KATHOLIEKE UNIVERSITEIT LEUVEN

SPM 15

Sport Policy & Management

THE HISTORIC TREBLE IN FOOTBALL

The legal, political and economic driving forces behind football's transformation

Arnout Geeraert
Hans Bruyninckx
Jeroen Scheerder

2012

In cooperation with

HIVA
ONDERZOEKSINSTITUUT VOOR ARBEID EN SAMENLEVING

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PREFACE

The aim of this report is to explain how the organisation and structure of football has transformed from the early developments of association football in England at the end of the 19th century up until its current state. As Europe has always been the epicentre of football, the focus is almost inevitably on driving forces mostly situated at the European or EU-level.

More specifically, the report analyses the economic, political and legal driving forces, since those have been referred to in the literature as being the most crucial in the transformation of football. Naturally, those alone do not capture the incredibly complex series of events that transformed Europe's uncontested number one sport – indeed, many societal transformations are left untouched in this report. Nevertheless, in our opinion, they give a satisfyingly holistic explanatory image.

Arguably the most important driving forces are economic in nature. Those have been crucial in shaping and determining the organisation and structure of the game and were accelerated, shaped and canalised by a number of external political, legal and societal factors through the years. Therefore, this report starts with the economic factors that changed football and then continues with a summary of how EU law influences the organisational aspect of the game. Finally, the EU involvement in sport is discussed and analysed from a political point of view.

The final chapter brings together the economic, legal and political factors discussed in this report. After a summary that combines the three driving forces, conclusions are drawn and some attempts are made to indicate the way ahead for football.

CHAPTER 1

ECONOMIC DRIVING FORCES IN PROFESSIONAL FOOTBALL

1. Introduction

> There is no doubting the obvious fact that the Football Association had turned from its original object of promoting sport and had adopted the core of the business of football. (Jackson, 1899, p.67)

The above quotation comes from a book on the state of football written in 1899 by N.L. Jackson. Jackson, one of the great figures in the early development of football, withdrew from the English Football Association at the end of the 19th century, embittered that it had legalised professionalism in 1885 as he had hoped that it would have retained its "amateur purity" (Green, 1953, pp. 203-228). The quotation proves that people have been suspicious about the commercial side of football since the development of (professional) association football. It is also a perfect example of the long-standing frictions in the world of football between those who aim to keep the game as "pure" as possible, and those who advocate a full commercial liberalisation. Indeed, as football continued to commercialise, indictments of sport when treated as a business have surfaced over and over in debates over the virtues of amateur and professional sport.

As this section will explain, the economic driving forces in football have been crucial in shaping and determining the organisation and structure of the game. They have been omnipresent since the early developments of association football in England at the end of the 19th century and were accelerated, shaped and canalised by a number of external political, legal and societal factors through the years.

2. The development of professional football and its global spread

In order to have a comprehensive understanding of the commercialisation of football, one must first understand its structures. The football system is highly path-dependent, meaning that its current shape largely depends on its early history (Lechner, 2009, p. 53). In fact, sport leagues around world,

safe for those in the US, are based on a model created in the last few decades of the 19th century by the Football Association (FA), the governing body of the game in England to this day (Szymanski and Zimbalist, 2005, p. 3). At a famous meeting at the Freemason's Tavern in London in 1863, a group of eleven football clubs, most of them based in and around London, founded the FA with the purpose of establishing a common set of rules (Goldblatt, 2007, p. 32). In 1871, an annual, single-elimination tournament open to all members of the FA was founded: the FA Cup. The Cup was an immediate and enormous success, and it hastened the spread of the initial gentlemen game down the social order into all sections of society. Paying spectators to the Cup games made football a very attractive commercial activity for the organisers of a successful team (Szymanski and Zimbalist, 2005, p. 37). In order to have a successful team, one must have the best players, and attracting the best players means offering them money. Hence, the fundamentals of the "football business" became apparent. According to Szymanski (2011), those fundamentals, which have changed little since the end of the 19th century, hold that "in all cases, teams seek to attract the best players by offering the highest wages, which then enables them to attract large crowds whose payments then pay the wages" (p. 68-69). Although the FA at first did not allow remuneration of players by their clubs, and many diehards from Northern amateur associations categorically opposed to "pay for play", the FA eventually changed its rules to legalise professionals in 1885. By 1886, the professional clubs from the North had managed to install representatives of their own fraction to the detriment of many of the traditional southern representatives. A classic example of English compromise, the professional and amateur clubs managed to hold the ship together by means of bargaining. The enormous long-term consequences for football was that it ensured an integrated administration for the game at all levels. Simply put: from then on, the FA was responsible for the health of the game at all levels within its territory (Szymanski and Zimbalist, 2005, pp. 38-39).

After the legalisation of professional football in 1885, pressures to generate a stable income stream started to emerge. The proliferation of many different cup competitions in England had created uncertainty for the scheduling of matches and this was becoming a problem. For instance, a club usually entered a number of cup tournaments and, in case they lost in the first round, had blank days; if they kept in longer than they expected to remain, games could coincide with fixtures already arranged in different cups. So, in order to generate a stable income for professional clubs, a different structure of competition was needed (Szymanski and Zimbalist, 2005, pp. 40-41). A combination of the leading clubs in the country binding themselves to play a series of home and away matches with the club winning the most matches being the champion for the season, the Football League was founded in 1888, probably inspired by the similar system that had flourished in American professional baseball for some years (Jackson, 1899, p. 211). Thus, a "fixity of fixtures" was created,

generating a substantial increase in revenue for participating clubs (Szymanski and Zimbalist, 2005, p. 41).

At this point, according to Szymanski and Zimbalist (2005, p. 45), English football took an organisational turn that would eventually signify the principal defining difference between the American and the European models of sport. First of all, the Football League decided to remain within the governance structure of the FA, rather than asserting its independence (as happened in the US). At the time, the FA's competition (the FA Cup) and influence were well established thanks to the income and prestige the clubs had obtained (and needed) from participating in its Cup. Moreover, by developing a more inclusive system, the Football League "assured its legitimacy to the largest number of FA teams and thwarted competition from potential upstart leagues" (Szymanski and Zimbalist, 2005, p. 46). Second, as the most important manifestation of its inclusiveness, the Football League adopted a system of promotion and relegation. Various amendments to this system had been tried out since 1889, but in 1898 the standard system for promotion and relegation was adopted. From then on, the worst performing teams at the end of the season were demoted to play at the immediately junior league and were replaced by the best-performing teams from that league. The demoted and promoted teams were determined by the number of points scored during the season (Szymanski and Zimbalist, 2005, pp. 46-47).

Even before the founding of the FA, Englishmen had been playing football in other countries. Between 1850 and 1914 Great Britain dominated the world economy and the British were the largest international exporters and investors (Foreman-Peck, 1995, p. 121) and many English expatriates played the game around the world. Indeed, the spread of football was intimately tied to the British imperial and commercial power at that time (Szymanski and Zimbalist, 2005, p. 54). For instance, British sailors and traders introduced the game in Italy (Guttman, 1994, p. 53), British teachers introduced the game in Argentina (Murray, 1996, pp. 32-33), a British college took the initiative in Uruguay (Giulianotti, 2000) and soldiers of the British army introduced the game in India (Murray, 1996, p. 18). According to Szymanski and Zimbalist (2005, p. 54), English gentlemen amateurs played a significant role both in the governance of football in England and in the new associations founded abroad. Many national associations were founded by the English and quite soon thereafter passed under the control of local citizens (Szymanski and Zimbalist, 2005, p. 51). Those associations adopted the English system of a fixed competition with promotion and relegation and solidarity between amateurs and professionals. In fact, apart from being widely adopted in the football world, this system has also been widely adopted in other sports, in particular in Europe. Thus, the European Commission stated in 1998 that, together with, amongst others, the fact that amateurs play

alongside professionals, promotion and relegation is “one of the key features” in sport in Europe (European Commission, 1998, pp. 2-5).

In the 20th century, international competition grew rapidly and helped to spread football’s popularity (Murray, 1996, p.31). This was exemplified in particular by the first World Cup in Uruguay in 1930, which marked the beginning of what became “a quintessential global event” (Lechner, 2009, p. 38). Ever since the first “international” match between England and Scotland in 1870, the firm principle was established that member clubs of an association were obliged to release their best players to participate in such contests, which was of vital importance for the development of international football (Szymanski and Zimbalist, 2005, p. 37). In 1904, FIFA was founded at first as a body of and for Europeans which gradually realised its “internationalist” ambition to control every type of association football, foster friendly relations amongst members, and thereby bring everyone involved in football together in one “family”. At the time, FIFA already was a powerful organisation (Sugden and Tomlinson, 1998, pp. 5-6). Meanwhile, in particular across the wealthier countries, football became well organised. Within the first decade of the 20th century, football teams and governing bodies were to be found in every European country (Murray, 1996, p. 31). So, even before World War II, football had globalised (Lechner, 2009, p. 39).

While football had globalised by World War II, it hardly had the global presence it has today. World Cups did not involve many countries, few players earned a living at their game, only Latin-American players tended to go abroad and, even across Europe, there was no standard annual tournament (Lechner, 2009, p. 39). In the absence of TV broadcasting, public interest was limited and the football business did not generate vast sums of money. To put it simple: football was not a big deal. But after World War II, it would soon become one.

3. Post-World War II commercialisation

After World War II, the genuine globalisation of the football economy, and the sport economy in general, took off. According to Andreff (2008), three key trends triggered this globalisation. First, the extension of annually paid holidays for individuals led to the engagement by the society in many leisure activities in all developed market economies and sport was now consumed in many forms. Second, television broadcasting of big sporting events provided access to TV-viewers at any significant international competition convened anywhere around the world. Third, the emergence of new information and communication technologies.

Commercial radio broadcasting in the United States began in 1920 and the first sports broadcast on commercial radio in 1921, the heavyweight boxing world title match, was widely credited with spreading the popularity of the new medium (Szymanski, 2006b, p. 428). In the United States, broadcasters were (and still are) private enterprises, licensed by federal regulatory authorities. In the eyes of the British authorities, the competition in the US had created chaos (Coase, 1950, p. 20). Therefore, when the British Broadcasting Company, a consortium of radio manufacturers, was founded, the company was granted a monopoly. Then, in 1927, the company was turned into the British Broadcasting Corporation (BBC), a publicly funded, yet quasi-autonomous organisation, empowered by a royal charter (Crisell, 1997, p. 22). In the same year, the BBC's first sport broadcast was a football match between Arsenal and Sheffield United. Safe for the United States, most countries in the world followed the British example and also created state-funded monopoly broadcasters. The consequence was that, outside the US, broadcasters were not willing to pay a lot of money for the broadcasting of sports events because they held a monopoly, and thus market power, and/or a limited budget because they were state-funded while funding through advertising was strictly limited (Szymanski, 2006b, p. 429). This situation did not change when the television era dawned, some 10 years later, and the first televised sports event occurred with the broadcasting of the 1937 Olympic games (Jeanrenaud and Késenne, 2006, p. 1). In fact, leagues and clubs were fearful that live television broadcasting would decrease attendance in stadiums and, given the monopsony position[1] of the public broadcasters in a market without competition, the low fees for television rights of matches would not be sufficient to compensate for lost gate receipts (Andreff and Staudohar, 2000, pp. 259-263). Even when competition broadcasting was introduced in the UK in 1955 by the creation of a privately owned channel, ITV, funded by advertising, clubs were wary about the broadcasting of live matches and until 1983, they only allowed broadcasts of match highlights (Szymanski and Zimbalist, 2005, p. 155).

Although television was of major importance for the spread of the (global) popularity of football, for above stated reasons, broadcasting initially was not a major source of income for football clubs. In fact, throughout most of the 20th century, the primary source of revenue for European clubs was gate receipts. Gradually, advertising revenues accrued, and in the 1960s and 1970s, there was a significant increase in corporate sponsorship revenue. In some cases, clubs even received subsidies from local authorities, usually municipalities. Still, until the 1980s, the lion's share of revenue for clubs was gate receipts from local or national residents (Andreff and Staudohar, 2000, p. 259).

[1] Analogous to monopoly, but on the demand side not the supply side, monopsony is a state in which demand comes but from one source.

In this financing model, clubs have limited sources of finance, which became increasingly problematic. According to Késenne (1996, 2000, 2006), clubs essentially behave as win-maximisers, resulting in a high demand for talented players. This in turn results in high player salaries. Before the *Bosman* ruling, there was very limited player mobility. Therefore, the high demand of star players could not be satisfied, which placed strains on the domestic market and substantially increased the price of the best domestic players. Football clubs therefore resorted to new methods of finance in order to try to increase their budgets (Andreff and Staudohar, 2000, p. 272). Soon they would realise the enormous potential of a new source of revenue: football broadcasting.

