

## Limits to the autonomy of sport: EU law

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### Introduction

Athletes have rights and obligations deriving from ordinary law but also from the rules of the (international and national) sports federations they are registered with (Parrish, 2003a). Many of those rules are captured by the EU's internal market competences. The establishment of an internal market<sup>74</sup>, 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 Union.<sup>75</sup> For decades now, the Treaties have defined the objective of establishing an internal market as the creation of *“an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”*.<sup>76</sup> 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). Through the latter so-called “four fundamental freedoms”,<sup>77</sup> the founding fathers of the European Union ultimately wanted to open up economic activity within the whole Union. In the end, they hoped that the process of economic integration would progressively lead to a form of political union among the Member States that would proliferate peace and prosperity in Europe.

Within the internal market, there should be free competition, favouring an efficient allocation of resources.<sup>78</sup> The EU “rules on competition” (EU competition law) comprise rules prohibiting distortion of competition by undertakings and rules restricting State Aid granted to undertakings. Competing undertakings are said to ensure further innovation and to motivate undertakings to develop more efficient methods of production. This should lead to lower prices, high-quality products and ample choice for the consumer. In this context, EU rules on competition, enshrined in articles 101-109 of the Treaty on the functioning of the European Union (TFEU), are designed to make EU markets work better, by ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy as a whole (European Commission, 2010).

It is generally acknowledged that sport bodies eschew any kind of state interference in their sector and that this has urged them to adhere to a strong protectionist vision of sports governance (Parrish, 2011, pp. 215-216). Indeed, the world of sport has tradition-

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74 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.

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

76 Article 26(2) Treaty on the Functioning of the European Union (TFEU)

77 The foundations of the internal market are the Treaty provisions on the free movement of goods (articles 28 to 37 TFEU), free movement of persons, services and capital (articles 45 to 66 TFEU).

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

ally been regulated in all its aspects through a self-governing network with its own rules and regulations. At the same time, governments were reluctant to intervene in the sports sector as, even now; they tend to regard it more as a cultural industry rather than a business. For almost a century, the sporting network was able to exercise its self-governance without any significant interference from states or other actors. Since rules issued by sporting bodies are captured by the EU's Internal Market competences, the Court of Justice of the European Union (CJEU) proved to be a suitable venue for unsatisfied stakeholders to challenge the decisions made at the top of the governing associations of their sports. In its first ever ruling issued in the area of sport, the 'Walrave ruling'<sup>79</sup> 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.<sup>80</sup>

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'<sup>81</sup> 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. Some authors feared that actors in the sports world would be encouraged by this ruling to challenge actions by sports associations in their disadvantage on the basis of EU law, opening a "Pandora's box" of potential legal problems because all disciplinary measures in the field of sport can be considered as violating EU (competition) law (see e.g. Infantino, 2006; Hill, 2009). However, 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.<sup>82</sup>

Through the years, the CJEU has developed a solid body of case law on the application of EU law on the organisational aspects of sport. That coherent and consistent body of case law can be labelled "EU sports law", as it constitutes a distinct legal approach to applying EU law to sporting situations (see Parrish, 2003b).<sup>83</sup> This paper provides a concise overview of the application of EU law on sporting rules as it delineates the

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79 CJEU, Case 36/74 Walrave [1974] E.C.R. 1405.

80 Ibid., paras 4-7. This was later confirmed in several cases.

81 CJEU, Case C-519/04 Meca-Medina & Majcen v. Commission [2006] E.C.R. II-3291.

82 In its staff working document annexed to the 2007 White Paper on sport, the European Commission lists a few types of "pure sporting rules" that – based on their legitimate objectives – are likely not to breach EU law: 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. See European Commission (2007b, p. 39).

83 Under EU law there is no doctrine of precedent. The previous case law of the CJEU is neither binding on itself, nor on national courts. In practice, the CJEU has been very reluctant to depart from its earlier case law, in particular because of the need for legal certainty and equality (see Raitio, 2003).

boundaries of the autonomy of sport with regard to EU law. Finally, it provides an overview of the different methods of enforcement of EU law on sports bodies and the legal and political limitations thereof.

## Freedom of movement

The Court of Justice of the European Union (CJEU) has dealt with the freedom of movement and sport in numerous cases. It is arguably the area of EU law which has had the most substantial impact on sport.

### The free movement of workers

Art. 45 (1) TFEU states: “*Freedom of movement for workers shall be secured within the Union*”. More specifically, it enshrines the right, subject to limitations justified on grounds of public policy, public security or public health, to accept offers of employment, to move freely within the territory of Member States and to stay in a Member State for this purpose, and to remain in the territory of a Member State after having employed in that State.

Alongside each Member State’s legislation on nationality, the concept of “worker” determines who qualifies for free movement of workers. If the definition of that term could be determined unilaterally by national law, each Member State would be able to eliminate the protection afforded by the treaties to workers.<sup>84</sup> Therefore, there is a need for a Union definition of the concept. Consequently, the CJEU defined as a “worker” “[a person] who for a certain period of time [...] performs services for and under the direction of another person in return for which he receives remuneration”.<sup>85</sup> This fundamental principle has a broad interpretation. Neither the duration of the work,<sup>86</sup> the origins of the funds from which the remuneration is paid,<sup>87</sup> nor the fact that remuneration provided for genuine work is under the minimum subsistence level laid down in the Member State of employment<sup>88</sup> is relevant. In addition, also the type of work is irrelevant, provided that an economic activity is involved.<sup>89</sup>

Hence, the CJEU has confirmed in a number of cases that professional or semi-professional sportspeople are workers by virtue of the fact that their activities involve gainful employment.<sup>90</sup> In the ‘Bosman case’, the Court held that “rules which are laid down by sporting associations which determine the terms on which professional sportsmen can engage in gainful employment are captured by the treaty provision on the free movement of workers”.<sup>91</sup>

84 See CJEU, Case 75/63 Hoekstra (née Unger) [1964] E.C.R. 177, at 184.

85 CJEU, Case 66/85 Lawrie-Blum [1986] E.C.R. 2121, para. 17.

86 CJEU, Case 53/81 Levin [1982] E.C.R. 1035, para 17

87 Ibid., para. 16

88 Ibid., para. 15

89 CJEU, Case 196/87 Steymann [1988] E.C.R. 6159, paras 12-14; CJEU, Case C-456/02 Trojani [2004] E.C.R. I-7573, paras 17-24.

90 This was first confirmed in CJEU, Case 36/74 Walrave [1974] E.C.R. 1405, and later in the cases 13/76 Donà, C-415/93 Bosman, C-176/96 Lehtonen, C-519/04 Meca-Medina and C-325/08 Olympique Lyonnais.

91 CJEU, Case C-415/93 Bosman [1995] E.C.R. I-4921, para. 87. In all subsequent cases related to the free movement of (semi-)professional athletes, save for the Deliège case, the Court qualified these as workers.

When an athlete does not perform services “under the direction of another person”<sup>92</sup>, he or she cannot be considered as a worker. In this case, the economic activity of the athlete can in principle be considered an independent activity which might fall under the scope of the provisions of self-employed persons. With self-employment is meant economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his or her personal responsibility.<sup>93</sup> Pursuant to article 49 TFEU, self-employed persons who are nationals of a Member State enjoy the right of establishment in the territory of another Member State. However, because there generally is no “fixed establishment in another Member State for an indefinite period”,<sup>94</sup> athletes usually do not fall under the freedom of establishment enshrined in article 49 TFEU. In principle, sportspeople may be considered as providers of service in that case.

### The free movement of services

The freedom of services is enshrined in articles 56-62 TFEU. Pursuant to article 56 TFEU, restrictions on freedom to provide services within the Union shall be prohibited. Article 57 TFEU regards as “services” those which are “normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”. Thus, only remunerated services which do not fall under the other fundamental freedoms can be regarded as “services”. This way, it is ensured that all economic activity falls within the scope of the fundamental freedoms.<sup>95</sup> Sport is thus subject to the freedom of services where economic activity within the sector has the character of a remunerated service and does not fall under one of the other fundamental freedoms.

Thus far, the only time the CJEU (possibly) qualified an athlete as a provider of service was in the ‘Deliège case’.<sup>96</sup> The Court referred to the grants awarded on the basis of earlier sporting results and to sponsorship contracts directly linked to the results achieved by the athlete in order to determine whether she could be regarded as a provider of services within the meaning the Treaty.<sup>97</sup> In that regard, it held that an athlete is capable of being involved in “a number of separate, but closely related, services”.<sup>98</sup>

### The prohibition of obstacles to the freedom of movement

For a long time, it was assumed that if a restriction on the mobility of economic operators applied without distinction to a State’s own nationals and nationals of other Member States, this was not contrary to the Treaty provisions on free movement of persons

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92 CJEU, *Lawrie-Blum*, para. 17.

93 CJEU, *Case C-268/99 Jany and Others* [2001] E.C.R. I-8615, paras 34-50. The Treaties however provide for exceptions to the free movement of persons on grounds of public policy, public security and public health (Articles 45(3) and 52 TFEU).

94 CJEU, *Case C-221/89, The Queen t. Secretary for Transport ex parte Factortame ea.*, [1991] E.C.R. I-3905, para. 20.

95 CJEU, *Case C-452/04 Fidium Finanz* [2006] E.C.R. I-9521, paras 31-33.

96 CJEU, *Deliège*.

97 *Ibid.*, para. 51.

98 *Ibid.*, para. 56. The Court explicitly referred to CJEU, *Bond van Adverteerders and others*, para. 16, where it was stipulated that “[...] Article 60 [now article 57] does not require the service to be paid for by those for whom it is performed [...]”.

