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Thesis

Sport in the perspective of the free movement of workers and services and European competition law

Vypracoval: Ivan Karpják

Vedoucí diplomové práce: Prof. JUDr. PhDr. Michal Tomášek, DrSc.

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Prohlašuji, že jsem tuto diplomovou práci zpracoval samostatně a pouze s použitím pramenů v práci uvedených.

I hereby declare that the diploma thesis was written by me alone and that the use of external sources is referenced within the text.

Karpják

V Praze, dne 30. června 2008/In Prague, 30th June 2008 Ivan Karpják

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Table of contents

Abbreviations/Seznam použitých zkratek

EC	European Communities
Commission	Commission of the European Communities
EC Treaty	Treaty establishing European Communities
ECJ	European Court of Justice
CFI	Court of First Instance
Smlouva o ES/Smlouva	Smlouva o založení Evropského společenství
ESD	Evropský soudní dvůr
Komise	Evropská komise
FIFA	The Fédération Internationale de Football Association
UEFA	The Union of European Football Associations

1 Preface

As shall be in more detail elaborated on in the following chapters, sport is a unique phenomenon which helps to promote many important societal objectives. Pursuant to the Commission's White Paper on sport, sport is a dynamic and fast-growing sector with an underestimated macro-economic impact, and can contribute to the Lisbon objectives of growth and job creation. It can serve as a tool for local and regional development, urban regeneration or rural development. Sport has synergies with tourism and can stimulate the upgrading of infrastructure and the emergence of new partnerships for financing sport and leisure facilities. Despite the specific societal functions and features, it still is capable to trigger the application of different statutory provisions, whether as a result of a conduct of a single sportsman who for instance, intentionally harms his opponent during the course of a game or as a result of activities of sporting regulatory bodies. It needs to be noted in this regard that national legal systems do not usually address sport as such. Legal aspects of sporting activities and sporting organisation are dealt with by means of 'ordinary' statutory provisions applicable to a variety of legal relationships.

As regards the Member States of the European Union, there is an additional factor that needs to be taken into account, that being law of the European Communities. Even though the European Communities do not posses any express powers with regard to sport, its legal systems, may affect sport indirectly.

There has been a rather intensive development in this area in the last decade. The European communities, being aware of the importance of sport, have indisputably been providing support to sport in order to make it accessible to as many citizens as possible. At the same time however, even though sport primarily promotes non-commercial goals, it cannot be overlooked that professional sport bears manifest economic implications. This is exactly the point where provisions of EC Law start to apply in order to protect objectives set out in Art. 2 EC, primarily by setting forth rules which touch upon economic aspects of sporting conduct.

The main purpose of this Diploma Thesis is to analyse the relationship of law of the European Communities and its policies with activities and regulations of national and international sporting organisations. The thesis shall provide an overview of a

never-ending dispute concerning the extent of application of EC Law to sport as well as analyse application of the key provisions of the EC Treaty as regards sport.

The Thesis itself is divided into four main parts. The first one outlines main features characterising sport in Europe, such as its pyramid-like structure. For the purpose of a better understanding of this model of sporting organisation, the Thesis at the same time provides a comparison with the organisation of sport in the United States of America.

The second part analyses the relationship between sport and law of the European Communities in general and a formation of two advocacy coalitions, promoting two different approaches of the European Communities to sport.

This is followed by the third part which concentrates on the application of the free movement rules in the area of sport; free movement of workers, freedom of establishment and freedom to provide services in particular.

The last part deals with an impact of the European competition law rules on sport. The main emphasis is on the application of Articles 81 and 82. The chapter is complemented by an analysis of a recent case-law of the ECJ and the CFI.

2 The European model of sport

2.1 Introduction

The first step that needs to be taken in order to undertake a proper analyses of the relation between sport and legal system of the European Communities, is to define sport as such, outline its functions as well as to point out specificities sport in Europe possesses compared to the rest of the world.

One of many definitions of sport can be found in the European Sport Charter, drafted by the Council of Europe.[1] Article 2(a) of the Charter reads as follows: "*Sport means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.*"

Sport is thus a social phenomenon helping to carry out many objectives in contemporary societies. There can be identified several different functions of sport demonstrating its uniqueness.[2] In the first place it is the *recreational* function, for both active participants as well as for passive bystanders. Pursuant to results of Eurobarometer 2004[3] some 60% of European citizens participate in sporting activities on a regular basis within or outside some 700.000 sporting clubs in Europe. Moreover, millions of spectators watch sporting events at stadiums or by means of television coverage. Second, sport fulfils the *social* role since it can be used to enhance social cohesion as well as in a struggle against racism, intolerance, violence, alcohol and drugs abuse. Third, the *educational* function of sport is used to encourage sense of fair play, solidarity and team spirit. Fourthly, sport contributes to *public health* as physical activity may serve as a prevention of illnesses as well as their cure and improve well-being of individuals. Fifthly, sport may also be used for *political* purposes. For example, for many years athletes and teams from Southern Africa were prevented from taking part in international sporting competitions as a result of condemnation of the apartheid system in the country. Furthermore, sport has been indisputably acquiring stronger and more visible *economic* dimension. The economic importance of sport within the

[1] Council of Europe, European Sports Chapter - RECOMMENDATION No. R (92) 13 REV, consult https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(92)13&Sector=secCM&Language=lanEnglish&Ver=rev&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[2] See European Commission staff working paper, The development and prospects for Community action in the field of sport, consult http://ec.europa.eu/sport/index_en.html.

[3] Special EUROBAROMETER 213 "Citizens of the European Union and sport", consult ec.europa.eu/public_opinion/archives/ebs/ebs_213_summ_en.pdf.

European Union is considerable. It has been estimated that sport generates a value-added of €407 billion in 2004 representing 3.7% of the EU GDP and 15 million employees, which represents a share of 5.4% of the labour force. Sport has become "big business", primarily as a result of the increase of the value of broadcasting rights, especially television rights to sport events.[4] For instance, the value of TV rights of the Olympic Games jumped from EUR 308 million for the Los Angeles games in 1984 to EUR 1.4 billion for the Sydney Games in 2000. In 1992, broadcasters paid EUR 434 million for the TV rights of the English Premier League for five seasons. In 2000 they paid EUR 2.6 billion for three seasons.

When determining the specific nature of the European model of sport, two different time periods have to be distinguished. The first one, from the end of the Second World War until late 1980's, characterised by two distinct models of sport, namely the eastern and the western European model. The former one was more or less ideologically oriented and used as a means of propaganda. In western countries European sport developed a mixed model, in which actions performed by governmental and non-governmental organisations existed side by side. Western European sport is thus mostly a result of private and public activity. However, in the north of Europe, the regulatory role of state is insignificant, whereas in countries in the south state plays an important regulatory role in sport.[5]

As regards the latter, contemporary, European model of sport, it is organised as a "pyramid structure". It is accompanied by a system of promotion and relegation and interdependence of professional and amateur sports. The model has been strongly influenced by the Olympic movement based on the idea of contribution "*to building a peaceful and better world by educating youth through sport practiced without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play*".[6]

2.2 Pyramid structure

The basic feature characterising European model of sport is its pyramid-like organisation which consists of 4 mutually intertwined levels.

[4] http://ec.europa.eu/comm/competition/sectors/sports/overview_en.html.
[5] Commission of the European Communities (1998), The European Model of Sport, Consultation Document of DG X, consult http://ec.europa.eu/sport/action_sports/historique/docs/doc_consult_ en.pdf.
[6] http://www.olympic.org/uk/organisation/missions/culture/index_uk.asp.

The ground level of the pyramid is formed by the clubs. This level fulfils two basic objectives. First, it fosters the development of new generations of sportsmen. Secondly, by providing basis for amateur sport, the level is elementary for promotion of the idea of sport as a recreational activity that should be available to everyone.[7]

The next floor of the pyramid is formed by regional federations. These are responsible for the coordination of sport on regional level and organisation of regional championships.

Regional federations for each discipline are usually members of the next level, national federations. These federations are the regulators of all general matters within their discipline and organise national championships. At the same time they represent "their" sport in the European and international federations, which form the last level of the 'pyramid'. This one federation per sport principle makes the system easy to manage. On the other hand, the system by its nature generates a strongly self-supporting monopolistic structure, which makes it extremely hard for new leagues to enter the market and thus may restrict competition within the Internal market. Today, very few sports experience serious competition between rival federations, with boxing as a well known exception to that rule.[8]

2.3 The system of promotion and relegation

Not only has the organisation of sport in Europe taken on the pyramid structure. The interdependence between different levels of the pyramid applies to the competitive side of European sport as well. This open competition model means that a football club playing at a regional level can qualify for championships on a national or even international level (e.g. the UEFA Cup) by winning promotion. On the other hand a club will be relegated if it fails to qualify. Implications of this system can also be identified on a European, interstate, level. Since national federations are members of both European and international federations which organise their own championships, qualification for most of these international tournaments is usually decided at a national level.

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[7] After watching television and surfing the Internet, sport is Europe's favourite activity and is highly valued for its development of team spirit, discipline and ethos of fair play. These are among the findings of special Eurobarometer surveys published in December 2003 and November 2004 (http://ec.europa.eu/comm/public_opinion/archives/ebs/ebs_183_6_en.pdf, http://ec.europa.eu/public_opinion/archives/ebs/ebs_213_report_en.pdf).

[8] There are currently 5 international boxing organisations: World Boxing Association, World Boxing Organisation, World Boxing Council, International Boxing Federation and International Boxing Organisation.

Only recently have non-sportive criteria (licensing) been introduced by several (inter)national federations in order to grant clubs the right to participate in professional competitions. These criteria often refer to the financial situation of the clubs. An example can be found in the realm of European football. The UEFA club licensing system has, among other things, introduced certain financial criteria that clubs must respect in order to obtain a licence. A club needs such a licence to be eligible to participate in UEFA club competitions. One of the reasons for introducing this system is to ensure that clubs remain solvent throughout the course of a competition and do not have to drop out or play with a depleted squad because they cannot pay their players. In this respect, the licensing system could be said to protect the interests of not only the competition organisers, but also the interests of the players and the interests of the public.[9]

For a better understanding of the abovementioned scheme, the following lines provide a brief insight into the sport competition model of the United States. The model is characterised by closed championships and multiple sport federations. Teams' participation in the league does not depend on their sporting performance. The same teams, once in the championship, keep on playing in the same league. Changes in the leagues are based on market developments and economic criteria. It is therefore team owners and the League who decide to move a team to a more profitable market or add one or more new teams (expansion). There is also a possibility of bankruptcy removing teams from a league, as well as entire leagues may cease operation for financial reasons.

A potential advantage of the closed American model of league is the revenue distribution based on a horizontal solidarity. This all for a greater balance of the league as a whole. The more balanced and exciting the competition, the more attracting it is for fans which implies even higher incomes for clubs and their owners. The best example of this practice is American football, where all television revenues from national broadcasts are divided equally among teams. Gate receipts are divided 60 percent for the home team and 40 percent for the visiting team. As a result there is less economic disparity, and a team like the New York Jets (in a big market) has about the same revenue as the Green Bay Packers (in a small market).[10] The application of the same scheme of financial distribution in Europe is however limited due to a system of

[9] José Luis Arnaut, Independent European Sport Review 2006, page 44; UEFA Club Licensing System Manual Version 2.0 © UEFA – Edition 2005, page 57.
[10] Wladimir Andreff, The Evolving European Model of Professional Sports Finance, Journal of Sports Economics, Vol. 1, No. 3, 257-276 (2000).

promotion and relegation as clubs leave and enter competition each year. The notion that the revenues should be divided equally for the good of the game has therefore never really been part of the European Model of Sports.[11] As an exception to this general approach, redistribution of pooled TV-income and quota on foreign players in the field of football could be mentioned.

To conclude, both the European as well as the United States' model has found its way to attract a considerable number of funs. The former one does so by extending its market beyond the limits of national states. This can be evidenced by an increased number of international championships in Europe in the last three decades. The latter one, on the contrary, exploits its national market[12] potential to the full.

2.4 Amateur and professional sports

As already mentioned, it is inherent in the pyramid structure of the European model of sport that the same governing body regulates all sporting activities within one discipline, its powers ranging from amateur youth sports to professional levels. This often results into conflicts between amateur and professional interests. The prime reason is a distribution of revenues which come from the exploitation of the commercial value of sport. Although the revenues do mostly originate with the performance of professional sportsmen, amateurs claim their piece of cake as well. They base their claims on the double pyramid theory. According to this theory thousands of amateur athletes generate a few Olympic champions (feeding), while these champions inspire thousands to participate in amateur sports (inspiring). In order to promote the overall interests of sport, it is thus crucial that some of the revenues are redistributed downwards to the grass roots of the game.[13] As much as amateurs benefit from the promotional and commercial value of professional sports, professional clubs need the support of unpaid volunteers of the amateur branch and (financial) support of local and regional governments. This mixture of public and private funding is another distinct feature of the European Model of Sport.[14]

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[11] European Parliament Working Paper, *Professional Sport in the Internal market*, IP/A/IMCO/ST/2005-004 (http://www.europarl.europa.eu/comparl/imco/studies/0509_study_sport_en.pdf), page 29.

[12] With an exception of teams from Canada.

[13] This is often referred to as a "vertical' solidarity between amateur and professional clubs and athletes. Paragraph 8 of the Council's Nice declaration or section 4.1 of the Commission's White paper on sport can serve as very good examples that the practice has been upheld by the institutions of the European Communities as well.

[14] European Parliament Working Paper, *Professional Sport in the Internal market*, IP/A/IMCO/ST/2005-004, page 29, consult http://www.europarl.europa.eu/comparl/imco/studies/0509_study_sport_en.pdf.

As will be shown in following chapters of the Thesis, the abovementioned specificities of sport in Europe bear many implications on the way it is treated by EC law.

3 Sport and the Law of the European Communities

3.1 Application of EC Law to sport

There has been a rather intensive tendency towards the internalisation of sport in Europe in the last twenty to thirty years. Development of sport as a cross-border activity, caused by commercial interests and the public's desire to experience top class competition, have required sport governing bodies to establish rules governing relations between participants from different states. However, these trans-national rules have not escaped the scrutiny of international and European law.

As regards the relationship between sport and the European Union, it has to be realised that the original Treaty of Rome Establishing the European Economic Community was primarily economically oriented. This appeared clearly from the aims of economic integration set out in its preamble and in Article 2 EEC.[15] At the time of drafting of this Treaty, at the end of the 1950's, professional sport was still in its infancy. Its economic dimension was insignificant. Most of sporting activities were performed on a purely amateur basis. Hence, no explicit reference was included into the original version of the EC Treaty.[16] But the time has changed and money and professionalism have made an undeniable entry into sport. Although sport still is a leisure activity for majority of people, there is a considerable number of professionals who make their living of some kind of sporting performance. Moreover, sport generates revenues for organisers of sporting events, for sponsors, advertisers as well as for television broadcasters and many others.

This rapid development however has not made any changes in the EC Treaty, which still does not contain any explicit reference to sport. Pursuant to the principle of attributed competencies, the European Community "*shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*"[17] The remaining competencies stay with the Member States. It is therefore them, together

[15] P.Craig & G. de Búrca, EU Law. Text, Cases and Materials, Oxford, 2004, page 10.
[16] Article 3 of EC Treaty, setting forth competences of the European Communities, did not and still does not mention sport which implies that no direct authority has been conferred upon the Community to develop a sports policy so far.
[17] Article 5 of the EC Treaty.

with sporting associations, who has main competences in the area of sporting affairs. Nonetheless, Community law may still affect sport indirectly as a number of the Treaty provisions encompass activities and rules pertaining to sport. This is, for example, the case of Article 12 of the EC Treaty stipulating that any discrimination on grounds of nationality shall be prohibited, article 39, granting freedom of movement for workers, articles 43 and 49 providing for freedom of establishment and freedom to provide services as well as articles 81, 82 and 87, concerning competition law. This approach was taken by the ECJ when addressing sport related matters.

The application of law of the European Communities to sport was first recognised by the ECJ in cases *Walrave and Koch*[18] and *Donà and Mantero*[19] delivered in the mid 1970's. It was then re-affirmed in the following cases dealing with sport, including the breakthrough *Bosman* ruling.[20] The Core of the ECJ's reasoning was that "*sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty. This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service*".[21] It therefore comes as inevitable that sporting organisations as well as the Member States try to restrict the application of the Treaty rules by stressing the non-economic character of the sporting activities in particular cases or by emphasising sport-specific characteristics in order to downplay the importance of its economic features. At the same time, they are not completely blind to the reality that many sports undeniably have economic aspects, with high wages for sportsmen and their personnel, huge revenues for clubs and federations derived from various sources such as sponsoring, ticketing or television broadcasting of sporting events. These economic aspects are nonetheless claimed to be indispensable for the well-functioning of the entire system.[22] As an example, the defendants in the *Deliège* case contended that "*judo, at least as it is practised in Belgium, is a purely sporting and recreational activity which is not of an economic nature.*"[23]

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[18] Case C-36/74 B.N.O. *Walrave v Union Cycliste Internationale* [1974] ECR 1405.
[19] Case C-13/76 *Donà v Mantero* [1976] ECR 1333.
[20] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-4921*, paragraph. 73; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 41; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 32.
[21] *Donà, supra* note 19, paragraph. 12.
[22] Stefaan Van Den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU post-Bosman*, The Hague: Kluwer Law International, 2005, page 16.
[23] See opinion of A.G. Cosmas in *Deliège*, supra note 20, paragraph 23.

Moreover, in order to protect sport from European law, a parallel between sport and culture is drawn. As an example, in *Bosman* the German government submitted that sport in general has points of similarity with culture and pointed out that, under Article 151(1) of the EC Treaty, the Community must respect the national and regional diversity of the cultures of the Member States.[24] The same paragraph also contained the third defence usually submitted on the part of sport, that being freedom of association and autonomy enjoyed by sporting federations under national law. The protection following from the freedom of association is not unconditional. As provided for by A.G. Cosmas in his opinion on *Deliège*, "*the right of association on which the federations rely in order to guarantee their self-regulation cannot be so absolute as to afford them complete immunity from Community law, thereby creating gaps in the Community legal order...while freedom of association may be protected by Community law, it does not extend to excluding the activity pursued by Ms Deliège from the scope of Article 59 et seq. of the Treaty, since the problem does not directly affect the exercise of that freedom.*"

The *Walrave* and *Donà* decisions did not however bring changes that could have been expected. Afterwards, it was business as usual. Most sporting associations continued elaborating their own regulations, settling their affairs autonomously and operating on the assumption that they were practically immune from legal intervention from outside.[25] The rulings however made it clear that sport was at least partly under the scrutiny of European Law. This made European institutions, especially the European Parliament and the European Commission, dedicate more attention to sport. Their interventions in relation to sport did not remain strictly limited to issues having economic context. This was due to a development the EEC Treaty was undergoing. With an adoption of the Single European Act and the Treaties of Maastricht, Amsterdam and Nice, the original European Economic Community has been transformed into the European Community, followed by the foundation of the European Union. The newly attributed powers have by far exceeded the economic sphere.[26] The Community interest in sport has thus gained a social, educational and cultural

[24] See *Bosman*, supra note 20, paragraph 72.
[25] C. Joerges, A. Furrer & O. Gerstnberg, *Challenges of European Integration to Private Law, Collected Courses of the Academy of European Law*, Volume VII, Book I, Kluwer international, The Hague, 1999, page 281.
[26] P Craig & G. de Búrca 2004, page. 13.

dimension, even though only in a form of communications, resolutions, reports or declarations.

