

Sports organisations, autonomy and good governance

Working paper for Action for Good Governance in International Sports Organisations (AGGIS) project

By Michaël Mrkonjic, PhD Candidate, Swiss Graduate School of Public Administration, University of Lausanne, Switzerland, and Arnout Geeraert, HIVA - Research Institute for Work and Society; Institute for International and European Policy; Policy in Sports & Physical Activity Research Group, KU Leuven, Belgium

Introduction

Only recently, the call for good governance has finally reached the traditionally closed sporting world (e.g. Sugden and Tomlinson, 1998; Katwala, 2000; IOC, 2008; Pieth, 2011; Council of Europe, 2012; European Commission, 2012). That this happened in sport much more slowly than in other sectors, such as for failed States or misbehaving corporations in the 1990s, has to do with the fact that the world of sport is traditionally regulated in all its aspects through a closed, self-governing network with its own rules and regulations. Sports organisations tend to act in self-organizing, interorganizational networks characterized by interdependence, resource-exchange, rules of the game, and significant autonomy from the state (Rhodes, 1997). For almost a century, the sporting network was able to exercise its self-governance without any significant interference from states or other actors (Geeraert *et al.* 2012). However, the quality of the self-governance of International Non-Governmental Sport Organisations (INGSOs)¹ has been increasingly questioned due to the commercialisation of sport, which made sport subject to the more avaricious and predatory ways of global capitalism (Andreff 2000, 2008; Sugden 2002; Henry and Lee 2004), but also painfully exposed governance failures such as organisational corruption (such as the Salt Lake City scandal in 1998). Hence, for more than ten years now, the discourse on good governance in sports organisations has become common in the political and sports sphere and this has appeared in relation with the discourse on their autonomy.

Recognising the economic and social function of sport, the European Union (EU) acquired a certain degree of legitimacy in the political steering of sports governance (Garcia, 2009) if INGSOs are not able to protect these functions. That is for instance the case with regard to cases of organisational corruption, doping or match-fixing⁵³ and adherence to principles of good governance is then perceived as a cure for these diseases. In its 2011 Communication on the European dimension in sport, the European Commission even stresses that good governance is a condition for the self-regulation and autonomy of the sports sector (European Commission, 2011).⁵⁴

Although the body of academic literature on good governance in sport is progressively swelling (see for instance Henry and Lee, 2004; Chappelet and Kübler-Mabott, 2008; de

⁵³ This is particularly true after the entry into force of the Treaty of Lisbon in 2009, when the EU has been given an explicit, albeit very limited, role in the field of sport.

⁵⁴ Which must also respect EU law.

Zwart and Gilligan, 2009), a reflection on the meanings and definitions of the concept of autonomy seems neglected by research (see f.i Chappelet, 2010), except perhaps from a legal perspective. In practice, the autonomy of sport is often assimilated with broad concepts such as independence or freedom, or narrower ones such as self-government and self-determination (Thing and Ottesen, 2010) or self-regulation of the sporting world. This paper aims to present an overview of the different possible conceptualisations of autonomy applied to sports organisations: political autonomy, legal autonomy, financial autonomy, pyramidal autonomy, functional autonomy, supervised autonomy and negotiated autonomy. Assuming that there may be several conceptualisations of autonomy that apply for the same situation, this paper tries to draw lines of thought on the relation between the concepts of sporting autonomy and good governance in sport. Given the general purpose of the AGGIS project, the focus of this paper is on the European context.

Political autonomy

Political autonomy can be considered as the historic understanding of the relationships between sports organisations and their environment. Szymanski (2006) describes how modern sport developed in England out of new forms of associativity created during the European enlightenment. That period saw a political sphere dominated by the political ideas of John Locke, often credited as the father of (classic) liberalism. His theory of the social contract advanced the idea that the State itself was a kind of voluntary association that individuals chose to enter out of a state of nature. In his essay “A letter concerning toleration”, Locke takes it for granted that voluntary associations have the right to establish themselves and create their own rules and regulations. As a consequence, in Britain, “the state showed little appetite for regulation or intervention” (Clark, 2002, p. 97) while in the rest of Europe, intellectually, the marriage of the state with the developments of sport clubs can be traced back to Rousseau, whose concept of the social contract left little place for independent voluntary associations.⁵⁵ The influence of the British in the global spread of the governing structures of football eventually made sure that FIFA was established in 1904 by a class of people who believed in the separation of sport and state as a sacred principle (Tomlinson, 2000).

An equally powerful organisation, the International Olympic Committee (IOC), was founded in 1894 by Pierre de Coubertin. Since its creation, the International Olympic Committee (IOC) has been the supreme authority on all questions regarding the Olympic Movement, a complex system created to regulate the Olympic Games. A product of late nineteenth-century liberalism, de Coubertin strongly believed that politicians could only violate sports integrity stating that: “the beam formed by the goodwill of all members of an autonomous sport, relaxes when the giant figure of this dangerous and imprecise figure called State appears” (de Coubertin, 1909 cited in Chappelet, 2010). Indeed, the Olympic vision emphasised the improvement of the individual and attention had to be on the athletes, not on the countries they represented (Chappelet, 2010). Hence, it was clear

55 In his work “The social contract”, in Book II, Chapter 3, Rousseau basically writes that private associations within the state are harmful, because they provoke faction which works against the general will. These ideas were influential in the development of sports organisations because of his concern with the physical and moral development of the Young, as set out in popular discourse “Emile, ou l’*éducation*”.

what de Coubertin envisioned: a central role for sports federations. Nevertheless, the word “autonomy” appears for the first time in the Olympic Charter only in 1949 (Chappelet, 2010): in order to be recognised by the International Olympic Committee (IOC), the National Olympic Committees (NOCs) must be free from any interference from national authorities.⁵⁶ The formalisation of the concept of autonomy can be explained by the post-war political context and the role of communist countries which tended to develop a systematic instrumentalisation of sport for policy aims, while federations, in the quest for an identity⁵⁷, are constantly struggling for their autonomy (Jeu, 1989). Indeed, exploiting sport as a diplomatic weapon in international relations became common in the former Soviet Union. It led not only to the intervention of the government in the selection of members or the creation of “State sportsmen” (i.e. embracing or forced to embrace the communist ideology), but also less gloriously to systematic doping (Terret, 2010; Bose, 2012).