(Lenaerts and Van Nuffel, 2011, p. 245). However, since the 1988 judgment in ‘Wolf’<sup>99</sup>, the CJEU has developed a significant body of case law prohibiting obstacles to the freedom of movement. Now, provisions which preclude or deter a national of a Member State from leaving the country in which he or she is pursuing an economic activity in order to exercise the right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the worker concerned.<sup>100</sup>

Consequently, in the field of sport, provisions such as transfer rules which, even if applied without regard to nationality, restrict the freedom of movement of sportspeople who wish to pursue their activity in another Member State constitute obstacles to free movement. A measure which constitutes an obstacle to freedom of movement can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that is the case, application of that measure will still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.<sup>101</sup>

### *The Bosman case*

Before the ‘Bosman case’, a professional footballer at the expiry of his contract could be transferred to his new club only if the latter paid his old club a transfer fee. Jean-Marc Bosman was a professional football player under contract of a Belgian first division club. When the end of his contract approached in 1990, he refused to sign a new contract with his club and was placed on the transfer list for a transfer fee based on his training costs and other pre-determined factors. When no club showed interest in his contract during the month-long compulsory transfer period, Bosman – as an unclaimed player signed a contract with a French second-division club. Bosman’s Belgian club never filed the certification papers required to finalise the transfer and subsequently suspended him, preventing him from playing the entire season.<sup>102</sup> Consequently, Bosman brought an action against his Belgian club, RC Liège, the Belgian football association URBFSFA and UEFA.<sup>103</sup> Finally, the case was referred to the CJEU for a preliminary ruling.

The Court, recognising that sporting activities are of considerable social importance in the EU, held that the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.<sup>104</sup> However, the Court reasoned that the transfer fee system did not effectively maintain the legitimate objective of financial and competitive balance because the rules neither prevented the richest clubs from monopolising the best players nor reduced the decisive impact of

99 CJEU, Joined Cases 154-155/87 Wolf and Others [1988] E.C.R. 3897, paras 9-14.

100 CJEU, Case C-18/95 Terhoeve [1999] E.C.R. I-345, para. 39; CJEU, Case C-232/01 Van Lent [2003] E.C.R. I-11525, para. 16; CJEU, Case C-209/01 Schilling and Fleck-Schilling [2003] E.C.R. I-13389, para. 25; CJEU, Case C-464/02 Commission v Denmark [2005] E.C.R. I-7929, para. 35; CJEU, Case C-345/05 Commission v Portugal [2006] E.C.R. I-10633, para. 16; CJEU, Case C-104/06 Commission v Sweden [2007] E.C.R. I-5701, para. 65; CJEU, Case C-318/05 Commission v Germany, [2007] E.C.R. I-06957, para. 114.

101 See, inter alia, CJEU, Case C-19/92 Kraus [1993] ECR I-1663, para. 32; Bosman, para. 104; CJEU, Case C-109/04 Kranemann [2005] ECR I-2421, para. 33; and CJEU, Case C-208/05 ITC [2007] ECR I-181, para. 37.

102 Ibid., paras 28-33.

103 Ibid., paras 34-42.

104 Ibid., para. 106.

finances on the strength of competition. Moreover, the Court indicated that these goals could be achieved by other, less-restrictive means which do not impede worker's freedom of movement.<sup>105</sup> Consequently, the CJEU declared transfer rules adopted by sports associations according to which, at the expiry of his contract, a professional footballer could be transferred to his new club only if it paid his old club a transfer fee to be an obstacle to the free movement of workers.<sup>106</sup>

Secondly, the Court ruled that rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States cannot be deemed to be in accordance with article 45 TFEU since they are not of a purely sporting nature and cannot be justified by a legitimate objective.<sup>107</sup>

#### *The Lehtonen case*

In the 'Lehtonen case',<sup>108</sup> the transfer rules regarding a "transfer window" of the Belgian basketball federation came under scrutiny. The CJEU ruled that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity of sporting competitions<sup>109</sup> and therefore may be objectively justified. The Court reasoned that 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 teams taking part in that championship, and consequently the proper functioning of the championship as a whole.<sup>110</sup> However, as the rules of the basketball federation established different deadlines for EU and non-EU citizens, the Court ruled that these went beyond what is necessary to achieve the aim pursued.<sup>111</sup>

#### *The Bernard case*

In the recent (2010) 'Bernard case', the CJEU ruled on obstacles to the free movement of workers arising from training compensation schemes.<sup>112</sup> In its ruling, the Court explicitly and for the first time refers to the new legal basis of the Treaty on Sport, emphasizing the account must be taken of the specific characteristics of sport in general and of its social and educational function when making this consideration.<sup>113</sup>

The French sporting rules at issue concerned a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him. Fifteen years after the 'Bosman judgement', when the Court declared that a transfer compensation at the end of contract was against EU law, the judges decided that a training compensation is an obstacle to the free movement of workers that, in principle, can be justified by the

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105 Ibid., para. 110.

106 Ibid., paras 94-104.

107 Ibid., paras 129 and 137.

108 CJEU, Lehtonen.

109 Ibid., para. 53.

110 Ibid., para. 55.

111 See Bosman, para. 104.

112 CJEU Case C-325/08, Bernard [2010] E.C.R. I-02177

113 CJEU, Bernard, para 40.

objective of encouraging the recruitment and training of young players.<sup>114</sup> In the case of Mr Bernard, the scheme at issue however went beyond what is necessary to attain this legitimate objective because it is characterised by the payment to the club which provided the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.<sup>115</sup>

## The prohibition of discrimination to freedom of movement

### *The prohibition of direct discrimination*

In order to ensure the free movement of sportspeople there can be no discrimination on the basis of their nationality. On a general note, article 18 TFEU states that “*within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*”. This article is a horizontal clause, which means that it applies in all situations which fall within the scope *ratione materiae* of EU law. According to settled case-law, article 18 TFEU applies independently only to situations governed by Community law for which the Treaty lays down no specific rules prohibiting discrimination.<sup>116</sup> More specifically, that principle has been implemented explicitly in the TFEU as regards workers<sup>117</sup>, self-employed persons<sup>118</sup> and services<sup>119</sup> in the EU.

The fact that professional athletes from an EU Member State under certain conditions fall within the scope of the free movement for people and services implies that any direct or indirect discrimination on grounds of nationality is forbidden and this applies not only to discrimination on behalf of EU Member States but also on behalf of sport associations or organisations. So, when an athlete goes to another EU country and registers himself/herself with a foreign federation, he/she cannot be discriminated.

Discrimination is direct where a measure employs a prohibited distinguishing criterion such as nationality or subjects different cases to formally similar rules (Lenaerts and Van Nuffel, 2011, p. 172). Sport rules leading to direct discrimination on grounds of nationality are not compatible with EU law. A good example of such rules are for instance those which pose a complete ban on the participation in sporting competitions of athletes who are not nationals of the Member State where the competition is organised but who are nonetheless EU citizens. In the ‘Donà case’ for instance, only football players affiliated to the Italian federation could take part in matches, whilst affiliation was only open to players having the Italian nationality. The CJEU ruled that the rules of the Italian Football Federation limiting participation in football matches to players with

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114 CJEU, Bernard, para. 93.

115 CJEU, Bernard, paras 46-50.

116 See, inter alia, CJEU, Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* [1991] E.C.R. I-5889, para. 11, and CJEU, Case C-379/92 *Peralta* [1994] ECR I-3453, para. 18.

117 Article 45(1) and (2) TFEU.

118 Articles 49 and 55 TFEU.

119 Articles 56§1 and 57§3 TFEU. The CJEU attached direct effect to these provisions “in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided”, see CJEU, Case 33/74 *Van Binsbergen* [1974] E.C.R. 1299, para. 27.

Italian citizenship were incompatible with the provisions of the Treaty as they were of an economic nature and were not of sporting interest only.<sup>120</sup>

Direct discrimination may also stem from the installment of quota based on nationality. Particularly, in the ‘Bosman’ and ‘Lehtonen’ cases the CJEU held that the fact that such rules or quota do not concern the employment as such of players is of no relevance in order to determine the discriminatory nature of the rules. Because participation in official matches constitutes the essential activity of professional players, any rule limiting such participation also restricts the employment opportunities of the players concerned.<sup>121</sup>

#### *The prohibition of indirect discrimination*

The provisions on the free movement of persons and services also prohibit indirect discrimination. Indirect discrimination arises where although not making use of an unlawful distinguishing criterion, a provision has effects coinciding with or approaching those of such a distinguishing criterion as a result of its use of other distinguishing criteria which are not as such prohibited (Garonne, 1994).<sup>122</sup> Accordingly, the CJEU has held that “[t]he rules regarding equality of treatment, [...] forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result”.<sup>123</sup>

Moreover, the Court has concluded that even if certain criteria are applicable irrespective of nationality, they must be regarded as indirectly discriminatory if there is a risk of EU migrant workers being placed at a particular disadvantage.<sup>124</sup> Indirectly discriminatory measures must be necessary and proportionate to the achievement of their legitimate objective in order to be compatible with EU law.<sup>125</sup>

#### *The UEFA Home-Grown Players Rule*

In 2004, UEFA claimed that studies had shown that the number of players trained in an association and playing in that association’s top league had reduced by thirty per cent since the ‘Bosman ruling’ in 1995 (Chaplin, 2005). As this trend, according to UEFA, is amongst others accompanied by “a lack of incentive in training players, identity in local/regional teams and competitive balance”, UEFA decided to take action. In 2005, it adopted regulations with the effect of requiring each club by the 2006-2007 season to have four club-trained players and four players trained by other clubs belonging to the same national association in its twenty-five man squad registered to play in European competitions organised by UEFA (UEFA, 2005). These regulations are known as the

120 CJEU, Donà, Case 13/76 Donà [1976] E.C.R. 1333, para. 19.

121 CJEU, Bosman, and CJEU Case C-176/96, Lehtonen [2000] E.C.R. I-2549.

122 The concept as such is not explicitly covered by the various non-discrimination provisions in EU law, which only prohibits discrimination in general terms.