The whole process of development of the relationship between sport and the European Communities was substantially accelerated by the *Bosman* ruling. The decision provided a decisive impulse of change to the status quo which followed after the decisions from mid 1970's. The *Bosman* decision raised the often painful awareness in sporting circles that sporting rules are in principle subject to a test of compliance with Community law. The decision also caused a change in the mindset of the Community institutions about sport. It led to intensification as well as deepening of a Community intervention in sports matters. Sport even started figuring on the agenda of the European Council during various intergovernmental conferences.[27] This led to official declarations on sport being attached to the Treaties of Amsterdam and Nice. The first Declaration on sport, annexed to the Amsterdam Treaty, emphasised the social significance of sport and called on the bodies of the European Union to give special consideration to the particular characteristics of amateur sport.[28] The second Declaration relates to the specific characteristics of sport and its social, educational and cultural functions in Europe, of which account should be taken in implementing common policies.[29] Sport has thus gained at least partially formal position in the Community legal framework.

3.2 All-inclusive label of sport

As follows from the previous analyses, the importance of sport in the European Union goes beyond the limits of the Single Market and a balanced competition. Sport has also been recognised as a tool fulfilling educational, recreational, social, political and cultural goals.[30]

The basic question therefore stands: how far is it proper for EU sports policy to shelter arrangements of sporting organisations from full or partial legal scrutiny by ascribing the promotion of important social goals to it? The label of 'sport' is used to encompass a variety of practices in today's world. However, sport is simply not a single social phenomenon and it is more than apparent that there is a need to separate sports as

[27] Van den Bogaert 2005, page 7.
[28] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, OJ C 340, 10th November 1997, Annex No. 29 – Declaration on sport.
[29] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, OJ C 80/1, 10th March 2001.
[30] See chapter No. 2 of the Thesis.

an instrument of social cohesion from sports as money-making enterprise. This can very well be seen in the pyramid structure of sport in Europe, with the professional game at the apex, below which semi-professional sport, amateur sport and, located at the base, purely recreational sport are nurtured. Professional sport has little to do with the social and educational function of sport mentioned in the Commission's Helsinki Report on sport.[31] Conversely recreational sport has no economic motivation. The notion of 'vertical solidarity', whereby revenue raised in the higher levels of the professional game is used in part to sustain the grass roots, has not been abandoned entirely in Europe, but the commercial preferences of corporate sport, in particular football, are steadily loosening traditional vertical ties. In these circumstances managers of professional sport clubs would only be pleased with the opportunity to hide their profits behind the notion of social and educational importance of sport and hence to negotiate favourable legal treatment for their commercial activities. There is therefore a pressing need to draw a more careful distinction when the all-inclusive label sport is used.[32]

3.3 Formation of two advocacy coalitions

As a result of the endeavour to lay down the European sport policy and thus to define its relation to the legal system of the European Communities, two advocacy coalitions have been formed. Protection of the Single European Market and the socio-cultural role of sport are the two features distinguishing these two coalitions.[33]

3.3.1 The Single market coalition

The first one, the Single market coalition is formed by the Competition Policy Directorate General within the European Commission and the European Court of Justice. The market model of sport, this coalition promotes, treats sport in the same manner as any other business operating within the Single Market. The coalition therefore acts as the guardian of the EU's legal framework. It is supported by individual litigants claiming their rights as set forth by the provisions of directly effective law, procedure under Article 234 and complaints procedure with the Commission.

On the other hand, it still recognises the socio-cultural responsibilities of the European Union. In this regard, whilst sport should be subject to law, the application of

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[31] The Helsinki Report on Sport, COM/99/0644 final.
[32] Stephen Weatherill, "Fair play please!": Recent development in the application of EC law to sport, Common Market Law Review 2003, page 52.
[33] Richard Parrish 2003, The Birth of European Union Sports Law, Entertainment and Sports Law Journal, volume 2 number 2, 2003, page 24 et seq.

the EU's legal framework may take into account the specificity of sport in so far as it does not impede uniform application of EU law and as such undermine the fundamentals on which the Single Market is based.

3.3.2 The socio-cultural coalition

On the other hand, the socio-cultural coalition supports the socio-cultural model of sports, expressing the need to recognise the uniqueness and specificity of sport within its legal framework. As claimed by some scholars, the coalition is not coherent but rather divided into three streams, each one proposing the best way to pursue its individual interests.

The first one, the so called maximalists, support an alternative of including an Article for sport in the EU Treaty[34] in order to protect sports rules from the application of EC law. The Article would also facilitate the development of a socio-cultural sport policy. This concept is supported by the European Parliament, some of the Member States as well as by many important sports organisations such as the European Olympic Committee or national sports federations.[35]

The moderates take less radical way of a protocol attached to the Treaty that would recognise the specificity of sport. This would shield sports rules from EC Law without any further supranational involvement in sport by the European Union, as would be the case of the Article alternative. Such a solution is naturally mainly represented by sports bodies[36] longing for a regulatory autonomy.

Finally, the minimalists could even be considered as standing somewhere between the two main streams. Represented be the three Member States,[37] they argue that the EC institutions have established an effective and functioning regulatory system in sporting matters. The Amsterdam Declaration on Sport, the Nice Declaration and the jurisprudence of the ECJ and the Directorate General for Competition are frequently quoted as examples thereof.

3.3.3 The separate territories approach

The tension between the two sports policies has led a formation of the separate territories approach. This involves three territorial zones.

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[34] The Treaty on European Union (Consolidated Version) OJ 2002 C325/5.
[35] The support of sporting organisations is motivated by a vision of potential new sources of funding.
[36] The most significant support can be seen on the side of UEFA and FIFA.
[37] The United Kingdom, Sweden and Denmark.

The first encompasses sporting rules which do not fall within the scope of the EC law. The second refers to rules which do fall within the ambit of the EC law but are eligible for an exemption from it. The third territory is formed by sporting rules which fall foul of the EC law. These are rules of essentially commercial nature.

The legal basis of the separate territories approach can be found in formal Decisions of the Directorate General for Competition and the judgements of the ECJ as well as in soft law.

4 Sport and Free Movement Rules

4.1 Introduction

As regards the relationship between sport and European law, attention has mainly been paid to three fundamental freedoms of the Internal Market: freedom of movement of workers, freedom to provide services and freedom of establishment.

In order for the EC Treaty provisions on free movement of persons and freedom to provide services to apply, three conditions must be complied with. First, the person who wishes to exercise the right to freedom of movement must be engaged in some kind of economic activity, moreover, he or she must usually be a national of a Member State of the European Union, and finally, a cross-border element is required. At first, the second paragraph of this chapter shall however be dedicated to the preliminary question of whether the Community free movement provisions can actually be relied upon in disputes between private entities.

4.2 Horizontal direct effect

The first matter that needs to be addressed with regard to the relation of the provision on free movement and rules and practices enacted and imposed by sporting associations or clubs is the question of the so-called horizontal direct effect. The answer to this question gradually evolved in the case-law of the ECJ.

The issues of the horizontal direct effect of the provision on the free movement of persons were for first time dealt with in *Walrave*.[38] The defendants claimed that the prohibitions of any discrimination on grounds of nationality, as set forth in Articles 12, 39 and 49 EC, "*refer only to restriction which have their origins in acts of an authority and not to those resulting from legal acts of persons or association who do not come*

[38] *Walrave*, supra note 18.

under public law."[39] This reasoning was, however, refused by the ECJ which held that the prohibition of discrimination "*does not apply to the action of public authorities but extends likewise to rules to rules of any other nature aimed at regulating employment and the provision of services.*"[40] Consequently, the ECJ considered public and private regulations constituting measures of a *collective manner* to be equal.[41]

The next step towards the full horizontal direct effect was made by the ECJ in *Bosman*. First, it reiterated the point of view taken in *Walrave*. It then however went further by stating "*that even though the transfer rules in question did not discriminate on grounds of nationality, they still directly affected players' access to the employment market of other Member States and were thus capable of impeding the freedom of movement of workers.*"[42] The ECJ thus also brought *non-discriminatory private collective measures* within the ambits of the free movement provisions. Moreover, it recognised individuals' right to invoke limitations on grounds of public policy, public security or public health: "neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question".[43]

Finally, the explicit confirmation of the full horizontal direct effect of Article 39 was given in the *Angonese* case.[44] The case concerned a requirement to produce the certificate of bilingualism as a prerequisite of a bank in Bolzano, Italy for being able to take part in a competition for a post in the bank. The certificate could only be obtained in the province of Bolzano. The ECJ once again fell back on the reasoning laid down in *Walrave*.[45] Subsequently, however, the ECJ introduced a final part necessary for the full horizontal direct effect of Article 39 EC, referring to its judgement in the *Defrenne* case.[46] It stated that "*the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus*

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[39] *Walrave*, supra note 18, para. 15.
[40] *Walrave*, supra note 18, para. 17. The decision was supported by 3 arguments at following paragraphs 18-21 of the judgement, their substance being, firstly, protection of the basic freedom from being compromised by the neutralisation of abolition of barriers of national origin by regulations of non-public law entities, secondly, the need of a uniform application of the freedoms and lastly, the general nature of the EC Treaty provisions, not distinguishing between the source of the restrictions.
[41] The ECJ reaffirmed its position in *Donà* case, *supra* note 19, para. 17.
[42] Bosman, supra note 20, para. 103.
[43] Bosman, supra note 20, para. 85.
[44] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, [2000], ECR I-4139.
[45] *Angonese*, *supra* note 44, paras. 30-33.
[46] Case 43/75 *Gabrielle Defrenne v Sabena* [1976] ECR 455.

laid down." And accordingly it held, in relation to a provision of the Treaty which was mandatory in nature, that *"the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals."*[47] *Such considerations must, a fortiori, be applicable to Article 39 of the Treaty, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 12 of the EC Treaty. In that respect, like Article 143 of the EC Treaty, it is designed to ensure that there is no discrimination on the labour market. Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 39 of the Treaty must be regarded as applying to private persons as well."*[48]

Even thou the *Angonesse* judgement made it clear that Article 39 EC is horizontally directly effective, it gave no clue with regard to the freedom of establishment and freedom to provide services. In this respect, the ECJ ruled in *Wouters* that *"compliance with Articles 43 and 49 of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services."*[49] It did not appear to matter to the ECJ whether the contested regulation was discriminatory or not.[50] It can therefore relatively safely be assumed that non-discriminatory rules from collective private actors are also covered under Article 43 and 49 EC. Consequently, on the basis of these findings, it can be advocated that the regulations from all sporting association which are self-regulatory and possess powers akin to public law must comply with the provisions on free movement of persons and services, regardless of whether they are discriminatory or not and whether the athletes submitted to these regulations are workers or self-employed. Moreover, discriminatory measures imposed on employed sportsmen by private entities such as clubs, for example in contracts, arguably also come under the scope of application of Article 39 EC. Whether Community law will eventually reach even further within the realm of private relations must still be awaited.[51]

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[47] *Angonese*, supra note 44, para. 34.
[48] *Angonese*, supra note 44, paras. 35 and 36.
[49] Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, para. 120.
[50] *Wouters*, supra note 49, para. 122.
[51] Van den Bogaert 2005, page 29.

4.3 Economic activity requirement

Now, that it has been established to what extend do provisions on the free movement apply to private entities, the economic nature of sportsmen' activities needs to be dealt with. Ever since its first decision regarding sport, the ECJ has consistently held that sport falls within the ambit of the Community's law to the extent that it constitutes an economic activity within the meaning of Article 2 EC.[52] It needs to be realised though that it is the particular activity of sportsman that needs to constitute an economic activity rather than a sport discipline in general. As Advocate General Cosmas provided in its opinion on *Deliège*,[53] it is perfectly feasible that notwithstanding the fact that a sport is deemed to be of an amateur character in general, some sportsmen nevertheless perform it in an economic way. In case the performance is considered to be an economic activity the reliance on the free movement provision is possible.

Based on the ECJ's interpretation of activities under Articles 39, 43, 49 EC, two conditions need to be fulfilled for an activity to be considered as economic within the meaning of Article 2 EC. First, it must be a genuine and effective, not a merely marginal or ancillary activity, and second, it must be of a truly economic character, and therefore carried out in return for remuneration.[54] These criteria help to establish when a sport performance in general ceases or starts being an economic activity for the purpose of the Treaty. Since it is hard to set up a general dividing line in this respect,[55] the particular situation of each sportsman needs to be evaluated on a case-by-case basis. What really seems to distinguish professional sportsmen from amateurs and permits them to be considered as workers or self-employed competing on an independent basis within the meaning of the Treaty provisions on free movement is the fact that, in return for exercising their specific skills and capacities within a given sports discipline, they earn a regular income exceeding the expenses made.[56]

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[52] *Walrave*, supra note18, para. 4.
[53] A.G. Cosmas in *Deliège*, supra note 20, para. 26.
[54] See case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, para. 17 and Case 196/87 *Udo Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, para. 13.
[55] The main reason, as to why it is rather difficult to lay down a general borderline for all sports which would help to separate economic activity from the non-economic one, is that the popularity of each particular sport differs from one Member state to other. For example, whereas ice-hockey is to be considered immensely popular in Sweden or Finland, the popularity of this sport in Member states such as Greece or Spain is considerably lover if any and therefore attracts more attention of sponsors and media. Similarly, in Italy or Spain, generally considered among the strongest European football leagues, a footballer playing in the third division may still be considered as carrying out an economic activity, whereas in Luxembourg, a second-division player and perhaps even some first-division players may not satisfy the conditions to be regarded as such any longer.
[56] Van den Bogaert 2005, page 47.

A thorough analysis of the problem can be found in the opinion of Advocate General Cosmas on the *Deliège* case. The case dealt with the rules of the Belgian Judo federation which set forth conditions for the selection of judokas for international tournaments.

First, Advocate General analysed whether the aid paid by the judo sport federation to Ms. Deliège was to be considered as the financial counterpart of the services she claimed to provide, even though there was no contractual relationship between the athlete and the federation. He states that: "*A sportsman is a `non-amateur' falling within the scope of Article 49 et seq. of the Treaty where his practice of sport, viewed objectively, must be treated in the same way as the practice of a profession, and therefore constitutes the regular pursuit of the funds necessary to support himself. Classification as such will depend primarily on the objective conditions of practice which the federation or some other institution attaches to the award of financial aid: daily training, other obligations requiring exclusive dedication to the sport, substantial investment of time and effort, a high level of performance, and medals. Furthermore, in order to be regarded as `non-amateur', a sportsman must be subject to the conditions described above for a certain period of time, that is to say that there must be a degree of continuity in his activity. Finally, the amount of aid received is not immaterial: travelling expenses and even benefits in kind which amount to more than an average salary constitute pay rather than aid awarded for purely sport-related reasons.*"[57] The Advocate General also considered subjective criteria, such as the aim of federation pursued by the aid. The federations maintained that the grants, premiums and assorted benefits were intended to enable an athlete to develop his sporting skills and did not constitute consideration for his performance. The Advocate General however made an amendment to this assertion. According to him, "*a high-level athlete provides an important service to the sport's governing bodies. His success makes him an `idol' for the young people the federation wishes to attract, a magnet for sponsors, and another argument for sports organisations to rely on when seeking a larger share of publicly-funded subsidies.*"[58] In the light of these objective and subjective elements, under certain circumstances, sporting activities could be considered as services normally provided in return for which the sportsman regularly receives financial and/or material support from his federation.

[57] A.G. Cosmas in *Deliège*, supra note 20, para. 43.
[58] A.G. Cosmas in *Deliège*, supra note 20, para. 45.

Second, the Advocate General examined the importance of sponsoring contracts concluded between sportsmen and private financiers for the application of Community free movement law. He came to the conclusion that the publicity required for sponsoring does relate to athletes of a high level know by the audience at large. Consequently, it was concluded that the existence of personal sponsors is an important indicator of the fact that a given sports activity might represent an economic character.

Third, the specific characteristics of sporting competition were examined in the light of its economic implications. The Advocate General expressed an opinion that *sportsmen can only be assessed by reference to the competitions they enter, their individual performances being largely meaningless unless combined with success in particular competitions in which they pit themselves against their rivals. (...)If the significance of the sports event does not relate purely to sport, in the sense that it does not merely represent confrontation and reward for being the best, but also exhibits an intrinsic economic interest, then the economic dimension of the sporting event is clearly such that the event in itself constitutes an economic activity within the meaning of Article 2 of the Treaty.* According to Cosmas, this economic dimension may consist of different elements: first, spectators may be required to pay to attend a sports event; second, a sports event may become a television product which will generate substantial revenue for the holders of the television broadcasting rights; and, third, it may provide a framework for promotion through advertising, that is to say it may become a means of providing advertising services.[59] He also pointed out that common experience shows that economics are, as a matter of course, becoming an increasingly prominent dimension of sports events.[60]

Based on these findings, the Advocate General came to a conclusion that the participation of a high-level athlete such as Christine Deliège, who has the benefit of some sponsors, in international tournaments which involve not only sport but also constitute an economic event amounts to the exercise of an activity which would 'normally' be economic in nature.[61] This opinion was upheld by the ECJ which stated that "*sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 59 of*

[59] A.G. Cosmas in *Deliège*, supra note 20, para. 54.
[60] A.G. Cosmas in *Deliège*, supra note 20, para. 55.
[61] A.G. Cosmas in *Deliège*, supra note 20, para. 60.

the Treaty even if some of those services are not paid for by those for whom they are performed."[62]

The ECJ has consistently given a generous reading to the concept of an *economic activity* in its case law. In practice, this broad interpretation has allowed many athletes to pass the hurdle of a genuine and effective, and not a merely marginal or ancillary activity which is carried out in return for remuneration, so as to qualify as a worker or as a service provider for the purpose of the application of Articles 39 and 49 EC.[63]

4.3.1 Workers or self-employed?

Now that it has been established under which circumstances the conduct of sportsmen constitutes an economic activity, the question stands which set of the EC Treaty provisions on the free movement is applicable. Does sporting activity fall under the provisions on the freedom of movement of workers or under the rules concerning the freedom to provide services, or potentially those on the freedom of establishment, although the latter have not been addressed by the ECJ in sport-related cases yet.

Since *Walrave* the ECJ, however, did not seem to attach much importance to establishing which of the free movement provision should be applied. It stipulated that when the practice of sport has the character of gainful employment or remunerated service, "*it comes more particularly within the scope, according to the case, of Articles 39 to 42 or 49 to 55 of the Treaty*[64] *In this respect, the exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services.* "[65] The same line of reasoning was utilised in the case of *Donà* as well as by Advocate General Lenz in his opinion on the *Bosman* case.

The situation however changed with the ECJ's decisions in *Bosman*, *Deliège* and *Lehtonen,*[66] in which it based its judgement on a single free movement provision, this respectively being Articles 39, 49 and 39 EC. The application of the rest of the free movement provisions was not dealt with at all. There are two possible explanations for this approach. First, the national courts limited their preliminary questions to only one fundamental freedom, thereby limiting the ECJ's legal analyses to a particular Treaty

[62] *Deliège*, supra note 20, para. 56.
[63] Van den Bogaert 2005, page 74.
[64] *Walrave*, supra note 18, para. 5.
[65] *Walrave*, supra note 18, para. 7
[66] *Bosman supra note* 20, *Deliège* supra note 20, *Lehtonen* supra note 20.

provision. Second, the more probable explanation seems to be that the concepts of workers and services have evolved since the mid seventies, when decisions in the *Walrave* and *Donà* were delivered, which made it far easier for the ECJ to subsume cases at hand under the appropriate Treaty provisions on the free movement. The importance of distinguishing between workers and service providers is however not doctrinal only. One reason can be found in the already mentioned *Angonese* case, in which the ECJ has still only recognised the full horizontal application of Article 39 EC as opposed to Article 49 EC.

4.4 The condition of nationality

4.4.1 EU nationals

Basically, the right of free movement is limited to the sportsmen who are nationals of the Member States, excluding non-EU nationals. Whereas Articles 43 and 49 EC explicitly refer to *nationals of Member State*, the wording of Article 39 is not so clear with regard to this point. However, as held by the ECJ in the case of *Meade*,[67] the wording 'workers of the Member State' refers solely to EU nationals.