4. The Breakthrough of football broadcasting

During the 1980s, a wave of privatisation and deregulation swept Europe, partly at the behest of the EU (Parker, 1998).[2] Throughout European countries, public service monopolies were gradually removed and finally, in 1989, the EU Directive "Television without Frontiers" required all EU Member States to grant private broadcasters access to their domestic markets. The purpose of this Directive was to promote the process of European integration through cross-border transmissions. Such transitions would be a source of cultural enrichment, would provide the impetus for increased technical innovation in Europe in transmission media and would prevent the dominance of the big American media Corporations (European Commission, 1984; Presburger and Tyler, 1989, pp. 496-497).

The dismantling of public broadcasting monopolies in Europe has fostered competition in the industry and consequently, the European consumer increasingly had more public and private channels to choose from (Bourg and Gouguet, 1998). Parallel with those evolutions, since the beginning of the 1980s, a technological revolution has taken place, adding first cable and then satellite and digital television to traditional terrestrial television, while also expanding the available number of channels. The extra capacity persuaded governments to license extensive competition in broadcasting (Szymanski, 2006, p. 430). Moreover, satellite and cable broadcasting brought with it the opportunity to charge consumers directly for signal reception. By the end of the 1980s, a significant number of new competitors offering pay-TV services vied on the European markets. Furthermore they all realised that two main drivers would attract subscriptions: Hollywood movies and premium sport (Jeanrenaud and Késenne, 2006, p. 7; Szymanski, 2006b, p. 433). As international

[2] Privatisation in Europe occurred as a means of reducing the level of governmental debt, to develop and expand domestic capital markets and due to EU directives aimed at liberalising markets previously dominated by state-owned enterprises.

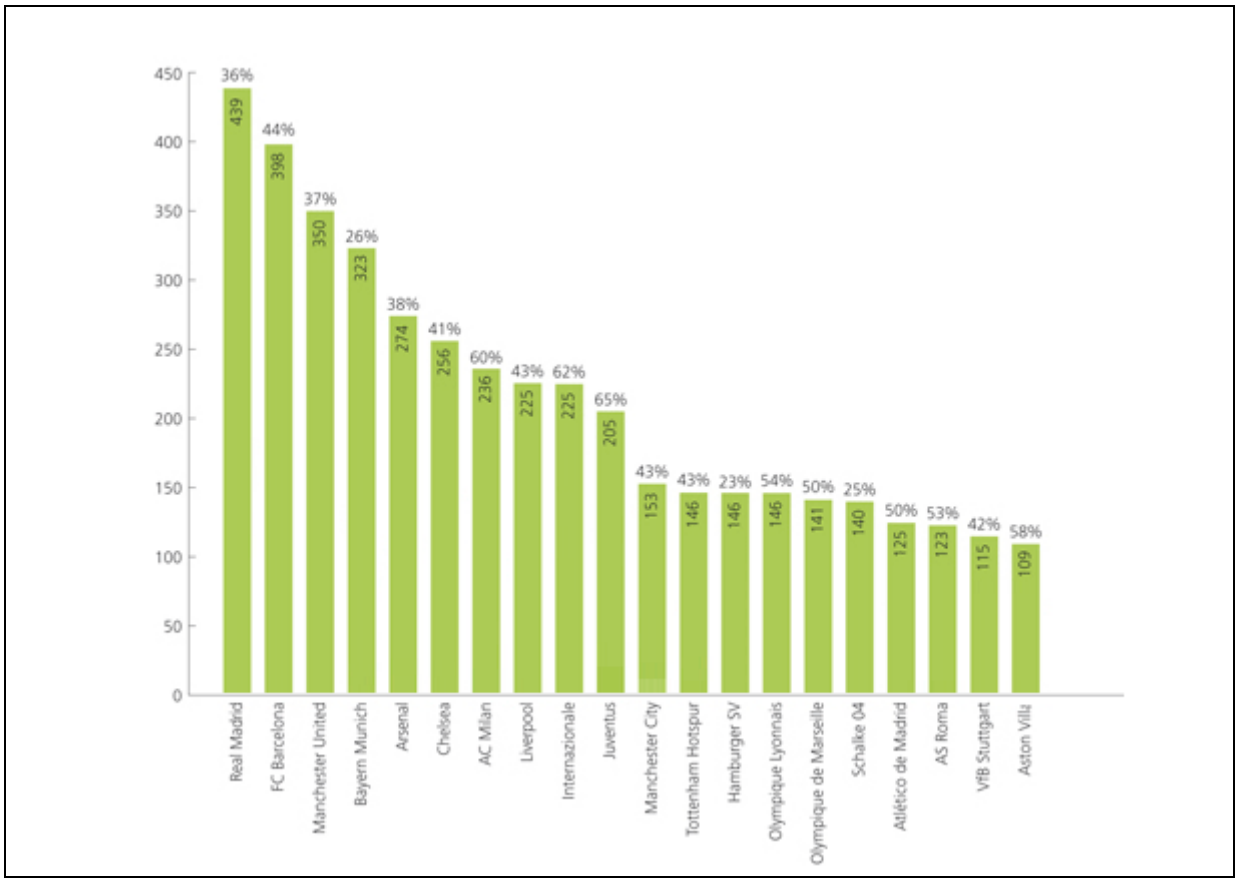
sporting events like the FIFA World Cup were too irregular, the only option as regards the latter in the European sporting monoculture for these companies was domestic league football (Szymanski and Zimbalist, 2005, p. 158).[3]

Those evolutions have boosted the growth of the demand side of the sports broadcasting market since the 1980s (Andreff and Bourg, 2006, p. 37). Due to the phasing out of the monopsonic[4] position of a single public channel on the market for football broadcasting, professional leagues and clubs can make use of the increased competition by negotiating more lavish television deals, which are sufficient to compensate for lost gate receipts. The above described evolutions alone however do not explain the enormous escalation of rights values. According to Szymanski (2006), the key to this escalation is "the capacity of premium sports rights to attract large audiences of committed eyeballs in a world where average audience size has been shrinking dramatically" (p. 430).

Thus, broadcasting rights have alleviated the budget crunch for professional clubs, particularly in the biggest leagues. In fact, the sharp rise in television rights fees has made them the most important source of income, up to 55 % of their total budgets (Andreff and Staudohar, 2000, p. 263; Késenne, 2008, p. 110). The chart below shows the amount of broadcasting revenue, generated by the 20 biggest European football clubs in 2011, expressed in the percentage of the total income of those clubs.

[3] Because football always retains the largest coverage, television broadcasting in fact generates or reinforces differentiation or even discrimination across the various sport disciplines (Andreff, 2008, p. 16).
[4] In economics, a monopsony is a state in which demand comes from one source.

Figure 1.1 *Broadcasting revenue in €m as a percentage of the total revenue for the 20 biggest European clubs in 2011*



Source: Deloitte, 2011

The growing importance of television rights is one of the main reasons of the growing gap between the total league budgets of the large countries and the small countries. According to Késenne (2007, p. 394) the correlation coefficient between the total league's budget and the size of the national market, measured by the total population in the country, based on the data from 2006 of 12 European countries, is as high as 80%.

With the increasing importance of sports broadcasting, the influence of broadcasting companies over sport has also increased. In fact, sport and the media are now closely entwined in a relationship that can be described as "symbiotic": television rights are the main source of income for many clubs and sport, particularly football, is a key factor in attracting audiences benefiting broadcasters (Jeanrenaud and Késenne, 2006, p. 5). Pressures from broadcasters have also resulted in the development of pan-European football competitions. Blockbuster fixtures between top teams in those competitions brought unprecedented gate receipts and an enormous infusion of television revenue. As early as the 1980s, broadcasters proposed a European Superleague, as they saw the potential for expanding the scale of European club competition. For most European clubs, this

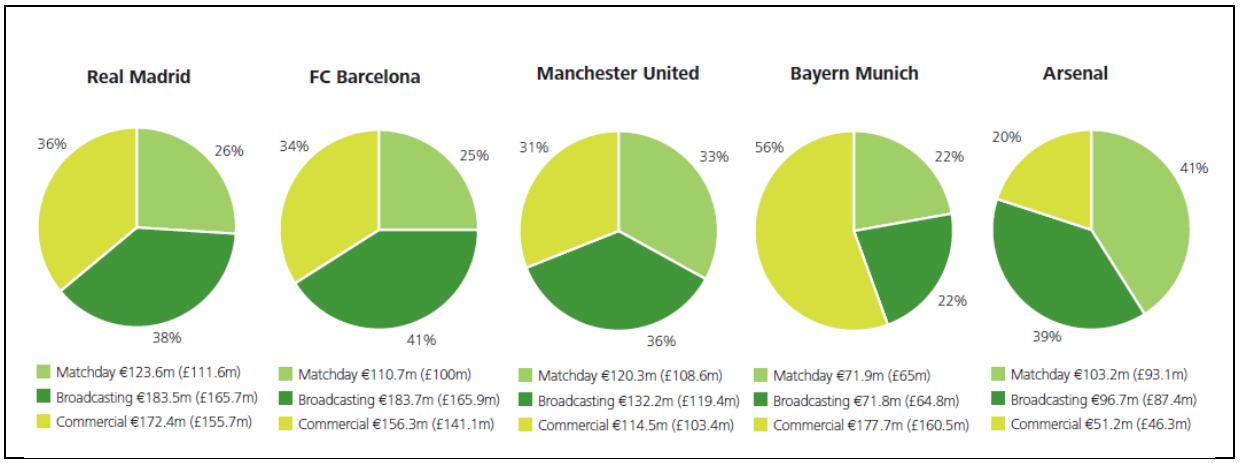
proposal went one bridge too far, but in 1992, UEFA inaugurated the Champion's League to replace the European Cup. As this competition introduced a group stage, the number of games played was dramatically increased, and therefore also the broadcasting revenues (Szymanski and Zimbalist, 2005, p. 162). Participating clubs also receive a substantial amount of prize money[5] and they obtain extra income from the sale of tickets, merchandise and related items (Dabscheck, 2008, p. 331). Blockbuster fixtures brought unprecedented gate receipts and an enormous infusion of television revenue. However, since only the highest ranked teams in the national championships can participate in the Champions League, the number of teams from each country depending on their international performances, the competition is widening the gap between the large and the small countries even further. Moreover, clubs from larger leagues can make more money than clubs from the small countries, even when the latter's performances on the field are the same or better (Késenne, 2007, p. 394).

Another outcome of TV broadcasting has been a globalisation and a sharp increase of sponsorship fees for sport in general and football in particular. In fact, without television, it would be difficult to imagine that companies would be willing to spend the vast sums of money they spend today for the privilege of being associated with a sporting event, a club or even a player. In terms of favoured sponsorship vehicles around the world, football is now the number one target, followed by a relatively recent trend: stadium naming rights (Jeanrenaud, 2009, p. 53-54).

To summarise this section, the graph below shows the percentage of matchday, broadcasting and commercial revenue in relation to the total earnings of the five most earning European clubs for the 2010/11 season. The chart excludes player transfer fees, VAT and other sales-related taxes revenue. The connection between the football and the business world is demonstrated by the fact that for all five clubs, income from broadcasting, merchandising and sponsorship by far constitutes the biggest revenue share.

[5] Include information.

Figure 1.2 *The relative distribution of revenue for the five highest earning European clubs for the 2010/11 season*



Source: Deloitte, 2012a

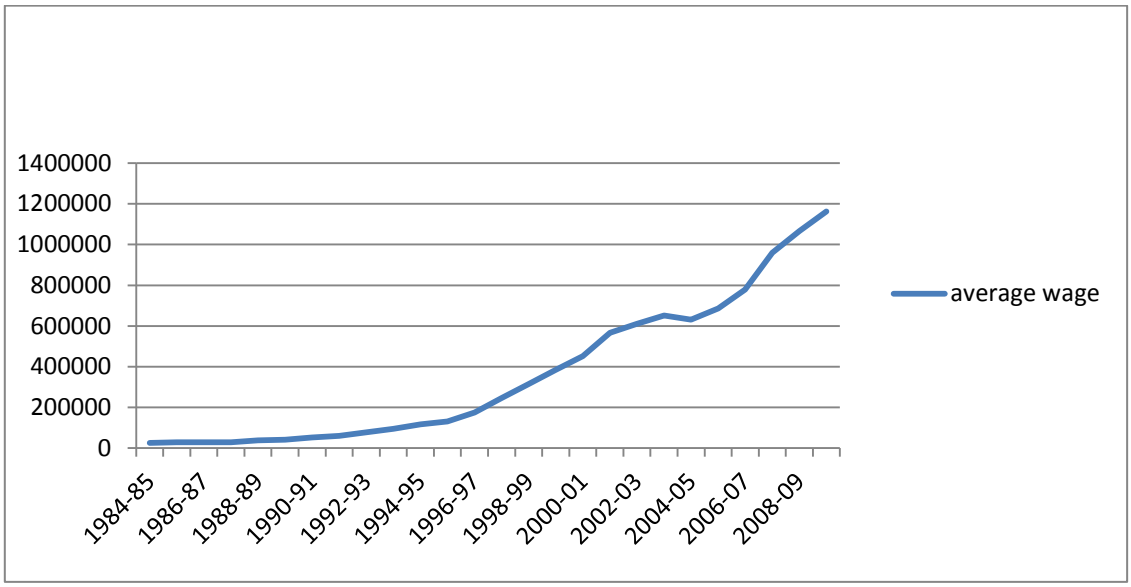
5. The Bosman ruling

While increased broadcasting and sponsorship revenue has significantly enlarged the budget of especially the largest football clubs, one decision from the CJEU in particular has determined the economic driving forces in professional football. In 1995, the Court ruled in the *Bosman* case that prohibiting out-of-contract players to move to a different club and the 3+2 rule, a quota system allowing only three foreign players on a team in a national league, plus two other foreigners if they played for 5 years without a break in the host country, was a violation of EU law.