123 CJEU, Case 152/73 Sotgiu [1974] E.C.R. 153, para. 11.

124 CJEU, Case C-237/94 O’Flynn [1996] E.C.R. I-02617.

125 CJEU, Case C-55/94, Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano [1995] E.C.R. I-4165, para. 37. The Court identified the conditions required to justify an indirectly discriminatory measure in what has become known as the “Gebhard formula” as “(i) applied in a non-discriminatory manner; (ii) justified by imperative requirements in the general interest; (iii) suitable for securing the attainment of the objective which they pursue; and (iv) not go beyond what is necessary to attain it”).

'home-grown players rule'. In the 2007–2008 season, the quota increased to six locally trained players with at least three players qualifying as "club-trained" (UEFA, 2006). The quota increased again for the 2009–2010 season to eight 'locally-trained' players with at least four 'club-trained' players (UEFA, 2009).

UEFA claims that this rule is a purely sporting rule, installed to develop and promote young players. The rule is not directly discriminatory as it does not by its terms impose a restriction on the employment of non-nationals. However, employment opportunities for non-nationals, compared with those for nationals, may be indirectly reduced because the training requirements of the home-grown players rule are more likely to be fulfilled by nationals than non-nationals (Miettinen and Parrish, 2007). Therefore, one could argue that this rule leads to indirect discrimination based on nationality and therefore is incompatible with EU law on the free movement of workers.

The European Parliament considers UEFA's home-grown player rule to be proportionate and non-discriminatory and endorses it enthusiastically (European Parliament, 2008, p. 98). The European Commission's view is that the provisions of the rules appear to be inherent in and proportionate to the achievement of promoting the recruitment and training of young players and ensuring the balance of competitions. However, since the rules risk having indirect discriminatory effects and since the implementation has been gradual over several years, the Commission recently announced a study to assess the consequences of rules on home-grown players in team sports in 2012 (European Commission, 2011).

#### *Discrimination against third country nationals*

The CJEU decisions in 'Bosman' and 'Lehtonen' on nationality quota did not address whether non-discrimination principles also applied to nationals from countries that had entered into Association or Cooperation Agreements with the EU.<sup>126</sup> Many of these Agreements contain non-discrimination clauses regarding employment conditions for third-party nationals legally employed in EU Member States. The principle of non-discrimination applied in Association Agreements is restricted to workers legally employed in the territory of Member States, and subject to a condition of reciprocity. The Commission expressed the view that non-EU nationals covered under such agreement enjoyed the same anti-discrimination protections as EU citizens. If the sport involves gainful employment it will be subject to EU law or to the provisions of non-discrimination of the Association Agreements. However, most national sport governing bodies did not adjust their rules accordingly as the increased signing of relatively inexpensive players from non-EU countries would further undermine the development of young, domestic talent (Penn, 2006).

In the 2003 'Kolpak case' and in the 2005 'Simutenkov case', the CJEU nonetheless extended the principle of equal treatment to sportsmen from third countries having an Association Agreement with the European Union, because of the existence of non-

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<sup>126</sup> Association or Cooperation Agreements, also known as "Europe Agreements", provide the framework for bilateral relations between the EU, its Member States, and partner countries. Areas frequently covered by such agreements include the development of political, trade, social, cultural and security links. The legal base for the conclusion of association agreements is provided by article 217 TFEU.

discrimination clauses in these agreements. According to these clauses, the treatment accorded by each Member State to workers from partner countries legally employed in its territory would be free from any discrimination based on nationality as regards working conditions, remuneration and dismissal, relative to its own nationals.

The principle of non-discrimination is also reaffirmed in similar terms in the Cotonou Agreement<sup>127</sup> between the European Union and 78 African, Caribbean and Pacific countries. However, to this date no case regarding this Agreement has reached the CJEU.

## Competition law

Article 101 TFEU prohibits anti-competitive agreements between undertakings. The purpose is to prevent an informal group of undertakings or a more formal association of undertakings from agreeing together to act in an anti-competitive manner, for example, by forming (price) cartels or by market-sharing. Article 102 TFEU prohibits abusive conduct by undertakings that have a dominant position on a market, for example forcing consumers to buy a bundle of products that could be sold separately or forcing competitors off the market by entering into exclusive arrangements. The CJEU defines dominance as “[a] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.<sup>128</sup> If a company has a market share of less than 40%, it is unlikely to be dominant. There will generally be a rebuttable presumption of dominance where a company has a market share of 50% or more.<sup>129</sup> Sports associations usually have practical monopolies in a given sport and may thus normally be considered dominant in the market of the organisation of sport events under Article 102 TFEU.

### The application of articles 101 and 102 TFEU on sporting rules

In its 2006 ‘Meca-Medina’ and ‘Majcen’ ruling<sup>130</sup>, the CJEU applied for the first time articles 101 and 102 TFEU to a sporting rule adopted by a sports association relating to a sporting activity.<sup>130</sup> The ruling provides valuable guidance as regards the methodological approach towards assessing a sporting rule adopted by a sports association under articles 101 and 102 TFEU.<sup>131</sup> First, it must be determined sports association that adopted the rule to be considered an ‘undertaking’ or an ‘association of undertakings’. Then, it must be determined whether the rule in question restricts competition within the meaning of article 101(1) TFEU or constitutes an abuse of a dominant position under article 102 TFEU. In order for articles 101 and 102 TFEU to apply, it is also necessary that trade between Member States is affected. Finally, it must be determined if the rule fulfils the conditions for an exception under Article 101(3) TFEU.

<sup>127</sup> Article 13, par.3 of the ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000.

<sup>128</sup> CJEU, Case 27/76 United Brands Company v Commission [1978] E.C.R. 207, para. 65.

<sup>129</sup> CJEU, Case C-62/86 Akzo Chemie BV v. Commission [1991] E.C.R. I-3359, para. 60.

<sup>130</sup> CJEU Case T-313/02 David Meca-Medina and Igor Majcen v. Commission [2004] E.C.R. 2004 II-3291.

<sup>131</sup> The Commission has indicated that it subscribes to the four-step “test” followed by the Court in order to assess whether a sporting rule infringes EU competition law (European Commission, 2007b).

### ‘Undertaking’ or ‘association of undertakings’

Article 101 TFEU speaks of ‘undertakings’ and ‘associations of undertakings’, while article 102 TFEU only mentions ‘undertakings’. The CJEU has given a broad definition of an ‘undertaking’. It defined the term as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.<sup>132</sup> Since in the absence of ‘economic activity’ articles 101 and 102 TFEU do not apply, it is relevant to assess to what extent the sport in which the clubs or athletes are active can be considered an economic activity and to extent the members exercise economic activity. The CJEU has defined ‘economic activity’ as any activity consisting of ‘offering goods or services on the market’<sup>133</sup> As EU case law has shown; economic activity may take place at various levels in the sport sector. This ranges from sports associations to clubs and individual athletes.

International sports associations such as FIFA or UEFA are undertakings to the extent that they themselves carry out activities of economic nature. This can be, for example, the selling of broadcast rights. In its 1990 ‘FIFA World Cup ruling’, the Commission held that although FIFA is a federation of sports associations and accordingly carries out sports activities, “FIFA also carries out activities of an economic nature, notably as regards: the conclusion of advertising contracts, the commercial exploitation of the World Cup emblems, and the conclusion of contracts relating to television broadcasting rights”.<sup>134</sup> Therefore, the Commission concluded that FIFA constitutes an undertaking within the meaning of article 101 of the TFEU.<sup>135</sup> Sports associations also constitute undertakings under Article 102 TFEU to the extent they group members which in turn constitute undertakings.<sup>136</sup>

International sports associations not carrying out economic activities themselves may be considered associations of undertakings. A sports association is an “association of undertakings” capable of acting anti-competitively if its members, i.e. clubs or athletes, are engaged in an economic activity.<sup>137</sup> Also, international sports associations can sometimes be referred to as “associations of associations of undertakings”. In its ruling in the UEFA Champions League case, the Commission held that, as its membership consists of economic entities (clubs), national football associations are associations of undertakings but are also themselves engaged in economic activities. As the members of UEFA are the national football associations, it is therefore “both an association of associations of undertakings as well as an association of undertakings”.<sup>138</sup>

A national sports association can be both an undertaking under Articles 101 and 102 TFEU and an association of undertakings under Article 101 TFEU. National sports associations are undertakings where they themselves carry out economic activity. In the

<sup>132</sup> CJEU, Case 41/90 Klaus Höfner and Fritz Elser v Macroton GmbH [1991] E.C.R. I-1979, para. 21.

<sup>133</sup> CJEU, Case 118/85 Commission v Italy [1987] E.C.R. 2599, para. 7.

<sup>134</sup> European Commission, Cases 33384 and 33378, Distribution of package tours during the 1990 World Cup [FIFA World Cup], OJ 1992 L 326/31, para. 47.

<sup>135</sup> *Ibid.*, para. 48.

<sup>136</sup> CJEU, Case T-193/02, Piau v. Commission, E.C.R. 2005 II-209, paras. 112 and 116.