4.4.2 Third country nationals

Since some of the most prestigious sporting competitions and leagues[68] take place in Europe, the sportsmen from all around the world are being attracted to join European clubs and hence also clubs of the Member States. This, however, not always turns out to be as good choice as it seems at the first glance. The national as well as international sporting associations often impose rules which for different reasons, directly or indirectly, limit participation of the overseas sportsmen in competitions. One of the best examples can be provided by the famous *Bosman* judgement of the ECJ.[69] Here, the so called *3+2 rule* was subjected to the scrutiny of the EC Law. The UEFA rule permitted each national association to limit to three the number of foreign players whom a club may field in any first division match in their national championships, 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 same limitation applied to matches and competitions organised by UEFA on the European interstate

[67] Case 238/83 *Caisse d'Allocations Familiales de la Région Parisienne v Mr and Mrs Richard Meade*, [1984], ECR 02631, para. 7.
[68] For example, the UEFA Champions League in which the Europe's best football clubs are engaged, is considered to be a football competition of the highest quality in the world.
[69] *Bosman*, supra note 20.

level. Even though the ECJ held the rule as falling foul of the free movement of workers, this was true only with regard to EU nationals. The third country nationals, as a basic rule, were and still are left out of the scope of the EC Treaty provisions and thus unprotected from similar *nationality clauses* in the regulations of sporting federations. Nevertheless, there are two sets of rules which the third country nationals may fall back on in order to enjoy at least limited rights within the EU. First, it is the secondary Community legislation, Directives 2004/38 and 2003/109 in particular. Second, relevant provisions of some of the international agreements concluded by the European Communities and their Member States with third the countries, dealing with the position which nationals coming from these countries have within the Community.

4.4.2.1 Secondary legislation

With regard to the secondary Community legislation, Directive 2004/38[70] grants some rights to the relatives of the EU citizens. Article 24(1) of the Directive reads as follows: "*Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members*[71] *who are not nationals of a Member State and who have the right of residence or permanent residence.*" There are, however, two downsides to the application of the provision. First, it is indispensable that the EU national, the family member of whom is to be granted an equal treatment, must have effectively made use of his right of free movement before the third-country national can invoke the provision of Article 24. Second, the scope of application of Article 24 is restricted to the territory of the Member State in which the European Union national is employed, and does not extend to the territory of other Member States.

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[70] Directive of the European Parliament and of the Council 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 229, 29.6.2004, p. 35.

[71] Article 2(2) of the Directive defines family members as:

(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

In addition to the rights granted by Directive 2004/38, sportsmen who are the third-country nationals may also rely on Directive 2003/109.[72] The Article 4(1) of the Directive sets forth that, provided the conditions of Article 5(1) are complied with, Member States shall grant *long-term resident status* to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application. Long-term residents shall enjoy equal treatment with nationals as regards access to employment and self-employed activity, (...) and conditions of employment and working conditions, including conditions regarding dismissal and remuneration.[73] In addition, a long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months.[74] The equal treatment shall be enjoyed in the same areas as in the first Member State as soon as he has received a residence permit in the second Member State.[75] The main difference to Directive 2004/38 is that the long-term residents are entitled to these rights on their own, without the need to derive their rights from EU nationals.

4.4.2.2 International agreements with third-countries

The sportsmen from the third countries may also rely on international agreements concluded between the EC and its Member States and those third countries.[76] These agreements form an integral part of EC Law.[77] The ECJ has consistently held that a provision of such agreements must be regarded as being directly applicable when, with regard to the wording and the purpose and nature of the agreements themselves, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[78]

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[72] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53.
[73] Directive 2003/109/EC, supra note 72, Article 11(1)(a).
[74] Directive 2003/109/EC, supra note 72, Article 14(1).
[75] Directive 2003/109/EC, supra note 72, Article 21(1).
[76] See *e.g.* Case C-438/00 *Deutscher Handballbund eV v Maroš Kolpak* [2003] ECR I-4135, para. 58; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, para. 19; Case C-18/90 *Office national de l'emploi v Bahhia Kziber* [1991] ECR I-199, para. 15; Case C-113/97 *Henia Babahenini v Belgian State* [1998] ECR I-183, para. 17.
[77] Case C-181/73 *R. & V. Haegeman v Belgian State* [1974] ECR 449, para. 5
[78] Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 14; Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655, para. 31-36; Case C-171/01 *Wählergruppe Gemeinsam Zajedno/ Birlikte Alternative und Grüne GewerkschafterInnen/ UG* [2003] ECR I-4301, para. 53.

In order to clarify the aforesaid conditions, a short recourse to some of the most illustrative case-law shall be had. A good example of the provision which was regarded as complying with all the ECJ's requirements regarding the direct effect is the first indent of Article 38(1)[79] of the Europe Agreement establishing an Association between the European Communities and their Member States and the Republic of Slovakia,[80] which was dealt with in the *Kolpak* case.[81] The case concerned a Slovak national, Mr. Maroš Kolpak, who was employed by the German second division handball team TSV Östrigen as a goalkeeper. Pursuant to Rule 15 of the Playing Regulations of the German Handball Federation,[82] he was issued a player's licence marked with the letter A because of his foreign nationality. Kolpak regarded this to be an unfavourable treatment and sought from the Federation a player's licence without a suffix indicating his foreign nationality. He claimed that Slovakia is one of the third countries whose nationals are entitled to unrestricted authorisation to play. The claim was based on the relevant provisions of the Playing Regulations and the Association agreement between the EC and Slovakia. The ECJ upheld the claim and held that with regard to its wording[83] and purpose[84], the first indent of Article 38(1) of the Association agreement between the EC and Slovakia is identical to Article 37(1) of the Association agreement between the EC

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[79] The provision reads as follows: "*treatment accorded to workers of Slovak Republic nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals*"

[80] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, [1994] OJ L 359/2.

[81] Kolpak, see supra 76.

[82] Rule 15 reads as follows:

(1) The letter A is to be inserted after the licence number of the licences of players

(a)who do not possess the nationality of a State of the European Union (EU State),

(b)who do not possess the nationality of a non-member country associated with the EU whose nationals have equal rights as regards freedom of movement under Article 39(1) of the EC Treaty,

(c)...

(2)In teams in the federal and regional leagues, no more than two players whose licences are marked with the letter A may play in a league or cup match.

...

(5)The marking of a licence with the letter A is to be cancelled from 1 July of the year if the player's country of origin becomes associated within the meaning of Paragraph 1(b) by that date. The Deutscher Handballbund shall publish and continually update the list of the States correspondingly associated.

[83] See *Kolpak*, supra 76, paras. 24, 25 in connection with *Pokrzeptowicz-Meyer*, infra note 86, para. 22 which reads as follows: "*This rule of equal treatment lays down a precise obligation to produce a specific result and, by its nature, can be relied on by an individual to apply to a national court to set aside the discriminatory provisions of a Member State's legislation, without any further implementing measures being required for that purpose.*"

[84] See *Kolpak*, supra 76, para. 26: "*Second, those two Association Agreements do not differ in regard to their objectives or the context in which they were adopted. Each has, according to the final recital in the preamble and Article 1(2), the aim, inter alia , of establishing an association to promote the expansion of trade and harmonious economic relations between the contracting parties so as to foster dynamic economic development and prosperity in the Slovak Republic and in the Republic of Poland respectively, in order to facilitate those countries' accession to the Communities.*"

and Poland,[85] the direct effect of which had already been recognised in the *Pokrzeptowicz-Meyer* case.[86]

The ECJ further held in *Kolpak*, that the first indent of Article 38(1) of the Association agreement had a *horizontal direct effect* and that Mr. Kolpak could rely on it in his claim against the rules laid down by a non-public body, a sports federation in particular. That means that the ECJ transposed the interpretation of Article 39(2) EC as adopted in *Bosman*[87] to the analysed provision.[88]

As established by other cases concerning the non-EU nationals, the agreements do not necessarily need to pursue an objective of accession into the EC. For instance, in the *Simutenkov* case[89] the ECJ found the provision on the equal treatment of workers in the Communities-Russia Partnership Agreement, the wording of which is almost identical to those of the Association agreements,[90] directly applicable despite the fact that the purpose of the Agreement was an establishment of a partnership without any intention of accession of the Russian Federation to the EC whatsoever. However, the equivalent provisions in the Agreements of Partnership and Co-operation, which were concluded between the Community and its Member States with other former Soviet Union republics, such as Ukraine, Uzbekistan or Armenia[91] in all likelihood lack direct effect, as contracting parties only committed themselves to *endeavour to ensure* that the treatment accorded to the nationals of these countries shall be free from discrimination.[92] These Agreements principally aim towards a gradual rapprochement between ex-Soviet States and s wider area of co-operation in Europe and neighbouring

[85] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, [1993] OJ L 348/2.
[86] Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer*, [2002] ECR I-01049.
[87] *Bosman*, supra note 20, para. 84.
[88] *Kolpak*, supra note 76, para. 36.
[89] Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura/ Real federación Espanola de Futbol* [2005] ECR I-2579.
[90] The wording of the relevant provision of the Communities-Russia Partnership Agreement was as follows: "*Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.*"
[91] Partnership and Co-operation agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part [1998] OJ L 49/3, Partnership and Co-operation agreement between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part [1999] OJ L 229/3, Partnership and Co-operation agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part [1999] OJ L 239/3.
[92] Van den Bogaert 2005, page 96.

regions.[93] In my opinion however, what can be seen here are politically motivated decisions made by the ECJ and basing the extent to which the EC labour market shall be open to workers from the third countries depending on the importance of the international partner.

Finally, as was the case of workers of Slovak nationality in the *Kolpak* case and as is, due to a similar wording, the case of the other directly applicable international agreements between the EC and third-countries, the prohibition of discrimination on grounds of nationality applies solely with regard to conditions of work, remuneration or dismissal. This provision therefore does not extend to national rules concerning *access* to the labour market, in contrast to Article 39 EC.[94]

When compared to the abovementioned directives, the international agreements do not require a family relationship with an EU national nor fulfilment of any preconditions, except from nationality of a particular contracting state.

4.5 The Requirement of a cross-border element

In order to trigger the application of the EC free movement rules, a cross-border element must be present in an economic activity conducted by a sportsman.[95] In addition, a purely hypothetical prospect of exercising free movement rights does not establish a sufficient connection with Community law to justify the application of Community provisions.[96] This may, however, lead to situations when static nationals are treated less favourably than nationals who have made use of the freedom of movement of workers. The situation is often referred to as a *reverse discrimination.* This exactly has become the case of football in Europe after the *Bosman* had been delivered. In the case the ECJ held that the international transfer rules which prevent a professional football player whose contract with a club has already expired from being freely engaged by a club in another Member State as falling foul of Article 39 EC. The ECJ's judgement did not, however, have any impact on purely domestic transfers of football players. As a result of this, it has become cheaper for clubs to hire players from abroad due to no transfer fees. Being engaged by a club from abroad has also become more interesting for players since the money spared for transfer fees could be used for

[93] S. Peers, *From cold war to lukewarm embrace: the European Union's agreements with the CIS states* (1995) 44 ICLQ, p 831.
[94] *Kolpak*, supra note 76, para. 42.
[95] Case 175/78 *La Reine v Vera Ann Saunders* [1979] ECR 1129, para. 11, Case 298/84 *Paolo Iorio v Azienda autonoma delle ferrovie dello Stato* [1986] ECR 247, para. 14.
[96] See e.g. Case 180/83 *Hans Moser v Land Baden-Württemberg* [1984] ECR 2539, para. 18.

their salaries to be raised. The example shows that a division of the spheres of competence between the Community and the Member States bears also unpleasant consequences in the realm of sport.

4.6 Restrictions on free movement

The current approach of the ECJ with regard to the fundamental freedoms is predominantly centred around the concept of restriction which has to a large extent replaced the traditional non-discrimination analysis. The principle of non-discrimination on grounds of nationality lies at the heart of the application of the Community provisions on the free movement of workers, the freedom of establishment and the freedom to provide services. Originally, in the early case law of the ECJ, it even constituted the undisputed decisive criterion in the assessment of the ECJ whether a contested national measure breached the relevant Treaty provisions. At the same time, it cannot however be denied that Article 3(1)(c) EC has stipulated from the outset that the activities of the Community shall comprise 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'. As a result, it did not come entirely as a surprise that the ECJ gradually started to strengthen its grip on the free movement provisions, extending its supervision over the lawfulness of national rules from a pure discrimination based control to a wider investigation into the existence of restrictions to the right to freedom of movement.[97] The concept was conceived to be applied in the sphere of the free movement of goods. It was stated in *Dassonville*[98] and confirmed in *Cassis de Dijon*[99] that as soon as trading rule is found to be capable of restricting inter-state trade, regardless of whether the measure is discriminatory or indistinctly applicable, Article 28 applies.

This approach was eventually transposed by the ECJ to the other fundamental freedoms.[100] The conditions that need to be fulfilled for a regulation or an action to be considered a *restriction* are as follows: first, a contested national measure must affect access to the labour market within the Member State; second, the restrictive effects of the barrier in question must not necessarily be such as to actually preclude persons from exercising their free movement rights, for it suffices that they simply deter from doing

[97] Van den Bogaert 2005, page 124; P.Craig & G. de Búrca 2004, pages 715-722.
[98] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, [1974] ECR 837, para. 5.
[99] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649, para. 8.
[100] One of the first decision which dealt with the issue was the case 96/85 Commission of the European Communities v French Republic [1986] ECR 1475.

so;[101] third, these effects must be substantial, that is to say, they must be of a certain level of gravity or intensity.[102]

4.7 Justification of sporting rules

As a result of this approach towards the concept of *restriction*, the issue of the specific reasons invoked to justify the existence of national measures has become central for the examination of legality of national measures by the ECJ. It is therefore possible to distinguish between two different types of justification.

First, there are derogations expressly provided for in the EC Treaty. Article 39(3) EC, establishing the rights attached to the freedom of movement of workers, stipulates that these rights are subject to limitations justified on grounds of public policy, public security or public health. Equally, Articles 43(1) and 49 EC permit Member States only to derogate from the Treaty provisions on the freedom of establishment and the freedom to provide services on grounds of public policy, public security and public health. The precise scope of these three exceptions has been further outlined in secondary legislation [103] and in the case-law of the ECJ.

Although the derogations expressly provided in the EC Treaty undeniably form an important justification grounds in the area of the free movement rights, pursuant to the up until today delivered case-law, their importance in the sphere of sport is rather marginal when compared to the additional justification grounds as established by the ECJ in the field of professional sport. The objective justifications have been recognised by the ECJ in its case-law under the so-called *rule of reason doctrine* also known as the *mandatory requirements*. These derogations from the free movement rights form the second type of justification. Further analyses shall therefore focus on the application of the rule of reason doctrine to sport and its co-existence with the so-called *orthodox test.*

As will be demonstrated in the following paragraphs by some of the ECJ's cases in the area of sport, there is confusion in the case-law of the ECJ concerning the justification of 'sporting rules' under EC law. The approach of the ECJ taken in some of its case-law suggests that those rules shall be escaping the application of the EC Treaty provisions whatsoever, designating them as 'rules of purely sporting interest.' On the

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[101] See e.g. Case C-18/95 *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland*, [1999] ECR I-345.
[102] Van den Bogaert 2005, page 137.
[103] Directive of the European Parliament and of the Council 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30th December 2004.

other hand, in some cases it adheres to the rule of reason-like reasoning, stating that rules of this kind are caught by law of the European Communities, nonetheless still eligible for justification on non-economic grounds.

Already in its first judgement regarding sport, the *Walrave* case,[104] the ECJ established a practice that grants rules of sporting bodies fulfilling certain criteria a protection from the free movement rules. The *Walrave* decision concerned provisions of the Rules of the Union Cycliste Internationale (hereinafter as "UCI") relating to the medium-distance world cycling championships behind motorcycles. According to the rules, the pacemaker must be of the same nationality as the stayer. The action was brought by two Dutch nationals who normally took part as pacemakers in races of the said type and who regarded the aforementioned provisions of the rules of the UCI as discriminatory.

The first step taken by the ECJ in its analysis was, as provided for in section 3.1 of the Thesis, to establish that sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty. However, the ECJ continued that under specific conditions, even if the sporting activity is considered economic within the meaning of Article 2 of the EC Treaty, a sporting rule imposed by a sporting organisation may completely fall outside the scope of the EC Treaty. It held that with regard to the current situation, the prohibition arising from provisions of the EC Treaty do not affect a rule that is of purely sporting interest (the composition of sport teams, in particular national teams in) and thus has nothing to do with economic activity. *This restriction on the scope of the provisos in question must however remain limited to its proper objective.*[105] According to an 'orthodox' reading of *Walrave*, a rule of 'purely sporting interest' would therefore in principle fall outside the scope of the EC Treaty, unless it is found to be disproportionate, in which case it would be scrutinised pursuant to Articles 39 or 49 EC.[106]

It follows that according to an "orthodox" reading of *Walrave*, a sporting rule in order to be exempt from the application of law of the European Communities:

I. must be of purely sporting interest,

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[104] *Walrave*, supra note 18.

[105] Walrave, *supra* note 18, paragraph 8 and 9. See also *Deliège*, supra note 20, paragraph 41 and case case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991, supra note 105, paragraph 22. This approach is referred to as '*orthodox test*' and shall be distinguished from the '*mandatory requirements*'. See Pablo Ibanez Colomo 2006.

[106] Pablo Ibanez Colomo, "*The application of EC treaty Rules to Sport: the Approach of the European Court of First instance in the Meca Medina and Piau cases*", [2006] ESLJ Volume 3 Number 2, para. 5.

II. must have nothing to do with economic activity – the nature of sporting activity in particular cases is for national courts to determine,[107]

III. and must remain limited to its proper objective.[108]

The similar line of legal reasoning as in *Walrave* seems to have been employed in the *Donà* case. The case concerned the provisions of the Rules of the Italian Football Federation. Under the rules only players who were affiliated to that federation could take part in matches as professional or semi-professional players, whilst affiliation in that capacity was in principle only open to players of Italian nationality. The ECJ held that "*those provisions do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. This restriction on the scope of the provision in question must however remain limited to its proper objective.*[109]

Then, at paragraph 19, the ECJ however stated that the Rules are *incompatible* with provisions of the EC Treaty "*unless such rules or practices exclude foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only*". If in *Walrave* the discrimination at stake fell plainly and clearly outside the scope of the EC Treaty,[110] the ECJ seemed to suggest in *Donà* that the non-economic nature of a sporting rule could be invoked as a justification for a measure otherwise caught by Articles 39 and/or 49 of the EC Treaty.[111]

This confusion resulted into a shift from the 'orthodox test' as established in *Walrave* to the 'mandatory requirements doctrine' in the *Bosman* case. The ECJ officially introduced this doctrine in the field of the free movement of goods. In the case of *Cassis de Dijon* it declared that "*obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to*

[107] *Donà supra* note 19, para. 16.
[108] According to doctrine, it is necessary to prove that the absence of restriction would eliminate or significantly reduce the efficiencies that follow from it or make it significantly less likely that they will materialize. Jones & Sufrin 2004, p. 242.
[109] *Donà*, supra note 19, paras. 14, 15.
[110] See *Walrave*, supra note 18, paragraphs 4, 8.
[111] Pablo Ibanez Colomo, supra note 106, paragraph 6.

the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer."[112] This objective justification test was then transposed to the sphere of workers, services and establishment.[113]

In the *Bosman* judgement the ECJ decided upon two questions concerning the organisation of football in Europe. The first one concerned FIFA regulation which provided that at the expiry of the contract the player is free to enter into a new contract with the club of his choice. That club must immediately notify the old club which in turn is to notify the national association, which must issue an international clearance certificate. However, the former club is entitled to receive from the new club compensation for training and development.[114] Jean Marc Bosman was a professional football player who had been under contract to the Belgian club R.C.Liegois. In June 1990 his contract expired and he was offered a new contract worth only 25% of the value of his former contract. Since Mr. Bosman refused this offer, R.C.Liegois offered him for transfer for a fee of Bfr 12 million. This sum was a compensation for training expenses incurred by the club according to a strict formula laid down by Union Royale Belge des Sociétés de Football Association ASBL (hereinafter as "URBSFA"). As no club was willing to pay the fee, Mr. Bosman arranged transfer on his own to the French Club U.S.Dunderque. Both arrangements between U.S.Dunkerque, Mr. Bosman and R.C.Liegois were subject to the condition that Mr. Bosman's registration certificate be sent from URBSFA to the French Football Association by the start of the next season, 2nd August 1990. R.C.Liegois, having doubts about U.S.Dunkerque's solvency, did not ask URBSFA to send the certificate to the French Football Association. Thus R.C.Liegois suspended Mr. Bosman, preventing him from playing for the rest of the season. The ECJ held that the rules which provide that a professional footballer, upon the termination of his contract, 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

[112] See *Casis de Dijon*, supra note 99, paragraph 8.
[113] See Case C 288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, [1991] ECR I-4035, paragraph 14 with regard to services and Case C-19/92 *Dieter Kraus v Land Baden-Württemberg*, [1993] ECR 1663, para.32 with regard to Articles 39 and 43 EC.
[114] See *Bosman*, supra note 20, paragraph 13.

associations, the said rules constitute an obstacle to freedom of movement for workers.[115]

Second, the applicants contested the so called 3+2 rule, under which national associations were permitted to limit to three the number of foreign players whom a club may field in any first division match in their national championships, 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 same limitation also applies to UEFA matches in competitions for club teams. Also this regulation had been established to fall foul of Article 39 EC.