The ruling had very important economic consequences for professional football. Firstly, transfer rules adopted by football associations according to which, at the expiry of his contract, a professional footballer could be transferred to his new club only if it paid his old club a transfer fee constituted a limitation on player mobility that kept salaries low. The abolition of that system resulted in clubs losing their monopsony power over players. Market power shifted to the players, who could sell their talents to the team that offered the highest wages (Ericson, 2000; Dejonghe and Van Opstal, 2010). As a consequence of this shift and the general increase of income thanks to increased broadcasting and sponsorship revenue, player salaries have risen significantly since 1995. The below graph shows the increase in average annual wages for players in the FA Premier League since 1984.[6]

[6] In 1992, the top English league was renamed "FA Premier League".

Figure 1.2 *Average annual wages in £ in the FA Premier League from 1984 until 2010*



Source: Sportingintelligence (2011)

Secondly, the abolition of the 3+2 rule has resulted in a tremendous increase in professional player mobility. Assuming that clubs behave as win-maximisers, there exists a large demand for talented players. In an open league system with promotion and relegation, all clubs want to maximise their winnings in order to be promoted, to avoid relegation or to end as high as possible in the league in order to qualify for the very profitable pan-European tournaments. The system is hypercompetitive compared with a closed system, which is demonstrated by the lower frequency of financial failure in the major U.S. major sports leagues as compared to the top European leagues. All clubs invest in player talent, of which there is a limited supply, before the season begins, but in bad performing clubs, gate receipts and television revenue will not cover ex-post payroll costs. Thus, sporting competition prevails over economic competition in open leagues and player mobility is crucial (Késenne, 1996, 2000, 2006; Szymanski and Zimbalist, 2005, p. 46; Andreff, 2008, p. 28). As a result of this, and a general bad governance of football clubs, a number of European football clubs are experiencing severe financial difficulties in recent years (see, e.g., Lago, Simmons and Szymanski, 2006; Andreff, 2007).

Before the *Bosman* ruling, those economic factors were already in play, but they were canalised by a limited player mobility as clubs were only allowed to field a limited number of foreign players. Since the *Bosman* ruling, European clubs can field as many EU citizens as they want.[7] Thus, clubs were no

[7] And, in addition, according to recent case law from the CJEU, also players from from third countries having an Association Agreement with the European Union, because of the existence of non-discrimination clauses in these agreements. See the Chapter 2.

longer dependent on their domestic market for the acquisition of talented players and this has skyrocketed the number of international football transfers. The teams with the largest budgets can attract the best talents, so there has been an exodus of talented players to the top 5, wealthiest, leagues, i.e. those in England, Spain, Germany, Italy and France. The teams playing in smaller leagues have to compete for the best players on an open European labour market with the teams of the large countries with budgets that are up to 15 times as large as their own budgets (Andreff and Staudohar, 2000, p. 257; Késenne, 2007, p. 389; Andreff, 2008, p. 28). Besides, as major European clubs cannot afford to enlist a second rate player in the highly profitable Champions League because of an injury of one of their crucial players, the best teams in Europe have two outstanding players available for each position (Groot, 2005, p.3). Moreover, the richest clubs buy talented players from an increasingly younger age. This destabilises the manpower of many teams with the exception of the richest and this calls for the reintroduction of certain regulations (Andreff, 2008, p. 21).

A final, indirect, consequence of the *Bosman* ruling is the high number of foreign players in the teams of almost all European leagues, often to the detriment of the quality of the domestic national team. In the broadcasting era, professional football clubs are no longer dependent on their basic product, i.e. a match offered in a stadium. Due to the global popularity of professional football, major European clubs that are seeking new sources of revenue market their indirect product, their football matches, and their derived products, such as merchandising and exhibition games in Asia, on an increasingly global market. Thus, there is no reason why players, coaches, managers, sponsors, fans and owners would have the same nationality. On the contrary, an internationalised squad probably increases international interest (Andreff, 2008, p. 29). The increased international player mobility after *Bosman* has certainly accelerated that trend.

6. The football business

Today, economic driving forces have transformed professional team sports, football in particular, into a complex micro-economy consisting of a set of interdependent markets. Teams buy players; fans buy tickets, merchandising and subscriptions to sports broadcasting channels; media companies buy broadcasting rights; and big businesses buy corporate suites and sponsorship opportunities. Teams themselves have even become commodities to be bought and sold (Gerrard, 2004, p. 247).

The football business is not a passive player; it is a proactive and increasingly aggressive stakeholder within football (Conn, 1998). Indeed, football in Europe has become increasingly commercial and more and more the target of, and integrated with, transnational business interests (Holt, 2007, p.

51). That can sometimes be taken quite literally, in the case where businesses have bought shares of clubs (Gerrard, 2004). There now exists a complex network with growing interdependence between business interests and the football world. Within that network, clubs have emerged as big power players, as is perfectly illustrated by the establishment of the G14, a self-styled elite of clubs who in 2000 established an exclusive lobbying cartel, the formula for membership being a combination of money, success and potential television audience (Sugden, 2002, p. 70). Two years earlier, Media Partners, a private business group linked to the Fininvest conglomerate that owns the club A.C. Milan, had plans to set up a highly profitable European Super League by luring the clubs that would later establish the G-14 away from their respective national leagues. Those plans were eventually shelved when UEFA agreed to reform the Champions League in favour of the largest teams in Europe.[8]

The intensive commercialisation of professional football has of course many unpleasant side-effects. As with any other areas of international business, the evermore, uncontrolled, internationalised financing of football is exploited by those involved in severe financial misdoings such as embezzlements, money launderings, corruption, match-fixing etc. (Andreff, 2000, p. 1). Besides, the sky-rocketed transfer fees for professional football players have made football an extremely profitable business for player's agents. Malicious agents are currently involved in the human trafficking of young players, some even under aged, from African and Latin-American countries (Tshimanga and Bakadiababu, 2001).

It is clear that professional football needs to be protected from the more avaricious and predatory ways of global capitalism (Sugden, 2002, p. 78). However, in the business network of football, football's governing bodies, in particular FIFA and UEFA, also have mutually dependent partnerships with powerful and highly successful multi-national companies. This has led Hare (1999, p. 123) to wonder if such governing bodies' dual functions of "custodians of the sport's self regulatory integrity" and of "agents of the game's commercialisation" are compatible.

[8] In order to ensure that as many of the big clubs as possible would qualify for the Champions League, UEFA relaxed the criteria for inclusion, allowing up to –currently- four clubs from the strongest leagues. In 2008, following the out of Court settlement of the *Charleroi/Oulmers* case, the elite clubs signed the Memorandum of Understanding which stipulated that FIFA and UEFA would pay compensation to clubs for injuries to their players on international duty; in return, they agreed to release their players for internationals until the 2014 World Cup and to dissolve the G-14. In its place the European Club Association, an organisation with a far more inclusive member base, was established and subsequently recognised by FIFA and UEFA (García, 2008, p. 41).

CHAPTER 2

THE IMPACT OF EU LAW ON THE ORGANISATIONAL ASPECT OF PROFESSIONAL FOOTBALL

1. Introduction

Athletes have rights and obligations deriving from ordinary law but also from the rules of the (international and national) sports federations they are registered with (Parrish, 2003a). Many of those rules are captured by the EU's internal market competence. The establishment of an internal market[9], the integration of the Member State's economies as a means to achieve the objectives of the Union such as a balanced economic growth, remains one of the principal tasks entrusted to the Union.[10] For decades now, the Treaties have defined the objective of establishing an internal market as the creation of *"an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured"*.[11] In order to secure the ability to deploy factors of production freely across frontiers, the Member States are prohibited to discriminate against goods, persons, services and capital from other Member States (EU freedom of movement law). Through the latter so-called "four fundamental freedoms",[12] the founding fathers of the European Union ultimately wanted to open up economic activity within the whole Union. In the end, they hoped that the process of economic integration would progressively lead to a form of political union among the Member States that would proliferate peace and prosperity in Europe.

Within the internal market, there should be free competition, favouring an efficient allocation of resources.[13] The EU "rules on competition" (EU competition law) comprise rules prohibiting distortion of competition by undertakings and rules restricting State Aid granted to undertakings.

[9] Since the Single European Act (SEA, 1986), the term "common market" is gradually replaced by "internal market". Since the entry into force of the Lisbon Treaty, the internal market is the sole expression of the objective of market integration pursued by the EU.
[10] Article 3(3) Treaty on European Union (TEU)
[11] Article 26(2) Treaty on the Functioning of the European Union (TFEU)
[12] The foundations of the internal market are the Treaty provisions on the free movement of goods (articles 28 to 37 TFEU), free movement of persons, services and capital (articles 45 to 66 TFEU).
[13] Articles 119(1) and (2), 120 and 127(1) TFEU.

Competing undertakings are said to ensure further innovation and to motivate undertakings to develop more efficient methods of production. This should lead to lower prices, high-quality products and ample choice for the consumer. In this context, EU rules on competition, enshrined in articles 101-109 of the Treaty on the functioning of the European Union (TFEU), are designed to make EU markets work better, by ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy as a whole (European Commission, 2010).

It is generally acknowledged that sport bodies eschew any kind of state interference in their sector and that this has urged them to adhere to a strong protectionist vision of sports governance (Parrish, 2011, pp. 215-216). Indeed, the world of sport has traditionally been regulated in all its aspects through a self-governing network with its own rules and regulations. At the same time, governments were reluctant to intervene in the sports sector as, even now, they tend to regard it more as a cultural industry rather than a business. For almost a century, the sporting network was able to exercise its self-governance without any significant interference from states or other actors. Since rules issued by sporting bodies are captured by the EU's Internal Market competences, the CJEU proved to be a suitable venue for unsatisfied stakeholders to challenge the decisions made at the top of the governing associations of their sports. In its first ever ruling issued in the area of sport, the *Walrave* ruling[14] in 1974*,* the CJEU had to establish whether and to what extent sporting activities are subject to the provisions in the Treaties laying down prohibitions. The Court ruled firstly that the practice of sport is subject to EU law only in so far as it constitutes an economic activity within the meaning of article 2 EEC Treaty (now article 3 Treaty on European Union). Thus, activities which are of sporting interest only, and therefore are not of an economic nature, are not subject to EU law.[15]

It is however very difficult to define non-economic sporting regulations, which in principle fall outside the scope of EU law. In its 2006 *Meca-Medina*[16] ruling, the CJEU ruled that even if a rule is purely of a sporting nature, and has nothing to do with an economic activity, this does not mean that the activity governed by that rule or the body which issues such rules are not governed by the Treaty. Thus, the simple notion that a rule or regulation would have a purely sporting nature is not sufficient to exclude whoever runs this activity, or the organisation which has created it, from the scope of the Treaty. Some authors feared that actors in the sports world would be encouraged by this ruling to challenge actions by sports associations in their disadvantage on the basis of EU law, opening a "Pandora's box" of potential legal problems because all disciplinary measures in the field of sport can

[14] CJEU, Case 36/74 *Walrave* [1974] E.C.R. 1405.
[15] *Ibid.*, paras 4-7. This was later confirmed in several cases.
[16] CJEU, Case C-519/04 *Meca-Medina & Majcen v. Commission* [2006] E.C.R. II-3291.

be considered as violating EU (competition) law (see e.g. Infantino, 2006; Hill, 2009). However, it must be noted that the Court's ruling essentially does not derogate from its previous treatment of sport. For instance, the so-called sporting rules *sensu stricto* will most definitely continue to fall outside the scope of EU law.[17]

Through the years, the CJEU has developed a solid body of case law on the application of EU law on the organisational aspects of sport. That coherent and consistent body of case law can be labelled "EU sports law", as it constitutes a distinct legal approach to applying EU law to sporting situations (see Parrish, 2003b).[18] This chapter provides a concise overview of the application of EU law on sporting rules as it delineates the boundaries of the autonomy of sport with regard to EU law. Finally, it provides an overview of the different methods of enforcement of EU law on sports bodies and the legal and political limitations thereof.