<sup>137</sup> See CJEU, Case T-193/02, Piau v. Commission, E.C.R. 2005 II-209, para. 72.

<sup>138</sup> European Commission, Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 106.

‘FIFA World Cup case’, the Commission held that the Italian football league had a share in the profits of the FIFA World Cup and was able to exploit commercially in Italy the 1990 World Cup emblem, which is had itself created.<sup>139</sup> National sports associations are also associations of undertakings under Article 101 TFEU to the extent they constitute groupings of undertakings, i.e. sport clubs or athletes for which the practice of sport constitutes an economic activity.<sup>140</sup> Sport clubs or teams are undertakings within the meaning of Article 101 and 102 TFEU to the extent that they carry out economic activities. This has been confirmed by the CJEU in the ‘Piau’<sup>141</sup> and by the Commission in the ‘ENIC/UEFA cases’.<sup>142</sup>

Individual athletes may also be undertakings within the meaning of article 101 TFEU regardless of his or her status of amateur or professional.<sup>143</sup> In his opinion in the ‘Bosman case’, Advocate General Lenz considered that football players employed by a football club – and who therefore are not independent - do not constitute undertakings.<sup>144</sup> However, in this case they may be considered undertakings when they carry out economic activities independent of their club, for instance when they enter into sponsoring agreements. Besides, the ‘Deliège case’ has demonstrated that an athlete can be a provider of service and thus an entity engaged in an economic activity.<sup>145</sup>

### The ‘Wouters’ test

If a sport association can be regarded as an ‘undertakings’ or “associations of undertakings”, it must then be assessed whether the rule adopted by it restricts competition within the meaning of article 101(1) TFEU or constitutes an abuse of a dominant position under article 102 TFEU. In this regard, the most significant element of the CJEU’s assessment of the latter in ‘Meca-Medina’ concerns the role of the judgement in the ‘Wouters case’, which as such had nothing to do with sport.<sup>146</sup> The Court’s reference to ‘Wouters’ is of profound importance to the future treatment of sport under EU competition law. It entails that, in order to establish whether a rule adopted by a sport body violates EU Competition Law, account must be taken of the ‘overall context’ in which the rule was adopted or produces its effects and its objectives; whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and whether the rule is proportionate in light of the objective pursued.

The ‘Meca-Medina ruling’ eliminates the notion, originating in the ‘Walrave case’, of a ‘purely sporting rule’ which has an economic effect yet automatically falls out of the scope of EU law. The only rules which can pass as ‘purely sporting’ are a very small category of rules which have no economic effect, the so-called sporting rules *sensu stricto*, which will

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139 See FIFA World Cup Case.

140 In the Piau case, the GC held that is “common ground” that national associations are groupings of football clubs for which the practice of football is an economic activity. See CJEU, Case T-193/02, Piau v. Commission, E.C.R. 2005 II-209, para. 69.

141 European Commission, Piau,.

142 European Commission, Case 37806, ENIC/UEFA, para. 25.

143 Ibid., para. 46.

144 See Opinion of Advocate-General Lenz in Bosman.

145 Ibid, paras. 56 and 57.

146 CJEU, Case C-309/99 Wouters [2002] E.C.R. I-1577.

most definitely continue to fall outside the scope of EU law.<sup>147</sup> The majority of regulations adopted by a sport body however exert an economic impact. This does not mean that they are incompatible with EU law. Consequential restrictive effects of a regulation of a sporting association which cause economic hardship are not treated as prohibited restrictions for the purposes of application of article 101 TFEU (or the provisions on freedom of movement for workers and freedom to provide services) provided that they are inherent in the pursuit of those objectives.

It is important to stress that article 2 of Council Regulation No 1/2003 on the implementation of the rules on competition provides that the burden of proving an infringement of art. 101(1) TFEU shall rest on the party or the authority alleging the infringement.<sup>148</sup> Those who want to challenge a regulation by a sport body find that the ‘Wouters’ formula is reversed: they will have to show that the consequential effects restrictive of competition go beyond what is inherent in the pursuit of the practice’s objectives, for only then there is a violation of article 101(1) TFEU. Given the burden of proof, it is for the applicant, challenging a sport regulation, to demonstrate coherent alternative governance structures (Weatherill, 2006).

The CJEU made it clear in its ‘Meca-Medina ruling’ that, in the line of its ‘Wouters ruling’, even if a rule issued by a sport association restricts the freedom of action of the athletes, it may not breach Articles 101 and 102 TFEU to the extent that the rule in question pursues a legitimate objective and its restrictive effects are inherent in the pursuit of that objective and are proportionate to it. Following the ‘Meca-Medina ruling’, legitimate objectives of sporting rules will normally relate to “the organisation and proper conduct of competitive sport”.<sup>149</sup> In assessing the existence of a legitimate objective, account must be taken of the specific characteristics, i.e. the distinctive features setting sport apart from other economic activities, of sport and of their social and educational function.<sup>150</sup> The restrictions caused by a sporting rule must be inherent in the pursuit of its objective.<sup>151</sup>

### Justification under article 101 (3) TFEU

Where a restriction under Article 101(1) TFEU is found, such restriction may be justified under Article 101(3). Article 101(3) TFEU provides that the prohibition contained in

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147 In its staff working document annexed to the 2007 White Paper on sport, the European Commission lists a few types of “pure sporting rules” that – based on their legitimate objectives – are likely not to breach EU law: 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 (European Commission, 2007b, p. 39).

148 EU Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

149 CJEU, *Meca Medina*, paras. 45 and 46. They may include, for instance, the ensuring of fair sport competitions with equal chances for all athletes, the ensuring of uncertainty of results, the protection of the athletes’ health, the protection of the safety of spectators, the encouragement of training of young athletes, the ensuring of financial stability of sport clubs or the ensuring of a uniform and consistent exercise of a given sport.

150 See e.g. CJEU *Bernard*, para. 40.

151 CJEU, *Meca Medina*, para. 45. In *Meca-Medina*, the CJEU concluded that the effects of penalties on athletes’ freedom of action must be considered to be “inherent” in the general objective of the anti-doping rules to combat doping in order for competitive sport to be conducted on a fair basis.

Article 101(1) TFEU may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned. Such a justification is most likely to apply where a rule is not inherent in the organisation or proper conduct of sport so as to justify the application of 'Wouters' but where the beneficial effects of a rule outweigh its restrictive effects.

### Sporting rules that may infringe Articles 101 and 102 TFEU

The cases in this section concern sporting rules which restrict competition and which have not been held to be necessary or inherent for the organisation of proper conduct of sporting competitions. Therefore, such rules will be likely to infringe Articles 101 and/or 102 TFEU.

#### *Rules shielding sports associations from competition*

The 'FIA case' concerned a conflict of interest situation arising from the fact that the Fédération Internationale d'Automobile (FIA), the principal worldwide authority for motor racing, was not only the regulator but also the commercial exploiter of motor sport. This set incentives for the FIA to abuse its regulatory power in order to protect and increase the commercial rents from its self-promoted products and, thus, discriminate against and deter products under its authority that were promoted by independent agencies.

In 1999, the Commission issued a Statement of Objections (SO) against rules by FIA that prohibited drivers and race teams that held a FIA licence from participating in non-FIA authorised events, so circuit owners were prohibited from using the circuits for races which could compete with Formula One. The Commission *prima facie* alleged the FIA to abuse its dominant position in the market for global motor racing because

- it used its power to block series which compete with its own events;
- it used this power to force a competing series out of the market;
- it used its power abusively to acquire all the television rights to international motor sports events; and
- it protected the Formula One (F1) Championship from competition by tying everything up that is needed to stage a rival championship.

In 2001, the Commission reached a settlement with FIA and subsequently closed the case (European Commission, 2001a, 2001b). In particular, the settlement included that FIA would:

- limit its role to that of a sport regulator without influence over the commercial exploitation of the sport and thus removing any conflict of interest (through the appointment by FIA of a 'commercial rights holder' for 100 years in exchange for a one-off fee);

- guarantee access to motor sport to any racing organisation and to no longer prevent teams to participate in and circuit owners to organize other races provided the requisite safety standards are met;
- waive its TV rights or transfer them to the promoters concerned; and remove the anticompetitive clauses from the agreements between FOA and broadcasters.

The ‘MOTOE case’<sup>152</sup> involved the combination of regulatory powers and an organisation of competitions with economic activity in the regulated market, similar to the F1/FIA investigation into alleged abuses by the FIA in making commercial gains (European Commission, 2001b). The key difference between these cases is the role which the state plays in legitimising and establishing the special powers of the dominant undertaking. In the MOTOE case, the respondent ELPA was granted a regulatory power of consent by the state rather than economic power. However, ELPA could effectively prevent rival competitions with that state power and it was alleged to have been abused when ELPA offered no reasons for refusing to consent to a competition organised by MOTOE, a rival to its own competitions (Miettinen, 2008, p. 13).

In the MOTOE case, it was declared that the mere risk of abuse is sufficient for an infringement of article 106(1) TFEU considered in conjunction with article 102 TFEU.<sup>153</sup> It is important to stress the fact that the MOTOE judgment provides some reasons why sports services will not often constitute services of general interest that are shielded from the full force of the Treaty’s internal market rules.

So, the MOTOE judgment raises the question of whether the risk of abuse itself requires regulation and supervision of an undertaking that is placed, by virtue of special powers, in a dominant position (Miettinen, 2008, p. 16). Where a body is active in other ancillary markets, its regulatory function is itself the reason why it is led to abuse its dominant position by imposing unfair conditions on its competitors.<sup>154</sup> The ‘MOTOE case’ however suggests that, if tempered with “restrictions, obligations, and review”, the grant of that power might not in itself be contrary to Articles 102 and 106(2) TFEU. As a consequence of MOTOE, it could be argued that since all undertakings that are endowed with regulatory powers are placed in a dominant position, regardless of whether they abuse that position, they must be subject to ‘restrictions, obligations and review’ (Miettinen, 2008, p. 17).