In both cases the ECJ proceeded to a possible justification for these nationality clauses under the rule of reason. In *Gebhard*, the ECJ had determined exact conditions which needed to be complied with in order to justify a contested national measure under the rule of reason doctrine. It had to be (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.[116] This so-called Gebhard-formula is reiterated in *Bosman*, with one slight difference, however: the requirement that the disputed measure must be non-discriminatory in order to be eligible for objective justification has disappeared and has been replaced by the condition that the rule pursues a legitimate aim compatible with the Treaty.[117] This formula being applied, neither the regulations on transfer of players nor the "3+2" rule were found to be in line with Article 39 EC by the ECJ.

In *Deliège*[118] and *Lehtonen*,[119] the two judgments which followed 5 years after *Bosman*, both the "orthodox" – *Walrave* test as well as the one of *Bosman* were employed.

In *Deliège* the ECJ took the view that "*although selection rules like those at issue in the main proceedings inevitably have the effect of limiting the number of participants in a tournament, such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 59 of*

[115] See *Bosman*, supra note 20, paragraph 100.
[116] Case C-55/94, *Gebhart v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37.
[117] See *Bosman*, supra note 20, paragraph 104; see also Bogaert, page 155.
[118] *Deliège*,supra note 20.
[119] *Lehtonen*, supra note 20.

the Treaty".[120] This conclusion could be interpreted as upholding the *Walrave* test, requiring rules to be of purely sporting interest in order to escape the application of the EC Treaty.

The *Lehtonen* case subject matter concerned question of whether the EC Treaty precludes the application of rules laid down in a Member State by sporting associations (Belgian basketball association) which prohibit a basketball club from fielding players from other Member States in matches in the national championship, where the transfer has taken place after a specified date. In addition, the transfer deadline was set stricter for players coming from a European association than for those from another association. Just as in *Bosman*, the ECJ held that the rules are "*liable to restrict the freedom of movement of players who wish to pursue their activity in another Member State, by preventing Belgian clubs from fielding in championship matches basketball players from other Member States where they have been engaged after a specified date. Those rules consequently constitute an obstacle to freedom of movement for workers*".[121] In paragraph 53, the ECJ accepted that such rules could be justified on 'non-economic' grounds, provided that they meet the objective of ensuring the regularity of sporting competitions.

The aforementioned examples clearly demonstrate the confusion with regard to the application of "rules of clearly sporting interest". The approach of the ECJ taken in *Walrave* and *Deliège* suggests that those rules shall be escaping the application of the EC Treaty provisions whatsoever. On the other hand, in *Bosman* and *Lehtonen* it takes the view that rules of this kind are caught by law of the European Communities and therefore need to be justified on non-economic grounds.

5 Sport and European competition law

5.1 Introduction

Western economies adhere to the maxim that competition between enterprises is a good thing. The fact that less effective enterprises fall in the race of the survival of the fittest is the basic principle which leads to products of a higher quality, lower prices and technical development. The EC Treaty and national legislation in the Member States therefore provide rules that guarantee competition in the common and national market.

[120] *Deliège*, supra note 20, paragraph 64.
[121] *Lehtonen*, supra note 20, paragraph 49.

In Europe those rules apply both to (private) enterprises and to Member States, including non-central authorities. The rules form a necessary condition for realising the objective of the European Community, a common market (articles 2 and 3 EC). They break down barriers to trade within and between EU member states thus strengthening national markets and the Single Market. This promotes European integration and serves a similar role as late 19th century US anti-trust legislation which promoted the political integration of the US states.[122]

5.2 Sport operates under different market rules

As will be shown below, sport falls within the ambit of the EC Treaty competition provisions. An attention must however be paid in this regard to specific market conditions under which it operates and which differ from those of other industries. An insight into Scottish football provides a sufficiently illuminating example.

In April 2002, ten of the twelve clubs that compete in the Scottish Premier League announced their intention to resign. The "breakaway ten" declared a plan to start a new League. The two clubs not involved were Glasgow Rangers and Glasgow Celtic, the most successful clubs in the history of Scottish football and also the clubs that attract by far the largest numbers of supporters. The "breakaway ten" promptly informed Rangers and Celtic that the Glasgow duo would be welcome to join the new competition beginning in 2004, but only provided they accepted changes in decisions-making system. The ten smaller clubs had in mind the adoption of systems of wealth distribution that would involve much more substantial transfers of revenue from the best supported clubs to the less well supported clubs. Mr. Ian McLeod, Celtic's chief executive, observed that the clubs that had announced their resignation "appear to regard themselves as the oppressed ten when, because Celtic and Rangers generate 80 per cent of the revenue in Scottish football, they are actually being subsidised by the two biggest clubs". The comment, however, overlooked one important feature. Plainly the "oppressed ten" make money as a result of their entanglement with the commercially dominant Glasgow clubs, but Celtic and Rangers also make their money because of the existence of their opponents. They depend on finding parties willing to

[122] European Parliament Working Paper, *Professional Sport in the Internal market*, IP/A/IMCO/ST/2005-004 (http://www.europarl.europa.eu/comparl/imco/studies/0509_study_sport_en.pdf), page 15.

supply that crucial extra element in the sporting bargain – opposition – to lend commercial and sporting purpose to their very existence.[123]

Here the diversity between "normal" and sport market can be seen. If smaller producers quit the market, the more powerful firms will typically simply seize their market share. In football, the dominant market share claimed by Celtic and Rangers would not increase if their rivals refused to compete. On the contrary, exit by weaker parties ruins the game for the stronger.

There are also other features typical for sporting competition, which distinguish it from "normal" competition situation. As already stated, sporting federations or leagues form a 'natural monopoly'. The existence of several federations in one discipline would risk causing major conflicts. The organisation of national championships and the selection of national athletes and national teams for international competition also often require the existence of one umbrella organisation bringing together all the sports associations and competitors of one discipline. Fans prefer a single sports organisational structure as this meets the natural sporting objective of seeing who the single champion is. Fans cannot also be regarded as "consumers" in the normal free market sense, since they tend to be loyal to "their" club, which they follow almost unconditionally - principle of loyalty and nationality. Many of them are attracted by the excitement contained in the uncertainty as to the outcome of the match or competition. This excitement among other things depends on equal chances within competition - competitive balance.

The notion of different market qualities was also recognised in the *Bosman* case.[124] The Court stated that: "*In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.*"

5.3 Application of EC Treaty provisions in the field of sport

The key provisions of EC competition law with regard to sport are articles 81, 82 and 87 EC. The following paragraphs shall thus be focused on conditions enumerated in these articles which are necessary to trigger the application of EC competition law.

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[123] Weatherill 2003, *supra* note 32, page 53.
[124] *Bosman*, *supra* note 20, para. 106.

After that, an analysis of recent case-law of the ECJ concerning application of competition law to sport shall be conducted.

5.4 Article 81

Article 81(1) EC provides that, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market shall be prohibited as incompatible with the common market. Article 81(3), however, grants an exception to those agreements, decisions or concerned practices 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 benefit, and which are indispensable and do not eliminate competition.

5.4.1 Undertakings and associations of undertakings

The first question that needs to be answered is whether the sporting associations and clubs may be considered to be undertakings within the meaning of Articles 81 and 82 of the EC Treaty or associations of undertakings within the meaning of Article 81 of the EC Treaty. The test developed by the ECJ is as follows: "Every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed is considered to be an undertaking.[125] It is therefore necessary to ascertain whether clubs or sporting associations carry on an economic activity. For this reason, it is of no relevance whether an entity has a form of a capital company or a club. The aims of the entity are of no importance either. Whilst the governing bodies of sport as well as clubs play an important non-economic regulatory function, they also have responsibilities for ensuring the commercial success of the sport and are thus acting in an economic capacity. It does not matter that sporting bodies pursue primarily unquantifiable activities such as development of young players or organisation of national competitions. The activities actually embarked on are decisive.[126] It also makes no difference that only some of the activities are economic in their nature. The EC Competition Law does not require that activities are carried on with a view to making a

[125] Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR. I-1979, para. 21.
[126] See joined cases 209-215 & 218/78 *Van Landewyck v European Commission* [1980] ECR 3125, para. 88. See also Stix-Hackl/Egger 2002, page. 84.

profit either.[127] The activities of the associations or clubs would be considered economic even though they exercise functions of a public authority.[128]

An example of the economic activities can be found in Regulations Governing the Application of the FIFA Statutes.[129] Article 10(1) the Regulations provide that the levy to be paid to FIFA for each match played between two national "A" teams (in compliance with the Statutes), including the matches played in tournaments or in games including football except for junior tournaments, shall comprise 2%. Based on Article 10(2), the amount shall be based on the gross receipts (ticket sales, advertising rights, rights for television and radio broadcasts, and film and video rights etc.) derived from matches. UEFA, being a confederation, profits from the system as well. Pursuant to Article 10(4) of the FIFA Application Regulations, the levy due to FIFA in respect of matches played on the territory of a Confederation between Members belonging to that Confederation is only 1%, the remaining 1% being payable directly to the Confederation involved and in respect of matches played between Members affiliated to different Confederations, on the territory of one of these Confederations, the 2% levy due is payable to FIFA, which will retrocede 0.5% to each of the Confederations involved.

As to the economic activity of the individual football clubs, besides the receipts mentioned in Article 10(2) of the FIFA Application Regulations, sponsorship agreements and the transfer fees for players form a considerable part of their incomes. The training of players also forms an economic activity to a certain extend. The purpose of the training is to enhance player's performance and thus match result and incomes received by clubs thereof to gain profit by a transfer of such player. This is a form of occupational training and development similar to that in service undertakings, which ultimately benefits the undertaking too. It therefore relates in that respect to economic activities.[130] Some clubs also exploit the opportunity to finance themselves by quoting their shares on the on the stock exchange.

Furthermore, the fact that the individual clubs may be considered to be undertakings implies that the national and international associations form associations of undertakings. As stressed by the Advocate General Lenz in his opinion to in the

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[127] Joined Cases 209-215 & 218/78 *Van Landewyck v. European Commission* [1980] E.C.R. 3125; [1981] 3 C.M.L.R. 134, paragraph 88.
[128] *Höfner, supra* note 125, paras. 21 et seq.
[129] http://www.fifa.com/mm/document/affederation/federation/fifa%5fstatutes%5f0719%5fen%5f14479.pdf.
[130] Stix-Hackl/Egger 2002, p. 84.

Bosman case, "*The fact that in addition to the professional clubs, a large number of amateur clubs also belong to those associations makes no difference*".[131] The international associations may even be regarded as groupings of associations of undertakings. As the ECJ stated in *Piau*: "(...) FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity", and "*since the national associations constitute associations of undertakings and also, by virtue of the economic activities that they pursue, undertakings, FIFA, an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article 81 EC.*"[132]

In conclusion, professional sports clubs are to be considered as undertakings within the meaning of Article 81 of the EC Treaty. As regards national and international sporting associations, these may also be classified as associations of undertakings or even as groupings of associations of undertakings.

5.4.2 Agreements, decisions by associations of undertakings or concerted practices

Secondly, it is necessary for acts of sporting bodies to constitute agreements, decisions by associations of undertakings or concerted practices in order to fall under the Article 81(1) of the EC Treaty. Agreements and concerted practices are usually reached between undertakings (such as clubs) or between associations of undertakings (such as governing bodies).[133] The same goes for decisions by associations of undertakings, which will most often be represented by decisions of national or international sporting associations. For example, the rules regulating transfer of football players by the FIFA qualify as a decision by an association of undertakings. They form a part of the FIFA Regulations issued by the Executive Committee, which is one of FIFA main bodies and bases its competence on Article 5 of the FIFA Statutes. The character of rules as a decision thus follows from the fact that they were adopted on the basis of the federation's statutes which are considered to be a collective legal act.[134]

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[131] Opinion of A.G. Lenz in *Bosman*, supra note 20, point 256.
[132] Case T-193/02 *Laurent Piau v Commission of the European Communities* [1990] ECR II-209, at paras. 69 and 72.
[133] European Parliament Working Paper, supra note 11, page 16.
[134] See also Jones & Sufrin 2004, p. 150 and Stix-Hackl/Egger 2002, p. 85.

It needs to be added that as provided in the opinion of the A.G. Lenz in *Bosman*, it is of no importance for the application of Article 81(1) whether the acts are to be regarded as decisions or agreements since both fall within its ambit.[135]

However, rules of marginal significance (de minimis) and those not having an appreciable effect on cross border trade will fall outside the scope of the Treaty competition provisions.

5.4.3 Restriction of competition

Thirdly, Article 81(1) of the EC Treaty prohibits practices which have as their object or effect the prevention, restriction or distortion of competition within the common market. However, prima facie restrictive agreements need careful examination and proper account should be taken of the overall context in which a decision restricting competition had been made, paying particular attention to the objectives of the rule in question. Thus even restrictive rules are capable of falling outside the scope of competition law if that restriction is subject to a rule of reason analysis in which the pro-competitive features of the rule in question are deemed to outweigh the anti-competitive features. Such restrictive rules are necessary for the proper functioning of sport. In this regard, the unique nature of the European model of sport and the interdependence of clubs is to be taken into consideration. The problematic of competition's restrictions are dealt with in more detail in section 5.7 of the Thesis.

5.4.4 Effect on trade between the Member States

As there are many international sporting competitions within the Internal market, with many of them having rather substantial economic implications, decisions and rules of international federations may very well influence trade between the Member States.

If an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant.[136]

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[135] Opinion of A. G. Lenz in *Bosman*, supra note 20, point 258:"(...) *since Article 85 applies in the same way to both those forms of coordination, the distinction is of no importance here".*

[136] Case C-306/96 *Yves Saint Laurent Parfums SA v. Javico International* [1998] E.C.R. I-1983; [1998], para. 16; see also Case 5/69 *Völk* [1969] E.C.R. 295, para. 5/7, and Case 56/65 *Société Technique Minière (LTM)* [1996] E.C.R. 235, para. 249.

Even a potential impact on the pattern of trade between Member States suffices.[137] A potential of sporting rules to have such effect can once again be show by resorting to the opinion of the Advocate General Lenz on the FIFA players transfer rules in the *Bosman* case. Paragraph 260 of the opinion provides that: "*...The rules on transfers also, however, have a substantial effect on trade between Member States....Moreover, it would suffice if trade between Member States was potentially affected in an appreciable manner. That is certainly the case.*"

As the ECJ has consistently held, the concept of trade is interpreted broadly in competition law.[138] It comprehends the placement of employees and the provision of services. *A potential effect on trade between Member States threfore arises in particular where the placement of employees by private companies may extend to the nationals or to the territory of other Member States.*[139]

Just as in case of competition restrictions, anti-competitive decisions fall within Article 81 EC if they appreciably affect trade between Member States.[140] It is of no question that decisions of international sporting association or decisions taken by their members, such as transfer rules of football players imposed by FIFA,[141] are in a position to appreciably effect trade between the Member states. But what about measures limited to the territories of the Member States or those having implications with regard to the non-EU members? Should these be considered as falling within EC competition law? As to the measures having effect within national markets, they still are capable of indirectly influencing interstate trade in so far as they cause that national transactions are being given priority to those between the Member States.[142] Accordingly, the measures regulating trade with third countries may have intracommunity implications as well.[143]

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[137] See Case 19/77 *Miller v Commission* [1978] ECR 131, paras. 14-15.
[138] See Case 155/73 *Italy v. Saachi* [1974] E.C.R. 409; [1974] 2 C.M.L.R. 177 relating to television rights, and Case 172/80 *Züchner* [1981] E.C.R. 202, para. 18.
[139] Case 56/65 *Société Technique Minière (LTM)* [1996] E.C.R. 235, para. 37; see also Stix-Hackl/Egger 2002, p. 90.
[140] See *e.g.* Case 22/78 *Hugin v Commission* [1979] ECR 1869, para. 17; Case 28/77 *Tepea v Commission* [1978] ECR 1391, paras. 46-47.
[141] http://www.fifa.com/mm/document/affederation/administration/regulations%5fon%5fthe%5fstatus%5fand%5ftransfer%5fof%5fplayers%5fen%5f33410.pdf.
[142] Joined Cases 56 & 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] E.C.R. 299 at 341 et seq.
[143] On exports to non-member countries, see Joined Cases C 89, 104, 114, 116, 117 & 125-129/85 *A. Ahlström Osakeyhtiö and others v Commission of the European Communities* [1993] E.C.R. I-1307, paras 141 et seq.

5.4.5 Article 81(3)

Conduct or measures that engage article 81(1) of the EC Treaty and are considered restrictive may still qualify for an exemption under article 81(3) EC provided they satisfy all the criteria outlined therein. They should therefore provide consumers with a fair share of the benefit; promote technical or economic progress; they should be indispensable and should not eliminate competition in respect of a substantial part of the products.

An example of rules that meet requirements of Article 81(3) can be found among rules governing the activity of football players' agents. In *Piau v Commission,*[144] the Court of First Instance upheld the Commission's decision that the requirement of a licence as a condition for acting as a players' agent necessarily affected competition since it constituted a barrier for access to an economic activity. It could therefore only be accepted if the conditions of Article 81(3) were met. The Court took account of FIFA's explanation that this rule was pursuing dual objective of raising professional and ethical standards for the occupation of players' agent in order to protect players who have a short career, noting also that there were virtually no national rules and no collective organisation of players' agents. The Court found that the licence system appears to result in a qualitative selection, appropriate for the attainment of the objective or raising professional standards for the occupation of players' agent, rather than a quantitative restriction on access to that occupation. Accordingly, the conditions of Article 81(3) appeared to be satisfied.[145]

5.5 Article 82

Article 82 EC prohibits any abuse by one or more undertakings of a dominant position within the Common market or in a substantial part of it insofar as it may affect trade between member states.