Both FIFA and the IOC have been very influential on the creation of other INGSOs and hence, the sports world generally eschews state intervention in its activities. On the European continent, governments have also been reluctant to intervene in the sports sector as, even now; they tend to regard it more as a cultural industry or leisure activity rather than a business (Halgreen, 2004, p. 79). Of course, within EU Member States, different structures of sports policy exist, varying from systems with high degrees of state involvement to systems with close to no government interference in sport (Henry, 2009). Nevertheless, in most of European countries, NOCs are politically independent. They are “generally working on premises they own” (Chappelet and Kübler-Mabbott, 2008, p. 55). But the level of autonomy of an NOC varies from one country to another in different parts of the world. There are several situations where NOCs are controlled by the national government. In some situations, notably in “African, Asian and Latin American countries, the NOC is an annex to the Ministry of sport” (Chappelet and Kübler-Mabbott, 2008, p. 55) and the NOC is Minister of Sport, or even President of the Country.

Legal autonomy

The legal autonomy of a sports organisation can be defined as the private autonomy of the organisation to adopt rules and norms that have a legal impact in a legal framework imposed by the State,⁵⁸ be it at national or at international level. At national level, the legal autonomy of sports organisations can be under the scope of civil law for organisational construct, fiscal law for tax exemptions or corporation law for contractual issues. All INGSOs that are seated in Switzerland are non-profit associations (except the World Anti-Doping Agency which is incorporated as a foundation). They fall under the provision of the Swiss Civil Code (articles 60ss) which provides minimum requirements for an association to be created, such as writing and adopting statutes, having an ideal objective

56 Translated and adapted definition from “Pour être valablement reconnu par le C. I. O., un Comité national olympique doit remplir les conditions suivantes [...] être indépendant et autonome” (International Olympic Committee, 1949, p.11).

57 The author simply defines identity as internal and external differentiation (Jeu, 1989, p.161)

58 Translated and adapted definition from “Les organisations sportives ne peuvent édicter des règles ou des normes de portée juridique que dans les limites de leur autonomie privé, c’est-à-dire dans le cadre que le droit étatique laisse à leur libre disposition “ (Oswald, 2010, p.155)

and resources. Inherent to the hierarchy of norms, most of the articles are considered as non-binding. However, some of them such as article 75⁵⁹ have the value of mandatory law. In line with a federal act considering them as having a public utility (Host State Act, 2008), INGSOs are exempt from tax on the federal level. Their particular status has been reaffirmed in 2011, with the adoption of the new law on sport (Loi sur l'encouragement du sport, LESp) stipulating that the Swiss confederation “shall ensure, within the limits of its powers, that international sporting federations enjoy favourable conditions for their activities in Switzerland” (LESp, article 4.3) The legal autonomy is also under the scope of national ordinary courts⁶⁰. However, only a limited number of cases were brought before them.⁶¹ In the same vein, Miège (2000), Camy et al., (2004), and Chaker (2004) have developed a typology of interventionist and non-interventionist European countries by identifying the existence of a sports law and the presence of a provision on sport in the Constitution. At international level, the Council of Europe already recognised this conceptualisation of autonomy in the early 1990s through the European Sports Charter (1992). The Charter stipulates that “voluntary sports organisations have the right to establish autonomous decision-making processes within the law” (Council of Europe, 1992). Accordingly, in its 2000 ‘Nice Declaration’ on sport, the European Council stressed that “[...] with due regard for national and Community legislation [...], it is the task of sporting organisations to organise and promote their particular sports” (European Council, 2000).

In many cases, the legal autonomy of sport has been challenged by the decisions of the Court of Justice of the EU (CJEU). Indeed, athletes have rights and obligations deriving from ordinary law but also from the rules of the sports federations they are registered with (Parrish, 2003). Many of those rules are captured by the EU's internal market competence. The establishment of an internal market,⁶² the integration of the Member State's economies as a means to achieve the objectives of the Union such as a balanced economic growth, remains one of the principal tasks entrusted to the Union⁶³. In order to secure the ability to deploy factors of production freely across frontiers, the Member States are prohibited to discriminate against goods, persons, services and capital from other Member States (EU freedom of movement law). Within the internal market, there should be free competition, favouring an efficient allocation of resources.⁶⁴ The EU “rules on competition” (EU competition law) comprise rules prohibiting distortion of competition by undertakings and rules restricting State Aid granted to undertakings.

Rules issued by sports organisations may potentially breach EU competition and freedom of movement law since sport, when it constitutes an economic activity, is subject to EU

59 « Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof » (Swiss Civil Code, Article 75)

60 See for instance for Switzerland, Baddeley, 1994; Zen-Ruffinen, 2002 ; Oswald, 2010 ; Valloni and Pachmann, 2011. See for instance for France, Simon, 1990 and Karaquillo, 2011.

61 One of the recent examples refers to the decisions of the Swiss Federal Court against a disciplinary measure imposed by FIFA and endorsed by the Court of Arbitration for Sport against a football player on the basis of a violation of public order (Matuzalem case).

62 Since the Single European Act (SEA, 1986), the term “common market” is gradually replaced by “internal market”. Since the entry into force of the Lisbon Treaty, the internal market is the sole expression of the objective of market integration pursued by the EU.

63 Article 3(3) Treaty on European Union (TEU)

64 Articles 119(1) and (2), 120 and 127(1) TFEU.

law.⁶⁵ The CJEU has dealt with the freedom of movement and sport in numerous cases, most notably in the ‘Bosman case’. It is arguably the area of EU law which has had the most substantial impact on sport. Competition law has mainly had an impact on sport rules due to the far-reaching powers of the European Commission as public enforcer of EU competition law (Geeraert, Bruyninckx and Scheerder, 2012, p. 37-40). Hence, it is clear that EU law constitutes a clear limitation to the legal autonomy of sports organisations, as they in principle cannot devise rules that are contrary to EU law. Generally, in case such rules pursue a legitimate (sporting) aim, they may not be deemed to breach EU law when the application of those rules do not go beyond what is necessary for the achievement that purpose. Case law by the CJEU provides invaluable guidance for the application of EU law to sport and as such, it is clear that certain rules will not survive the proportionality test should they ever become under scrutiny before the Court. Obviously, the CJEU did not rule on every type of sporting rule yet, as it can only rule on the cases it gets and then only insofar as the question of their conformity with EU law is part of the constituent elements of the reference for a preliminary ruling made to it. That leaves many questions on conformity with EU law with regard to sporting rules unresolved and consequently, it is not yet clear to what extent EU law limits the legal autonomy of sports organisations.