#### *Rules concerning the legal challenge of decisions taken by sports associations*

In the ‘FIA case’, one of the Commission’s concerns was to ensure that legal challenge against FIA decisions would be available not only within the FIA structure but also before national courts. 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.<sup>155</sup>

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152 CJEU, Case C-49/07, *Motosyklistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, [2008] E.C.R. I-04863.

153 CJEU, MOTOE, para. 50.

154 CJEU, MOTOE, paras 49-50.

155 *Ibid.*

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 end (European Commission, 2002).

*Rules concerning nationality clauses for sport clubs/teams*

The 'Bosman case'<sup>156</sup> concerned UEFA's '3+2 rule', which permitted each national football association to limit the number of foreign players whom a club may field in any first division match in their national championships to three, plus two players who have played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior. The limitation of foreign players in a football club was ruled illegal by the CJEU in so far as they discriminated against players from countries within the European Union.<sup>157</sup>

Although the CJEU ruled only on the basis of the free movement for workers, the Commission and Advocate General Lenz<sup>158</sup> considered that rules limiting the employment of foreign players also infringed Article 101(1) TFEU because they restricted the possibilities for the individual clubs to compete with each other by engaging players.

*Rules governing the transfer of athletes in club competitions*

In the 'Bosman case', the CJEU ruled that transfer rules for expired contracts constitute an obstacle to the freedom of movement for workers since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations.<sup>159</sup> The Court reasoned that the transfer fee system did not effectively maintain the legitimate objective of financial and competitive balance because the rules neither prevented the richest clubs from monopolising the best players nor reduced the decisive impact of finances on the strength of competition. Moreover, the Court indicated that the goals set out by UEFA could be achieved by other, less-restrictive means which do not impede worker's freedom of movement.<sup>160</sup>

The CJEU did not assess the transfer rules under Articles 101 and 102 TFEU. Advocate General Lenz however concluded in his Opinion that the transfer rules also violated Article 101 TFEU because they replaced the "normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved... [E]ven after the contract has expired the player remains assigned to his former club for

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156 CJEU, Bosman.

157 Ibid., para. 137.

158 CJEU, Bosman, Opinion of AG Lenz, para. 262.

159 Ibid., para. 100. In para. 103, the Court held that "[i]t is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players "access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers".

160 Ibid., para. 110.

the time being”.<sup>161</sup> Under normal competitive conditions, a player would have been able to transfer freely upon expiry of the contract and choose the club which offers him the best terms. The transfer rules therefore restrict the possibilities of the clubs to compete with each other by engaging players. Therefore, there is no doubt that such transfer rules for expired contracts would also not survive the test in ‘Meca-Medina’.

Much more controversial is the discussion about the issue of the legality of the payment of transfer fees for players who are still under contract. The demanding of such a fee by the selling club has the potential to severely restrict freedom of movement between EU states for players. According to Egger and Stix-Hackl (2002, p. 87), the regulations, as a decision of an association of undertakings, have restrictive effects since they in certain cases prevent football clubs to engage players without a transfer payment or for a smaller payment than that demanded by the old club. As their effects, the transfer regulations combine the right of the former club to retain the player with a right to compensation. In fact, in a large number of cases it is precisely the amount of the fee demanded which prevents a player's transfer and thereby, the clubs' access to their sources of supply is restricted.

In accordance with the ‘Meca-Medina ruling’, it must then be determined whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and whether the rule is proportionate in light of the objective pursued. The response to this question, which ultimately must be answered by the CJEU, is analogous to the response above as regards objective justification of the transfer system in the field of the free movement for workers. Referring to the ‘Bosman ruling’,<sup>162</sup> Egger and Stix-Hackl (2002, p. 89) find that the demanding of a freely defined fee for a player is not proportionate. Objective criteria are thus needed to calculate the fee, based primarily on the costs of training of the player and on the contribution of the player concerned to the economic success of the club.<sup>163</sup>

#### *Rules concerning the organisation of ancillary activities (agent licensing)*

The ‘Piau judgment’<sup>164</sup> concerned FIFA rules governing the profession of football agents through whom professional football players may conclude contracts with the clubs. Under these rules, a contract was valid only if the agent involved had a licence for his/her practice issued by the national football association. Licensed agents had to pass an interview, have an impeccable reputation, and deposit a bank guarantee. In 2000, following the administrative procedure initiated by the Commission after a complaint

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161 Bosman, Opinion GA Lenz, para. 262. The transfer rules in Bosman did not constitute “purely sporting” rules but concerned economic activity (see the reference of the GC Meca Medina, paras. 40 and 42).

162 In Bosman, para. 107, the CJEU held that “the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs”.

163 It must be noted that the fact that the current rules have been worked out with and even approved by the Commission has no legal significance. The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions as it is for the CJEU alone to give binding interpretations of those provisions. Thus, the CJEU might still find these rules to be incompatible with EU law should they become under scrutiny again. Egger and Stix-Hackl (2002, p. 89) mention that a way to draw up transfer rules compatible with Competition Law, is to lay them down at contractual level, whether in the individual contracts of players with their (former) clubs or in the form of a collective agreement.

164 CJEU, Case T-193/02, Piau v. Commission, E.C.R. 2005 II-209.

was lodged which alleged that the regulations constituted a restriction on competition under Articles 101 and 102 TFEU, FIFA adopted new Players' Agents Regulations, which were enforced in March 2001 and were amended again in April 2002. FIFA had removed the most restrictive limitations. For instance, the deposit was substituted by a liability insurance and the interview was replaced with a multiple-choice test. Following these amendments the Commission, by a decision of 15/04/2002, rejected the complaint. The General Court (GC) and later the Court of Justice<sup>165</sup> upheld this decision.

## Sports media rights

Securing media rights for major international, European and national sport events are crucial for many media operators to be able to enter and stay in the market. Especially top league European football clubs increasingly make a large part of their revenue from the sale of media rights. In recent years, the sale of broadcasting rights has become a of capital importance for top European clubs, replacing ticket income as the single most important source of revenue. As the Commission stated in its decision in the *Newscorp/Telepiù* case: "rights to recent premium films and most regular football events where national teams participate [...] constitute the essential factor (the "drivers") that leads consumers to subscribe to a particular pay-tv channel or platform"<sup>166</sup>

Given the economic importance of sport media rights, it is no wonder that the sale of in particular football broadcasting rights has been subject to scrutiny by the Commission and the national competition authorities for some time now. So, the Commission has dealt with the acquisition of sport media rights in a number of cases.

It should come as no surprise that, as regards EU competition law, all broadcasting organisations, whether they are public or not, are undertakings within the meaning of Articles 101 and 102 TFEU.<sup>167</sup> The activities of acquiring and sublicensing television rights and the sale of advertising slots all constitute examples of activities of an economic nature.<sup>168</sup>

## Market definitions

The definition of the relevant market is the first necessary step in any antitrust investigation. Indeed, in order to assess the existence or creation of market power it is essential to identify the relevant geographical and product markets, i.e. the boundaries of competition between firms. A general distinction is usually made between two markets: the up-stream markets and the downstream markets. In the upstream market, media operators purchase rights for content from the right-owners. In the downstream markets, media operators compete for audiences and advertising revenues. As the acquisition of media rights at the upstream level affects the competitive structure at the downstream level, these two levels are clearly interrelated (Gérardin, 2004, p. 7).

<sup>165</sup> Order of the CJEU of 23 January 2006, Case C-171/05P, E.C.R. 2006 I-37.

<sup>166</sup> European Commission, Decision of 2 April, 2003, Case COMP/M. 2876 OJ 2004 L 110/73. See also: European Commission, Decision of 15 September 1999, Case 36539 British Interactive Broadcasting/Open, OJ 1999 L 312/1, para. 28.

<sup>167</sup> CJEU, Case 155/73 Giuseppe Sacchi E.C.R. [1974]409, para. 14.

<sup>168</sup> European Commission, Decision of 10 May 2000, Case 32150, Eurovision, OJ 2000 L 151/18, para. 64.