5.5.1 Dominant position

The dominant position (...) relates to a position of economic strength enjoyed by an undertaking[146] *which enables it to prevent effective competition being maintaibed on the relevant market by affording it the power to behave to an appreciable extent*

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[144] CFI in *Piau, supra* note 132.
[145] Bellamy & Child, *European Community Law of Competition,* sixth edition, Oxford University Press, 2008, pages 401, 402; see also CFI in *Piau, supra* note 132, paras. 102-104.
[146] The concept of an undertaking under Article 82 corresponds to that of Article 82.

independently of its competitors, its customers and ultimately of the consumers .[147] A potential for finding a dominance is enhanced due to a number of factors inherent to sport and its organisation in Europe. Firstly, it is the nature of the European model of sport. As already provided for in the part of the Thesis on the European model of sport, the pyramid structure-kind of organisation of sport in Europe results into a single governing body per sport and thus into an overall control over the course of events therein. This necessitates international sports federations to assume considerable (even monopolistic) control over the activities of its members. Secondly, the nature of the rules employed by governing bodies to maintain the single structure model is often highly restrictive. Thirdly, the nature of substitutability – sport is characteristic for its limited scope for demand and supply side substitutability.[148]

5.5.1.1 Collective dominant position

As provided at paragraph 285 of the Advocate General Lenz opinion in the Bosman case, "(...) *it could very well be assumed that the clubs in a professional league are `united by such economic links' that together they are to be regarded as having a dominant position. One could cite in particular here the fact,(...) that those clubs are dependent on each other if they wish to be successful. Such a natural community of interests can probably be found in scarcely any other sector.*[149]

Three cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, *the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market;* thirdly, *the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.*[150]

In *Piau* the CFI considered whether the members of FIFA held a collective dominant position by virtue of the fact that they agreed to be bound by the FIFA regulations, in that case by the regulations governing the activities of players' agents. The members of FIFA are the national associations of football clubs. The regulations adopted by FIFA could, where implemented, result in the clubs being so linked as to

[147] See case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para. 38.
[148] European Parliament Working Paper, supra note 11, page 17.
[149] The opinion of A. G. Lenz in 20, paras. 285.
[150] See CFI in Piau, supra note 132, para. 111; case T-342/99 *Airtours plc v Commission of the European Communities*[2004] ECR II-1785, para. 62; *see also* Jones & Sufrin 2004, p 259.

their conduct on the market that they present themselves on that market as collective entity vis-à-vis their competitors, trading partners and consumers. The court held: "*Because the regulations are binding for national associations that are members of FIFA and the clubs forming them, these bodies appear to be linked in the long term as to their conduct by rules that they accept and that other actors (players and players' agents) cannot break on pain of sanctions that may lead to their exclusion from the market, in particular in the case of players' agents. Within the meaning of the case-law...such a situation therefore characterises a collective dominant position for clubs on the market for the provision of players' agents' services, since, through the rules to which they adhere, the clubs lay down the conditions under which the services in question are provided.*" [151]

The CFI went on holding that the fact that FIFA itself was not an economic operator that bought players' agents' services on the marker and that its involvement in the market stemmed rather form its rule making activity was irrelevant to the application of Article 82. FIFA was the emanation of the national associations and the clubs who were the actual buyers of the services and therefore operated on the market through its members.[152]

Nevertheless, despite strong links among entities establishing a collective dominance, there still might be situations in which clubs/sporting organisations compete against each other and a situation of collective dominance thus has to be ruled out. An example can again be found in the opinion of the Advocate General in *Bosman* when assessing effect of rules laid down by a national football association on competition in the supply market for players:[153] "*the present case does not concern the power on the market which the clubs taken together have against competitors, customers or consumers. The players do not, in my opinion, belong to any of those categories. There would be such a question, by contrast, if - to take an example already mentioned - the clubs themselves acted as a group to market the television rights for their matches. The present case, however, concerns rules which restrict the possibility of taking on players. Those rules lead to a restriction of competition between the clubs. That is not, however,*

[151] See Piau, supra note 132, para. 114.
[152] See Piau, supra note 132, para. 116; see also Bellamy & Child 2008.
[153] The supply market for players is a market on which an offer and demand for players meet.

to be seen as an abuse within the meaning of Article 86, since in that respect only the relationship between the clubs and their players is affected."[154]

5.5.2 Abuse of a dominant position

The finding of dominance is not in itself illegal and, unlike in the US antitrust law, it must be established whether an abuse of this dominance has taken place. An abuse of a dominant position in sport is likely to occur where a sporting body enjoys effective control over rights to participate in a major sport or to broadcast coverage of such a sport. Since, until its decision in the *Meca-Medina* case, the ECJ had been avoiding to express its opinion on the application of EC competition law to sport, it was the European Commission who found itself faced with need to shape a policy in this area. It has on several occasions dealt with practices of sporting bodies which were likely to be considered inconsistent with EC provision on competition.

For instance, a sporting organisation may infringe Article 82 by using its regulatory powers to exclude from the market, without objective justification, competing organisers or indeed market players. Formal proceedings were opened by the Commission into Formula One motor racing and the activities of the Federatin Internationale de l'Automobil (FIA). The investigation concerned the possible abuse of market power in the licensing of participants in the sport, the acquisition of television rights and the arrangements entered into with broadcasters, promoters and teams.[155] The investigations resulted into substantial changes made in the Formula One arrangements. The agreed modifications ensure that the role of FIA is limited to that of a sports regulator, and are designed to excise the risk of commercial conflicts of interest. Certain perniciously anti-competitive restrictions, designed to suppress the growth of new motor sports, have been abandoned, so that, for example, circuit owners hosting Formula One races will no longer be contractually restrained from staging other events that may compete with Formula One, nor will broadcasters be induced to commit exclusively to Formula One.[156]

In another investigation in the sports area, the Commission held that the ticket sales arrangements for the 1998 Football World Cup in France fell foul of Article 82.[157]

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[154] A.G. Lenz in *Bosman*, *supra note* 20, paras. 286.
[155] Bellamy & Child 2008, page 983.
[156] Stephen Weatherill, *"Fair play please! ": Recent development in the application of EC law to sport*, Common Market Law Review 2003, pages 60, 61.
[157] Commission decision of 20.7.1999, (Case COMP/36888) concerning discriminatory ticketing practices (territorial restrictions) OJ L 5/55 of 8 January 2000.

5.5.3 Relevant market

Definition of a relevant market is indispensable for determination of the ability of an undertaking to affect competition and to behave independently of its competitors and customers. Even though the determination of the relevant market in the context of Article 81 does not have the same importance as in the context of Article 82, the examination of possible interferences with competition requests the definition of the market as well.[158]

As to the territorial market, the pyramid organisation of sport in Europe implies that this market shall cover territories of all the states in which a particular sporting activity is being exercised and organised by means of a national or international association. In most of the cases, this comprises the whole territory of the European Union.

With regard to the relevant product market, three interconnected markets can generally be distinguished in sport.[159]

First, the exploitation market, in which both individual clubs and national and international associations act as undertakings and exploit their performances. This market includes secondary goods such as tickets for sporting events, broadcasting rights, advertising goods.

Second, the contest market which produces a typical product of professional sport, the sporting performance. It is complementary produced by clubs or sportsmen/sportswomen competing against each other, with external factors such as spectators and sponsors also intervening. The market depends on the standard of the teams/players and uncertainty of the result. In order to preserve the two mentioned prerequisites of the contest market, sporting associations adopt regulations which very often affect trade between the Member States.

Third, it is the supply market where the clubs sell and buy players. Human being as a production factor is a characteristic of many branches of the economy in the service sector. The clubs have opposing interest of buying the best possible player for the needs of their team. This is where the richest clubs misuse their rather unlimited resources and buy the most talented, mostly very young, players in order to prevent competitors from

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[158] See e.g. Case C-234/89 *Delimitis v. Henninger Brau AG* [1991] E.C.R. I-935; [1992] 5 C.M.L.R. 210, paras 15 et seq; Case C-18/93 *Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova* [1994] E.C.R. I-1783, para. 41; Case C-247/86 *Société Alsacienne et Lorraine de Télécommunications et D'Electronique (Alsatel) v. Novasam SA* [1988] E.C.R. 5987; [1990] 4 C.M.L.R. 434, para. 15.

[159] Stix-Hackl/Egger 2002, p. 85.

engaging them. This often leads to the situation when young players are trapped on the substitutes' benches of clubs which do not really need their services, without a possibility of a further professional development.

5.5.4 Justification under Article 82

As emphasised by the legal doctrine,[160] Article 82 has no equivalent to Article 81(3). For that reasons the ECJ has developed the concepts of objective justification and proportionality in order to provide some flexibility in what would otherwise be a too draconian application of Article 82. Based on this justification, a conduct of a dominant undertaking, proportionate to its aim, will escape condemnation under the Article.[161]

5.6 Article 87 – State aids

Even though the attention has mainly been paid to the relation of sporting regulations and Articles 81 and 82, the implications of Article 87 should not be ignored either. The objective of State aid control is to ensure that state interventions do not distort competition and intra-Community trade. In this respect, State aid is defined as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Member States.[162] Public support measures in sports generally finance either infrastructure or activities of individual sports clubs. It has long been the case that local authorities as well as central governments support clubs by measures such as tax benefits or gifts, justification being that the clubs secure educational, social, cultural and recreational functions.

Public subsidies to professional clubs may however raise problems of compatibility with EU state aid rules since professional clubs are engaged in economic activities and are therefore considered to be undertakings under the EU competition rules.[163] This can be evidenced by the letter sent by Director General of competition A.

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[160] Craig & de Búrca 2004, p. 1030, Jones & Sufrin 2004, p. 282, see also: Philip Lowe 2003.

[161] Issues relating to objective justification and proportionality have been considered in a number of case that have been litigated under this Article (Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* (1978) ECR 207; Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389 Case T-30/89, Hilti *AG v Commission* [1991] ECR II-1439, [1992] 4 CMLR 16. Case C-311/84, *CBEM v CLT and IPB* [1985] ECR 3261).

[162] See L. Tichý, R. Arnold, P. Svoboda, J. Zemánek, R. Král, Evropské právo, 3. vydání, Praha 2006, pages 582 and 583.

[163] SEC(2007) 935, COMMISSION STAFF WORKING DOCUMENT, THE EU AND SPORT: BACKGROUND AND CONTEXT, Accompanying document to the WHITE PAPER ON SPORT, page 28, available *via* http://ec.europa.eu/sport/index_en.html.

Schaub of the European Commission to the Dutch representatives in Brussels,[164] from which it can be (indirectly) concluded that a number of municipalities in the Netherlands have violated state support rules.

Nevertheless, there are certain types of support granted by the Member States to the sport sector, which are capable of being qualified as state aid within the meaning of EC rules, and which may still be considered to be compatible with EC Law. This is notably the case of the aids which fall within the scope of the existing block exemptions that apply to all economic sectors, such as:

- "De minimis" aid: aid of up to 200,000 EUR distributed over 3 fiscal years to a single undertaking.
- Rescue and restructuring aid: aid to clubs facing financial difficulties, provided that such aid is limited in time, followed by a restructuring plan, and reimbursed in the 12 months after payment.
- Aid to SMEs: under certain conditions, aid for investments by small and mediumsized enterprises can be considered compatible.
- Training aid: state support accorded to the training of young athletes is generally compatible with EU law if it fulfils the conditions laid down in the block exemption regulation on training aid. Alternatively, it is not covered by the State aid rules if it falls within the competence of the State in the area of education.[165]

Furthermore, public financing related to the construction of sport infrastructure can also be considered as not constituting State aid, provided certain conditions are fulfilled.[166]

5.7 Sport and the case-law of the ECJ related to competition law

Although the first decisions by the ECJ concerning sport date back to mid-seventies,[167] it was not before the CFI's decision in the *Meca-Medina* case on 30th

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[164] Europese Commissie, DG Concurrentie, Alexander Schaub, juli 2002. Alle kranten maakten reporting van de brief midden november waaronder bijvoorbeeld NRC Handelsblad, 18 november 2002, voorpagina "EU valt over steun to voetbalclubs.

[165] *COMMISSION STAFF WORKING DOCUMENT, THE EU AND SPORT: BACKGROUND AND CONTEXT, supra* note 163, page 28.

[166] Some general principles were laid down in a letter from the European Commission's Directorate-General for Competition to Germany regarding State funding for the Hanover football stadium. Aid for the construction of stadiums or other sports infrastructure could be argued not to constitute aid, provided it fulfils the following criteria: (1) the type of infrastructure involved is generally unlikely to be provided by the market because it is not economically viable; (2) it is not apt to selectively favour a specific undertaking: in other words, the site provides facilities for different types of activities and users and is rented out to undertakings at adequate market based compensation; (3) it is a facility needed to provide a service that is considered as being part of the typical responsibility of the public authority to the general public.

September 2004 that the first ruling on the applicability of Community competition law to sports rules was delivered.[168] The ECJ as well as the CFI had notoriously avoided analysing sporting matters from the perspective of the competition rules, even though Articles 81 and 82 EC had been invoked in the preceding cases.[169]

5.7.1 Meca-Medina

The background of the case can be summarised as follows. The applicants, David Meca-Medina and Igor Majcev, were professional long-distance swimmers. They both had failed a drug test administered as part of the overall control exercised over the sport by Fédérarion Internationale de Natation (FINA), swimming's governing body. Consequently they had been suspended for a period of four years by FINA. After an appeal to the Court of Arbitration for Sport, the suspension was, based on results of later scientific experiments, set at two years in duration. It follows that the economic detriment of the action taken against the swimmers was plain. And yet this was clearly not *only* a matter of economics. Sport is based on fair play – it is structured around rules which define the essence of the endeavour. Keeping out drug cheats has an undeniable economic context, but at the same time it is an existential choice, since sport is only sport if there is a playing field for competitors. In its applications to the European Commission, followed by complaints to the CFI and the ECJ, the swimmers complained that the anti-doping arrangements, set forth in the Olympic Movement's Anti-Doping Code and implemented by FINA's Doping Control Rules, had led to their exclusion from the sport constituted a violation of the Treaty competition rules.

In their submission lodged with the Commission Mr. Meca-Medina and Mr. Majcev contended that the anti-doping rules adopted by the International Olympic Committee (IOC) were in violation of Articles 81, 82 and 49 of the EC Treaty. First of all they claimed that the anti-doping rules were restrictive within the meaning of Article 81. Secondly, they considered that the fixation of a limit for nandrolone at 2 ng./ml. was constitutive of a concerted practice between the IOC, the FINA and the accredited network of laboratories. Finally, the swimmers claimed the dispute settlement system created by the IOC to be restrictive in nature. The Commission rejected the

[167] *Walrave*, supra note 18; *Donà*, supra note 19.
[168] Case T 313/02, *Meca-Medina and Igor Majcen v Commission of the European Communities*, [2004] ECR II-03291.
[169] See for example decisions in *Bosman, Lehtonen, Deliège, supra* note 20.

complaint.[170] It did not however base its decision on the reasoning employed in *Walrave* and *Deliege* but chose to follow the reasoning of the *Wouters* case,[171] which provided a *sui generis* "rule of reason" kind of interpretation of article 81 EC. Here, we can see an inconsistency on the side of the Commission. On the one hand, it seemingly endorsed the *Walrave* approach in the 1999 Helsinki Report on Sport by setting forth that the rules inherent to sport are not caught by Article 81 EC.[172] On the other hand, when encountering the case dealing with such rules, it chose to adhere to the *rule of reason* kind of argumentation.

The Commission's decision was followed by an action for annulment brought by the swimmers before the CFI which was dismissed as well.[173] Firstly, the applicants claimed, that the Commission made a manifest error of assessment in fact and in law, by deciding that the IOC is not an undertaking within the meaning of the Community case-law, secondly, that the Commission wrongly applied the criteria established in the *Wouters* case and, finally, that a manifest error of assessment was made with regard to the application of Article 49 of the EC treaty.

The CFI began its assessment by recalling the orthodox judicial test according to which sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC.[174] In paragraphs 40 and 41 of the judgment, the CFI held, on the basis of case-law of the Court of Justice, that while the prohibitions laid down by Articles 39 EC and 49 EC apply to the rules adopted in the field of sport that concern the economic aspect which sporting activity can present, on the other hand those prohibitions do not affect purely sporting rules, that is to say rules relating to questions of purely sporting interest and, as such, having nothing to do with economic activity.[175] Based on the fact that purely sporting rules may have nothing to do with

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[170] COMP 38.158, 1 August 2002.

[171] *Wouters*, supra note 49.

[172] See The Helsinki Report on Sport, supra note 31, pages 8, 9 – the European Commision devides sporting practices into 3 categories:

- practices which do not come under the competition rules
- practices that are, in principle, prohibited by the competition rules
- practices likely to be exempted from the competition rules

[173] *Meca-Medina*, supra note 168.

[174] *Meca-Medina*, supra note 168, para. 37.

[175] At paragraph 41 the CFI referred to 'purely sporting rules, that is to say rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity' and juxtaposed this to a description of 'regulations, which relate to the particular nature and context of sporting events, are inherent in the organisation and proper conduct of sporting competition and cannot be regarded as constituting a restriction on the Community rules on the freedom of movement of workers and the freedom to provide services'. But this is to conflate two different points. Perhaps there is a (small) category of purely sporting rules unassociated with economic activity, but regulations inherent in the

economic activity, with the result that they do not fall within the scope of Articles 39 EC and 49 EC, the ECJ held that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC.[176] In paragraphs 44 and 47 the CFI held that the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration. It concluded that the rules to combat doping consequently cannot come within the scope of the Treaty provisions on the economic freedoms and, in particular, of Articles 49 EC, 81 EC and 82 EC. It supported its conclusion by reference to the Helsinki report on sport,[177] according to which "*the rules inherent to sport are, first and foremost, the 'rules of the game' and the aim of these rules is not to distort competition*".

The notion that there is in principle a separation between sporting rules (which escape the scope of application of EC law) and rules of an economic nature (which do not) reflects the nature of the EC as an institution possessing a set of attributed competences, of which sport is not one.[178] This, in fact, is the core of the 'no overlap' thesis – there is sports governance and there is EC law, and there is no overlap between the two.[179] But the implications of sporting activity leak beyond what the CFI labels 'noble competition'[180] and are commonly economically highly significant; while EC law, though not explicitly targeted on sport by the Treaty, has a broad functional reach because so few activities exert no economic impact.[181] The CFI's attempt to assert 'no overlap' approach in *Meca Medina* was doubtless a source of delight to sports federations, for such an analysis maximises the room for sporting autonomy, but it is constitutionally deeply unconvincing. Rules governing the composition of national

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organisation and proper conduct of sporting competition form a much larger category in which economic effect is commonly present. Similarly at paragraph 44 the CFI observed that the 'the campaign against doping does not pursue any economic objective'. That may not be true, for the CFI itself refers at paragraph 57 to the economic value of a 'clean' sport to its organisers, but even if true, this is not of itself a reason for locating that campaign outside the Treaty. Anti-doping rules certainly have economic effects on those found to have contravened them. Attempts to present such rules as 'sporting' and not 'economic' are unhelpful. They are both. See Stephen Weatherill, On overlapping legal orders - what is the 'purely sporting' rule?, Somerville College, Oxford (www.essex.ac.uk/centres/euro/Weatherill%20article.rtf), pages 6,7.

[176] *Meca-Medina*, supra note 168, para. 42.

[177] Supra note 31.

[178] Article 5(1) EC, vigorously applied by the Court in Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 in finding the 'Tobacco Advertising' Directive invalid.

[179] The 'no overlap' thesis has been promoted by the ECJ since the *Walrave* judgment.

[180] See Meca Medina, supra note 10 nad, paragraph 49.

[181] In my opinion, only those rules should be treated as rules of the game and therefore fall into the first category of "Practices which do not come under the competition rules" provided for at paragraph 4.2.1.1. of the Helsiki report on sport.

sports teams or the conduct of anti-doping controls may plausibly define the nature of sporting competition, in the sense that the very existence of sporting endeavour is undermined without such rules. They are sporting rules. But they are not *purely* sporting rules. They visibly have economic repercussions (for players most of all). What is really at stake is not a group of sporting rules and a separate group of economic rules, but rather a group of sporting rules which carry economic implications and which therefore fall for assessment, but not necessarily condemnation, under EC trade law.[182]

The approach based on the overlap of sporting interests and economic implications within the ambit of a sporting rule was endorsed by the ECJ on appeal. Nevertheless, the ECJ dismissed the swimmers' application for annulment of the Commission Decision rejecting their complaint as well.

The ECJ began by recalling that sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC and that the prohibitions contained in Articles 39 and 49 EC "*do not affect rules concerning questions which are of purely sporting interest and, as such, have nothing to do with economic activity.*"[183] Then, in paragraph 26, it stressed "*the difficulty of severing the economic aspects from the sporting aspects of a sport,*" confirming its view that the provisions concerning free movement "*do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events,*" adding that such a restriction on the scope of the provisions in question must remain limited to its proper objective.