Financial autonomy

Historically, sport relies on public financial support and even today, sport often relies on government grants (see Eurostrategies *et al*, 2011). Nevertheless, with the commercialisation of sport came the growing independence of sports organisations. A key factor in that regard has been the breakthrough of sports broadcasting. Indeed, television broadcasting of big sporting events provided access to TV-viewers at any significant international competition convened anywhere around the world and hence, the genuine globalisation of the sport economy took off (Andreff, 2008). In Europe, the dismantling of public broadcasting monopolies in Europe in the 1980’s⁶⁶ has fostered competition in the industry and consequently, the European consumer increasingly had more public and private channels to choose from (Bourg and Gouguet, 1998). Parallel with those evolutions, since the beginning of the 1980s, a technological revolution has taken place, adding first cable and then satellite and digital television to traditional terrestrial television, while also expanding the available number of channels. The extra capacity persuaded governments to license extensive competition in broadcasting (Szymanski, 2006, p. 430). Moreover, satellite and cable broadcasting brought with it the opportunity to charge consumers directly for signal reception. By the end of the 1980s, a significant number of new competitors offering pay-TV services vied on the European markets. Furthermore they all realised that two main drivers would attract subscriptions: Hollywood movies

65 As has been established in CJEU, Case 36/74 Walrave [1974] E.C.R. 1405. This was later confirmed in numerous sport cases.

66 Privatisation in Europe occurred as a means of reducing the level of governmental debt, to develop and expand domestic capital markets and due to EU directives aimed at liberalising markets previously dominated by state-owned enterprises. Throughout European countries, public service monopolies were gradually removed and finally, in 1989, the EU Directive “Television without Frontiers” required all EU Member States to grant private broadcasters access to their domestic markets. The purpose of this Directive was to promote the process of European integration through cross-border transmissions. Such transitions would be a source of cultural enrichment, would provide the impetus for increased technical innovation in Europe in transmission media and would prevent the dominance of the big American media Corporations (European Commission, 1984; Presburger and Tyler, 1989, pp. 496-497).

and premium sport (Jeanrenaud and Késenne, 2006, p. 7). Hence, we witnessed a sharp increase in broadcasting rights for major sports events. Another outcome of TV broadcasting has been a globalisation and a sharp increase of sponsorship fees for sport. In fact, without television, it would be difficult to imagine that companies would be willing to spend the vast sums of money they spend today for the privilege of being associated with a sporting event, a club or even a player (Jeanrenaud, 2009, p. 53-54).

These evolutions enabled in particular INGSOs to generate vast amounts of revenue by marketing their major events. For instance, broadcast revenues and corporate sponsorship through the Olympic Partner (TOP) programme are currently the most significant source of revenue for the IOC (Chappelet and Kübler-Mabbott, 2008). The 2010 FIFA World Cup made EUR 1,802 million through the sale of television rights, and EUR 802 million via marketing rights. Overall, South Africa 2010 accounted for 87 per cent of FIFA's total revenue during the 2007-2010 period (FIFA, 2013). The revenue that INGSOs can make through their venue has made them independent from their member federations (Forster and Pope 2004, p. 102). Member federations of SGBs usually "own" the organisation since they have created it (Forster and Pope 2004, p. 107) and they have an important watchdog function.⁶⁷ Since INGSOs are *de facto* independent organisations, the danger exists that they will not act in the interest of their "owners", i.e. their member federations, and this necessitates the presence of accountability arrangements.

Pyramidal autonomy

Governing networks in sport, save for those in North America, are based on a model created in the last few decades of the 19th century by the Football Association (FA), the governing body of the game in England to this day (Szymanski and Zimbalist, 2005, p. 3). This implies that INGOs are the supreme governing bodies of sport since they stand at the apex of a vertical chain of commands, running from continental, to national, to local organisations (Miège, 2000; Croci and Forster, 2004). In other words "the stance taken by a governing body will influence decisions made in any organisation under that governing body's umbrella" (Hums and MacLean, 2004, p.69). Such networks are called pyramidal networks because their hierarchic organisational structure visually resembles the shape of a pyramid.

For instance, the football network is comprised of a set of autonomous, interrelated organisations with at the apex FIFA, the worldwide football federation. Under FIFA are five continental organisations,⁶⁸ which in their turn all have national associations beneath them. All the organisations in the network are in their own geographical/functional sphere of competence responsible for the regulation of football but they have to "report" to the organisations that stand above them in the network (Croci, 2001, pp. 2-3; Croci and Forster 2006, pp. 5-6). For instance, UEFA has to comply with FIFA's rules and regulations (FIFA Statutes: art. 20(3) a) and national football associations in Europe

⁶⁷ In this context it is important to note that the IOC was a top-down creation, whereas most other INGSOs are the creations of groups of national associations that voluntarily gave up their autonomy.

⁶⁸ Those are AFC (Asian Football Confederation), CAF (Confédération Africaine de Football), CONCACAF (Confederation of North, Central American and Caribbean Association Football), CONMEBOL (Confederación Sudamericana de Fútbol), OFC (Oceania Football Confederation) and UEFA (Union of European Football Associations of Union Européenne de Football Association).

are required to comply with and to enforce UEFA statutes and regulations in their jurisdiction (UEFA Statutes: Art. 7 (5)), but they are also obliged to ensure that clubs and leagues comply with the statutes, decisions and regulations of FIFA (FIFA Statutes: Article 13.1 (d)). Similar networks are to be found in most European sports (European Commission, 1998), but also globally, for instance with the Olympic Movement.

The IOC draws on the Olympic Charter to form its very own ‘Constitution’, which sets forth not only the fundamental principles and rules of the Olympic Games, but also the organisational and procedural rules governing the Olympic Movement and the statutes of the IFs ruling a given sport (Casini, 2009, p. 4 ; International Olympic Committee 2011, p.8). In this respect, if an International Sports Federation (IF) wishes to join the Olympic movement and obtain the recognition of the IOC, it must comply with the Olympic Charter and the World Anti-Doping Code of the World Anti-Doping Agency (WADA) (International Olympic Committee, 2011, p.51).