In 1996 in the Bertelsmann/CLT case, the Commission identified for the first time a separate product market for television rights for sport events.<sup>169</sup> This segmentation was justified by the Commission by pointing towards the specific characteristics of sport events as compared to film and other programme rights. In later decisions, the Commission has given a more specific definition of upstream markets. In the 'Eurovision case', the Commission considered that there could be separate markets for the broadcasting rights for certain major sport events such as the Olympic Games.<sup>170</sup> In its decision in the 'UEFA Champions League case', the Commission defined a separate market for the acquisition and resale of broadcasting rights for football events played regularly throughout the year. This includes in particular matches in the national leagues or national cup tournament as well as the UEFA Champions League and the UEFA Europa League.<sup>171</sup> In the 'Newscorp/Telepiù case', the Commission defined a separate market for the broadcasting rights for football events that do not take place regularly where national teams participate, such as the FIFA World Cup and the European Football Championship.<sup>172</sup> In the recent CVC/SLEC decision, the Commission suggested that in Italy and Spain a narrower market of TV-rights for major sports events could be defined consisting of Moto GP and Formula One.<sup>173</sup> The decision confirmed that regular major sport events, i.e. sport events that take place throughout the year or throughout a significant time period each year such as Formula One races are not in the same market as major irregular sport events which take place for a few weeks every four years.<sup>174</sup>

Technology has made the greatest contribution to the many different product markets at the downstream level, i.e. the markets for the acquisition of media rights for sport events. Separate markets are generally defined for the provision of pay-TV as opposed to free-to-air TV.<sup>175</sup> The Commission concluded this based on the different trading relationships involved, the different conditions of competition, the price of the services, and the characteristics of the two types of television.<sup>176</sup> As regards new media, the Commission further identified downstream markets for on-demand sport content services delivered via second- and third generation mobile phones (such as UMTS) and via internet.<sup>177</sup>

With regard to the geographic market definition, the Commission has held thus far that the upstream markets are of a national character or at the largest confined to linguistic

169 European Commission, decision of 7 October 1996, Case M.779 Bertelsmann/CLT, OJ 1996 C 364/3, para. 19.

170 European Commission, Decision of 10 May 2000, Case 32150, Eurovision, OJ 2000 L 151/18, paras 38-45.

171 European Commission, Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 63.

172 European Commission, Decision of 2 April, 2003, Case M. 2876, Newscorp/Telepiù, OJ 2004 L 110/73.

173 European Commission, Decision of 20 March 2006, Case M.4066, CVC/SLEC, paras 51-55..

174 Ibid., para. 33-37.

175 See, e.g., European Commission, Decision of 3 August 1999, Case M.1574, Kirch/Mediaset, OJ 1994 L 364/1; European Commission, Decision of 2 April, 2003, Case M. 2876, Newscorp/Telepiù, OJ 2004 L 110/73.

176 See European Commission, Decisions of 15 September 1999, Case IV.36.539, BiB/Open, C1999/2935, para. 24; of 21 March 2000, Case JV.37 BSKyB/Kirch Pay TV, para. 24; of 2 April, 2003, Case Newscorp/Telepiù, COMP/M. 2876, OJ 2004 L 110/73, paras. 18-47; of 29 December 2003, Case 38287, Telenor/Canal+/Canal Digital, para. 28; Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 82; and Commission decision of 19 January 2005, Case 37214 Joint selling of the media rights to the German Bundesliga, OJ 2005 L 134/46, para. 18).

177 Case 37214 Joint selling of the media rights to the German Bundesliga, OJ 2005 L 134/46, para. 18; European Commission, Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, paras. 82-85.

regions.<sup>178</sup> As a result of national regulatory regimes, language barriers, and cultural factors, the upstream geographical market also tends to be national, not only for national events but also for international sport events.<sup>179</sup> However, in the ‘Murphy case’,<sup>180</sup> the CJEU has stated that a system of licences for the broadcasting of football matches which grants broadcasters territorial exclusivity on a Member State basis and which prohibits television viewers from watching the broadcasts with a decoder card in other Member States is contrary to EU law .

### The joint selling of media rights (upstream market)

The Commission’s decision making practice as regards the sale and acquisition of football rights is thus far limited to cases relating to the joint selling of exclusive rights under Article 101 TFEU. No decisions have been adopted with regard to the behaviour of a single seller, such as sport associations or sport rights agencies, under Article 102 TFEU. Joint selling occurs, for instance, when sport clubs entrust the selling of their media rights to their sports association, which sells the rights collectively on their behalf. Such an arrangement constitutes a horizontal agreement between clubs which restricts competition as it prevents individual clubs from competing in the sale of sports media rights. As one price is applied to all rights collectively, which leads to uniform prices compared to a situation with individual selling, the horizontal agreement constitutes price fixing, a hard-core restriction under Article 101 TFEU.

In addition, the joint selling arrangement often reduces the number of rights available in the upstream acquisition market. Particularly, if those exclusive rights are purchased by a single buyer, this can result in the reinforcement of the market position held by dominant pay-tv companies which are the only companies with a sufficient financial capacity to offer the high prices demanded for sports media rights. As such, this may create barriers to entry on downstream broadcasting markets and may lead to access foreclosure in these markets, as other retailers in the downstream market are foreclosed from accessing these rights. Moreover, joint selling could lead to output restrictions when certain parts of the jointly acquired rights are withheld from the market (Toft, 2006).

However, the Commission has recognised that joint selling may have pro-competitive effects that lead to efficiency gains in the marketing of rights and accepted joint selling arrangements under Article 101(3) TFEU. In its decisions, the Commission has in particular identified three types of benefits (European Commission, 2007b):

- The creation of a single point of sale, which provides efficiencies by reducing transaction costs for football clubs and media operators.
- Branding of the output creates efficiencies, which helps the media products getting a wider recognition and hence distribution.

178 See, e.g., Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 90; Case M.779 Bertelsmann/CLT, OJ 1996 C 364/3, para. 22.

179 See, e.g., Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 88

180 CJEU, Case Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) [Murphy] [2011] E.C.R. I-00000.

- The creation of a league product, which is focused on the competition as a whole rather than the individual football clubs participating in the competition.

#### *The UEFA CL case*

The Commission's position on joint selling of sport rights is exemplified by its 2003 decision on the joint marketing of the Champions League by UEFA.<sup>181</sup> In this case, the Commission for the first time accepted joint selling of football media rights and laid out the principles for a pro-competitive rights structure. The joint selling arrangements for the sale of the Champions League rights were originally notified to the Commission in 1999. The original arrangements provided for the sale of UEFA Champions League free and pay-tv rights on an exclusive basis in a single bundle to a single broadcaster per territory for several years in a row. Buyers had only one source of supply and a single large broadcaster per territory would acquire all free and pay-tv rights, excluding others and resulting in a number of rights being left unexploited and output restrictions (European Commission, 2007b). The Commission took the view that these arrangements would result in the rights being acquired in a bundle by a single media group per country on an exclusive basis thereby restricting competition between pay-tv operators and hampering the development of new forms of distribution.<sup>182</sup> Following the intervention by the Commission, UEFA amended its joint selling arrangements. UEFA's proposal for a new joint selling arrangement was the subject of several meetings between UEFA and the Commission and it was modified in a number of points at the request of the Commission. The revised arrangements were notified to the Commission which in its decision of 2003 finally exempted them under Article 101(3) subject to a number of conditions.

First, in order to reduce the risk of foreclosure effects in the downstream market, the Commission required UEFA to organise a competitive bidding process under non-discriminatory and transparent terms, the so-called "non-discriminatory and transparent tendering". This way, all qualified broadcasters are given an equal opportunity to bid for the rights.<sup>183</sup>

Second, the risk of long-term market foreclosure was limited by requiring UEFA to limit the duration of the exclusive media rights contracts to a period not exceeding three UEFA Champions League seasons.<sup>184</sup> Allowing longer contract duration would risk creating a situation where the purchaser would be able to establish a dominant position on the downstream market.

Third, the risk of market foreclosure resulting from a single buyer acquiring all the valuable rights was limited by obliging UEFA to unbundle the media rights in separate packages by splitting them up into several different rights packages that would be offered for sale in separate packages to different third parties.<sup>185</sup> UEFA agreed to offer its TV rights in several smaller packages on a market-by-market basis. The precise format

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181 European Commission, Decision of 23 July 2003, Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, paras 136 et seq.

182 Statement of objections sent on 20 July 2001 (IP/01/1043).

183 See: European Commission, UEFA CL, paras 27-30.

184 Ibid., para. 25.

185 Ibid., para. 22.

may vary depending on the structure of the TV market in the Member State in which the rights are being offered.<sup>186</sup> More specifically, the Commission required:

- A reasonable amount of different packages. The Commission required the creation of two or two main live rights packages for free-TV or pay-TV each comprising two matches per match night, the so-called Gold and Silver packages. When the competition has reached the final stages the two main live packages will absorb all TV rights of the UEFA Champions League.<sup>187</sup> The reason for this requirement was that the creation of various packages would enable more than one media operator to acquire the rights.
- By providing for specific packages for certain distribution platforms, the so-called earmarking, mobile operators and internet service providers were enabled to acquire rights. Due to the strong asymmetric value of rights for different distribution platforms, access to sports media rights may be foreclosed to downstream market operators in certain evolving markets or platforms such as 3G networks or internet markets.

In Order to limit the risk of output restrictions caused by the joint sale of broadcast rights, the Commission required UEFA to ensure that there were no unused rights. This was achieved firstly by a reduction of UEFA's exclusive right to sell by allowing the football clubs to sell certain media rights in parallel with UEFA. If UEFA has not managed to sell the rights of the matches not falling under a package within one week after the draw for the group stage of the UEFA Champions League, UEFA will lose its exclusive right to sell these TV rights. Thereafter, UEFA will have a non-exclusive right to sell these TV rights in parallel with the individual home clubs participating in the match).<sup>188</sup> The right of UEFA and the individual football clubs to sell these remaining matches are subject to picks made by the broadcasters having bought the main live packages Gold and Silver.<sup>189</sup> Secondly, The Commission ensured market availability of less valuable rights such as deferred highlights and new media rights<sup>190</sup> by imposing the parallel exploitation of these rights by individual clubs and UEFA.

The approach by the Commission in the *UEFA CL* case has become standard. The spirit of this decision was clearly followed in subsequent cases related to the joint selling of sports media rights, in particular the 'DFB' and 'FAPL' cases.

#### *The DFB and FAPL cases*

The DFB<sup>191</sup> and FAPL<sup>192</sup> concerned the joint selling by the German Football League (Deutsche Liga-Fussballverband, DFB) and the English Football League (FA Premier League Limited) of the media rights of their respective competitions. In both cases,

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186 *Ibid.*, para. 32.

187 *Ibid.*, para. 33.