This line of reasoning culminated in the ECJ stating that "*the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.*"[184] The ECJ then continued that if the sporting activity in question falls within the scope of the Treaty, the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition.

It is a rejection of the notion that a 'purely sporting' rule is of itself apt escape the scope of application of the Treaty and therefore does not need to comply with the

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[182] *Weatherill*, supra note 175, page 6.
[183] Case *Meca-Medina*, supra note 105, paras. 22 and 25.
[184] *Meca-Medina*, supra note 105, para. 27.

expectations of EC trade law. The equivocation of *Walrave and Koch* is abandoned. This part of the judgment is instead an embrace of the 'overlap' analysis - an admission that a practice may be of a sporting nature - and perhaps even 'purely sporting' in *intent* – but that it must be tested against the demands of EC trade law where it exerts economic *effects*.[185]

Thus "*where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of Articles 81 EC and 82 EC, whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States.*[186] The CFI was adjudged to have made an error of law in assuming that purely sporting rules which have nothing to do with economic activity and which therefore do not fall within the scope of Articles 39 EC and 49 EC equally have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC.[187]

The ECJ, when deciding on the substance of the appellants' claims, made recourse to its previous decision in *Wouters*.[188] The case had nothing to do with sport. The Court was asked to consider the compatibility with Article 81 EC of a Dutch rule forbidding the creation of multi-disciplinary partnerships involving barristers and accountants. The Court took the view that the national rule "*has an adverse effect on competition and may affect trade between Member States*".[189] A multi-disciplinary partnership could offer a wider range of services, as well as benefiting from economies of scale generating cost reductions. The prohibition was therefore liable to limit production and technical development within the meaning of Article 81(1) (b) of the EC Treaty.

Nevertheless, the ECJ stated that for the purposes of application of Article 81:

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[185] *Weatherill*, supra note 175, page 7.

[186] It has to be recalled that the test laid down by the ECJ in *Walrave* was conceived to apply to the fundamental freedoms and thus can not extend as such to Articles 81 and 82 EC. Indeed, the requirement that the activity is economic in nature within the meaning of Article 2 EC is actually a rule applying in general to Articles 39, 43 and 49 EC. The assessment of the ECJ and the Commission under Article 81 and 82 EC is slightly different. It is true that these two provisions require, as much as Articles 39 and 49 EC, the exercise of an economic activity. However, this requirement is deemed fulfilled if a given body can be qualified as an undertaking, and thus the question whether the athlete's activity is of economic nature bears no consequences for the application of articles 81 and 82 EC.

[187] *Meca-Medina*, supra note 105, para. 28, 30 and 31.

[188] *Wouters*, supra note 49.

[189] *Wouters*, supra note 49, para. 86.

- account must be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects, more particularly, account must be taken of its objectives;
- it has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives;[190]
- and whether they are proportionate to them. Pursuant to the ECJ and the legal doctrine,[191] the proportionality test comprises the following parts. The measure must be suitable to achieve the public interest, secondly the measure is necessary to achieve that aim (no less restrictive measures entailing the same effect are available) and finally the measure is proportionate in relation to its goal.

In the case of sport, the reasoning in *Wouters* invites an argument that the overall context in which sports regulation occurs, built around pursuit of a broad objective of fair competition, produces effects which though apparently restrictive of competition are nonetheless inherent in the pursuit of those objectives and therefore permitted. This is the route chosen by the ECJ in *Meca-Medina and Majcen.*[192]

Consequently, the view taken by the ECJ in *Meca-Medina* was that the general objective of the rules was to combat doping in order for competitive sport to be conducted on a fair basis. The effect of penalties on athletes' freedom of action was held to be to be inherent in the anti-doping rules. Restrictions must be limited to what is necessary to ensure the proper conduct of competitive sport, and this relates to both defining the crime of doping and selecting penalties. The Court considered that the rules did not constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they pursued a legitimate objective and were no more restrictive than was necessary to achieve it.

5.7.2 Piau

The next case dealing with the competition issues in the area of sport was the *Piau* case. The Case concerned FIFA rules on players' agents and their compliance with Articles 81 and 82 EC. The rules were firs issued in 1994, coming into force as from 1st January 1996. The requirements to obtain a license included verification – through an

[190] *Wouters*, supra note 49, para. 97.
[191] Case C-331/38, *R v Minister of Agriculture, Fisheries and Food ex parte Fedesa* [1990] ECR I-4023; Case C-189/01, *Jippes and others v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689. See Chalmers 2006, page 448, T. Tridimas 1999, pages 91, 93; G. de Burca 1993, pages 105, 113, Van Den Bogaert 2005, page 242.
[192] *Weatherill*, supra note 175, page 9.

interview – of the candidate's knowledge in the fields of law and sport and the obligation to deposit s CHF 200.000. bank guarantee The rules were challenged before the European Commission in 1996 by Mr. Piau for an alleged breach of EC Law. Following a Commission statement of objections, FIFA agreed to alter the regulations on players' agents and adopted a new text in order to make conditions for granting of license more objective and transparent. As a result of these modifications, the Commission found no reason to continue to examine the case and decided to reject Mr. Piau's complaint for lack of Community interest.[193] The Commission had establishedin its decision that the regulations on players' agents fell entirely outside Article 81(1) EC or at least benefited from an exemption under Article 81(3).

Following the rejection of his complaint, Mr. Piau brought an action for annulment before CFI challenging the alleged lack of Community interest and raising several pleas on Articles 81 and 82 EC. After the rules had been found to be in compliance with EC Law, Mr. Piau appealed against the judgement of the CFI.[194] The ECJ rejected the appeal by the means of an Order pursuant to Article 119 of its Rules of Procedure, i.e. without a hearing, basically following the reasoning of the CFI.[195]

At paragraph 101 of its judgement the CFI, contrary to the view taken by the Commission, stated that the licence requirement necessarily affected competition, and therefore had to be cleared under Article 81(3) EC. Not all restrictions of competition are however treated as severely under EC Law. As already shown above by the *Wouters* and *Meca-Medina* cases, Community law requires not only that the anti-competitive effects are measured, they should also, at the same time, be weighed to a certain extent against pro-competitive effects when applying Article 81(1) EC. Therefore, even if the license requirement, dealt with in *Piau*, had been deemed to have restrictive effects on competition, it should have arguably been weighed against its alleged objectives before concluding that it was caught by Article 81(1) EC.

However, as the CFI took the view that the license requirement was caught by Article 81(1) EC it had still to ascertain whether it fulfilled the conditions of Article 81(3). The CFI analysed the question in the light of the arguments raised by Mr. Piau and concluded that the Commission was right to find that the agreement deserved an

[193] Case COMP/37.124, *Piau v. FIFA*.
[194] Case T-193/02 *Laurent Piau v Commission of the European Communities* [1990] ECR II-209.
[195] Case C-171/05 P *Laurent Piau v Commission of the European Communities*, [2006] ECR I-37.

exemption.[196] The Commission found that it could still have benefited from an exemption pursuant to Article 81(3) EC. The Commission came to this conclusion by referring to previous case law where similar regulations were found to be compatible with Articles 43 and 49 EC. As regards the proportionality of FIFA regulations, the Commission acknowledged that only France had so far regulated the activities of players' agents and that the players' agents had no internal organisation themselves regulating the profession. Since certain practices on the part of players' agents could, in the past, have harmed players and clubs, financially and professionally, the regulations appeared justified to protect clubs, as well as players, who have a short career.

To conclude, given the different outcomes of the *Meca-Medina* and *Piau* cases, it will be interesting to watch the way in which the ECJ deals with the next competition case related to sport that is currently pending before it - the *Charleroi* case.[197] The case concerns FIFA's rules governing the release of players for international representative matches under which clubs must release players – their employees – for a defined period of time and for a defined group of matches. The clubs are however not entitled to any payment in return. Moreover, it is the clubs, not the national association neither the international federations who are explicitly stated to be responsible for the purchase of insurance to cover the risk that the player will be injured when playing for his country. Even if the player is not injured, he will arrive back at his club tired. The subject matter of the case concerns the Belgium football club Charleroi, the young promising player of which got seriously injured in 2004 when playing for his home country, Morocco. Charleroi's fortunes on the field slumped without their young star, while they continued to have to pay his wages. The club therefore claimed damages from FIFA, alleging a violation of Article 82 EC. The case provides a good opportunity for the ECJ to unify its attitude with regard to the justification of the rules and actions of sporting bodies which fall foul of the EC Treaty competition provisions.

[196] Piau, supra note ????? – to T-193/02, paragraph 104.
[197] Case C-243/06.

6 Conclusion

The main purpose of this Thesis was to provide an overview of the application of EC law to sport. Firs, the work analysed general conditions that need to be fulfilled for practices of sporting bodies to fall under EC Law. Second, the Thesis dealt with requirements of EC Treaty provisions on the free movement of workers, services and freedom of establishment as well as competition law as regards their application to sport. The analyses were complemented by approaches taken by different institutions of the European Communities, such as the European Commission or the ECJ, when dealing with actions of sporting associations.

As provided at the beginning of this Thesis, sport provides an important service for the contemporary society, having among others important recreational, social or educational functions. Being aware of this fact, institutions of the European Communities take actions on their own as well as strongly encourage the Member States to support sport, especially in its amateur form.

At the same time, it is necessary to bear in mind that sport, its professional part in particular, has gained an important economic dimension. It generates considerable incomes for sporting federations, club owners, individual sportsmen/sportswomen as well as for other economic operators. Sport also provides many employment opportunities.

The question therefore stands, should sport be perceived by law of the European Communities as a monolithic phenomenon, encompassing both social as well as economic characteristics. The latter alternative would be gladly welcomed by sporting associations and club owners who wish to retain an overall control over sport and stay free from any interventions from the Member States or the European Communities. In my opinion however, it is necessary to distinguish between professional sport with its clearly economic orientation and amateur sport which provides public with an opportunity to engage in different types of physical activity. Since it is rather difficult to draw a clear general dividing line in this regard, I find it crucial for the European Commission and the ECJ to set forth precise criteria for distinguishing between economic and non-economic aspects of sport and thus to lay down when the EC Treaty provisions are to be employed.

It was found out that, as a basic rule, sport is subject to sport only in so far as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty. This thesis forms the core of the ECJ's reasoning with regard to sport.

As regards the basic freedoms of the Internal market, beside those expressly provided for in the EC Treaty, the ECJ employs two other different approaches when dealing with justification of the sport-related rules or actions. First, the so-called orthodox test is based on a premise that sporting rules are apt to fall outside EC Law provided they are of a purely sporting interest. Based on the ECJ's decisions, an example of such a rule would be selection policies for national representative teams, which pursuant to the ECJ's decision in *Walrave*, are rules of 'purely sporting interest'. This comes, however, as an unconvincing statement, since economic effects of the rule are a necessary consequence of their contribution to the structure of sports governance. So nationality rules governing the composition of national representative teams do have an economic effect. They limit the opportunities enjoyed by players to choose which country to play for, by structuring international football in a way that appeals to spectators, sponsors and so on. On the other hand, they serve to define the very endeavour of international competition, the character of which would be destroyed without such rules. Whereas, by contrast, nationality-based discrimination in club football has economic effects, but the Court will *not* treat it as inherent in the organisation of the game and therefore it is fatally exposed to the EC Treaty's prohibition of nationality-based discrimination contained in Article 12 as well as, in appropriate cases, other prohibitions too, such as Article 39 in *Bosman*. In my opinion, the rule of reason, as the second type of justification used by the ECJ when deciding on matters related to the basic freedoms, is therefore better suited to prevent misuse of sport to shelter economic activities harmful to the Common Market. The reason is that it is capable to take account of objectives of the measures aimed at promotion of sport and does not blindly rely on the vague notion of a 'purely sporting interest'.

As if inspired by the rule of reason, the ECJ relied on a similar line of reasoning in competition law cases. It resorted to the *Wouters* case when dealing with a matter of long-distance swimmers in the *Meca-Medina* case. Here, the Court took the overall context and objectives of actions under the scrutiny into account.

7 Résumé v českém jazyce

Cílem této diplomové práce je přiblížit úpravu sportu v právu Evropských společenství. Práce se současně snaží analyzovat způsoby, jakými se s touto problematikou vypořádávají Evropský soudní dvůr a Evropská komise.

7.1 Evropský model sportu

Za účelem provedení řádné analýzy vztahu mezi sportem a právním systémem Evropských společenství je nejprve potřeba definovat sport jako takový, nastínit jeho základní funkce, jakož i poukázat na specifika sportu v Evropě.

Jedna z mnoha definic sportu se nachází v článku 2 odst. A Evropské sportovní charty vypracované Radou Evropy, a zní takto: "Sportem se rozumí všechny formy tělesné činnosti, které se prostřednictvím příležitostné nebo organizované účasti zaměřují na zlepšení fyzické zdatnosti a duševního blaha člověka a vytváření sociálních vztahů. Sport je tedy sociální jev plnící rozličné funkce, co poukazuje na jeho jedinečné postavení v současné společnosti. V první řadě se jedná o funkci rekreační, a to jak pro aktivní účastníky, tak i pro pasivní přihlížející. Za druhé, sport plní funkci společenskou, neboť může být použit jak pro posílení sociální soudržnosti, tak i v boji proti rasismu, xenofobii a intoleranci, násilí, alkoholu a drogám. Za třetí, vzdělávací funkce sportu vede k formování smyslu pro fér play, solidaritu a rozvoji týmového ducha. Sport má rovněž pozitivní vliv na veřejné zdraví, jelikož fyzická aktivita slouží k prevenci onemocnění i jejich léčbě. Za páté, sport může být použit také pro politické účely, jako tomu bylo například při vyloučení sportovců a týmů z Jihoafrické republiky z účasti na mezinárodních sportovních soutěžích na protest proti režimu apartheidu v této krajině. Sport navíc postupem času získal silnější a viditelnější ekonomický rozměr a plní tak funkci zdroje příjmů pro sportovce a jiné osoby ve sportu se angažující.

7.1.1 Specifika sportu v Evropě

Organizace sportu v Evropě, který byl silně ovlivněn myšlenkami Olympijského hnutí, se vyznačuje několika znaky, které jej odlišují od způsobu jeho fungování v jiných částech světa. Za prvé to je pyramidová struktura jeho organizace. Tento znak je doplněn o systém „postupu a sestupu" a vzájemnou propojeností profesionálního i amatérského sportu.

Základní rysem charakterizujícím evropský model sportu je tedy jeho pyramidová struktura, která je tvořena čtyřmi vzájemně propojenými úrovněmi. Přízemí

pyramidy tvoří sportovní kluby. Tato úroveň plní dvě základní funkce. První je výchova nových generací sportovců. Kromě toho poskytuje základ pro amatérsky sport jako rekreační aktivitu, která by podle vyjádření Evropské komise měla být dostupná pro každého. V dalším patře pyramidy se nalézají regionální svazy. Ty jsou odpovědné za koordinaci sportu na oblastní úrovni a za organizaci regionálních mistrovství. Tato sdružení, existující pro každou disciplínu, jsou obvykle členy další úrovně pyramidy tvořené národními svazy. Národní svazy jsou regulačními orgány ve všech obecných záležitostech v rámci své sportovní disciplíny. Zároveň zastupují jednotlivé státy v evropských a mezinárodních federacích, které tvoří poslední úroveň pyramidy. Existence jenom jedné federace pro jeden sport výrazně ulehčuje správu daného sportovního odvětví. Zároveň tím ale vytváří silně monopolní strukturu, která značně stěžuje vstup nových lig a soutěží na trh, a omezuje tak hospodářskou soutěž v rámci společného trhu.

Vzájemná propojenost jednotlivých úrovní „sportovní pyramidy" má dopad i na sportovní soutěž. Model otevřené soutěže znamená, že kluby hrající na regionální úrovni mohou postoupit do celonárodní soutěže. Stejné zásady pak platí i při sestupu do nižších soutěží. Vzhledem k tomu, že národní federace jsou členy evropských i mezinárodních sportovních struktur, které organizují své vlastní soutěže a mistrovství, tak na národní úrovni se obvykle rozhoduje i o kvalifikaci na většinu z těchto mezinárodních (např. UEFA Cup).

Třetím odlišujícím rysem sportu v Evropě je, že v rámci jednotné organizační struktury, vedle sebe existují jak profesionální, tak amatérský sport. V důsledku toho část příjmů plynoucích ze zápolení profesionálů připadne sportu amatérskému, který zas na oplátku funguje jako zdroj talentů pro soutěže profesionální.

Pro srovnání, na zcela rozdílných principech je postavena organizace sportu ve Spojených státech. Tamní model se vyznačuje paralelní existencí několika sportovních organizací pro jeden druh sportu. Účast týmů v lize nezávisí na jejich sportovní výkonech, ale na rozhodnutí vedení ligy a majitelů týmů. Výhodou tohoto uzavřeného amerického modelu je distribuce příjmů založená na horizontální solidaritě, co zajišťuje vyrovnanost soutěže, její větší přitažlivost pro diváky a tím i výší příjmy jednotlivých klubů. Použití stejného systému finanční distribuce v Evropě je však, až na výjimky, omezeno právě z důvodu existence systému postupu a sestupu. Závěrem lze říci, že jak evropský model, tak model uplatňovaný ve Spojených státech nalezl způsob, jak učinit sport přitažlivější pro fanoušky. Ten evropský tak činí vytvářením nadnárodních

šampionátů, zatímco americký co největší vyrovnanosti jednotlivých klubů v národní soutěži.

7.2 Sport a právo Evropských společenství

7.2.1 Uplatnění práva ES ve sportu

V posledních dvou až třech dekádách došlo k poměrně intenzivní internacionalizaci evropského sportu. Jeho rozvoj jako přeshraniční činnosti byl způsoben zájmem fanoušků o pořád vyšší úroveň soutěže a s tím spojenými obchodními zájmy. To si vyžádalo přijetí pravidel, jimiž se řídí vztahy mezi účastníky z různých států. Tato pravidla nicméně neunikly kontrole práva mezinárodního a evropského.

Pokud jde o vztah mezi sportem a Evropskou unií, je třeba si uvědomit, že původní Římská smlouva o založení Evropského hospodářského společenství byla orientována především hospodářsky. To jasně plyne z cílů hospodářské integrace stanovených v preambuli a v článku 2 Smlouvy EHS. V době přípravy této Smlouvy, na konci padesátých let minulého století, byl profesionální sport jenom v plenkách. Jeho ekonomické dosahy byly zanedbatelné. Proto taky nebyla do původního znění Smlouvy EHS zahrnuta žádná výslovná zmínka o sportu. Doba se ale změnila a peníze a profesionalita si našli cestu i do sportu. Ten dnes generuje příjmy pro sportovce, pořadatele sportovních akcí, sponzory, zadavatele reklamy, stejně jak pro televizní stanice. Tento rychlý rozvoj však nevedl k žádným změnám Smlouvy o ES ve vztahu ke sportu.

V souladu s článkem 5 Smlouvy o ES "Společenství jedná v mezích pravomocí svěřených mu touto smlouvou a cílů v ní stanovených." Zbývající kompetence zůstávají členským státům. I přesto je však řada ustanovení Smlouvy o ES aplikovatelná na činnosti a pravidla vztahujících se k sportu. To je například případ článku 12 Smlouvy o ES, pokud jde o diskriminaci z důvodů státní příslušnosti, článků 39, 43 a 49 vztahující se k základním svobodám, jako i článků 81, 82 a 87, týkající se hospodářské soutěže.