Olympic IFs are also members of associations representing their interests according to their participation in the winter or summer Olympic Games, the AIOWF and the ASOIF. IFs recognised by the IOC are members of the Association of Recognised International Sport Federations (ARISF). Although these three types of IFs maintain their autonomy in the organisation and the development of their sport, membership in these associations requires compliance with their respective statutes as well as the Olympic Charter. Finally, national federations (NFs) must comply with the statutes of the IF to obtain the recognition and the rights and obligations related to it. For instance, the International Association of Athletics Federations (IAAF) “shall comprise national governing bodies for Athletics which have been democratically elected in accordance with their constitutions and which agree to abide by the Constitution and by the Rules and Regulations. A national governing body (including its executive body) which has not been so elected, even on an interim basis, shall not be recognised by the IAAF” (IAAF Constitution: Art.4.1).

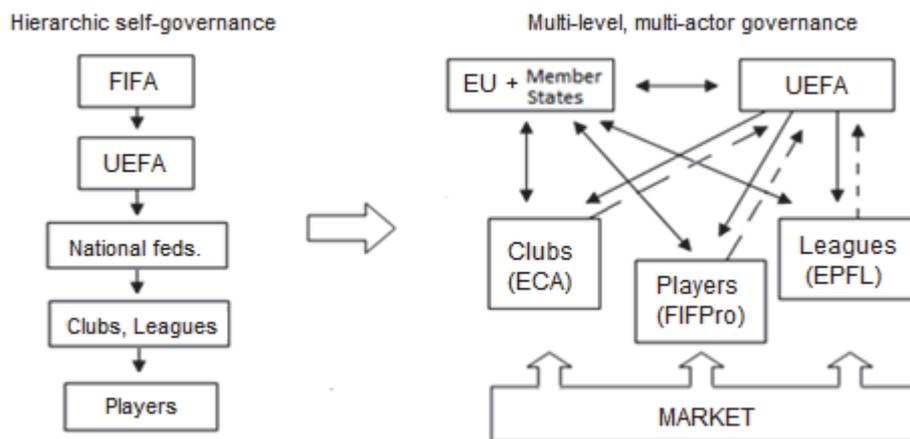
The pyramid structure in sport is said to be undemocratic since those at the very bottom of the pyramid, i.e. clubs and players who want to take part in the competitions of the network, are subject to the rules and regulations of the governing bodies, often without being able to influence them to their benefit. In football, for instance, a player is a member of his club, this club is a member of a national association, and this national association is a member of a continental association (e.g. UEFA) and the global association FIFA. Football’s governing bodies issue the footballer with the corresponding license to play only provided he/she fulfils the criteria established in the competition regulations. Consequently, FIFA and, on the European continent, UEFA determine the rules which every club and player must obey.

Currently, the self-governed pyramid networks that traditionally constitute the sports world are increasingly facing attempts by governments – mostly due to the commercialisation of sport- and increasingly empowered stakeholder organisations to interfere in their policy processes (Bruyninckx and Scheerder, 2009; Bruyninckx, 2012; Geeraert *et al*, 2012). At the European level, for instance, the Bosman ruling assured for a definitive but forced EU involvement in sport (García, 2007). The “governmentalisation of sport”

(Bergsgard *et al.*, 2007, p. 46) might seem paradoxical in a time when most academic literature speaks of a retreat of the state from the governance of society. However, when we regard INSGOs as the main regulatory bodies of the sports world, their erosion – or rather delegation – of power mirrors the recent evolutions in societal governance quite perfectly (Geeraert *et al.*, 2012). With regard to stakeholders, in recent years, we witnessed an increasing influence of athletes in the development of policies in INSGOs (Thibault, Kihl and Babiak, 2010).⁶⁹ In addition, the commercialisation of sport has made certain clubs, especially those at top-level professional football, big power players, and that has certainly enhanced their position in the governance of their sport. In football, representative organisations of both clubs and players have been given institutionalised consultation by UEFA.

All those developments have led to the emergence of a more networked governance in sport, much to the detriment of the pyramidal autonomy of sport (Crocì and Forster, 2004). In European football, for instance, more levels of government (multi-level) and various actors (multi-actor) are now involved in the policy processes (Geeraert, Scheerder and Bruyninckx; 2012). Thus, there has been a shift from the classic unilateral vertical channels of authority of the pyramidal network towards new, horizontal forms of networked governance (see figure 1).

Figure 1: The governance shift in European professional football



Source: Geeraert *et al.* (2012)

Functional autonomy

Autonomy can also be explained in a functionalist perspective. Indeed, it is common to assume that the primary function of sports organisations is to produce and sanction so called sports rules (Miège, 2000; Forster and Pope, 2004). In that regard, several authors

⁶⁹ The development of input from athletes in policy-making, however, has not been uniform across all sport organisations. Moreover, as Houlihan (2004) rightly puts, “the few governing bodies of sport that do provide a voice for athletes do so either through limited membership of the body’s decision-making forum or through the formation of an ‘athletes committee/ commission’ linked to the main forum, but safely quarantined from any significant decision-making opportunities” (pp. 421-422).

(Baddeley, 1996; Zen-Ruffinen, 2002; Latty, 2007; Chappelet, 2010; Oswald, 2010) have demonstrated that sports rules cannot be considered as part of a homogeneous group. This is particularly true if we consider their justiciability.

Sports organisations produce (technical) sports rules, the sport rules *sensu stricto*. The most obvious example of such a rule is perhaps the offside rule in football. Sports bodies also produce competition rules, such as the setting of the duration of a world championship or the qualification rules for players. They produce internal organisational rules, such as the freedom to create and amend a governing document. The autonomy of the organisation to issue all these rules will be more or less limited by legal and political interferences. For instance, the Swiss Civil Code will influence organisational rules, such as the organisation of a general assembly.

