exploitation by the clubs. The abovementioned decisions had the effect of opening up media rights markets to broadcasters and new media service providers by making several different rights packages available while safeguarding the social and cultural aspects of football. This prevented the concentration of all available rights in the hands of a single media operator and ensured that a maximum amount of rights was made available to sports fans. The question if and under which conditions joint selling can be justified on the basis of Article 81(3) has to be examined in the light of the specific circumstances of each individual case.

The Declaration of the Nice European Council of 7-9 December 2000 on the specific characteristics of sport and its social function in Europe mentions (point 15) that the sale of television broadcasting rights is one of the greatest sources of income today for certain sports. The European Council stated that moves to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, would be beneficial to the principle of solidarity between all levels and areas of sport. The joint selling of media rights for sporting competitions may facilitate the redistribution of revenues based on the principle of mutual support and based on the principle that these revenues should be redistributed to all those involved in sport: amateurs, volunteers, young people in training centres, sports teachers etc. However, it is important to note that a system of joint selling does not automatically lead to an equitable redistribution of the revenues. It is the primary responsibility of the national league associations, sport associations and clubs concerned to agree on a form of redistribution that is in line with the principle of solidarity expressed in the Declaration of Nice European Council. It should be noted that financial solidarity can also be achieved on the basis of individual selling of sports media rights, provided that it is accompanied by a robust solidarity mechanism.

"At home and away from home" rule (Mouscron case)

The French city of Lille had lodged a complaint against UEFA under Article 82 EC as regards a rule for UEFA competitions to the effect that each club must play its home match at its own ground. The Belgian football club Excelsior Mouscron had thus been refused to switch its home match in the 1997/98 UEFA Cup against FC Metz from Mouscron to Lille. The Commission rejected the complaint as it considered the "home and away from home" rule as well as the exceptions contained therein to constitute a sporting rule that did not fall within the scope of Articles 81 and 82 EC. The Commission found that the organisation of football on a national territorial basis was not called into question by Community law. The Commission considered the rule indispensable for the organisation of national and international competitions in view of ensuring equality of chances between clubs. The Commission also found that the rule did not go beyond what was necessary.

The Commission noted that the exceptions had to be applied in an objective and non-discriminatory manner in order to escape Articles 81 and 82 EC. The Commission considered that Lille was active in the **market for the renting of stadiums.** The Commission also considered whether UEFA was dominant in the **market for organising European club competitions in football** although the question was left open.[36]

Multiple ownership of sport clubs/teams (ENIC case)

ENIC, a company that owned stakes in six professional football clubs in various Member States had lodged a complaint against a rule adopted by UEFA in 1998, which stated that no two clubs or more participating in a UEFA club competition may be directly or indirectly controlled by the same entity or managed by the same person. The Commission rejected the complaint concluding that there was no restriction of Article 81(1) EC because the objective of the rule was not to distort competition, but to guarantee the integrity of the competitions organised by UEFA. It concluded that the rule *"aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competitions.. "* The Commission also found that the rule did not go beyond what was necessary to ensure its legitimate aim: i.e., to protect the uncertainty of the results in the interest of the public.[37]

Ticketing

In *1998 Football World Cup*[38] the European Commission stated that ensuring effective safety at football matches is essential and may, in particular circumstances, justify the implementation of special ticket sales arrangements by tournament organisers. Nevertheless, in order to determine whether and, if so to what extent, security considerations may justify ticketing arrangements which would otherwise be deemed to infringe Community law (Article 82 EC Treaty), each set of arrangements must be considered on their individual merits in the light of an objective assessment what is necessary to achieve reasonable security objectives such as the segregation of rival groups of supporters by way of ticket allocation distributed by UEFA member associations among their own supporters and related to seats located at opposite ends of the stadium, non-transferability of tickets, etc. In *1998 Football World Cup* no explicit reference was made to the concept of sport specificity.

Access to major sporting events on television

The "Television without Frontiers' Directive"[39] recognised the specificity of sport[40]. in the media context and its importance for (television) viewers. In Article

[36] Case 36851; IP/99/965 of 9 December 1999.

[37] Case 37806 of 25 June 2002.

[38] Case 36888, OJ 2000 L 5/55.

[39] Council Directive No. 89/552/EEC of 3 October 1989.

[40] N.B. The term is explicitly used by the Commission in this context in the Accompanying Document to the White Paper on Sport, at p. 53, paragraph 4.8. Media.

3a (now, see below: 14) it provided for a possibility for the Member States to take measures to ensure in respect of events regarded as being of major importance to society (sport events being one of the foremost examples), that a significant part of the public is not deprived of the possibility of following such events on free television. The national lists, once notified to the Commission, are verified for their compatibility with Community law and published in the Official Journal. The new Article 3j (in the final version: 15) of the Audiovisual Media Services Directive[41] enhances access of viewers to events of high interest for society (including sport events): broadcasters exercising exclusive rights to such events have to grant other broadcasters the right to use extracts for the purpose of short news reports (based on the right to information of European citizens).