188 *Ibid.*, para. 34.

189 *Ibid.*, para. 35.

190 *Ibid.*, paras 40, 44.

191 European Commission, Decision of 19 January 2005, Case 37214 Joint selling of the media rights to the German Bundesliga, OJ 2005 L 134/46.

192 European Commission, Decision of 22 March 2006, Case 38173 Joint selling of the media rights to the FA Premier League [FAPL], OJ 2006 L 176/104.

commitments were made to amend the original joint selling arrangements and these were made legally binding under Article 9(1) of Regulation 1/2003.<sup>193</sup> Pursuant to this provision, Commission, where it intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. In the ‘DFB case’, the commission made its first ever commitment decision.

The commitments by both the DLF and the FAPL included the unbundling of rights into separate rights packages for TV broadcasting and mobile platforms, the possibility for individual clubs to exploit certain unsold rights and rights unused by the initial purchaser, as well as the exploitation of deferred rights and rights for the new internet broadcasting (the internet broadcasting rights were sold as a separate package in DFB but not in FAPL) and telephony broadcasting markets. Rights were to be disposed of using a public tender procedure and exclusive rights contracts were not to exceed three football seasons (European Commission, 2007b).

In the ‘FAPL case’, the Commission seemed to be pushing for more far-reaching measures due to the structure of the relevant downstream market.<sup>194</sup> In order to prevent that all packages of valuable live rights were sold to the dominant pay-TV operator in the United Kingdom, BSkyB, the Commission considered it necessary to impose a no single buyer obligation on the collective selling entity in the FAPL decision. Over a number of years prior to the ‘FAPL decision’, BSkyB had acquired all the valuable live-TV packages that were made available on the market by the joint seller. Additional remedies were therefore deemed necessary to prevent downstream foreclosure and to ensure access also of other market players. In the absence of such remedies there was a risk that competition would remain eliminated well beyond the duration of any on-going contract as due to the long-term presence of the dominant buyer competition was ineffective. Moreover, an obligation was imposed on the seller to accept only stand-alone unconditional bids for each individual package.<sup>195</sup> The rights would be sold to the highest standalone bidder. Such unconditional selling is aimed at preventing a powerful buyer interested in acquiring the most valuable package(s) from offering a bonus on condition that all the valuable rights are sold to it, thus inciting initial rights owners not to sell at least some packages to competitors in the same market or operators in neighbouring markets.

### The joint buying of media rights (downstream market)

Article 101 TFEU does not hold an automatic objection to joint buying agreements. However, such agreements may also raise competition concerns when the exclusive acquisition of sports media rights leads to foreclosure and output restrictions as a result of vertical restraints in agreements between seller and buyer or by horizontal agreements between different buyers (European Commission, 2007b). For instance, parties excluded from the agreement can be prevented from acquiring the rights. Therefore, the

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193 EU Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

194 *Ibid.*

195 European Commission, FAPL, para. 40.

Commission has tried to ensure in its decisions relating to the joint buying of media rights that third parties have sufficient access to the jointly acquired media rights.

The Commission has dealt with a number of cases where remedies were necessary to address situations where a powerful retail operator on one platform foreclosed access to exclusive content for operators in the same or neighbouring markets. Its approach can be illustrated on the basis of the ‘EBU/Eurovision’<sup>196</sup> and the ‘Audiovisual Sport’<sup>197</sup> cases. Those cases have demonstrated that “there is no necessary objection to membership rules per se. But they must be objective and sufficiently clear so as to enable them to be applied uniformly and in a non-discriminatory manner. Rules which do not meet these criteria cannot be treated as “indispensable” and so cannot be exempted under [Article 101(3)]” (Weatherill, 2006, p. 21).

### The import, use and sale of foreign decoder cards

In the ‘Murphy case’,<sup>198</sup> the CJEU ruled that a system of licences for the broadcasting of football matches which grants broadcasters territorial exclusivity on a Member State basis and which prohibits television viewers from watching the broadcasts with a decoder card in other Member States is contrary to EU law. The Court ruled that national law which prohibits the import, use or sale of foreign decoder cards is contrary to the freedom to provide services and cannot be justified by the objective either of protecting intellectual property rights or of encouraging the public to attend football stadiums. Therefore, any EU consumer should be allowed to go to another Member State in order to get a decoder and a decoder card.

However, as opposed to the actual live football match itself, the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics added to Premier League matches are protected by copyright. Therefore, a person who wants to transmit those works to the customers present in a public house (a “communication to the public” within the context of intellectual property law) may need consent from the rights holder and thus, a publican like Ms Murphy may need further authorisation from the Premier League to show these. It is certain that after the CJEU ruling the Premier League will not be able to prevent the free circulation across borders of decoder cards giving access to Premier League matches. However, copyright issues may prohibit broadcasting live PL football matches using foreign subscriptions.

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196 European Commission, Decision of 11 June 1993, Case 23150, EBU/Eurovision System, OJ 1993 L 179, para. 49.

197 European Commission, Press release of 8 May 2003, Commission closes its probe of Audiovisual Sport after Sogecable/Via Digital merger, IP/03/655.

198 CJEU, Case Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) [Murphy] [2011] E.C.R. I-00000.

## The enforcement of EU law on sports bodies

### The Court of Justice of the European Union

The reference for a preliminary ruling is the procedure that enables national courts to question the CJEU about the interpretation or validity of EU law in the context of a dispute submitted to the Court. Pursuant to Article 267 TFEU, the Court of Justice of the European Union is empowered to give preliminary rulings on the interpretation of the Treaties and the validity and interpretation of acts of the EU institutions, bodies, offices or agencies. Article 256(3) TFEU specifies that not only the CJEU but also the General Court shall have jurisdiction to give preliminary rulings in the areas determined by the Statute of the CJEU. However, the CJEU has not made any arrangements to share its jurisdiction with the General Court and consequently, the CJEU alone is empowered to give preliminary rulings.

Any national court to which a dispute in which the application of a rule of EU law raises questions has been submitted can decide to refer to the CJEU to resolve these questions. National courts or tribunals adjudicating at last instance, as a rule pursuant to article 267 TFEU, must refer but this is subject to the doctrine of *acte clair*.<sup>199</sup> Other courts can however exercise their discretion. From that time onwards the national court must stay proceedings until the CJEU has handed down its decision. The CJEU gives a decision only on the constituent elements of the reference for a preliminary ruling made to it, and the national court remains competent for the original case. Thus, the CJEU can only rule on the sporting rules that 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.

The referral to a preliminary ruling to the CJEU is by far the most effective tool to get satisfaction from an infringement of the EU law. The CJEU has the obligation to answer the question put to it. It cannot refuse to answer on the grounds that this response would be neither relevant nor timely as regards the original case. It can, however, refuse if the question does not fall within its sphere of competence. The CJEU has however rarely refused to give a preliminary ruling.

### The European Commission

#### *Guardian of the Treaties*

Each EU Member State is responsible for the implementation of Union law (the adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. The peculiarity of the EU legal order is emphasised by the Commission's powers to initiate proceedings against a defaulting Member State in its role as the "guardian of the Treaties" (action for non-compliance). Article 17(1) TEU specifies that the Commission "*shall oversee the application of Union law under the control of the CJEU*". Thus, the Commission, and not the other Member States,<sup>200</sup> has

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199 CJEU, Case 283/81, CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982], E.C.R. 3415.

200 Under Article 259 TFEU Member States are also empowered to bring an action against each other for an alleged breach of EU law but only after the matter has been laid before the Commission. Such actions are however rare,

the principle responsibility for ensuring that the Member States comply with EU law. Under article 258 TFEU, only the Commission may bring an action against a Member State. Nevertheless, a person considering that a MS is infringing EU Law may lay a general complaint before the European Commission. It is however under no obligation to act on the complaint.

The fundamental element authorising the Commission to initiate an infringement procedure against a Member State is the existence of behaviour (action or omission) resulting in the breaching of EU law that can be attributed to the State.<sup>201</sup> Therefore, no general complaint can be lodged against an international sports body because those are mostly private bodies, often governed under Swiss law. However, complaints could be lodged against a Member State that has implemented sporting rules in its legislation and a sports body when it is governed by public law and acts as a Public Authority. Consequently, it is essential to determine whether, and to what extent, Member States participate directly or indirectly in the organisation of professional sports activities.

The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself. Article 258 TFEU sets out a procedure to be followed by the Commission, which gives the Member State an opportunity, on the one hand, of remedying the breach before the action is brought before the CJEU, and on the other hand, to present its defence to the Commission's complaint. If the Commission still considers that a Member State is in breach of its obligation, it may institute proceedings before the CJEU.

#### *Public enforcer of EU competition law*

The Treaty grants the European Commission far-reaching powers as public enforcer of EU competition law. It has the competence to investigate whether practices of undertakings comply with its provisions on competition policy. The Commission may become aware of the infringement of EU competition law through any source (e.g., the press, TV, complaints from competitors and the general public). It may act *ex officio*, or upon an application from a Member State or from "any natural or legal person who can show a legitimate interest".<sup>202</sup> In order to show such an interest, complainants must demonstrate that their interest is, or is likely to be, adversely affected by the anti-competitive conduct of an undertaking.<sup>203</sup> If the latter is the case, a natural or legal person and a Member State may thus lodge a complaint with the European Commission against a football body, which can be considered an undertaking or an association of undertakings, regarding infringement of EU Competition Law.