With the commercialisation of sport came an increasing tension between the rules issued by INGSOs and state law. Indeed, the pyramidal governing model of sport is a major source of conflict, since those at the very bottom may want to challenge the federation's regulations and decisions if they are excluded from the decision making process or if the latter are unwilling to meet them halfway (Tomlinson, 1983, p. 173; Parrish and McArdle, 2004, p. 411; García, 2007, p. 205). Whereas national courts often do not have the jurisdiction to challenge those rules, the CJEU proved to be a suitable venue for unsatisfied stakeholders to challenge the decisions made at the top of the pyramid networks.

In its first ever ruling issued in the area of sport, the 'Walrave ruling' in 1974, the CJEU had to establish whether and to what extent sporting activities are subject to the provisions in the Treaties laying down prohibitions. The Court ruled firstly that the practice of sport is subject to EU law only in so far as it constitutes an economic activity within the meaning of article 2 EEC Treaty (now article 3 Treaty on European Union). Thus, activities which are of sporting interest only, and therefore are not of an economic nature, are not subject to EU law. It is however very difficult to define non-economic sporting regulations, which in principle fall outside the scope of EU law. In its 2006 'Meca-Medina ruling', the CJEU ruled that even if a rule is purely of a sporting nature, and has nothing to do with an economic activity, this does not mean that the activity governed by that rule or the body which issues such rules are not governed by the Treaty. Thus, the simple notion that a rule or regulation would have a purely sporting nature is not sufficient to exclude whoever runs this activity, or the organisation which has created it, from the scope of the Treaty. It must be noted that the Court's ruling essentially does not derogate from its previous treatment of sport. For instance, the so-called sporting rules *sensu stricto* will most definitely continue to fall outside the scope of EU law.

Obviously, the CJEU did not rule on every type of sporting rule yet, as it can only rule on the cases it gets and then only insofar as the question of their conformity with EU law is part of the constituent elements of the reference for a preliminary ruling made to it. That leaves many questions on conformity with EU law with regard to sporting rules unresolved and consequently leads to legal uncertainty. Ever since the 'Bosman ruling', sport organisations often complain about the lack of legal certainty with regard to EU law. They worry that their rules, transfer rules in particular, might be contested over and

over again by unsatisfied stakeholders and therefore, they ask for a special treatment of their sector (see, e.g., Infantino, 2006; IOC and FIFA, 2007; Hill, 2009). Those lobbying efforts have found their resonance with the EU institutions (see, e.g., European Parliament, 2007, points 59-64; Arnaut, 2006, p. 42-45), although sport never received an exemption from EU law. Some authors however point to the fact that the sport sector does not deserve more legal certainty than other sectors (Wathelet, 2008; Vermeersch, 2009, p. 425). For the sake of clarity, the European Commission is committed to explain, on a theme-per-theme basis, the relation between EU law and sporting rules in professional and amateur sport through its dialogue with sport stakeholders (European Commission, 2011, p. 11).

The Commission's powers in the field of competition law make it a more cost-effective venue for redress than the private enforcement route via national courts and the CJEU. Through that route, it may take many years before a final ruling is issued and since an athlete's prime years usually do not last that long, cases that involve dissatisfied athletes do not reach the CJEU that often and in case they threaten to do so, they may ultimately be settled outside the Court.⁷⁰ Events from the past have demonstrated that the Commission is susceptible to political pressure and lobbying efforts and therefore, it makes no hard use of its far-going competition competence and thus, the application of EU law on sport has clearly been politicised. Consequently, the Commission has always shown a willingness to find compromises in the sports sector. This is not necessarily a bad thing. The application of competition law to sports broadcasting rights, for instance, needs to be tailored to the characteristics of sport as a market. Nevertheless, ultimately, it is for the CJEU alone to give binding interpretations of the provisions of the Treaty and the Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions. Therefore, it is not yet possible to provide a holistic image of the impact of EU law on sporting rules. Given the fact that cases relating to sports rules only reach the CJEU every so often, this will not be the case over the next few years.

Meanwhile, the sports world has devised its own legal system which enables it to settle disputes within its own network and according to its own laws instead of in national or European courts. It is safe to say that the functional autonomy of sports organisations has been strengthened in recent years by the development of a system of sports arbitration which has contributed to the emergence of a body of global sports law/*lex sportiva*. According to Foster (2003, p.17), "*lex sportiva* is a dangerous smoke-screen justifying selfregulation by international sporting federations". He defines *lex sportiva* or "global sports law" as "a transnational autonomous legal order created by the private global institutions that govern international sport. Its chief characteristics are first that it is a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federations, and second that it is not governed by national legal systems" (Foster, 2003, p.2). The importance of sports arbitration has increased significantly after the establishment of the Court of Arbitration for Sport (CAS), an arbitral institution created by the IOC in 1983 which is competent to resolve all types of disputes of a private nature relating to sport. The jurisprudence of

⁷⁰ See the Balog (Blanpain, 1998, p. 188-220) and Oulmers (García, 2008, p. 41) cases.

CAS is said to contribute to the development of the body of *lex sportiva*. Since it may take many years before a final ruling is issued through the private enforcement route via national courts and the CJEU, sports arbitration often is more interesting for parties involved in a sporting dispute. Indeed, sports arbitration is a much more cost-effective venue for redress since disputes are resolved relatively fast.

Another illustration of the tension between *lex sportiva* and ordinary state law is the potential issue of “double sanctions” which may occur when a sporting dispute is brought before a sports arbitration and an ordinary court. For instance, suspicious behaviour on the field or, as it was the case for the two Chinese Badminton players at the London Olympic Games, “not using one's best efforts to win a match” can be interpreted as a lack of fair-play, but it can also potentially be sanctioned by a breach of sports rules (i.e. the disqualification of two players for “throwing matches”). Accordingly, manipulation of the outcome of a game may also be brought before ordinary courts. In that case, an offender may be sanctioned by two different legal systems according to the context, and potentially lead to “double sanctions”: a sports sanction and a public sanction. This happened for instance in the Marion Jones case in 2008. In order to resolve this issue, sports organisations sometimes forbid their athletes to seek redress before national courts. However, in one of the cases the Commission investigated with regard to alleged Competition law infringements by Fédération Internationale de l'Automobile (FIA), one of its concerns was to ensure that legal challenge against FIA decisions would be available not only within the FIA structure but also before national courts. Hence, the 2001 settlement included the inclusion of a new clause in the FIA rules clarifying that anyone subject to FIA decisions can challenge these before the national courts.⁷¹ Similarly, in the negotiations with FIFA on transfer rules following the abolishment of the old system after the *Bosman* ruling, the Commission insisted that arbitration would be voluntary and would not prevent recourse to national courts. FIFA agreed to modify its rules to this end⁷².