2. Freedom of movement

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

2.1 The free movement of workers

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

Alongside each Member State's legislation on nationality, the concept of "worker" determines who qualifies for free movement of workers. If the definition of that term could be determined unilaterally by national law, each Member State would be able to eliminate the protection afforded

[17] In its staff working document annexed to the 2007 White Paper on sport, the European Commission lists a few types of "pure sporting rules" that – based on their legitimate objectives – are likely not to breach EU law: rules fixing the length of matches or the number of players on the field; rules concerning the selection criteria for sports competitions; rules on "at home" and "away from home" matches; rules preventing multiple ownership in club competitions; rules concerning the composition of national teams; rules against doping; and rules concerning transfer periods. See European Commission (2007b, p. 39).

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

by the treaties to workers.[19] Therefore, there is a need for a Union definition of the concept. Consequently, the CJEU defined as a "worker" "[a person] who for a certain period of time […] performs services for and under the direction of another person in return for which he receives remuneration".[20] This fundamental principle has a broad interpretation. Neither the duration of the work,[21] the origins of the funds from which the numeration is paid,[22] nor the fact that remuneration provided for genuine work is under the minimum subsistence level laid down in the Member State of employment[23] is relevant. In addition, also the type of work is irrelevant, provided that an economic activity is involved.[24]

Hence, the CJEU has confirmed in a number of cases that professional or semi-professional sportspeople are workers by virtue of the fact that their activities involve gainful employment.[25] In the *Bosman* case, the Court held that "*rules which are laid down by sporting associations which determine the terms on which professional sportsmen can engage in gainful employment are captured by the treaty provision on the free movement of workers".*[26]

When an athlete does not perform services "under the direction of another person"[27], he or she cannot be considered a worker. In that case, the economic activity of the athlete can in principle be considered an independent activity which might fall under the scope of the provisions of self-employed persons. With self-employment is meant economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his or her own personal responsibility.[28] Pursuant to article 49 TFEU, self-employed persons who are nationals of a Member State enjoy the right of establishment in the territory of another Member State. However, because there generally is no "fixed establishment in another Member State for an indefinite period",[29] athletes usually do not fall under the freedom of establishment enshrined in article 49 TFEU. In principle, sportspeople may be considered as providers of service in that case.

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[19] See CJEU, Case 75/63 *Hoekstra* (née Unger) [1964] E.C.R. 177, at 184.
[20] CJEU, Case 66/85 *Lawrie-Blum* [1986] E.C.R. 2121, para. 17.
[21] CJEU, Case 53/81 *Levin* [1982] E.C.R. 1035, para 17
[22] *Ibid.*, para. 16
[23] *Ibid.*, para. 15
[24] CJEU, Case 196/87 *Steymann* [1988] E.C.R. 6159, paras 12-14; CJEU, Case C-456/02 *Trojani* [2004] E.C.R. I-7573, paras 17-24.
[25] This was first confirmed in CJEU, Case 36/74 *Walrave* [1974] E.C.R. 1405, and later in the cases 13/76 *Donà*, C-415/93 *Bosman*, C-176/96 *Lehtonen*, C-519/04 *Meca-Medina* and C-325/08 *Olympique Lyonnais*.
[26] CJEU, Case C-415/93 *Bosman* [1995] E.C.R. I-4921, para. 87. In all subsequent cases related to the free movement of (semi-)professional athletes, safe for the *Deliège* case, the Court qualified these as workers.
[27] CJEU, *Lawrie-Blum*, para.17.
[28] CJEU, Case C-268/99 *Jany and Others* [2001] E.C.R. I-8615, paras 34-50. The Treaties however provide for exceptions to the free movement of persons on grounds of public policy, public security and public health (Articles 45(3) and 52 TFEU).
[29] CJEU, Case C-221/89, *The queen t.Secretary for Transport ex parte Factortame ea.*, [1991] E.C.R. I-3905, para. 20.

2.2 The free movement of services

The freedom of services is enshrined in articles 56-62 TFEU. Pursuant to article 56 TFEU, restrictions on freedom to provide services within the Union shall be prohibited. Article 57 TFEU regards as "services" those which are "normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons". Hence, only remunerated services which do not fall under the other fundamental freedoms can be regarded as "services". That way, it is ensured that all economic activity falls within the scope of the fundamental freedoms.[30] Sport is thus subject to the freedom of services where economic activity within the sector has the character of a remunerated service and does not fall under one of the other fundamental freedoms.

Thus far, the only time the CJEU (possibly) qualified an athlete as a provider of service was in the *Deliège* case.[31] The Court referred to the grants awarded on the basis of earlier sporting results and to sponsorship contracts directly linked to the results achieved by the athlete in order to determine whether she could be regarded as a provider of services within the meaning the Treaty.[32] In that regard, it held that an athlete is capable of being involved in *"a number of separate, but closely related, services".*[33]

2.3 The prohibition of obstacles to the freedom of movement

For a long time, it was assumed that if a restriction on the mobility of economic operators applied without distinction to a State's own nationals and nationals of other Member States, this was not contrary to the Treaty provisions on free movement of persons (Lenaerts and Van Nuffel, 2011, p. 245). However, since the 1988 judgment in *Wolf*[34], the CJEU has developed a significant body of case law prohibiting obstacles to the freedom of movement. Now, provisions which preclude or deter a national of a Member State from leaving the country in which he or she is pursuing an economic activity in order to exercise the right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the worker concerned.[35]

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[30] CJEU, Case C-452/04 *Fidium Finanz* [2006] E.C.R. I-9521, paras 31-33.
[31] CJEU, *Deliège*.
[32] *Ibid*., para. 51.
[33] *Ibid.*, para. 56. The Court explicitly referred to CJEU, *Bond van Adverteerders and others*, para. 16, where it was stipulated that *"[…] Article 60 [now article 57] does not require the service to be paid for by those for whom it is performed […]"*.
[34] CJEU, Joined Cases 154-155/87 *Wolf and Others* [1988] E.C.R. 3897, paras 9-14.
[35] CJEU, Case C-18/95 *Terhoeve* [1999] E.C.R. I-345, para. 39; CJEU, Case C-232/01 *Van Lent* [2003] E.C.R. I-11525, para. 16; CJEU, Case C-209/01 *Schilling and Fleck-Schilling* [2003] E.C.R. I-13389, para. 25; CJEU, Case C-464/02 *Commission v Denmark* [2005] E.C.R. I-7929, para. 35; CJEU, Case C-345/05 *Commission v Portugal* [2006] E.C.R. I-10633, para. 16; CJEU, Case C-104/06 *Commission v Sweden* [2007] E.C.R. I-5701, para. 65; CJEU, Case C-318/05 *Commission v Germany*, [2007] E.C.R. I-06957, para. 114.

Consequently, in the field of sport, provisions such as transfer rules which, even if applied without regard to nationality, restrict the freedom of movement of sportspeople who wish to pursue their activity in another Member State constitute obstacles to free movement. A measure which constitutes an obstacle to freedom of movement can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that is the case, application of that measure will still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.[36]

The Bosman case

Before the *Bosman* case, a professional footballer at the expiry of his contract could be transferred to his new club only if the latter paid his old club a transfer fee. Jean-Marc Bosman was a professional football player under contract of a Belgian first division club. When the end of his contract approached in 1990, he refused to sign a new contract with his club and was placed on the transfer list for a transfer fee based on his training costs and other pre-determined factors. When no club showed interest in his contract during the month-long compulsory transfer period, Bosman –as an unclaimed player- signed a contract with a French second-division club. Bosman's Belgian club never filed the certification papers required to finalise the transfer and subsequently suspended him, preventing him from playing the entire season.[37] Consequently, Bosman brought an action against his Belgian club, RC Liège, the Belgian football association URBFSFA and UEFA.[38] Finally, the case was referred to the CJEU for a preliminary ruling.

The Court, recognising that sporting activities are of considerable social importance in the EU, held that the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.[39] However, the Court reasoned that the transfer fee system did not effectively maintain the legitimate objective of financial and competitive balance because the rules neither prevented the richest clubs from monopolising the best players nor reduced the decisive impact of finances on the strength of competition. Moreover, the Court indicated that these goals could be achieved by other, less-restrictive means which do not impede worker's freedom of movement.[40] Consequently, the CJEU declared transfer rules adopted by sports associations according to which, at the expiry of his contract, a professional footballer could be transferred to his

[36] See, *inter alia*, CJEU, Case C-19/92 *Kraus* [1993] ECR I-1663, para. 32; *Bosman*, para. 104; CJEU, Case C‑109/04 *Kranemann* [2005] ECR I‑2421, para. 33; and CJEU, Case C‑208/05 *ITC* [2007] ECR I‑181, para. 37.
[37] *Ibid*., paras 28-33.
[38] *Ibid*., paras 34-42.
[39] *Ibid*., para. 106.
[40] *Ibid*., para. 110.

new club only if it paid his old club a transfer fee to be an obstacle to the free movement of workers.[41]

Secondly, the Court ruled that rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States cannot be deemed to be in accordance with article 45 TFEU since they are not of a purely sporting nature and cannot be justified by a legitimate objective.[42]

The Lehtonen case

In the *Lehtonen* case,[43] the transfer rules regarding a "transfer window" of the Belgian basketball federation came under scrutiny. The CJEU ruled that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity of sporting competitions[44] and therefore may be objectively justified. The Court reasoned that late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.[45] However, as the rules of the basketball federation established different deadlines for EU and non-EU citizens, the Court ruled that these went beyond what is necessary to achieve the aim pursued.[46]

The Bernard case

In the recent (2010) *Bernard* case, the CJEU ruled on obstacles to the free movement of workers arising from training compensation schemes.[47] In its ruling, the Court explicitly and for the first time refers to the new legal basis of the Treaty on Sport, emphasizing the account must be taken of the specific characteristics of sport in general and of its social and educational function when making this consideration.[48]

The French sporting rules at issue concerned a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him. Fifteen years after the *Bosman* judgement, when the Court declared that a transfer compensation at the end of contract was against EU law, the judges decided

[41] *Ibid*., paras 94-104.
[42] *Ibid*., paras 129 and 137.
[43] CJEU, *Lehtonen*.
[44] *Ibid*., para. 53.
[45] *Ibid*., para. 55.
[46] See *Bosman*, para. 104.
[47] CJEU Case C-325/08, *Bernard* [2010] E.C.R. I-02177
[48] CJEU, *Bernard*, para 40.

that a training compensation is an obstacle to the free movement of workers that, in principle, can be justified by the objective of encouraging the recruitment and training of young players. [49] In the case of Mr Bernard, the scheme at issue however went beyond what is necessary to attain this legitimate objective because it is characterised by the payment to the club which provided the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.[50]

2.4 The prohibition of discrimination to freedom of movement

2.4.1 The prohibition of direct discrimination

In order to ensure the free movement of sportspeople there can be no discrimination on the basis of their nationality**.** On a general note, article 18 TFEU states that *"within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited"*. This article is a horizontal clause, which means that it applies in all situations which fall within the scope *ratione materiae* of EU law. According to settled case-law, article 18 TFEU applies independently only to situations governed by Community law for which the Treaty lays down no specific rules prohibiting discrimination.[51] More specifically, that principle has been implemented explicitly in the TFEU as regards workers[52], self-employed persons[53] and services[54] in the EU.

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

Discrimination is direct where a measure employs a prohibited distinguishing criterion such as nationality or subjects different cases to formally similar rules (Lenaerts and Van Nuffel, 2011, p.

[49] CJEU, *Bernard*, para. 28.
[50] CJEU, *Bernard*, paras 46-50.
[51] See, *inter alia*, CJEU, Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* [1991] E.C.R. I-5889, para. 11, and CJEU, Case C-379/92 *Peralta* [1994] ECR I-3453, para. 18.
[52] Article 45(1) and (2) TFEU.
[53] Articles 49 and 55 TFEU.
[54] Articles 56§1 and 57§3 TFEU. The CJEU attached direct effect to these provisions *"in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided"*, see CJEU, Case 33/74 *Van Binsbergen* [1974] E.C.R. 1299, para. 27.