Summary: sporting exceptions

On the basis of a close-reading of the full texts of the relevant Court case-law and Commission decision-making practice, the sporting exceptions and their justification(s) may be summarized as follows:

discrimination of EU non-nationals in national representative teams / justification: the formation of national teams is a question of purely sporting interest only (see: the particular nature and context of international representative matches) and as such has nothing to do with economic activity (Walrave para. 8/ operative part 2 ("dictum"); Donà para.14/operative part 1; Bosman 123);

training compensation schemes for young players ("joueurs espoirs") / justification: in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate; the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (Bernard/Olympique Lyonnais para. 39 with reference to Bosman para. 106; and Bernard para. 41/see also the "dictum" of the Bernard case);

limitation of the number of participants in a competition (other than national teams) / justification: such a limitation is inherent in the organisation of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted ; the adoption of one system for selecting participants rather than another must be based on a large number of considerations unconnected with the personal situation of any athlete, such as the nature. The organization and the financing of the sport concerned (Deliège paras 64-65 and 68 / "dictum");

transfer deadlines in team sports / justification: the objective of ensuring the regularity of sporting competitions; late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the

[41] Council Directive No. 2010/13/EU, OJ No. L 95 of 15 April 2010, and OJ L 263 of 6 October 2010 (corrigendum).

teams taking part in that championship, and consequently the proper functioning of the championship as a whole (Lehtonen paras. 53-54);

anti-doping rules / justification: the general objective of the rules is to combat doping in order for competitive sport to be conducted fairly and it includes the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport; a restriction of competition is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes;

supervision of the players' agents profession / "sport specificity" is not applicable (no sporting exception). (Piau para. 105 CFI);

sports media rights / justification: the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, is beneficial to the principle of solidarity between all levels and areas of sport.

"at home and away from home" rule / justification: this rule must be assessed within the context of the national geographical organization of football in Europe; the rule which stipulates that every club must play its home match at its own ground and not in its opponent's country, is needed to ensure equality between clubs (Mouscron);

no multiple ownership of sport clubs / justification: the main purpose of the rule is to protect the integrity of the competition and to avoid conflicts of interests that may arise from the fact that more than one club controlled by the same owner or managed by the same person play in the same competition; it aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competition between the participants, as consumers may suspect that teams with a common owner will not genuinely compete; without the rule, the proper functioning of the market where the clubs develop their economic activities would be under threat, since the public's perception that the underlying sporting competition is fair and honest is an essential precondition to keep its interest and marketability; if sporting competitions were not credible and consumers did not have the perception that the games played represent honest sporting competition between the participants, the competitions would be devaluated with the inevitable consequence over time of lower consumer confidence, interest and marketability; without a solid sporting foundation, clubs would be less capable of extracting value from ancillary activities and investment in clubs would lose value.[42] (paras 28, 32 ENIC);

ticketing arrangements / justification: spectators' safety and security at football matches;

free access to sporting events of major importance to society on television / justification: right of information of European citizens.

[42] Should two clubs under joint control or ownership meet at a certain stage of the competition, the public's perception of the authenticity of the result would be jeopardised; in the present case, for example, ENIC's business interests in the field of the provision of betting services could be seen by some as an obstacle to the development of fair competition on the pitch (para. 35 ENIC).