Finally, the functional autonomy of sports organisations is also affected by the increased complexity of the sports world. Considering the governance failures in many ISOs and the unpleasant side-effects of the sports business, it seems as though sport governing bodies are also not capable of dealing with the increasingly complex reality unilaterally (Geeraert *et al.*, 2012). Certain issues call for a constructive collaboration between different authorities, market actors and sports organisations (multi-actor) at international, national and local level (multi-level). For instance, an effective resolution of the problem of “match fixing” requires the knowledge and competencies of a constellation of public actors (police, justice, education system, etc.) and private actors (athlete, clubs, family, social network, betting companies, etc.).

Supervised autonomy

It is generally assumed that the EU offers sports bodies a degree of “supervised autonomy”: they can exercise their autonomy as long as they are respectful of European law and demonstrate a clear commitment to transparency, democracy and protection of the

⁷¹ European Commission, XXXIst Report on Competition Policy 2001, para. 221 et seq.; also see European Commission press release IP/01/1523 of 30 October 2001.

⁷² European Commission, press release of 6 June 2002, IP/02/284.

values of sport (Foster, 2000; García, 2007, p. 218; European Commission 2011). In that regard, the European Commission has stressed that its respect for the autonomy of the sports sector – within the limits of the law – is conditional to the commitment of the sector to democracy, transparency and accountability in decision-making (European Commission 2011). However, the Commission does not envisage concrete actions should the sporting organisations not commit themselves to these good governance principles to satisfactory extent. The anticipated role for the Commission in the encouragement of the use of good governance principles is limited to the promotion of standards of sport governance through the exchange of good practice and targeted support to specific initiatives.

On the other hand, because of its limited legal competences regarding sports and because of the recognised autonomous status of sports governing bodies at the European level (European Council 1997, 2000), the EU does not have the power to intervene strongly in the sector. Although the EU does not have a strong sporting competence, in principle it does possess the ability to intervene much stronger in the sports sector on the basis of its internal market powers. Although that is currently not at all politically desirable, such form of latent pressure is ever present in sport matters.

With regard to EU law, the European Commission has an important role as a “supervisor”. Pursuant to Article 17(1) of the Treaty on European Union, the Commission is “the guardian of the treaties”, which means that it “shall oversee the application of Union law under the control of the CJEU”. However, the European Commission has always treated sport matters as a politically highly sensitive issue. Consequently, the Commission’s approach towards sports bodies has been rather soft, as it tried to persuade them to comply with European law where appropriate rather than enforcing it (Barani, 2005, p. 46; European Commission, 1991).

Before the ‘Bosman ruling’, this “negotiated settlement approach” resulted in sport and European law operating in separate realms as there was no hard enforcement of EU law on the sports sector (Parrish, 2003b, p. 252).⁷³ After the ‘Bosman ruling’, the sports world realised that EU law could have far-reaching consequences for their activities and embarked on a campaign directed towards the EU (García, 2007, p. 209; Niemann and Brand, 2008, p. 98; Parrish and McArdle, 2004, p. 410). The main goal of the sports lobbying movement was to reduce the regulatory activity of the Commission as much as possible. Hence, the Commission’s powers as public enforcers of EU competition law are undermined by the political powers of big INGSOs, who lobby the European Parliament, in the case of FIFA and UEFA through the creation of the Parliamentary Group “Friends of European Football” (Holt, 2007), and the Member States via national politicians and the European Sports Forum (Willis, 2010). Moreover, since sport is very attractive to politicians (García, 2007, p. 208), as patriotic sentiments might come into play, governments often grant football special treatment and even exemptions. Thus, a hard use of the Commission’s competition competence in the sports sector is neither (politically)

⁷³ For instance, in 1991, UEFA adopted the so-called 3+2 rule after negotiations with the European Commission, hereby lifting nationality restrictions which, in the light of the CJEU’s ruling in the Donà case, were contrary to European free movement law (Parrish, 2003, p. 92). Since UEFA had a “gentlemen’s agreement” with the Commission on this issue, it had the conviction that these rules were stable and durable (García, 2007, p. 207).

feasible nor desirable. Therefore, in the field of sport, the Commission has always shown a willingness to find compromises with sports bodies. In football, for instance, this approach was evident in the high-profile cases concerning UEFA's rules on football broadcasting hours (European Commission, 2001c); FIFA's transfer system (European Commission, 2002) and the central marketing of Champions League's television rights (European Commission, 2001d). The rather soft approach by the European Commission in sports is not necessarily a « bad » thing. The application of competition law to sports broadcasting rights, for instance, needs to be tailored to the characteristics of sport as a market.

Negotiated autonomy

The risk of overlaps between the various forms and levels of autonomy, especially after the entry into force of the Lisbon Treaty which gave the EU a supporting competence in sport, gradually led to what Chappelet (2010) calls a "negotiated autonomy." There is a tendency that the autonomy of the sports movement is diluted and negotiated in arenas of deliberation (sports forums, social dialogue, expert groups, etc.), which tend to integrate the opinion of a multitude of stakeholders involved in a given issue.

For instance, there is the EU Sport Forum, an annual gathering of all sport stakeholders where the EU dialogues with sport stakeholders. Besides, the Commission also organises thematic discussions with a limited numbers of participants from the sports world. In the professional football sector, projects funded by the Commission relating to the encouragement of social dialogue, a means to foster cooperation and conclude agreements between employers and employees, in the sports sector eventually led to the instalment of a sectoral social dialogue committee in professional football (see Colucci and Geeraert, 2012). The aim of the committee is to improve employment relations for all players and reduce disputes through dialogue. The instalment of the SDCPF fits within the context of a general shift in the government of football (see figure 1).

Autonomy and good governance

An absolute autonomy of sports organisations seems not feasible in the current state of governance of sport. Its understanding is relative to contextual changes. Taking into account the complexity of the sports system, Chappelet (2010) shows already that the autonomy of sports organisations can be understood in several dimensions (political, psychological, financial and conceptual). That stance is confirmed by the White Paper on sport saying that "European sport is characterised by a multitude of complex and diverse structures which enjoy different types of legal status and levels of autonomy in Member States" (European Commission, 2007, p.18).