172). Sport rules leading to direct discrimination on grounds of nationality are not compatible with EU law. A good example of such rules are for instance those which pose a complete ban on the participation in sporting competitions of athletes who are not nationals of the Member State where the competition is organised but who are nonetheless EU citizens. In the *Donà* case for instance, only football players affiliated to the Italian federation could take part in matches, whilst affiliation was only open to players having the Italian nationality. The CJEU ruled that the rules of the Italian Football Federation limiting participation in football matches to players with Italian citizenship were incompatible with the provisions of the Treaty as they were of an economic nature and were not of sporting interest only.[55]

Direct discrimination may also stem from the installment of quota based on nationality. Particularly, in the *Bosman* and *Lehtonen* cases the CJEU held that the fact that such rules or quota do not concern the employment as such of players is of no relevance in order to determine the discriminatory nature of the rules. Because participation in official matches constitutes the essential activity of professional players, any rule limiting such participation also restricts the employment opportunities of the players concerned.[56]

2.4.2 The prohibition of indirect discrimination

The provisions on the free movement of persons and services also prohibit indirect discrimination. Indirect discrimination arises where although not making use of an unlawful distinguishing criterion, a provision has effects coinciding with or approaching those of such a distinguishing criterion as a result of its use of other distinguishing criteria which are not as such prohibited (Garonne, 1994).[57] Accordingly, the CJEU has held that "[t]he rules regarding equality of treatment, […] forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result".[58]

Moreover, the Court has concluded that even if certain criteria are applicable irrespective of nationality, they must be regarded as indirectly discriminatory if there is a risk of EU migrant workers being placed at a particular disadvantage.[59] Indirectly discriminatory measures must be necessary

[55] CJEU, *Donà*, Case 13/76 *Donà* [1976] E.C.R. 1333, para. 19.
[56] CJEU, *Bosman*, and CJEU Case C-176/96, *Lehtonen* [2000] E.C.R. I-2549.
[57] The concept as such is not explicitly covered by the various non-discrimination provisions in EU law, which only prohibits discrimination in general terms.
[58] CJEU, Case 152/73 *Sotgiu* [1974] E.C.R. 153, para. 11.
[59] CJEU, Case C-237/94 *O'Flynn* [1996] E.C.R. I-02617.

and proportionate to the achievement of their legitimate objective in order to be compatible with EU law.[60]

The UEFA Home-Grown Players Rule

In 2004, UEFA claimed that studies had shown that the number of players trained in an association and playing in that association's top league had reduced by thirty percent since the *Bosman* ruling in 1995 (Chaplin, 2005). As this trend, according to UEFA, is amongst others accompanied by "a lack of incentive in training players, identity in local/regional teams and competitive balance", UEFA decided to take action. In 2005, it adopted regulations with the effect of requiring each club by the 2006-2007 season to have four club-trained players and four players trained by other clubs belonging to the same national association in its twenty-five man squad registered to play in European competitions organised by UEFA (UEFA, 2005). These regulations are known as the "home-grown players rule". In the 2007–2008 season, the quota increased to six locally trained players with at least three players qualifying as "club-trained" (UEFA, 2006). The quota increased again for the 2009–2010 season to eight "locally-trained" players with at least four "club-trained" players (UEFA, 2009).

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

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

[60] CJEU, Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] E.C.R. 1-4165, para. 37. The Court identified the conditions required to justify an indirectly discriminatory measure in what has become known as the "Gebhard formula" as *"(i) applied in a non-discriminatory manner; (ii) justified by imperative requirements in the general interest; (iii) suitable for securing the attainment of the objective which they pursue; and (iv) not go beyond what is necessary to attain it"*).

2.4.3 Discrimination against third country nationals

The CJEU decisions in *Bosman* and *Lehtonen* on nationality quota did not address whether non-discrimination principles also applied to nationals from countries that had entered into Association or Cooperation Agreements with the EU.[61] Many of those Agreements contain non-discrimination clauses regarding employment conditions for third-party nationals legally employed in EU Member States. The principle of non-discrimination applied in Association Agreements is restricted to workers legally employed in the territory of Member States, and subject to a condition of reciprocity. The Commission expressed the view that non-EU nationals covered under such agreement enjoyed the same anti-discrimination protections as EU citizens. If the sport involves gainful employment it will be subject to EU law or to the provisions of non-discrimination of the Association Agreements. However, most national sport governing bodies did not adjust their rules accordingly as the increased signing of relatively inexpensive players from non-EU countries would further undermine the development of young, domestic talent (Penn, 2006).

In the 2003 *Kolpak* case and in the 2005 *Simutenkov* case, the CJEU nonetheless extended the principle of equal treatment to sportsmen from third countries having an Association Agreement with the European Union, because of the existence of non-discrimination clauses in these agreements. According to these clauses, the treatment accorded by each Member State to workers from partner countries legally employed in its territory would be free from any discrimination based on nationality as regards working conditions, remuneration and dismissal, relative to its own nationals.

The principle of non-discrimination is also reaffirmed in similar terms in the Cotonou Agreement[62] between the European Union and 78 African, Caribbean and Pacific countries. However, to this date no case regarding that Agreement has reached the CJEU.

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

[62] Article 13, par.3 of the ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000.

3. Competition law

Article 101 TFEU prohibits anti-competitive agreements between undertakings. The purpose is to prevent an informal group of undertakings or a more formal association of undertakings from agreeing together to act in an anti-competitive manner, for example, by forming (price) cartels or by market-sharing. Article 102 TFEU prohibits abusive conduct by undertakings that have a dominant position on a market, for example forcing consumers to buy a bundle of products that could be sold separately or forcing competitors off the market by entering into exclusive arrangements. The CJEU defines dominance as "[a] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[63] If a company has a market share of less than 40%, it is unlikely to be dominant. There will generally be a rebuttable presumption of dominance where a company has a market share of 50% or more.[64] Sports associations usually have practical monopolies in a given sport and may thus normally be considered dominant in the market of the organisation of sport events under Article 102 TFEU.

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

In its 2006 *Meca-Medina and Majcen* ruling, the CJEU applied for the first time articles 101 and 102 TFEU to a sporting rule adopted by a sports association relating to a sporting activity.[65] The ruling provides valuable guidance as regards the methodological approach towards assessing a sporting rule adopted by a sports association under articles 101 and 102 TFEU.[66] First, it must be determined sports association that adopted the rule to be considered an "undertaking" or an "association of undertakings". Then, it must be determined whether the rule in question restricts competition within the meaning of article 101(1) TFEU or constitutes an abuse of a dominant position under article 102 TFEU. In order for articles 101 and 102 TFEU to apply, it is also necessary that trade between Member States is affected. Finally, it must be determined if the rule fulfils the conditions for an exception under Article 101(3) TFEU.

[63] CJEU, Case 27/76 *United Brands Company v Commission* [1978] E.C.R. 207, para. 65.
[64] CJEU, Case C-62/86 *Akzo Chemie BV v. Commission* [1991] E.C.R. I-3359, para. 60.
[65] CJEU *Case T-313/02 David Meca-Medina and Igor Majcen v. Commission [2004] E.C.R. 2004 II-3291.*
[66] The Commission has indicated that is subscribes to the four-step "test" followed by the Court in order to assess whether a sporting rule infringes EU competition law (European Commission, 2007b).

3.2 "undertaking" or "association of undertakings"

Article 101 TFEU speaks of "undertakings" and "associations of undertakings", while article 102 TFEU only mentions "undertakings". The CJEU has given a broad definition of an "undertaking". It defined the term as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[67] Since in the absence of "economic activity" articles 101 and 102 TFEU do not apply, it is relevant to assess to what extent the sport in which the clubs or athletes are active can be considered an economic activity and to extent the members exercise economic activity. The CJEU has defined "economic activity" as any activity consisting of "offering goods or services on the market".[68] As EU case law has shown, economic activity may take place at various levels in the sport sector. This ranges from sports associations to clubs and individual athletes.

International sports associations such as FIFA or UEFA are undertakings to the extent that they themselves carry out activities of economic nature. This can be, for example, the selling of broadcast rights. In its 1990 *FIFA World Cup* ruling, the Commission held that although FIFA is a federation of sports associations and accordingly carries out sports activities, "FIFA also carries out activities of an economic nature, notably as regards: the conclusion of advertising contracts, the commercial exploitation of the World Cup emblems, and the conclusion of contracts relating to television broadcasting rights".[69] Therefore, the Commission concluded that FIFA constitutes an undertaking within the meaning of article 101 of the TFEU.[70] Sports associations also constitute undertakings under Article 102 TFEU to the extent they group members which in turn constitute undertakings.[71]

International sports associations not carrying out economic activities themselves may be considered associations of undertakings. A sports association is an "association of undertakings" capable of acting anti-competitively if its members, i.e. clubs or athletes, are engaged in an economic activity.[72] Also, international sports associations can sometimes be referred to as "associations of associations of undertakings". In its ruling in the UEFA Champions League case, the Commission held that, as its membership consists of economic entities (clubs), national football associations are associations of undertakings but are also themselves engaged in economic activities. As the members of UEFA are

[67] *CJEU, Case 41/90 Klaus Höfner and Fritz Elser v Macroton GmbH [1991] E.C.R. I-1979, para. 21.*
[68] *CJEU, Case 118/85 Commission v Italy [1987] E.C.R. 2599, para. 7.*
[69] European Commission, Cases 33384 and 33378, *Distribution of package tours during the 1990 World Cup [FIFA World Cup]*, OJ 1992 L 326/31, para. 47.
[70] *Ibid*., para. 48.
[71] *CJEU,* Case T-193/02, *Piau v. Commission*, E.C.R. 2005 II-209, paras. 112 and 116.
[72] *See CJEU,* Case T-193/02, *Piau v. Commission*, E.C.R. 2005 II-209, para. 72.

the national football associations, it is therefore "both an association of associations of undertakings as well as an association of undertakings".[73]

A national sports association can be both an undertaking under Articles 101 and 102 TFEU and an association of undertakings under Article 101 TFEU. National sports associations are undertakings where they themselves carry out economic activity. In the *FIFA World Cup* case, the Commission held that the Italian football league had a share in the profits of the FIFA World Cup and was able to exploit commercially in Italy the 1990 World Cup emblem, which is had itself created.[74] National sports associations are also associations of undertakings under Article 101 TFEU to the extent they constitute groupings of undertakings, i.e. sport clubs or athletes for which the practice of sport constitutes an economic activity.[75]

Sport clubs or teams are undertakings within the meaning of Article 101 and 102 TFEU to the extent that they carry out economic activities. This has been confirmed by the CJEU in the *Piau*[76] and by the Commission in the *ENIC/UEFA*[77] cases.

Individual athletes may also be undertakings within the meaning of article 101 TFEU regardless of his or her status of amateur or professional.[78] In his opinion in the *Bosman* case, Advocate General Lenz considered that football players employed by a football club –and who therefore are not independent- do not constitute undertakings.[79] However, in this case they may be considered undertakings when they carry out economic activities independent of their club, for instance when they enter into sponsoring agreements. Besides, the *Deliège* case has demonstrated that an athlete can be a provider of service and thus an entity engaged in an economic activity.[80]

3.3 The "Wouters" test

If a sport association can be regarded as an "undertakings" or "associations of undertakings", it must then be assessed whether the rule adopted by it restricts competition within the meaning of article 101(1) TFEU or constitutes an abuse of a dominant position under article 102 TFEU. In that regard, the most significant element of the CJEU's assessment of the latter in *Meca-Medina* concerns the

[73] European Commission, Case 37398, *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25, para. 106.
[74] See *FIFA World Cup Case*.
[75] In the *Piau* case, the GC held that is *"common ground*" that national associations are groupings of football clubs for which the practice of football is an economic activity. See *CJEU,* Case T-193/02, *Piau v. Commission*, E.C.R. 2005 II-209, para. 69.
[76] *European Commission, Piau,.*
[77] *European Commission, Case 37806, ENIC/UEFA, para. 25.*
[78] *Ibid., para. 46.*
[79] See Opinion of Advocate-General Lenz in *Bosman*.
[80] *Ibid*, paras. 56 and 57.

role of the judgement in the *Wouters* case, which as such had nothing to do with sport.[81] The Court's reference to *Wouters* is of profound importance to the future treatment of sport under EU competition law. It entails that, in order to establish whether a rule adopted by a sport body violates EU Competition Law, account must be taken of the "overall context" in which the rule was adopted or produces its effects and its objectives; whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and whether the rule is proportionate in light of the objective pursued.

The *Meca-Medina* ruling eliminates the notion, originating in the *Walrave* case, of a "purely sporting rule" which has an economic effect yet automatically falls out of the scope of EU law. The only rules which can pass as "purely sporting" are a very small category of rules which have no economic effect, the so-called sporting rules *sensu stricto*, which will most definitely continue to fall outside the scope of EU law.[82] The majority of regulations adopted by a sport body however exert an economic impact. This does not mean that they are incompatible with EU law. Consequential restrictive effects of a regulation of a sporting association which cause economic hardship are not treated as prohibited restrictions for the purposes of application of article 101 TFEU (or the provisions on freedom of movement for workers and freedom to provide services) provided that they are inherent in the pursuit of those objectives.