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because the political implications of them may damage friendly relations between the Member States involved. Consequently, Member States prefer that the Commission acts against the defaulting State under Article 258 TFEU.  
201 Article 258 TFEU refers explicitly to Member States, by which is meant central, regional or local authorities and any agency of the State or independent bodies or institutions which are to be regarded as public bodies. Furthermore, acts of legal persons governed by private law which are controlled by the public authority may result in an infringement of EU law on the part of the MS concerned.

202 Article 7 of Regulation 1/2003

203 GC, Case T-144/92, BEMIM v Commission [1995] E.C.R. II-147.

The CFI has distinguished the procedural stages concerning individual complaints before the Commission.<sup>204</sup> After gathering information, the Commission may either decide not to pursue the complaint, specifying the reasons for its decision and inviting complainants to submit their observations within a fixed time limit. Otherwise, it has a duty either to initiate a procedure against the subject of the complaint or to adopt a definitive decision rejecting the complaint.<sup>205</sup> The Commission is required to make a decision<sup>206</sup> as to whether to proceed with the complaint within a reasonable time.<sup>207</sup> If the Commission adopts a final decision on rejection or acceptance of a complaint, the complainant has the right to seek judicial review of that decision before the CJEU under Article 263 TFEU.<sup>208</sup>

It should be noticed that, although the Commission is under a duty to reply to a complainant,<sup>209</sup> under the settled case law of the CJEU, the Commission is not required to conduct an investigation in each case.<sup>210</sup> The Commission may reject a complaint when it considers that the case does not display a sufficient “EU interest” to justify further investigation.<sup>211</sup> The assessment of the Union interest raised by a complaint depends on the circumstances of each individual case. Such a decision can be taken either before commencing an investigation or after taking investigative measures.<sup>212</sup> However, the Commission is not *obliged* to set aside a complaint for lack of Union interest.<sup>213</sup>

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. This was for instance mirrored in the swelling sports-related caseload following the ‘Bosman ruling’, when a series of high profile investigations into the organisational aspect of sport were launched by the DG competition, usually after a complaint, including an examination of the transfer system in football (Parrish, 2003b, p. 252). The European Commission, should it decide to initiate a procedure against the subject of the complaint, can force a sports body to change its rules in conformity of the relevant EU Legislation and sanction it for its violation.<sup>214</sup> In order to enforce EU competition law the

204 More specifically, it has distinguished three stages, see GC, Case T-24/90 Automec (II) [1992] E.C.R. II-2223.

205 CJEU, Case C-282/95P Guérin [1997] E.C.R. I-1503.

206 Ibid.

207 GC, Case T-127/98 UPS Europe SA v Commission [1999] E.C.R. II-2633.

208 CJEU, Case 26/76 Metro v Commission [1977] E.C.R. 1875.

209 CJEU, Case 210/81 Demo-Studio Schmidt [1983] E.C.R. 3045.

210 Settled case law since CJEU, Case T-24/90, Automec v Commission of the European Communities, [1992] E.C.R. II-2223, para. 85.

211 The concept of “EU interest” was clarified by the GC in Case T-24/90 Automec II. In this case the Court stated that the Commission is entitled to prioritise cases and assess on a factual and legal basis whether a case raises significant EU interest, in particular as regards the functioning of the internal market, the probability of establishing the existence of an infringement and the required scope of the investigation.

212 CJEU, Case C-449/98 P, International Express Carriers (IECC) v Commission of the European Communities [2001] E.C.R. I-3875, para. 37.

213 Cf. CJEU, Case T-77/92, Parker Pen v Commission of the European Communities, [1994] E.C.R. II-549, paras 64/65. See European Commission, Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05).

214 Under article 7 of Regulation 1/2003, the European Commission is empowered to adopt a decision requiring the undertaking concerned to end an infringement and the Commission may impose on undertakings behavioural or structural remedies proportionate to the infringement and necessary to bring the infringement to an end. Under Article 8, the Commission may grant interim relief in urgent cases where there is immediate danger of irreparable damage to the complainant, or where there is a situation which is intolerable for the public interest. Under Article 9 of Regulation 1/2003 when the Commission intends to adopt a decision requiring the parties to terminate infringements, the parties

Commission is even empowered to impose pecuniary sanctions on undertakings for infringements that have already ceased, subject to the limitation period, as well as for on-going infringements.<sup>215</sup> In fact, fines imposed by the European Commission appear to be the main method of enforcement of EU competition law (Wils, 2002, p. 13). In the field of sport, however, the Commission has always shown a willingness to find compromises with sport bodies and remarkably, no fines have ever been imposed on a sports body.

*The negotiated settlement approach in sports*

Even though the CJEU ruled as early as 1974 in the ‘Walrave case’ that, when sport constitutes an economic activity it is subject to European law, for a long time, the EU was not at all occupied with sport. The ‘Walrave approach’ was not fully enforced as sport remained an activity of marginal economic significance during the 1970s and 1980s (Parrish and McArdle, 2004, p. 411). Moreover, the Council and especially the European Commission treated sport matters as a politically highly sensitive issue. Consequently, the Commission’s approach towards sports bodies was 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).<sup>216</sup> This negotiated settlement approach resulted in sport and European law operating in separate realms (Parrish, 2003b, p. 252) as there was no hard enforcement of EU law on the sports sector (Parrish, 2003b, p. 252).<sup>217</sup> The EU institutions were however not unanimous on the exceptional treatment of football. The European Parliament requested the Commission to ensure that economic sporting activities complied with EU law, consistently calling for restrictions on player mobility in European sport to be lifted (European Parliament, 1984; 1989a; 1989b; 1994, Parrish, 2003a, p. 65). Due to the Parliament’s lack of competence, these requests were nonetheless downplayed or ignored.<sup>218</sup>

However, the sports world clearly failed to understand that the Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions as it is for the CJEU alone to give binding interpretations of those provisions. Consequently, the CJEU’s ‘Bosman ruling’ shocked international sports organisations, who did not at all expect EU law to have such severe consequences for

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may offer commitments to meet the concerns expressed to them by the Commission. In such a situation the Commission may adopt a decision making these commitments binding on the undertakings.

215 Those fines, which are given for a variety of reasons, can even be imposed before a final decision is taken by the Commission. See articles 23 and 24 of Regulation 1/2003.

216 For instance, the Commission arranged several meetings with football authorities to discuss the problem of nationality quotas during the 1970s and 1980s.

217 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, 2003a, 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, 2007b, p. 207).

218 At the same time, however, the European Parliament demonstrated a desire to balance the economic regulation of sport with the promotion of sports socio-cultural and integrationist qualities, which was best expressed before the Bosman case in the 1994 “Larive report” (European Parliament, 1994; Parrish, 2003a, pp. 14-15). This desire was descended from the acknowledgement of the potential of sports as a tool for enhancing the identity and the image of the EU with its apathetic citizens. In the 1984, in a response to a perceived crisis in European integration, an ad hoc committee (the Adonnino Committee) was established following Fontainebleau Summit to explore measures that would strengthen the image of the European Community in the minds of its citizens. The Committee made eight sets of non-binding recommendations, one of which concerned sport. (see Parrish, 2003a; European Commission, 1984; Adonnino, 1985).

their rules, despite the fact that the ruling is a straightforward application of existing, well-established legal provisions (see, e.g., Blanpain and Inston, 1996; Parrish and McArdle, 2004): sport as a business activity has to abide by the rules of European law.<sup>219</sup>

Strengthened in their conviction by the Commission's negotiated settlement approach, they were convinced that they could continue their long-standing self-governance without any interference of state authorities. They failed to acknowledge that sport was starting to become a significant economic activity in the 1990s (García, 2007b, p. 209). Moreover, the EU had just completed the single market and the ideology of the four freedoms was particularly strong (Parrish and McArdle, 2004, p. 441).<sup>220</sup>

After an initial period of real confrontation with the EU characterised by emotional and sometimes irrational, unfounded criticism on the EU and its "over-zealous regulators", the sports world soon realised that EU law could have far-reaching consequences for their activities and embarked on a campaign directed towards the EU in an attempt to reverse the situation (García, 2007b, 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. It is quite safe to assume that political pressure by Member States, following skilful lobbying with national governments by FIFA and UEFA, contributed heavily in favour of FIFA and UEFA as regards the final settlement on the new FIFA transfer system in 2001 (Niemann and Brand, 2008, p. 98; García, 2011, p. 26).

Thus, although the European Commission acts autonomously in its competition competencies, it does not operate within a political vacuum. Clearly, the Commission's powers as public enforcers of EU competition law are undermined by the political powers of big international sports organisations, 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, 2007b, 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) feasible nor desirable. Therefore, in the field of sport, the Commission has always shown a willingness to find compromises with sports bodies.<sup>221</sup>

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219 As had been established by the Court in the Walrave and Donà cases. In fact, that UEFA did not expect the 3+2 rule to be contrary to the free movement of workers was a clear misinterpretation on their part of the CJEU's Donà ruling.

220 Furthermore, the Bosman ruling can to a large extent be considered as FIFA and UEFA's own making. The pyramid governing model of football 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 (García, 2007b, p. 205; Parrish and McArdle, 2004, p. 411; Tomlinson, 1983, p. 173).

221 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).

## Conclusion

It is clear that sport, when it constitutes an economic activity, is subject to EU law. This constitutes a clear limitation to the 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 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.<sup>222</sup> 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.

Ultimately, it is for the CJEU alone to give binding interpretations of the provisions of the Treaty. 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

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<sup>222</sup> See the Balog (Blanpain, 1998, p. 188-220) and Oulmers (García, 2008, p. 41) cases.

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 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*.<sup>223</sup>

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223 According to Foster (2003), “*lex sportiva* is a dangerous smoke-screen justifying selfregulation by international sporting federations”. (p.17) 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).

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