The discourse on "good" governance puts the emphasis on the diversity of the sports system and therefore it should also consider a multifaceted approach of the autonomy of sports organisations. INGSOs are the legitimate bodies to promote and develop their sport, but several questions need to be addressed in relation to "good" governance:

- Are they financially, politically, legally, functionally autonomous enough to implement 'good' governance?

- Which sports organisations and which governments are participating in the arenas of deliberation?
- To what extent is the level of EU supervision binding when most international sports organisations are located in a non-EU country?

References

- Andreff, W. (2000). Financing modern sport in the face of a sporting ethic, *European Journal for Sport Management*, 7, 5-30.
- Andreff, W. (2008). Globalisation of the sports economy. *Rivista di diritto ed economia dello sport*, 4(3), 13-32.
- Arnaut, J. (2006). *Independent European Sport Review* 2006.
- Baddeley, M. (1994). *L'association sportive face au droit: les limites de son autonomie*. Helbing and Lichtenhahn.
- Barani, L. (2005) The Role of the European Court of Justice as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling. *Journal of Contemporary European Research*, 1 (1), 42-58.
- Blanpain, R. (1998). De Belgische voetbalbond, het Vlaams Decreet Martens en het Arbitragehof. Vrijheid en gebondenheid in de sport. De CAO van 12 juni 1998. De Balog-case. Leuven: Uitgeverij Peeters, pp. 188-220.
- Bergsgard, N.A., Houlihan, B., Mangset, P., Nodland, S.I. and Rommetvedt, H. (2007) *Sport policy: a comparative analysis of stability and change* (Oxford: Butterworth/Heinemann).
- Bose, M. (2012). *The Spirit of the Game: How Sport Made the Modern World*, Constable, London
- Bourg, J.F. and Gouguet, J.J. (1998). *Analyse économique du sport*. Paris: Presses Universitaires de France.
- Bruyninckx, H. and Scheerder, J. (2009). Sport, macht en internationale politiek. Een politicologisch kader. [Sport, power and international politics. A political framework] In: J. Scheerder J., B. Meulders (Eds.), *Wedijver in een internationale arena. Sport, bestuur en macht* [Competition in an international arena. Sport, governance and power], Chapt. 1 (pp. 1-19). Ghent: Academia Press.
- Camy J. et al. (2004). *Vocasport, « La formation dans le domaine du sport en Europe »*, Ezus/EOSE/ENSSEE, rapport pour la Commission européenne.
- Casini, L. (2009). 'Globalhy hybrid public-private bodies: the World Anti-Doping Agency (WADA)', Draft paper for the Global Administrative Law Conference on 'Practical Legal Problems of International Organisations', Geneva, March 20-21, 2009, 4.
- Chaker, A.-N. (2004). *Good governance in sport - A European survey*, Strasbourg: Council of Europe publishing.
- Chappelet, J.L. and Kübler-Mabott, B. (2008). *The International Olympic Committee and the Olympic System: The Governance of World Sport*, Routledge, London & New York.
- Chappelet, J.L. (2010). *L'autonomie du sport en Europe*. Publications du Conseil de l'Europe, Strasbourg.
- Chappelet, J.L. (2012). 'From daily management to high politics: the governance of the International Olympic Committee'. In L. Robinson, P. Chelladurai, G. Bodet and P. Downward, *Routledge handbook of sport management* (pp. 7-25), New York: Routledge.
- Clark, P. (2002). *British Clubs and Societies 1580-1800: The Origins of an Associational World*. London: Oxford University Press.
- Colucci, M. and Geeraert, A. (2012). The 'Social dialogue' in European professional football. *Comparative Labor Law and Policy Journal*, 33 (1), 203-234.
- Council of Europe (1992). *European Sports Charter*
- Council of Europe (2012). *Good governance and ethics in sport*. Parliamentary assembly committee on Culture, Science Education and Media.

- Croci, O. (2001). Taking the field: the European Union and the governance of European football. Paper presented at the ECSA-USA Seventh Biannual International Conference. Madison, Wisconsin, 31 May -2 June, available at http://aei.pitt.edu/2069/1/002030_1.PDF.
- Croci, O. and Forster, J. (2004). Webs of Authority: Hierarchies, Networks, Legitimacy, and Economic Power in Global Sport Organisations in G. T. Papanikos (ed.), *The Economics and Management of Mega Athletic Events: Olympic Games, Professional Sports, and Other Essays*, Athens: Athens Institute for Education and Research, pp. 3-10.
- Croci, O. and Forster, J. (2006). Sport and politics: the question of Legitimacy of International Sport Organisations [online]. Paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego. Available from: http://www.allacademic.com/meta/p100098_index.html
- De Zwart, F. and Gilligan, G. (2009). Sustainable Governance in Sporting Organisations, in *Social Responsibility and Sustainability in Sports* (Rodriguez, P. et al, Eds), Oviedo, Universidad de Oviedo, pp. 165-227.
- European Commission. (1984). *Green Paper On the Establishment Of The Common Market for Broadcasting, Especially By Satellite And Cable*, COM (84) 300 final (June 14, 1984).
- European Commission (1991). *The European community and Sport. Communication from the Commission to the Council and the European Parliament*. SEC (91) 1438 final.
- European Commission (2001a). Outcome of Discussions between the Commission and FIFA/UEFA on Fifa Regulations on International Football Transfers, European Commission Press Release. IP/01/314, 5 March 2001
- European Commission (2001b). Press release IP/01/1523 of 30 October.
- European Commission (2001c). *XXXIst Report on Competition Policy*, paras. 221 et seq.
- European Commission (2007). *White Paper on Sport*, COM (2007) 391 final.
- European Commission (2011) *Developing the European dimension in sport*, COM (2011) 12 final, January 2011.
- European Commission (2012). *Expert Group 'Good Governance' Report from the 3rd meeting* (5-6 June 2012).
- European Council (1997) *Declaration No. 29, on Sport*, Attached to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.
- European Council (2000) *Declaration on the Specific Characteristics of Sport and Its Social Function in Europe, of Which Account Should Be Taken in Implementing Common Policies*, Presidency Conclusions. Nice European Council, 7-9 December 2000.
- European Parliament (2007). *Draft Report on the future of professional football in Europe*, (2006/2130(INI)).
- Eurostrategies, Amnyos, CDES, & Deutsche Sporthochschule Köln (2011). *Study on the funding of grassroots sports in the EU with a focus on the internal market aspects concerning legislative frameworks and systems of financing* (Eurostrategies Final report No. 1).
- FIFA (2013). *Finances*. Available at: <http://www.fifa.com/aboutfifa/finances/income.html>.
- Foster, A. (2003). Can sport be regulated by Europe?: An analysis of alternative models, In A. Caiger and S. Gardiner (Eds.), *Profession sport in the European Union* (pp. 211-216), Manchester, Manchester University Press.
- Forster, J. and Pope, N. (2004). *The Political Economy of Global Sporting Organisations*, Routledge: London.