It is important to stress that article 2 of Council Regulation No 1/2003 on the implementation of the rules on competition provides that the burden of proving an infringement of art. 101(1) TFEU shall rest on the party or the authority alleging the infringement.[83] Those who want to challenge a regulation by a sport body find that the *Wouters* formula is reversed: they will have to show that the consequential effects restrictive of competition go beyond what is inherent in the pursuit of the practice's objectives, for only then there is a violation of article 101(1) TFEU. Given the burden of proof, it is for the applicant, challenging a sport regulation, to demonstrate coherent alternative governance structures (Weatherill, 2006).

The CJEU made it clear in its *Meca-Medina* ruling that, in the line of its *Wouters* ruling, even if a rule issued by a sport association restricts the freedom of action of the athletes, it may not breach Articles 101 and 102 TFEU to the extent that the rule in question pursues a legitimate objective and

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

[82] In its staff working document annexed to the 2007 White Paper on sport, the European Commission lists a few types of "pure sporting rules" that – based on their legitimate objectives – are likely not to breach EU law: rules fixing the length of matches or the number of players on the field; rules concerning the selection criteria for sports competitions; rules on "at home" and "away from home" matches; rules preventing multiple ownership in club competitions; rules concerning the composition of national teams; rules against doping; and rules concerning transfer periods (European Commission, 2007b, p. 39).

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

its restrictive effects are inherent in the pursuit of that objective and are proportionate to it. Following the *Meca-Medina* ruling, legitimate objectives of sporting rules will normally relate to "the organisation and proper conduct of competitive sport".[84] In assessing the existence of a legitimate objective, account must be taken of the specific characteristics, i.e. the distinctive features setting sport apart from other economic activities, of sport and of their social and educational function.[85] The restrictions caused by a sporting rule must be inherent in the pursuit of its objective.[86]

3.4 Justification under article 101 (3) TFEU

Where a restriction under Article 101(1) TFEU is found, such restriction may be justified under Article 101(3). Article 101(3) TFEU provides that the prohibition contained in Article 101(1) TFEU may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned. Such a justification is most likely to apply where a rule is not inherent in the organisation or proper conduct of sport so as to justify the application of *Wouters* but where the beneficial effects of a rule outweigh its restrictive effects.

3.5 Sporting rules that may infringe Articles 101 and 102 TFEU

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

3.5.1 Rules shielding sports associations from competition

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

[84] *CJEU, Meca Medina, paras. 45 and 46.* They may include, for instance, the ensuring of fair sport competitions with equal chances for all athletes, the ensuring of uncertainty of results, the protection of the athletes' health, the protection of the safety of spectators, the encouragement of training of young athletes, the ensuring of financial stability of sport clubs or the ensuring of a uniform and consistent exercise of a given sport.
[85] See e.g. CJEU *Bernard*, para. 40.
[86] *CJEU, Meca Medina,* para. 45. In *Meca-Medina*, the CJEU concluded that the effects of penalties on athletes' freedom of action must be considered to be "inherent" in the general objective of the anti-doping rules to combat doping in order for competitive sport to be conducted on a fair basis.

promoted products and, thus, discriminate against and deter products under its authority that were promoted by independent agencies.

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

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

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

- limit its role to that of a sport regulator without influence over the commercial exploitation of the sport and thus removing any conflict of interest (through the appointment by FIA of a "commercial rights holder" for 100 years in exchange for a one-off fee);
- guarantee access to motor sport to any racing organisation and to no longer prevent teams to participate in and circuit owners to organize other races provided the requisite safety standards are met;
- waive its TV rights or transfer them to the promoters concerned; and remove the anticompetitive clauses from the agreements between FOA and broadcasters.

The *MOTOE* case[87] involved the combination of regulatory powers and an organisation of competitions with economic activity in the regulated market, similar to the F1/FIA investigation into alleged abuses by the FIA in making commercial gains (European Commission, 2001b). The key difference between these cases is the role which the state plays in legitimising and establishing the special powers of the dominant undertaking. In the *MOTOE* case, the respondent ELPA was granted a regulatory power of consent by the state rather than economic power. However, ELPA could

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

effectively prevent rival competitions with that state power and it was alleged to have been abused when ELPA offered no reasons for refusing to consent to a competition organised by MOTOE, a rival to its own competitions (Miettinen, 2008, p. 13). The CJEU ruled that the mere risk of abuse is sufficient for an infringement of article 106(1) TFEU considered in conjunction with article 102 TFEU.[88] It is important to stress the fact that the MOTOE judgment provides some reasons why sports services will not often constitute services of general interest that are shielded from the full force of the Treaty's internal market rules.

So, the MOTOE judgment raises the question of whether the risk of abuse itself requires regulation and supervision of an undertaking that is placed, by virtue of special powers, in a dominant position (Miettinen, 2008, p. 16). Where a body is active in other ancillary markets, its regulatory function is itself the reason why it is led to abuse its dominant position by imposing unfair conditions on its competitors.[89] The *MOTOE* case however suggests that, if tempered with *"restrictions, obligations, and review"*, the grant of that power might not in itself be contrary to Articles 102 and 106(2) TFEU. As a consequence of MOTOE, it could be argued that since all undertakings that are endowed with regulatory powers are placed in a dominant position, regardless of whether they abuse that position, they must be subject to *"restrictions, obligations and review"* (Miettinen, 2008, p. 17).

3.5.2 Rules concerning the legal challenge of decisions taken by sports associations

In the *FIA* case, one of the Commission's concerns was to ensure that legal challenge against FIA decisions would be available not only within the FIA structure but also before national courts. The 2001 settlement provided for the inclusion of a new clause in the FIA rules clarifying that anyone subject to FIA decisions can challenge those before the national courts.[90] Similarly, in the negotiations with FIFA on transfer rules following the abolishment of the old system after the *Bosman* ruling, the Commission insisted that arbitration would be voluntary and would not prevent recourse to national courts. FIFA agreed to modify its rules to that end (European Commission, 2002a).

3.5.3 Rules concerning nationality clauses for sport clubs/teams

The *Bosman* case[91] concerned UEFA's "3+2" rule, which permitted each national football association to limit the number of foreign players whom a club may field in any first division match in their national championships to three, plus two players who have played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior. The

[88] CJEU, *MOTOE*, para. 50.
[89] CJEU, *MOTOE*, paras 49-50.
[90] *Ibid.*
[91] CJEU, *Bosman*.

limitation of foreign players in a football club were ruled illegal by the CJEU in so far as they discriminated against players from countries within the EU.[92]

Although the CJEU ruled only on the basis of the free movement for workers, the Commission and Advocate General Lenz[93] considered that rules limiting the employment of foreign players also infringed Article 101(1) TFEU because they restricted the possibilities for the individual clubs to compete with each other by engaging players.

3.5.4 Rules governing the transfer of athletes in club competitions

In the *Bosman* case, the CJEU ruled that transfer rules for expired contracts constitute an obstacle to the freedom of movement for workers since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations.[94] The Court reasoned that the transfer fee system did not effectively maintain the legitimate objective of financial and competitive balance because the rules neither prevented the richest clubs from monopolising the best players nor reduced the decisive impact of finances on the strength of competition. Moreover, the Court indicated that the goals set out by UEFA could be achieved by other, less-restrictive means which do not impede workers' freedom of movement.[95]

The CJEU did not assess the transfer rules under Articles 101 and 102 TFEU. Advocate General Lenz however concluded in his Opinion that the transfer rules also violated Article 101 TFEU because they replaced the "*normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved... [E]ven after the contract has expired the player remains assigned to his former club for the time being*".[96] Under normal competitive conditions, a player would have been able to transfer freely upon expiry of the contract and choose the club which offers him the best terms. The transfer rules therefore restrict the possibilities of the clubs to compete with each other by engaging players. Therefore, there is no doubt that such transfer rules for expired contracts would also not survive the *Wouters* test as formulated in *Meca-Medina*.

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[92] *Ibid., para. 137.*

[93] CJEU*, Bosman, Opinion of AG Lenz,* para. 262*.*

[94] *Ibid*., para. 100. In para. 103, the Court held that *"[i]t is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players 'access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers"*.

[95] *Ibid*., para. 110.

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

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

Hence, in accordance with the *Meca-Medina* ruling, it must be determined whether those restrictions are inherent in the pursuit of the objectives; and whether the rule is proportionate in the light of the objective pursued. The response to that question, which ultimately must be answered by the CJEU, is analogous to the response above as regards objective justification of the transfer system in the field of the free movement for workers. Referring to the *Bosman* ruling,[97] Egger and Stix-Hackl (2002, p. 89) find that the demanding of a freely defined fee for a player is not proportionate. Objective criteria are thus needed to calculate the fee, based primarily on the costs of training of the player and on the contribution of the player concerned to the economic success of the club.[98]

3.5.5 Rules concerning the organisation of ancillary activities (agent licensing)

The *Piau* judgment[99] concerned FIFA rules governing the profession of football agents through whom professional football players may conclude contracts with clubs. Under those rules, a contract was valid only if the agent involved had a licence for his/her practice issued by the national football association. Licensed agents had to pass an interview, have an impeccable reputation, and deposit a bank guarantee. In 2000, following the administrative procedure initiated by the Commission after a complaint was lodged which alleged that the regulations constituted a restriction on competition under Articles 101 and 102 TFEU, FIFA adopted new Players' Agents Regulations, which were

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

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

[99] CJEU, Case T-193/02, *Piau v. Commission*, E.C.R. 2005 II-209.

enforced in March 2001 and were amended again in April 2002. FIFA had removed the most restrictive limitations. For instance, the deposit was substituted by a liability insurance and the interview was replaced with a multiple-choice test. Following these amendments the Commission, by a decision of 15/04/2002, rejected the complaint. The General Court (GC) and later the Court of Justice[100] upheld this decision.

4. The enforcement of EU law on sports bodies

4.1 The Court of Justice of the European Union

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

Any national court to which a dispute in which the application of a rule of EU law raises questions has been submitted can decide to refer to the CJEU to resolve these questions. National courts or tribunals adjudicating at last instance, as a rule pursuant to article 267 TFEU, must refer but this is subject to the doctrine of *acte clair*.[101] Other courts can however exercise their discretion. From that time onwards the national court must stay proceedings until the CJEU has handed down its decision. The CJEU gives a decision only on the constituent elements of the reference for a preliminary ruling made to it, and the national court remains competent for the original case. Thus, the CJEU can only rule on the sporting rules that it gets and then only insofar as the question of their conformity with EU law is part of the constituent elements of the reference for a preliminary ruling made to it.

The referral to a preliminary ruling to the CJEU is by far the most effective tool to get satisfaction from an infringement of the EU law. The CJEU has the obligation to answer the question put to it. It cannot refuse to answer on the grounds that this response would be neither relevant nor timely as

[100] Order of the CJEU of 23 January 2006, Case C-171/05P, E.C.R. 2006 I-37.
[101] CJEU, Case 283/81, *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982], E.C.R. 3415.

regards the original case. It can, however, refuse if the question does not fall within its sphere of competence. The CJEU has however rarely refused to give a preliminary ruling.

4.2 The European Commission

4.2.1 Guardian of the Treaties

Each EU Member State is responsible for the implementation of Union law (the adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. The peculiarity of the EU legal order is emphasised by the Commission's powers to initiate proceedings against a defaulting Member State in its role as the "guardian of the Treaties" . Article 17(1) TEU specifies that the Commission *"shall oversee the application of Union law under the control of the CJEU"*. Thus, the Commission, and not the other Member States,[102] has the principle responsibility for ensuring that the Member States comply with EU law. Under article 258 TFEU, only the Commission may bring an action against a Member State. Nevertheless, a person considering that a MS is infringing EU Law may lay a general complaint before the European Commission. It is however under no obligation to act on the complaint.

The fundamental element authorising the Commission to initiate an infringement procedure against a Member State is the existence of behaviour (action or omittance) resulting in the breaching of EU law that can be attributed to the State.[103] Therefore, no general complaint can be lodged against an international sports body because those are mostly private bodies, often governed under Swiss law. However, complaints could be lodged against a Member State that has implemented sporting rules in its legislation and a sports body when it is governed by public law and acts as a Public Authority. Consequently, it is essential to determine whether, and to what extent, Member States participate directly or indirectly in the organisation of professional sports activities.

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

[102] Under Article 259 TFEU Member States are also empowered to bring an action against each other for an alleged breach of EU law but only after the matter has been laid before the Commission. Such actions are however rare, because the political implications of them may damage friendly relations between the Member States involved. Consequently, Member States prefer that the Commission acts against the defaulting State under Article 258 TFEU.