11. SUMMARY AND CONCLUSION

The classical and still current central (legal) question in the debate on the position of sport in the European Union is whether sport is 'special,' whether it deserves specific treatment under European Law and to what extent and why. In other words, should sport be exempted from the EC Treaty? The "specificity of sport" is the legal concept (and method or instrument of appreciation or assessment) that is applied by the European Commission and the European Court of Justice to tackle this question on a case-by-case basis, in order to determine whether the sporting rules and regulations concerned are acceptable in EU law. Do they have justifiable objectives? Next to that, the proportionality test requires that each case is assessed on its own merits according to its own particular features or characteristics. The concept of "sport specificity" may be distinguished in sport specificity *lato sensu* and sport specificity *stricto sensu*. Sport specificity *lato sensu* concerns the external, societal context of sport, the "extra-sportive" role and function of sport, in particular professional sport, as a policy instrument in the society at large. Sport specificity *stricto sensu* applies to how sport is regulated and organised. It is the internal, purely sporting side of the coin. *Lato sensu*, the importance of the social (cultural, recreational, health) and educational functions of sport was stressed in the Court's case-law and basic documents like the Amsterdam and Nice Declarations and is codified in the "sport article" 165 of the Lisbon Treaty. Sport is said to play a morally elevating role in society through its traditional values of fair play, solidarity, fair competition and team spirit. Additionally, the Audiovisual Media Services Directive recognises the specificity of sport with regard to securing free television access to sporting events of major importance (Olympic Games, Football World Cup and European Championship, etc. and major national events like, for example, Wimbledon and the Tour de France) to society. This in fact is a sporting exception which may be implemented by Member States on the basis of the Directive. It in fact is a recognition of the "breaking news" value and societal relevance of major sporting events which give them an exceptional status. However, in this case the sport industry is not unique, "special" in comparison with other industrial sectors. *Stricto sensu*, the organisation of sport on a national basis, the principle of a single federation per sport, the pyramid structure of open competitions, separate competitions for men and women, voluntariness, the position of amateur sport, the interdependence between competing adversaries, the principle of equal opportunities and uncertainty of results (competitive balance), financial solidarity (especially, professional football), national teams of "(EU-)nationals", compensation schemes for young players (football), limitation of the number of participants in a competition (other than national teams), transfer deadlines in team sports, anti-doping rules, "at home and away from home" rule (football), no multiple ownership in sport clubs, ticketing arrangements for safety reasons, are particular characteristics of sport(s) itself - at least from an EU law perspective. The most specific, most purely sporting rules are the Laws of the Game for each individual sport *(lex ludica)*. The Laws of the Game are in fact the very core of sports law and apply worldwide. By their very nature they are

not contrary to EU competition law if EU competition law would apply, since the "playing field" is "level" for competitors, in individual and team sports, in every aspect. In football the playing field is symmetrical, divided into two completely equal halves, the duration of a game is divided into two equal halves of each 45 minutes, opposing teams change sides (halves) after lemon time, competitions are based on a system of home and away matches for all teams equally.

The applicability of the concept of sport specificity was explicitly not accepted by the ECJ in the Piau case (players' agents) and of course in Bosman and Donà either (transfer system, nationality clauses in professional club football). There is a number of other issues regarding which the sport specificity option was not even considered in principle, because that would have been totally out of order. Of course, these cases are still part of (European) sports law, but in a more marginal position one might say. This case-law (or Commission practice) is not about testing sporting rules against EU law, but about determining whether {category 1) EU law is also applicable to a particular sporting issue, or (category 2) whether particular sports-related national legislation or decision-making is in conformity with EU law, or (category 3) whether particular sporting rules or practices of a completely non-sport specific character are acceptable under EU law. These cases and issues are really "off the field of play"! Examples are: (category 1) equal treatment clauses for non-EU nnationals in agreements with third countries (Kolpak, Simutenkov, Kahveci)[43]; (category 2) ECJ rulings with regard to gambling and/or betting services; (category 3) FIA case[44]: in this case the Commission dealt with a conflict of interest situation arising from the fact that a sport association was not only the regulator but also the commercial exploiter of a sport. FIA rules prohibited drivers and race teams that held a FIA licence from participating in non-FIa authorized events. Circuit owners were prohibited from using the circuits for races which could compete with Formula One. Another similar case is MOTOE.[45] MOTOE is a non-profit-making association governed by private law, whose object is the organization of motorcycling competitions in Greece. MOTOE's activities consisted not only in taking part in administrative decisions authorising the organization of motorcycling events, but also in organizing such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts.

[43] Cases C-438/00, C-265/03, and C-152/08.

[44] Press releases IP/99/434 of 30 June 1999, and IP/01/1523 of 30 October 2001.

[45] Case C-49/07.

SPECIFIČNOST SPORTA: IZNIMCI U SPORTU U PRAVU EU

Klasično i još uvijek aktualno (pravno) pitanje u raspravi o položaju sporta u Europskoj Uniji je „ specifično“, bilo da zaslužuje specifični tretman prema Europskom pravu ili do koje mjere i zašto. Drugim riječima, treba li sport biti izuzet od Sporazuma EC? Ovo je rasprava o onom što se zove „ specifičnosti sporta i “ iznimka u sportu“. Ovaj članak se bavi općenitim okvirom koje institucije EU su razvijale glede specifičnosti sporta. Što su u stvari temeljne karakteristike? Koje su sportske iznimke prihvaćene, koje ne i zašto? Koji je rezultat usporedbe iznimaka i opravdanja, koje je stanje specifičnosti sporta uopće i njegova primjena od strane Komisije kao svakodnevna izvršna vlast EU i Europski sud pravde kao vrhovna pravosudna vlast? Slučajevi i pitanja će se kategorizirat prema jeli se oni bave „domaćim tržišnim slobodama (mobilnost radnika i pružanje usluga)“ ili EU tržišnim pravom u organizaciji sportskih stvari.

Ključne riječi: *EU pravo, sportsko pravo, specifičnost sporta, iznimke*