- García, B. (2007). UEFA and the European Union: From Confrontation to Cooperation, *Journal of Contemporary European Research*, 3(3), 202-223.
- García, B. (2008). *The European Union and the governance of football: a game of levels and agendas*. Thesis (PhD). Loughborough University.
- Geeraert, A., Bruyninckx, H. and Scheerder, J. (2012). The historic treble in football. The legal, political and economic driving forces behind football's transformation (*Sport Policy & Management* 15). Leuven: KU Leuven/Policy in Sport & Physical Activity Research Group.
- Geeraert, A., Scheerder, J., Bruyninckx, H. (2012). The governance network of European football: introducing new governance approaches to steer football at the EU level. *International journal of sport policy and politics*, published online as Ifirst.
- Halgreen, L. (2004). *European Sports Law: A Comparative Analysis of the European and American Models of Sport*, Copenhagen: Forlage Thomson.
- Henry, I., (2009). European models of Sport: Governance, Organisational Change and Sports Policy in the EU', *Journal of Policy for Physical Education and Sport*, 18, 1-22.
- Henry, I. and Lee, P.C., (2004). Governance and ethics in sport. In: S. Chadwick and J. Beech, eds. *The business of sport management*. Harlow: Pearson Education.
- Hill, J. (2009). The European Commission's White Paper on Sport: a step backwards for specificity?. *International Journal of Sport Policy and Politics*, 1(3), 253-266.
- Holt, M., (2007). The ownership and control of Elite club competition in *European football. Soccer & society*, 8 (1), 50-67.
- Houlihan, B. (2004). Civil rights, doping control and the world anti-doping code, *Sport in Society*, vol. 7, 2004, 420-437. International Association of Athletics Federations, 2011. Constitution.
- Infantino, G. (2006). *Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?* UEFA. Available at http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf.
- IOC (2008). *Basic universal principles of good governance of the Olympic and sports movement*. Lausanne: IOC.
- IOC and FIFA (2007). *IOC-FIFA Joint Declaration - EU white paper on sport: Much work remains to be done*, available at <http://www.olympic.org/news?articleid=54916>.
- Jeanrenaud, C. (2009). Sponsorship. In W. Andreff and S. Szymanski (Eds.), *Handbook on the economics of sport* (pp. 49-58). Cheltenham, UK: Edward Elgar Publishing Limited.
- Katwala, S. (2000). *Democratising global sport*. London: The foreign policy centre.
- Latty, F. (2007). *La Lex Sportiva : Recherche sur le Droit Transnational*, Martinus Nijhoff Publishers
- Miège, C. (2000). *Les Organisations sportives et l'Europe*, INSEP, Paris
- Oswald, D. (2010). *Associations, fondations et autres formes de personnes morales au service du sport*. Peter Lang
- Parrish, R. (2003). *Sports Law and Policy in the European Union*. Manchester: Manchester University Press.
- Parrish, R. and McArdle, D. (2004), Beyond Bosman: The European Union's Influence upon Professional Athletes' Freedom of Movement, *Sport in Society*, 7(3),.403-418.
- Pieth, M. (2011). *Governing FIFA, Concept paper and report*. Basel: Universität Basel.

- Presburger, P. and Tyler, M.R. (1989). Television Without Frontiers: Opportunity and debate created by the new European Community Directive. *Hastings International and Comparative Law Review*, 13, 495-510.
- Rhodes, R.A.W. (1997). *Understanding governance: policy networks, governance, reflexivity and accountability*, Open University Press.
- Sugden, J. and Tomlinson, A. (1998). *FIFA and the contest for world football: who rules the peoples' game?* Cambridge: Polity press.
- Sugden, J. (2002). Network football. In: J. Sugden and A. Tomlinson, eds. *Power games*. London: Routledge, 61–80.
- Szymanski, S. (2006). A theory on the evolution of modern sport, *International association of sports economists Working Paper Series*, Paper No. 06-30.
- Szymanski, S. and Zimbalist, A. (2005). *National Pastime*. Washington, DC: Brookings Institution Press.
- Terret, T. (2010), *Histoire du sport. Que sais-je ?*, Paris: Puf.
- Thibault, L., Kihl, L. and Babiak, K. (2010). Democratisation and governance in international sport: addressing issues with athlete involvement in organisational policy, *International Journal of Sport Policy and Politics*, 2:3, 275-302
- Tomlinson, A. (1983). Tuck up tight lads: Structures of control within football culture, in A. Tomlinson (Ed.) *Explorations in football culture* (pp. 165-186). Eastbourne: Leisure Studies Association Publications.
- Tomlinson, A. (2000). FIFA and the men who made it, *Soccer and Society*, 1(1), 55-71.
- Vermeersch, A. (2009). *Europese spelregels voor sport*. Overzicht van het Europees sportbeleid in wording en de toepassing van het Europees recht op sport, Antwerpen-Apeldoorn: Maklu .
- Wathelet, M. (2008). *Sport governance and EU Legal order: present and future*. In: R. Blanpain, M. Colucci and F. Hendrickx, (Eds). *The future of sports law in the European Union*. (pp. 51-75). Alphen aan den Rijn: Kluwer Law International.
- Willis, A. (2010). *Lisbon Treaty may give footballer a headache* [online]. EUobserver, 24 April. Available from: <http://euobserver.com/9/2989>.
- Zen-Ruffinen, P.M. (2002). *Droit du sport*. Schulthess