[103] Article 258 TFEU refers explicitly to Member States, by which is meant central, regional or local authorities and any agency of the State or independent bodies or institutions which are to be regarded as public bodies. Furthermore, acts of legal persons governed by private law which are controlled by the public authority may result in an infringement of EU law on the part of the MS concerned.

State is in breach of its obligation, it may institute proceedings before the CJEU.

4.2.2 Public enforcer of EU competition law

The Treaty grants the European Commission far-reaching powers as public enforcer of EU competition law. It has the competence to investigate whether practices of undertakings comply with its provisions on competition policy. The Commission may become aware of the infringement of EU competition law through any source (e.g., the press, TV, complaints from competitors and the general public). It may act ex officio, or upon an application from a Member State or from "any natural or legal person who can show a legitimate interest".[104] In order to show such an interest, complainants must demonstrate that their interest is, or is likely to be, adversely affected by the anti-competitive conduct of an undertaking.[105] If the latter is the case, a natural or legal person and a Member State may thus lodge a complaint with the European Commission against a football body, which can be considered an undertaking or an association of undertakings, regarding infringement of EU Competition Law.

The CFI has distinguished the procedural stages concerning individual complaints before the Commission.[106] After gathering information, the Commission may either decide not to pursue the complaint, specifying the reasons for its decision and inviting complainants to submit their observations within a fixed time limit. Otherwise, it has a duty either to initiate a procedure against the subject of the complaint or to adopt a definitive decision rejecting the complaint.[107] The Commission is required to make a decision[108] as to whether to proceed with the complaint within a reasonable time.[109] If the Commission adopts a final decision on rejection or acceptance of a complaint, the complainant has the right to seek judicial review of that decision before the CJEU under Article 263 TFEU.[110]

It should be noticed that, although the Commission is under a duty to reply to a complainant,[111] under the settled case law of the CJEU, the Commission is not required to conduct an investigation in each case.[112] The Commission may reject a complaint when it considers that the case does not

[104] Article 7 of Regulation 1/2003
[105] GC, Case T-144/92, *BEMIM v Commission* [1995] E.C.R. II-147.
[106] More specifically, it has distinguished three stages, see GC, Case T-24/90 *Automec (II)* [1992] E.C.R. II-2223.
[107] CJEU, Case C-282/95P *Guérin* [1997] E.C.R. I-1503.
[108] *Ibid*.
[109] GC, Case T-127/98 *UPS Europe SA v Commission* [1999] E.C.R. II-2633.
[110] CJEU, Case 26/76 *Metro v Commission* [1977] E.C.R. 1875.
[111] CJEU, Case 210/81 *Demo-Studio Schmidt* [1983] E.C.R. 3045.
[112] Settled case law since CJEU, Case T-24/90, *Automec v Commission of the European Communities*, [1992] E.C.R. II-2223, para. 85.

display a sufficient "EU interest" to justify further investigation.[113] The assessment of the Union interest raised by a complaint depends on the circumstances of each individual case. Such a decision can be taken either before commencing an investigation or after taking investigative measures.[114] However, the Commission is not *obliged* to set aside a complaint for lack of Union interest.[115]

The Commission's powers in the field of competition law make it a more cost-effective venue for redress than the private enforcement route via national courts and the CJEU. This was for instance mirrored in the swelling sports-related caseload following the *Bosman* ruling, when a series of high profile investigations into the organisational aspect of sport were launched by the DG competition, usually after a complaint, including an examination of the transfer system in football (Parrish, 2003b, p. 252). The European Commission, should it decide to initiate a procedure against the subject of the complaint, can force a sports body to change its rules in conformity of the relevant EU Legislation and sanction it for its violation.[116] In order to enforce EU competition law the Commission is even empowered to impose pecuniary sanctions on undertakings for infringements that have already ceased, subject to the limitation period, as well as for on-going infringements.[117] In fact, fines imposed by the European Commission appear to be the main method of enforcement of EU competition law (Wils, 2002, p. 13). In the field of sport, however, the Commission has always shown a willingness to find compromises with sport bodies and remarkably, no fines have ever been imposed on a sports body.

4.2.3 The negotiated settlement approach in sports

Even though the CJEU ruled as early as 1974 in the *Walrave* case that, when sport constitutes an economic activity it is subject to European law, for a long time, the EU was not at all occupied with sport. The *Walrave* approach was not fully enforced as sport remained an activity of marginal

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

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

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

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

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

economic significance during the 1970s and 1980s (Parrish and McArdle, 2004, p. 411). Moreover, the Council and especially the European Commission treated sport matters as a politically highly sensitive issue. Consequently, the Commission's approach towards sports bodies was rather soft, as it tried to persuade them to comply with European law where appropriate rather than enforcing it (Barani, 2005, p. 46; European Commission, 1991).[118] This negotiated settlement approach resulted in sport and European law operating in separate realms (Parrish, 2003b, p. 252) as there was no hard enforcement of EU law on the sports sector (Parrish, 2003b, p. 252).[119] The EU institutions were however not unanimous on the exceptional treatment of football. The European Parliament requested the Commission to ensure that economic sporting activities complied with EU law, consistently calling for restrictions on player mobility in European sport to be lifted (European Parliament, 1984; 1989a; 1989b; 1994, Parrish, 2003a, p. 65). Due to the Parliament's lack of competence, these requests were nonetheless downplayed or ignored.[120]

However, the sports world clearly failed to understand that the Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions as it is for the CJEU alone to give binding interpretations of those provisions. Consequently, the CJEU's *Bosman* ruling shocked international sports organisations, who did not at all expect EU law to have such severe consequences for their rules, despite the fact that the ruling is a straightforward application of existing, well-established legal provisions (see, e.g., Blanpain and Inston, 1996; Parrish and McArdle, 2004): sport as a business activity has to abide by the rules of European law.[121] Strengthened in their conviction by the Commission's negotiated settlement approach, they were convinced that they could continue their long-standing self-governance without any interference of state authorities. They failed to acknowledge that sport was starting to become a significant economic activity in the 1990s (García, 2007b, p. 209). Moreover, the EU had just completed the

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

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

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

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

single market and the ideology of the four freedoms was particularly strong (Parrish and McArdle, 2004, p. 441).[122]

After an initial period of real confrontation with the EU characterised by emotional and sometimes irrational, unfounded criticism on the EU and its "over-zealous regulators", the sports world soon realised that EU law could have far-reaching consequences for their activities and embarked on a campaign directed towards the EU in an attempt to reverse the situation (García, 2007b, p. 209; Niemann and Brand, 2008, p. 98; Parrish and McArdle, 2004, p. 410). The main goal of the sports lobbying movement was to reduce the regulatory activity of the Commission as much as possible. It is quite safe to assume that political pressure by Member States, following skilful lobbying with national governments by FIFA and UEFA, contributed heavily in favour of FIFA and UEFA as regards the final settlement on the new FIFA transfer system in 2001 (Niemann and Brand, 2008, p. 98; García, 2011, p. 26).

Thus, although the European Commission acts autonomously in its competition competencies, it does not operate within a political vacuum. Clearly, the Commission's powers as public enforcers of EU competition law are undermined by the political powers of big international sports organisations, who lobby the European Parliament, in the case of FIFA and UEFA through the creation of the Parliamentary Group "Friends of European Football" (Holt 2007), and the Member States via national politicians and the European Sports Forum (Willis 2010). Moreover, since sport is very attractive to politicians (García, 2007b, p. 208), as patriotic sentiments might come into play, governments often grant football special treatment and even exemptions. Thus, a hard use of the Commission's competition competence in the sports sector is neither (politically) feasible nor desirable. Therefore, in the field of sport, the Commission has always shown a willingness to find compromises with sports bodies.[123]

[122] Furthermore, the *Bosman* ruling can to a large extent be considered as FIFA and UEFA's own making. The pyramid governing model of football is a major source of conflict, since those at the very bottom may want to challenge the federation's regulations and decisions if they are excluded from the decision making process or if the latter are unwilling to meet them halfway (García, 2007b, p. 205; Parrish and McArdle, 2004, p. 411; Tomlinson, 1983, p. 173).

[123] In football, for instance, this approach was evident in the high-profile cases concerning UEFA's rules on football broadcasting hours; FIFA's transfer system and the central marketing of Champions League's television rights.

CHAPTER 3

PROFESSIONAL FOOTBALL AND EU POLITICS

1. The autonomy of sports bodies and the pyramid model

Because of the important role of the British in the diffusion of football around the world, and in particular in the new associations founded abroad, their ideas and ideology on associativity were most likely transposed to the network of football governing bodies that disseminated at the end of the 19th century. Szymanski (2006a) describes how modern sport in England developed out of new forms of associativity created during the European enlightenment. That period saw a political sphere dominated by the political ideas of John Locke, often credited at the father of (classic) liberalism. His theory of the social contract advanced the idea that the state itself was a kind of voluntary association that individuals chose to enter out of a state of nature:

> *"Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community".* (Locke, 1689)

In the ideology of Locke, freedom is not licensed but rather it is assumed. Moreover, in his essay "A letter concerning toleration", Locke takes it for granted that voluntary associations have the right to establish themselves and create their own rules and regulations. As a consequence, in Britain, "the state showed little appetite for regulation or intervention" (Clark, 2002, p. 97) while in the rest of Europe, intellectually, the marriage of the state with the developments of sport clubs can be traced back to Rousseau, whose concept of the social contract left little place for independent voluntary associations.[124] So, as Szymanski (2006a) describes, following the retreat of the state from the control of associative activities, sport associations developed autonomously in Britain during the 18th century. As explained above, the development of modern football relied heavily on the creation of networks of clubs. Those were "organised though voluntary association and without interference or oversight of the state" (Szymanski, 2006a, p. 22). So, it is not entirely inconceivable that football's governing bodies' view of state intervention in their sector is at least for a small part determined by

[124] In his work "The social contract", in Book II, Chapter 3, Rousseau basically writes that private associations within the state are harmful, because they provoke faction which works against the general will. These ideas were influential in the development of sports organisations because of his concern with the physical and moral development of the Young, as set out in popular discourse "Emile, ou l"éducation" (Szymanski, 2006, p. 26).

their path-dependency. Such bodies, not in the least their supreme governing body FIFA, were established by a class of people who believed in the separation of sport as a sacred principle. In their minds, politicians could only violate sports integrity (Tomlinson, 2000).

Thus, the world of football has traditionally been regulated in all its aspects through a self-governing network with its own rules and regulations. In fact, the organisations in this network are claiming their own space in society where they can exercise a parallel private sovereignty: the idea of a "state-in-a-state", a kind of private governments who exercise activities which are usually part of the functioning of a political system (Bruyninckx and Scheerder, 2009). The football network is comprised of a set of autonomous, interrelated organisations with at the apex FIFA, the worldwide football federation. Under FIFA are five continental organizations,[125] which in their turn all have national associations beneath them. All the organisations in the network are in their own geographical/functional sphere of competence responsible for the regulation of football but they have to "report" to the organisations that stand above them in the network (Croci, 2001, pp. 2-3; Croci and Forster 2006, pp. 5-6).[126]

Similar networks, which stem from the way football is traditionally governed in England, are to be found in most European sports (European Commission, 1998), but also globally, for instance with the Olympic Movement. They are called pyramid networks because their hierarchic organisational structure visually resembles the shape of a pyramid. This structure is undemocratic since those at the very bottom of the pyramid, i.e. clubs and players who want to take part in the competitions of the network, are subject to the rules and regulations of the governing bodies, often without being able to influence them to their benefit.[127] Consequently, FIFA and, on the European continent, UEFA determine the rules which every club and player must obey.

For almost a century, the football governance network was able to exercise its self-governance without any significant interference of states or other actors. But even when football, Europe's uncontested number one sport, started to commercialise, football federations, like they traditionally

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

[126] For instance, UEFA has to comply with FIFA's rules and regulations (FIFA Statutes: art. 20(3) a) and national football associations in Europe are required to comply with and to enforce UEFA statutes and regulations in their jurisdiction (UEFA Statutes: Art. 7 (5)), but they are also obliged to ensure that clubs and leagues comply with the statutes, decisions and regulations of FIFA (FIFA Statutes: Article 13.1 (d)).

[127] For instance, a player is a member of his club, this club is a member of a national association, this national association is a member of a regional association (e.g. UEFA) and the global association FIFA. These governing bodies shall issue the footballer with the corresponding license to play only provided he/she fulfils the criteria established in the competition regulations.

did, felt beyond the reach of nation states and their laws (Croci, 2001, p. 6). That was for instance illustrated in a straightforward manner by the refusal of UEFA to execute an order of a Belgian court to pay damages following the Heysel stadium disaster in 1985 (see Dupont, 1996, p. 66). At the same time, governments were reluctant to intervene in the football sector as, even now, they tend to regard it more as a cultural industry rather than a business. In fact, since football is very attractive to politicians (García, 2007b, p. 208) as patriotic sentiments might come into play, governments often grant the sports industry special treatment and even exemptions. Nevertheless, up until the mid-90s, even if they would have wanted to intervene in the governance of football, a national judge or a national political authority would not have been able to challenge FIFA or UEFA given the means of reprisal available to these powerful organisations (Demaret, 1996, p. 15).