Aplikovatelnost právních předpisů Evropských společenství na sport byla Evropským soudním dvorem poprvé uznána v případech *Walrave a Koch* a *Donà a Mantero*. Podstatou argumentace ESD bylo to, že sport podléhá právu Evropských společenství pouze v té míře, v jaké představuje hospodářskou činnost ve smyslu článku 2 Smlouvy o ES. Je proto přirozené, že sportovní organizace, jakož i členské státy se od té doby pokoušejí omezit aplikaci Smlouvy tím, že zdůrazňují neekonomický charakter sportovní činnosti nebo specifické vlastnosti sportu. Ekonomické aspekty sportu na

druhou stranu vyzdvihují jako nepostradatelné pro zabezpečení financování sportu. Sport je navíc, v zájmu ochrany před aplikací evropského práva, často přirovnáván ke kultuře. V případě *Bosman* tak německá vláda v bodě 72 namítala, že sport se místy podobá kultuře. V tomto ohledu poukázala na článek 151 odst. 1 Smlouvy o ES, podle kterého musí Společenství respektovat národní a regionální různorodost kultur členských států. Stejný bod zmiňovaného rozhodnutí obsahuje rovněž třetí námitku, obvykle předkládanou k obraně sportu. Tou je svoboda sdružování, kterou mají sportovní svazy podle vnitrostátních právních předpisů. Ochrana svobody sdružování ale není bezpodmínečná. Jak uvádí generální advokát Cosmas ve svém stanovisku k případu *Deliège*, právo sdružování, na které se federace spoléhají jako na záruku jejich samosprávy, nemůže být absolutní, a umožňovat tak úplné vynětí z práva Společenství, čímž by se v něm vytvořily mezery.

Rozhodnutí v případech *Walrave* a *Donà* však nepřinesly změny, které by bylo možné očekávat. Většina sportovních asociací pokračovala ve vypracovávaní svých vlastních předpisů, opírajíc se o předpoklad, že jsou prakticky imunní vůči právnímu zásahu zvenčí. Rozhodnutí však bylo jasné v tom, že sport byl alespoň zčásti pod kontrolou evropského práva. To mělo za následek, že evropské instituce, zejména Evropský parlament a Evropská komise, začaly věnovat více pozornosti sportu. Jejich zásahy v souvislosti se sportem ale nezůstaly omezeny pouze na otázky mající ekonomické souvislosti. To bylo způsobeno především vývojem, kterým procházela Smlouva o EHS. S přijetím Jednotného evropského aktu a smluv z Maastrichtu, Amsterdamu a Nice, bylo původní Evropské hospodářské společenství přeměněno v Evropské společenství a založena Evropská Unie, kterým byly nadále svěřeny pravomoci daleko přesahující hospodářskou sféru. Angažovanost Společenství ve sportu tak získalo sociální a kulturní rozměr, i když jen v podobě sdělení, usnesení, zpráv nebo prohlášení.

Celý proces vývoje vztahu mezi sportem a Evropskými společenstvími byl pak v polovině devadesátých let podstatně urychlen díky rozsudku *Bosman*. Rozhodnutí působilo jako impuls pro změnu statusu quo, který následoval po rozhodnutích *Walrave* a *Donà*. *Bosman* znovu upozornil na to, že právo Společenství se v zásadě vztahuje i na sportovní pravidla. Rozhodnutí také způsobilo změnu v přístupu orgánů Společenství k sportu. Došlo jak k zintenzivnění, tak k prohloubení zásahů Společenství v této oblasti. To vedlo k připojení oficiálních prohlášení o sportu k smlouvám z Amsterodamu a Nice. První z prohlášení, připojené k Amsterdamské smlouvě, zdůrazňuje společenský

význam sportu a vyzývá instituce Evropské unie, aby věnovaly zvláštní pozornost specifikám amatérského sportu. Druhá deklarace se týká specifických charakteristik sportu a jeho společenských, vzdělávacích a kulturních funkcí v Evropě, které je třeba zohlednit při provádění společných politik. Sport si tak alespoň částečně získal formální postavení v právním rámci Společenství.

7.2.2 Všezahrnující označení „sport"

Jak vyplývá z předchozí analýzy, význam sportu v Evropské unii přesahuje rámec společného trhu a hospodářské soutěže. Sport je totiž považován i za nástroj pro plnění vzdělávacích, rekreačních, sociálních, politických a kulturních cílů.

Základní otázkou tedy zůstává, v jakém rozsahu by měly být opatření a aktivity sportovců a sportovních organizací vyňaty z úplné nebo částečné právní kontroly práva Společenství z důvodů zabezpečování důležitých společenských cílů. Za tímto účelem je potřeba odlišit sport jako nástroj sociální soudržnosti od sportu jako výdělečné činnosti. Majitelé profesionálních sportovních klubů by totiž jen uvítali možnost skrýt své zisky za sociální a vzdělávací funkce sportu.

Výsledkem snahy o vymezení vztahu sportu k právnímu systému Evropských společenství je zformování dvou koalic. Ochrana jednotného evropského trhu a prosazování sociálně-kulturní role sportu tvoří cíle, kterými se tyto dvě koalice od sebe odlišují.

Koalice hájící společný trh je tvořena Generálním ředitelstvím pro hospodářskou soutěž a Evropským soudním dvorem. Tato koalice nahlíží na sport stejně jako na jakoukoliv jinou ekonomickou činnost v rámci jednotného trhu. Koalice proto působí jako strážce právního rámce EU.

Sociálně-kulturní koalice, na druhou stranu, podporuje sociálně-kulturní vnímání sportu, vyjadřující potřebu uznat jeho jedinečnost a specifičnost i v evropském právu. Patří do ní Evropský parlament, některé členské státy a samozřejmě mnoho důležitých sportovních organizací, jako je například Evropský olympijský výbor.

7.3 Sport a základní svobody vnitřního trhu

7.3.1 Úvod

Pokud jde o vztah mezi sportem a evropským právem, pozornost byla až donedávna věnována především třem základním svobodám vnitřního trhu, a to volnému pohyb pracovníků, volnému pohybu služeb, svobodě usazování. K jejich aplikaci musí být splněny tři podmínky. Za prvé to je podmínka výkonu hospodářské činnosti, dále

státní příslušnost členského státu Evropské unie, a konečně, přítomnost přeshraničního prvku.

7.3.2 Přímý horizontální účinek

Ještě před rozborem nahoře zmíněných podmínek aplikace jednotlivých svobod vnitřního trhu je potřeba rozebrat otázku jejich přímého horizontálního účinku. ESD se tímto problémem prvně zabýval v případě *Walrave*. Žalovaní v této věci tvrdili, že zákaz diskriminace na základě státní příslušnosti, tak jak je stanoveno v článcích 12, 39 a 49 Smlouvy o ES, se vztahuje pouze na omezení, která mají svůj původ v aktech orgánu veřejného práva a ne na ty, které vyplývají z právních úkonů soukromoprávních osob nebo sdružení. Tato úvaha však byla odmítnuta Evropským soudním dvorem, který rozhodl, že zákaz diskriminace se nevztahuje jen na činnost orgánů veřejné moci, ale na jakákoliv pravidla, jejichž cílem je regulace zaměstnanosti a poskytování služeb.

Další krok na cestě k úplnému přímému horizontálnímu účinku byl učiněn ve věci *Bosman*. ESD zde uvádí, že i přesto, že daná přestupová pravidla nediskriminují na základě státní příslušnosti, ovlivňují přístup hráčů na trh práce ostatních členských států, a jsou tak schopny omezovat svobodu pohybu pracovníků. ESD tímto vztáhl působnost ustanovení o volném pohybu i na nediskriminatorní soukromoprávní opatření.

A konečně, výslovné potvrzení přímého horizontálního účinku článku 39 bylo učiněno ve věci *Angonese*. ESD konstatoval, že skutečnost, že některé ustanovení Smlouvy jsou formálně určena členským státům nebrání současnému přiznání práv jednotlivcům, kteří mají zájem na dodržování těchto pravidel.

Ohledně svobody usazování a volného pohybu služeb ESD ve věci *Wouters* uvedl, že soulad s články 43 a 49 Smlouvy o ES je nutný rovněž v případě pravidel, která nejsou ve své podstatě veřejnoprávní, ale jsou určeny k regulaci samostatné výdělečné činnosti a poskytování služeb. Lze tedy poměrně bezpečně předpokládat, že nediskriminatorní pravidla soukromoprávních sdružení spadají pod články 43 a 49 Smlouvy o ES taky.

7.3.3 Požadavek hospodářské aktivity

Jak bylo uvedeno, jednou z podmínek aplikace ustanovení o základních svobodách vnitřního trhu je výkon hospodářské aktivity. ESD už od svého prvního rozhodnutí týkajícího se sportu prosazuje zásadu, že sport spadá do působnosti práva Společenství do té míry, do jaké představuje hospodářskou činnost ve smyslu článku 2 Smlouvy o ES. Je třeba mít ale na zřeteli, že se tím myslí konkrétní činnosti sportovce,

spíše než sportovní disciplína jako taková. V případě, že tato sportovní činnost je považována za činnost ekonomickou, je možné se opřít o ustanovení o volném pohybu. K tomu musí být splněny dvě podmínky.

Za prvé, hospodářská aktivita musí být skutečná a efektivní, ne pouze marginální nebo doplňkové povahy. Za druhé, musí mít skutečně hospodářskou povahu, a být tedy prováděna za odměnu. Protože je obtížné v tomto ohledu určit obecnou dělící linii, musí být situace jednotlivých sportovců posuzovány případ od případu. Analýzu této otázky lze nalézt ve stanovisku generálního advokáta Cosmase v případě *Deliège*. Generální advokát uvedl, že každý sportovec je považován za profesionála spadajícího do oblasti pusobnosti článku 49 a násl. Smlouvy o ES, a to v případě že je možné na jeho sportovní aktivitu objektivně pohlížet jako na výkon profese. Kromě toho, aby mohla být aktivita sportovce považována za „neamatérskou", musí být výše uvedené podmínky naplněny po určité časové období, to znamená, že musí existovat určitá kontinuita. Generální advokát k tomu ještě dodal, že profesionální sportovci svými výkony sportovním federacím zároveň poskytují důležitou službu. Je to dáno tím, že jejich úspěch je činí idolem pro mladé lidi, které chtějí federace přilákat, magnetem pro sponzory, jako i dalším argumentem pro sportovní organizace, o který se v případě žádosti o vyšší podíl na veřejných dotacích můžou opřít. Tato činnost, za kterou se sportovci pravidelně dostává finanční nebo materiální podpory od své federace, by se za jistých okolností dala považovat za poskytování služeb za úplatu ve smyslu článku 49 Smlouvy o ES.

Za druhé, stanovisko generálního advokáta obsahuje závěr, že důležitým ukazatelem, ze kterého by se dalo usuzovat na hospodářský charakter aktivit sportovce, je existence osobních sponzorů.

Za třetí bylo uvedeno, že má-li sportovní akce i jiný než sportovní význam v tom smyslu, že není pouhou konfrontací sportovců, ale reprezentuje i hospodářské zájmy, pak je nutno ji považovat za ekonomickou činnost ve smyslu článku 2 Smlouvy o ES. Tento ekonomický rozměr může spočívat například ve výběru vstupného nebo prodeji televizních vysílacích práv.

Na základě těchto zjištění, generální advokát Cosmas došel k závěru, že účast sportovců jako Christine Deliège na sportovních soutěžích, které mají taky značný ekonomický rozměr, vede k hodnocení jejich činnosti jako ekonomické ve smyslu článku 2 Smlouvy o ES. Toto stanovisko bylo potvrzeno Evropským soudním dvorem, který uvádí, že sportovní aktivity, zejména profesionálních sportovců, jsou schopny v

sobě zahrnout poskytování mnoha samostatných, ale úzce souvisejících, služeb, které mohou spadat do působnosti článku 49 Smlouvy o ES.

Potom, co bylo stanoveno, kdy je činnost sportovce považována za činnost hospodářskou, je potřeba určit kterou slobodu tato aktivita představuje. To znamená určit, zda činnost spadá pod ustanovení o volném pohybu pracovníků nebo k pravidlům týkajícím se svobody poskytování služeb nebo případně pod svobodu usazování.

ESD ale už od svého rozhodnutí v případě *Walrave* nepřikládal velký význam určení toho, která ze základních svobod by se měla aplikovat. Soud jenom uvedl, že v případech, kdy sport má charakter zaměstnání nebo placené služby, bude spadat pod ustanovení některé ze svobod vnitřního trhu. Přesná povaha právního vztahu je však bez významu, neboť zákaz diskriminace se za stejných podmínek vztahuje na výkon zaměstnání i služeb. Stejná argumentace byla použita v případě *Donà*, stejně jako v argumentaci generálního advokáta Lenze v stanovisku k případu *Bosman*.

Situace se však změnila s rozhodnutím ESD ve věcech *Bosman*, *Lehtonen* a *Deliège*, ve kterých ESD zakládá své analýzy vždy jenom na jedné ze základních svobod plynoucích ze Smlouvy o ES. Pravděpodobným vysvětlením se zdá být to, že pojmy pracovníka a služby prošly od poloviny sedmdesátých let vývojem, který učinil pro ESD daleko jednodušší podřadit dané případy pod konkrétní svobodu. Důležitost rozlišení mezi zaměstnanci a poskytovateli služeb však není pouze doktrinální. Příkladem může být rozhodnutí v již zmíněné věci *Angonese*, ve které ESD uznal přímou horizontální účinnost pouze pro článek 39 Smlouvy o ES, na rozdíl od článku 49 Smlouvy o ES.

7.3.4 Podmínka státní příslušnosti

Státní příslušníci EU

Ve své podstatě jsou práva plynoucí ze základních svobod vnitřního trhu omezena na sportovce, kteří jsou občany členských států EU. Zatímco články 43 a 49 Smlouvy o ES výslovně odkazují na státní příslušníky členských států, znění článku 39 není v tomto ohledu příliš jasné. Nicméně, dle názoru ESD v případě *Meade*, výraz „pracovníků" použitý v tomto článku se vztahuje jenom na státní příslušníky EU.

Občané třetích zemí

Vzhledem k tomu, že některé z nejprestižnějších sportovních soutěží se konají v Evropě, sportovci z celého světa jsou přitahováni do evropských klubů a tedy i klubů z členských států EU. To se však ne vždy ukáže jako dobrá volba. Národní i mezinárodní

sportovní svazy často stanoví pravidla, která z různých důvodů, přímo nebo nepřímo omezují účast sportovců ze zahraničí. Jako příklad může posloužit rozsudek *Bosman*. Zde bylo kontrole právních předpisů ES podrobeno tzv. „3 +2" pravidlo. Toto pravidlo ukládalo každému národnímu fotbalovému sdružení, aby omezilo počet zahraničních hráčů, které můžou kluby postavit na zápasy v národních ligách na tři zahraniční hráče, plus dva zahraniční hráče, kteří hrají v krajině příslušné národní asociace po dobu pět let, včetně třech let jako junior. Stejné omezení platilo i pro klubová utkání v soutěžích UEFA. I když ESD toto pravidlo označil za odporující pravidlům o volném pohybu pracovních sil, platí to pouze s ohledem na státní příslušníky EU. Státní příslušníci třetích zemí byli a nadále jsou vyňati z působnosti ustanovení Smlouvy o ES a nejsou tedy chránění před podobnými národnostními klauzulemi. Nicméně, i občané států, které nejsou členy EU mají určitá, i když omezená, práva. Za prvé se mohou opřít o příslušné sekundární právo Společenství. To představují směrnice č. 2004/38 a 2003/109. Kromě toho, jim plynou práva z příslušných ustanovení mezinárodních dohod, uzavřených mezi Evropskými společenstvími a jejich členskými státy a některými třetími zeměmi, které se týkají postavení státních příslušníků těchto zemí v rámci Společenství.

Sekundární právo

Pokud jde o předpisy sekundárního práva ES, některá práva přiznává příbuzným občanů EU směrnice 2004/38, o právu občanů Unie a jejich rodinných příslušníků svobodně se pohybovat a pobývat na území členských států. Článek 24 odst. 1 směrnice stanoví, že *„s výhradou zvláštních ustanovení výslovně uvedených ve Smlouvě a v sekundárních právních předpisech, požívají všichni občané Unie, kteří pobývají na základě této směrnice na území hostitelského členského státu, v oblasti působnosti Smlouvy stejného zacházení jako státní příslušníci tohoto členského státu. Právo na rovné zacházení se vztahuje i na rodinné příslušníky, kteří nejsou státními příslušníky žádného členského státu a mají právo pobytu nebo trvalého pobytu."* Ustanovení má ale dvě nevýhody. Především je nezbytné, aby občan EU, rodinnému příslušníku kterého má být poskytnuto rovné zacházení, skutečně využil svého práva na volný pohyb před tím, než se příslušník třetí země může dovolávat ustanovení článku 24. Za druhé, rozsah uplatnění článku 24 je omezen na území členského státu, v němž je občan EU zaměstnán, a nevztahuje se na území jiných členských států.

Sportovci ze třetích zemí se můžou, kromě práv poskytnutých směrnicí 2004/38, spolehnout taky na směrnici 2003/109 o právním postavení státních příslušníků třetích zemí, kteří jsou dlouhodobě pobývajícími rezidenty. Článek 4 odst.1 směrnice stanoví, že za předpokladu, že jsou splněny podmínky článku 5 odst. 1, členské státy přiznávají právní postavení dlouhodobě pobývajícího rezidenta státním příslušníkům třetích zemí, kteří bezprostředně před podáním příslušné žádosti pobývali oprávněně a nepřetržitě na jejich území po dobu pěti let. Směrnice dále stanoví, že dlouhodobě pobývajícím rezidentům je přiznáno rovné zacházení jako státním příslušníkům členského státu co se týče přístupu k zaměstnání, samostatné výdělečné činnosti, (...) podmínek zaměstnání, pracovních podmínek, včetně podmínek propouštění a odměňování. Kromě toho dlouhodobě pobývající rezident získá právo pobytu na území jiných členských států, než je členský stát, který uvedené osobě přiznal právní postavení dlouhodobě pobývajícího rezidenta, a to na období delší než tří měsíce. Jakmile tedy dlouhodobě pobývající rezidenti obdrží povolení k pobytu v druhém členském státě, je jim zajištěno v tomto státě rovné zacházení v rozsahu a za podmínek jako v původním členském státě. Hlavní odlišnost od směrnice 2004/38 je v tom, že dlouhodobě pobývající rezidenti mají nárok na tato práva aniž by je bylo třeba odvozovat od rodinné příslušnosti k občanu EU.

Mezinárodní smlouvy s třetími zeměmi

Sportovci ze zemí mimo ES se můžou spolehnout také na mezinárodní dohody uzavřené mezi ES a jejich členskými státy na straně jedné a třetími zeměmi na straně druhé. Tyto dohody tvoří nedílnou součást práva ES. Evropský soudní dvůr konstatoval, že ustanovení těchto dohod musí být považována za přímo použitelná, pokud s ohledem na jejich znění, účel a povahu, obsahují jasné a přesné povinnosti, a které k svému provedení nevyžadují přijetí jakýchkoli dalších opatření.

Příkladem ustanovení, které ESD uznal za splňující tyto požadavky týkající se přímého účinku, je první odrážka článku 38 odst. 1 Evropské smlouvy zakládající přidružení mezi Evropskými společenstvími a jejich členskými státy a Slovenskou Republikou. Jednalo se o věc *Kolpak*. Případ se týkal hráče slovenské národnosti, Maroše Kolpaka, který byl jako brankář ve službách německého druholigového házenkářského týmu TSV Östrigen. Z důvodu jeho cizí státní příslušnost byla pánu Kolpakovi, v souladu s článkem 15 hracího řádu Německé Házenkářské Federace, vydaná hráčská licence označená písmenem A. Kolpak považoval tuto skutečnost jako znevýhodňující zacházení. Tvrdil, že Slovensko je jednou ze třetích zemí, jejichž státní

příslušníci jsou oprávněni k neomezené licenci. Tvrzení bylo založeno na příslušných ustanoveních hracího řádu a Dohody o přidružení mezi ES a Slovenskem. Evropský soudní dvůr tuto tezi potvrdil a rozhodl, že s ohledem na svoje znění a účel je článek 38 odst. 1 dohody o přidružení přímo aplikovatelný.

ESD dále konstatoval, že první odrážka článku 38 odst. 1 Dohody o přidružení má přímý horizontální účinek, a že pan Kolpak se o něj při svém tvrzení o rozporu pravidel stanovených sportovním svazem mohl opřít.

Jak bylo stanoveno v jiných případech týkajících se příslušníků nečlenských států, dohody s těmito státy nemusí nezbytně sledovat cíl přistoupení k ES. Například v případě *Simutenkov* ESD shledal, že ustanovení Dohody o partnerství mezi Společenstvím a Ruskem, týkající se rovného zacházení s pracovníky, jehož formulace je téměř shodná s ustanoveními dohody o přidružení, jsou přímo použitelná bez ohledu na skutečnost, že účelem Dohody není vytvoření partnerství, ani vstup Ruské federace do ES.

Společným znakem zmiňovaných ustanovení mezinárodních smluv mezi Společenstvími a třetími státy je, že zákaz diskriminace z důvodu státní příslušnosti se vztahuje pouze na pracovní podmínky, odměnu a propuštění. Tato ustanovení se tedy nevztahují na vnitrostátní předpisy týkající se vstupu na trh práce. Ve srovnání s výše uvedenými směrnicemi, mezinárodní dohody nevyžadují existenci rodinných vztahů s občanem EU, ani splnění jakýchkoli předběžných podmínek, kromě státní příslušnosti k určitému smluvnímu státu.

7.3.5 Požadavek přeshraničního prvku

Další podmínkou práva ES, týkající se základních svobod, je přítomnost přeshraničního prvku v hospodářské činnosti, kterou sportovec vykonává. To však může vést k situacím, kdy je se státními příslušníky, kteří nevyužijí těchto svobod, zacházeno méně příznivě než s těmi, kteří je využijí. Tento stav je často označován jako obrácená diskriminace. Přesně tato situace nastala v případě fotbalových hráčů po rozhodnutí ve věci *Bosman*. ESD v tomto případě rozhodl, že mezinárodní pravidla přestupu, které znemožňují profesionálním fotbalistům, jejichž smlouva s klubem již vypršela, bez dalšího uzavřít smlouvu s klubem jiným, nejsou v souladu s článkem 39 Smlouvy o ES. Rozsudek však neměl žádný dopad na čistě vnitrostátní přestupy fotbalových hráčů. V důsledku toho se stalo pro kluby výhodnější zaměstnávat hráče ze zahraničí, protože za ně nemusejí platit poplatky za přestup.

7.3.6 Omezení základních svobod

Současný přístup Evropského soudního dvora, pokud jde o základní svobody, je zaměřen převážně na koncepci jejich omezení, která do značné míry nahrazuje tradiční princip nediskriminace. I když zásada nediskriminace na základě státní příslušnosti je základem pro uplatňování ustanovení Společenství o volném pohybu pracovníků, svobody usazování a volného pohybu služeb, zároveň nemůže být přehlíženo, že článek 3 odst. 1 písm. c Smlouvy o ES stanoví, že činnosti Společenství zahrnují vnitřní trh, který se vyznačuje odstraněním překážek volného pohybu zboží, osob, služeb a kapitálu mezi členskými státy. V důsledku toho ESD postupně začal rozšiřovat svůj dohled nad zákonnosti vnitrostátních opatření z čistě nediskriminatorního hlediska na kontrolu širší, zahrnující existenci *omezení* práva na svobodu pohybu.

Podmínky, které musí být splněny k tomu, aby se dalo mluvit o *omezení* jsou následující: za prvé, sporná vnitrostátní opatření musí ovlivňovat přístup na trh v členském státě; za druhé, tyto omezující účinky nemusí nutně zabraňovat osobám uplatňovat jejich práva volného pohybu, ale stačí, aby byly schopny odradit od jejich uplatnění; za třetí, tyto účinky, musí být podstatné, to znamená, musí dosahovat určitou intenzitu.

7.3.7 Výjimky ze základních svobod

I když dojde k omezení základních svobod, ještě pořád je možné je podřadit pod některou z výjimek stanovených právem Společenství nebo vytvořených Evropským soudním dvorem. Z tohoto důvodu rozlišujeme dva typy výjimek ze zákazu omezení základních svobod.

Za prvé existují výjimky výslovně stanovené ve Smlouvě o ES. Článek 39 odst. 3 který upravuje práva spojená se svobodou pohybu pracovníků, stanoví, že tato práva jsou předmětem omezení z důvodu veřejného pořádku, veřejné bezpečnosti nebo veřejného zdraví. Stejně tak článek 43 odst. 1 a článek 49 Smlouvy o ES dovolují členským státům odchýlit se od ustanovení Smlouvy z důvodů veřejného pořádku, veřejné bezpečnosti a veřejného zdraví.

I když výjimky výslovně uvedené ve Smlouvě o ES mají nesporně svůj význam, jejich uplatnění v oblasti sportu je spíše marginální ve srovnání s nepsanými výjimkami zavedenými judikaturou ESD. Ve věci *Beghard* Soud uvedl, jaké podmínky musí být splněny k tomu, aby bylo možné na vnitrostátní opatření, která omezují základní

svobody anebo je činí méně přitažlivými, vztáhnout nepsanou výjimkou. Vnitrostátní opatření musí být:

(i) aplikována nediskriminatorním způsobem,

(ii) odůvodněna naléhavými důvody obecného zájmu,

(iii) způsobilá dosáhnout cíl jimi stanovený, a

(iv) přitom nesmí být nepřiměřená, což znamená, že nesmí překračovat to, co je nezbytné k dosažení jimi sledovaného cíle.

S malou obměnou se o tento přístup k nepsaným výjimkám opíral ESD i v případě *Bosman*. Odchylka spočívala v tom, že požadavek, nediskriminatorní povahy opatření byl nahrazen podmínkou, aby toto pravidlo sledovalo legitimní cíl slučitelný se Smlouvou.

Z provedeného rozboru plyne, že základní svobody vnitřního trhu se uplatní i v oblasti sportu, a to v rozsahu, v jakém sportovní činnost představuje činnost ekonomickou ve smyslu článku 2 Smlouvy o ES.

7.4 Sport a evropské soutěžní právo

7.4.1 Úvod

Západní ekonomiky se přiklánějí k tvrzení, že hospodářská soutěž je prospěšná. Základním principem fungování hospodářské soutěže je skutečnost, že méně efektivní podniky zaniknou na úkor silnějších a schopnějších, co zpravidla vede k vyšší kvalitě produktů a služeb, nižším cenám a technologickému rozvoji. Smlouva o ES a vnitrostátní právní předpisy členských států proto stanoví pravidla, které zaručují hospodářskou soutěž na evropské i národní úrovni. Soutěžní právo je považováno za nezbytnou podmínku pro realizaci cíle vytvoření společného trhu. Prolomuje bariéry pro obchod uvnitř a mezi členskými státy EU a tím posiluje vnitrostátní, jako i společný trh.

Je potřeba si nicméně uvědomit, že ve sportu působí specifické tržní podmínky, které se liší od podmínek v ostatních průmyslových odvětvích. V první řadě jde o vzájemnou závislost mezi sportovci nebo mezi kluby. V obvyklých tržních podmínkách odchod soutěžitele obvyklé znamená zabrání jeho tržního podílu konkurenty. Naopak, ve sportu to, že jiné kluby nebo sportovci odmítnou soutěžit znamená znemožnění soutěže, a tedy neschopnost poskytnout divákům, sponzorům, televizím a dalším spotřebitelům produkt, kterým je sportovní zápolení, a při tvorbě kterého jsou sportovci na sobě závislí. S touto vzájemnou závislostí je úzce spojen požadavek konkurenční

rovnováhy mezi soupeři navzájem. Z ní totiž plyne nejistota ohledně výsledu zápasu nebo soutěže, co přitahuje diváky a přispívá tak k lepším hospodářským výsledkům.

Existují i další prvky typické pro sportovní soutěž, které ji odlišují od "normální" hospodářské soutěže. Jak již bylo uvedeno, sportovními svazy nebo ligy tvoří 'přirozené monopoly'. Existence několika federací v jedné disciplíně by totiž mohla znamenat nebezpečí vzniku konfliktů. Kromě toho, organizace národních mistrovství, jako i výběr sportovců do národních týmů reprezentujících státy na mezinárodních soutěžích často vyžadují existenci jedné zastřešující organizace sdružující všechny sportovní svazy a sportovce v rámci jedné disciplíny. Toto ústřední postavení sportovních organizací ale na druhou stranu vytváří nebezpečí, že ho bude zneužito k prosazování cílů se sportem přímo nesouvisejících a zároveň narušujících hospodářskou soutěž na společném trhu. Konečně, pokud jde o fanoušky, ti nemůžou být považováni za "spotřebitele" v klasickém smyslu slova, protože mají tendenci být loajální "jejich" klubu bez ohledu na výsledky, které dosahuje.

7.4.2 Uplatňování ustanovení evropského soutěžního práva v oblasti sportu

Klíčovými ustanoveními práva ES v oblasti hospodářské soutěže, pokud jde o sport, jsou články 81, 82 a 87 Smlouvy o ES. Následující odstavce budou proto zaměřené na to, zda sport splňuje podmínky pro aplikaci těchto ustanovení. Následně bude pozornost věnována rozhodnutím ESD ve věcech týkajících se soutěžního práva a sportu.

7.4.3 Článek 81

Článek 81 Smlouvy o ES stanoví, že se společným trhem jsou neslučitelné, a proto zakázané, veškeré dohody mezi podniky, rozhodnutí sdružení podniků a jednání ve vzájemné shodě, které by mohly ovlivnit obchod mezi členskými státy a jejichž cílem nebo výsledkem je vyloučení, omezení nebo narušení hospodářské soutěže na společném trhu.

Z výše uvedené definice plyne, že první podmínkou aplikace zákazu kartelu, kterou sportovní kluby a asociace musí splňovat je, že musí být považovány za podniky ve smyslu článků 81 a 82 Smlouvy o ES nebo za sdružení podniků ve smyslu článku 81 Smlouvy o ES. Podnikem se podle judikatury ESD rozumí jednotka vykonávající hospodářskou činnost nezávisle na právní formě a způsobu financování. Proto je nezbytné stanovit, zda kluby nebo sportovní svazy vykonávají hospodářskou činnost. Nezáleží na tom zda sportovní orgány sledují především neekonomické cíle, jako je

rozvoj mladých talentů nebo organizace národních soutěží. Rozhodující jsou skutečně vykonávané činnosti. Příklad takové hospodářské činnosti může být nalezen v nařízeních provádějících Stanovy FIFA. Článek 10 odst. 1 Nařízení stanoví, že poplatek, který má být zaplacen ve prospěch FIFA za každý zápas odehraný mezi dvěma národními "A" týmy, činí 2% z příjmů klubů, co jasně ukazuje na hospodářskou činnost provozovanou jak jednotlivými kluby, tak i fotbalovými organizacemi.

Také další požadavek článku 81, kterým je existence dohody mezi podniky, rozhodnutí sdružení podniků nebo jednání ve vzájemné shodě, můžeme považovat ve vztahu k sportu za splněný. Dohod a jednání ve vzájemné shodě je obvykle dosahováno mezi podniky, tedy sportovními kluby. Totéž platí i pro rozhodnutí sdružení podniků, za které se dají považovat sportovní federace.

Za třetí, článek 81 Smlouvy o ES zakazuje praktiky, jejichž cílem nebo výsledkem je vyloučení, omezení nebo narušení hospodářské soutěže v rámci společného trhu. Nicméně, na první pohled omezující nebo narušující dohody můžou být kvalifikovány jako výjimky podle článku 81 odst. 3 nebo jich jejich prosoutěžné kvality můžou vyjmout z působnosti článku 81. O těchto případech se pojednává v části věnované rozhodnutím ESD ve věcech hospodářské soutěže.

Za čtvrté, protože v rámci vnitřního trhu existuje mnoho mezinárodních sportovních soutěžích, přičemž mnohé z nich mají dosti značné hospodářské dopady, rozhodnutí a pravidla sportovních federací tak můžou, ať už přímo nebo nepřímo, reálně nebo potenciálně ovlivňovat způsob uskutečňování obchodu mezi členskými státy. Tento vliv ale nesmí být jen bezvýznamný.

I když jsou některé dohody, rozhodnutí nebo jednání článkem 81 odst. 1 označené za zakázané, ještě pořád se na ně může vztahovat výjimka obsažená v článku 81 odst. 3 Smlouvy o ES za předpokladu, že splňují všechna kritéria v něm uvedena. Měly by proto přispívat ke zlepšení výroby nebo distribuce výrobků anebo k podpoře technického či hospodářského pokroku, přičemž zároveň vyhradit spotřebitelům přiměřený podíl na výhodách z toho vyplývajících, a zároveň neukládat příslušným podnikům omezení, jež nejsou k dosažení těchto cílů nezbytná, jako i neumožňovat těmto podnikům vyloučení hospodářské soutěže ve vztahu k podstatné části výrobků tímto dotčených. I když se může zdát obtížné, aby dohody nebo jednání v oblasti sportu splňovaly uvedené požadavky, lze v této souvislosti odkázat na rozhodnutí ESD ve věci *Piau*, ve kterém Soud rozhodoval o pravidlech jež upravují udělování licencí

fotbalovým agentům, a které uznal za vyhovující požadavkům článku 81 odst. 3 Smlouvy o ES.

7.4.4 Článek 82

Se společným trhem je neslučitelné, a proto zakázané, pokud to může ovlivnit obchod mezi členskými státy, aby jeden nebo více podniků zneužívaly dominantního postavení na společném trhu nebo jeho podstatné části.

Pokud se jedná o požadavek dominantního postavení, tak možnost jeho existence je posílena díky způsobu organizace evropského modelu sportu. Jeho pyramidová struktura má za následek existenci jediného řídícího orgánu v každém sportovním odvětví, který má celkovou kontrolu nad během událostí v něm. Ke vzniku dominance přispívá i malá vzájemná zastupitelnost produktů vytvářených sportovní soutěží. Evropský soudní dvůr v již zmiňované věci *Piau* navíc stanovil, že je dobře možné, aby se i ve sportu vyskytovala kolektivní dominance více sportovních klubů nebo jejich sdružení.

Za druhé, článek 82, na rozdíl od antimonopolního práva USA, vyžaduje existenci zneužití tohoto dominantního postavení. Otázkami zneužití dominance se v oblasti sportu doposud zabývala převážně Evropská komise. Z jejích rozhodnutí lze učinit závěr, že k zneužívání monopolu dochází zpravidla v situacích, kdy sportovní organizace kontroluje televizní vysílací práva nebo má pod kontrolou možnost účasti ve významné sportovní soutěži či na šampionátu. To byl kupříkladu případ prodeje lístku na Mistrovství světa ve fotbale v roce 1998 ve Francii, kde docházelo ke zvýhodňování domácích fanoušků před zahraničními.

Za třetí, nevyhnutnou podmínkou pro určení dominantního postavení je vymezení relevantního trhu. Pokud jde o prostorově relevantní trh, z pyramidového způsobu organizace sportu v Evropě plyne, že tento trh bude zahrnovat území všech států, ve kterých je sportovní činnost organizovaná prostřednictvím národní nebo nadnárodní sportovní asociace. Co se týče věcně relevantního trhu, tady můžeme vymezit tři vzájemně propojené trhy. Prvním je trh s produkty souvisejícími se sportovní soutěží jako jsou reklamní předměty, vysílací práva nebo vstupenky. Druhým je trh se samotnými sportovními výkony, které jsou výsledkem sportovního zápolení mezi sportovci nebo sportovními kluby. Třetím věcně relevantním trhem je trh, na kterém dochází k nákupům a prodejům hráčů kluby. Všechny zmíněné produktově relevantní

trhy jsou velmi úzce propojené a změna na jednom z nich zpravidla vede ke změnám v ponuce a poptávce na zbylých dvou.

7.4.5 Článek 87 - Státní podpory

I přesto, že pozornost v oblasti práva hospodářské soutěže je věnována především vztahu sportovních pravidel a článků 81 a 82 Smlouvy o ES, vliv článku 87 nemůže být ignorován. Cílem kontroly státních podpor je zajistit, že vládní zásahy nenaruší hospodářskou soutěž a obchod uvnitř Společenství. U sportu jde zpravidla o podporu sportovní infrastruktury nebo aktivit klubů poskytovanou místními nebo ústředními orgány ve formě daňových úlev nebo darů. Tyto podpory mohou být nicméně považovány za sporné za předpokladu, že kluby vykonávají hospodářskou činnost s přesahem do jiných členských států a jsou ve smyslu soutěžního práva EU považovány za podniky. V těchto případech i podpory v oblasti sportu je možné kvalifikovat jako státní podpory a v případě, že nespadají pod žádnou blokovou výjimku stanovenou Evropskou komisí, jsou považovány za nepřípustné.

7.4.6 Sport a judikatura ESD ve věcech soutěžního práva

Přestože první rozhodnutí ESD týkající se sportu se datují do poloviny sedmdesátých let 20. století, prvním rozsudkem, který se týkal soutěžního práva je rozhodnutí Soudu prvního stupně ve věci *Meca-Medina* ze dne 30. září 2004. Evropský soudní dvůr, stejně jako Soud prvního stupně se až do vynesení tohoto rozsudku systematicky vyhýbal analýze sportovních záležitosti z hlediska pravidel hospodářské soutěže, a to i navzdory tomu, že porušení článků 81 a 82 Smlouvy o ES bylo několikrát namítáno v předchozích případech, jako *Bosman* nebo *Lehtonen*.

Rozsudek ve věci *Meca-Medina* se týkal dvou profesionálních dálkových plavců, Davida Meca-Mediny a Igora Majceva, kterým byly při dopingových testech prováděných 31. 1. 1999 naměřeny nadlimitní úrovně steroidu nadrolon. V důsledku toho jim byl uložen zákaz činnosti na dva roky. Plavci se vůči tomu ohradili a u Evropské komise se domáhali prohlášení antidopingových pravidel přijatých Mezinárodním olympijským výborem za porušující články 81, 82 a 49 Smlouvy o ES.

Největší význam tohoto případu pro sport a evropské právo ale nespočívá v tom, jak se k věci postavila Evropská komise nebo Soud prvního stupně, který se věcí posléze zabýval, ale v argumentaci použitou Evropským soudním dvorem. ESD svou analýzu začal tím, že to, zda určitá činnost podléhá ustanovením Smlouvy o ES týkajících se hospodářské soutěže, bude nutné určit s ohledem na specifické požadavky

článků 81 a 82 ES. Následně, odkazujíc na svoje dřívější rozhodnutí ve věci *Wouters*, vyslovil názor, že i když určitá činnost tyto požadavky splňuje, a je tedy schopna narušit soutěž a obchod mezi členskými státy, tak přesto je potřeba vzít v úvahu:

- celkový kontext, v němž bylo přijato rozhodnutí sdružení podniků a cíle, které sleduje;
- zda následné omezení hospodářské soutěže vyplývá z uskutečňovaní těchto cílů;
- a zda je omezení přiměřené ve vztahu k sledovaným cílům.

Soud na základě toho dovodil, že antidopingové pravidla zavedené Mezinárodním olympijským výborem sledují legitimní cíl boje za rovnou a férovou sportovní soutěž. Přitom tresty za jejich porušení označil za plynoucí z uvedeného cílu a neshledal je nepřiměřenými. ESD proto na základě této úvahy prohlásil antidopingová pravidla za neporušující článek 81 Smlouvy o ES.

Dalším případem týkajícím se hospodářské soutěže byl případ *Piau*, který, jak již bylo zmíněno, pojednával o pravidlech jež upravují udělování licencí fotbalovým agentům. Způsob použité argumentace se ale, na rozdíl od případu Meca-Madina, neopíral o argumentaci použitou v rozhodnutí *Wouters*, ale na zmíněná pravidla vztáhl výjimku článku 81 odst. 3 Smlouvy o ES.

Právě z důvodu rozdílného přístupu evropských institucí ke sportu v rámci soutěžního práva bude zajímavé sledovat, jestli se další vývoj přikloní k argumentaci použité v případu *Meca-Medina*, nebo k způsobu, jakým se Soud vypořádal s případem *Piau*.

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