2. The EU and football pre-Bosman

While European countries were neither willing nor able to intervene in the governance of football, for a long time the EU was not at all occupied with sport in general.[128] First of all, until only very recently, there was no legal basis in the Treaty for direct action in sport at the EU level. The CJEU has however ruled as early as 1974 in the *Walrave* case that, when sport constitutes an economic activity, it is subject to EU law. That approach was however not fully enforced as football remained an activity of marginal economic significance during the 1970s and 1980s (Parrish and McArdle, 2004, p. 411). Moreover, the Council and especially the European Commission treated sport matters as a politically highly sensitive issue. Consequently, the Commission's approach towards football bodies was rather soft, as it tried to persuade them to comply with European law where appropriate rather than enforcing it (Barani, 2005, p. 46; European Commission, 1991).[129] This negotiated settlement approach resulted in football and EU law operating in separate realms (Parrish, 2003b, p. 252). For instance, in 1991, UEFA adopted the so-called 3+2 rule after negotiations with the European Commission, hereby lifting nationality restrictions which, in the light of the CJEU's ruling in the *Donà* case, were contrary to European free movement law (Parrish, 2003a, p. 92). Since UEFA had a 'gentlemen's agreement' with the Commission on this issue, it was under the conviction that the rules were stable and durable (García, 2007b, p. 207). Here, UEFA clearly failed to understand that

[128] It did however have the potential to play a significant role in this regard. For instance, when the Belgian interior minister threatened to bring the refusal of UEFA to pay damages following the Heysel disaster to TREVI, a forum of national officials of European ministries of justice and the interior, UEFA caved and executed the order from the Belgian court (see Dupont, 1996, p. 66).

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

the Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions as it is for the CJEU alone to give binding interpretations of those provisions.

The EU institutions were however not unanimous on the exceptional treatment of football. The European Parliament requested the Commission to ensure that economic sporting activities complied with EU law, consistently calling for restrictions on player mobility in European sport to be lifted (European Parliament, 1984; 1989a; 1989b; 1994, Parrish, 2003a, p. 65). Due to the Parliament's lack of competence, these requests were nonetheless downplayed or ignored. At the same time, however, the European Parliament demonstrated a desire to balance the economic regulation of sport with the promotion of sport's socio-cultural and integrationist qualities, which was best expressed before the *Bosman* case in the 1994 "Larive report" (European Parliament, 1994; Parrish, 2003a, pp. 14-15). That desire was descended from the acknowledgement of the potential of sports as a tool for enhancing the identity and the image of the EU with its apathetic citizens.[130]

3. The Bosman case

The CJEU's ruling in the *Bosman* case generally consisted of two findings: first, the traditional transfer system with transfer fees to be paid for out-of-contract players infringed upon the freedom of movement and therefore had to be abolished; and second, the limitation of foreign players in a football club were ruled illegal in so far as they discriminated against players from countries within the European Union. The ruling is a straightforward application of existing, well-established legal provisions (see, e.g., Blanpain and Inston, 1996; Parrish and McArdle, 2004): football as a business activity has to abide by the rules of EU law.[131] Still, *Bosman* acted as an important watershed in the governing of professional football. Indeed, its political implications are as seismic as its above discussed economic consequences.

The ruling shocked UEFA and FIFA, who did not at all expect EU law to have such severe consequences for their rules. As they were convinced that they could continue their long-standing self-governance without any interference of state authorities, they failed to acknowledge that

[130] In the 1984, in a response to a perceived crisis in European integration, an *ad hoc* committee (the Adonnino Committee) was established following Fontainebleau Summit to explore measures that would strengthen the image of the European Community in the minds of its citizens. The Committee made eight sets of non-binding recommendations, one of which concerned sport. (see Parrish, 2003a; European Commission, 1984; Adonnino, 1985).

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

football was starting to become a significant economic activity in the 1990s (García, 2007b, p. 209). Moreover, the EU had just completed the single market and the ideology of the four freedoms was particularly strong (Parrish and McArdle, 2004, p. 441). The rules by UEFA and FIFA, devised in a previous age, simply did not fit in this new environment.

Furthermore, the *Bosman* ruling can to a large extent be considered as FIFA and UEFA's own making. The pyramid governing model of football is a major source of conflict, since those at the very bottom may want to challenge the federation's regulations and decisions if they are excluded from the decision making process or if the latter are unwilling to meet them halfway (Tomlinson, 1983, p. 173; Parrish and McArdle, 2004, p. 411; García, 2007b, p. 205). In fact, transfer systems in football have been historically challenged by players as illegal, in particular those provisions that restricted footballers from changing clubs even at the end of their contract (see McArdle, 2000, 25-27; Greenfield and Osborn, 2001, 79-82). Whereas national courts often do not have the jurisdiction to challenge those rules, the CJEU proved to be a suitable venue for unsatisfied stakeholders to challenge the decisions made at the top of the governing network of football.

Football's governing bodies, especially UEFA, considered the ruling to be an attack on football (García, 2007b, p. 209). After an initial period of real confrontation with the EU characterised by emotional and sometimes irrational, unfounded criticism on the EU and its "over-zealous regulators", they soon realised that EU law could have far-reaching consequences for their activities and embarked on a campaign directed towards the EU in an attempt to reverse the situation (García, 2007b, p. 209; Parrish and McArdle, 2004, p. 410; Niemann and Brand, 2008, p. 98). That was more than necessary, as the tone of Commission in the direct aftermath of *Bosman* was very harsh: football constitutes a normal business activity and therefore it must be regulated according to European Law. Although the CJEU did not address the EU rules on Competition in its *Bosman* ruling, the Commission questioned the compatibility of in-contract payments with EU Competition law. The DG Competition took the lead in the discussion and its viewpoint was that football players, just like normal employees, retained the right to break their contract unilaterally (Niemann and Brand, 2008, p. 98).[132] Indeed, the Commission's powers in the field of competition law made it a more cost-effective venue for redress than the private enforcement route via national courts and the CJEU, and that was mirrored in the swelling sports-related caseload following the *Bosman* ruling. A series of high profile investigations into the organisational aspect of sport were launched by the DG

[132] The Commission's harsh reaction was partly driven by the unparalleled amount of attention by the media, the public and political authorities (Easson, 1996, p. 90).

competition, usually after a complaint, including an examination of the transfer system in football (Parrish, 2003b, p. 252).

Thus, the main goal of the football bodies was to reduce the regulatory activity of the Commission as much as possible. Their strategy was to try to change the definition of sports as a mere economic activity (García, 2007a, pp. 6-7). To this end, FIFA and UEFA tried to convince the Commission of the "disastrous consequences" of a fully legalised transfer market (Dabscheck, 2003, p. 95), herein receiving support from clubs, competitions, media and lawyers. Moreover, they looked for and received the support from leading European politicians like German Chancellor Gerhard Schröder, English Prime Minister Tony Blair and Belgian Prime Minister Jean-Luc Dehaene (Croci, 2001, p. 12; Garcìa, 2007a; Niemann and Brand, 2008, p. 98). All this lobbying found its resonance in the Treaty of Amsterdam.

4. The Declaration on sport, added to the Treaty of Amsterdam

The intention of the aforementioned lobbying community was to give sport a legal basis in the EU, hereby granting it a "special status" based on its specificity. Such a status had to protect the sport community from excessive government interference. The sports world found allies in the European parliament, which also called for an article on sport but categorically ruled out legal exemption (García, 2007a, p. 7). Besides, the Parliament had other motives as it namely saw the inclusion of a sports article to the Treaty as a means to build a socio-cultural sports policy. This fitted their view of a "Peoples Europe", where the EU had to use a range of non-economic measures to bind with their apathetic citizens. An article would grant the EU a legal base to develop such a policy (European Parliament, 1997). Throughout the Amsterdam intergovernmental conference, there was a lot of lobbying by the Parliament and the governing bodies for a Treaty article on sport (Parrish and McArdle, 2004, p. 411). Despite the support for an article, the Heads of State and Governmentof the EU decided merely to include a non-binding 'Declaration on Sport' to the treaty of Amsterdam (European Council, 1997).

The Declaration called on the institutions to take into account sports social significance. It is an important policy statement by the European Council, which however does not have a legally binding character, hence being referred to as "soft law". The lack of a binding article proved to be a disappointment for those who advocated a Treaty article. However, the Declaration unmistakeably had political significance: it was referred to by the CJEU in its *Lethonen* and *Deliège* rulings for the support of argument and it launched a series of political initiatives which all reflected a more broad

based approach to sport and football in particular (Parrish and McArdle, 2004, p. 411). Indeed, the Declaration opened the door towards a more holistic and nuanced vision of football which takes into account its wider social and cultural values.

5. The Helsinki Report on Sport: the Sports Unit and the European model of sport

Shortly after the Amsterdam Declaration on sport, the Sports Unit emerged. The Unit is located within the DG Education and Culture and profiled itself as a key figure in the search for balance between sports' commercial side and a better attention for its specificity (Parrish, 2003a, pp. 178-179).). More specifically, the Unit contributes to political co-operation among EU Member States in the field of sport, maintains a structured dialogue with the sports movement and supports the exchange of good practice between different actors.

The Unit initiated a process of dialogue and consultation within the EU. As a consequence, the European Council decided to invite the Commission to submit a report to the Helsinki European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework' (European Council, 1998; García, 2007a, p. 7). The general tenor of that report was aimed at the safeguarding of the existing sports structures in Europe (Weatherhill, 2009, p. 111). In that respect, it is important to stress that the Report acknowledged the "European model of sport", a concept which refers amongst others to the organisational structure in sports which, according to the Commission, is typical in European sports: the above-mentioned hierarchical pyramid structure. The recognition of that structure by the Commission strengthened the sports federations in their plea for a softer application of EU law in sport and felt that it implied the recognition of their autonomy (García, 2009, pp. 269-270).

6. The Nice Declaration on Sport and the 2001 agreement on new FIFA transfer rules

In 2000, after years of negotiations, the negotiations between FIFA, UEFA and the Commissionon a new transfer system approached their final stage. By analogy with the European model of social dialogue, the Commission had insisted that the international players union FIFPro would be involved in these negotiations (European Commission, 2000). FIFPro is the worldwide representative

organization for all professional players; more than 50,000 footballers in total. Currently, it is the umbrella organisation for 41 national players unions (FIFPro, 2010). FIFPro's eventual input in the new transfer rules was however close to none. That was mainly due to their limited organisational capacity at the time. Moreover, there were serious doubts regarding their legitimacy as a representative organisation (Irving, 2002, p. 713) as well as some internal divisions (Dabscheck, 2003). Altogether, at the time, there was no strong representative players' union at the European level that could adequately defend players' interests.

In 1996, the Commission had expressed concerns that, despite the amendments made to the transfer system after the *Bosman* judgement, there still were aspects of it that might infringe upon EU Competition law. In particular, it objected to the failure to grant transfers to players who unilaterally terminate their contract, the right for the selling club to receive a transfer sum, and the provisions to pay a fee for the international transfer of all players, both under and out of contract, from a non-EU country to a MS or vice versa (European Commission, 2002). After FIFA and UEFA informed the Commission that they did not plan to take into account those aspects which were not covered by the *Bosman* ruling, the Commission, acting on three formal complaints, started the formal infringement procedure in December 1998 (Reding, 2000). Meanwhile, UEFA and FIFA continued their skilful lobbying with national governments to send a message about the risks that the Commission's liberalising efforts could have for football (García, 2011, p. 23). The Nice Declaration on Sport is evidence of the responsiveness of the Heads of State and Government to their grievances.

The Nice Declaration on Sport (European Council, 2000) is considerably longer than the one added to the Amsterdam Treaty. It is, again, a non-binding political statement that nevertheless has a significantly large effect on policy developments. Tony Blair and Gerhard Schröder alleged pressure for a specific passage in the Declaration that would acknowledge the key role that sports federations had to play regarding the regulations of sports. Hence, the intentions of the declaration are perfectly reflected by its official title: "Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies" (García, 2007a, p.7; Parrish, 2003b, p. 255; Niemann and Brand, 2008, p. 98). Moreover, the Declaration explicitly stated that account had to be taken of the specificity of sports in the negotiations on new FIFA transfer regulations (European Council, 2000, para. 16). Thus, it is clear that the Declaration was a message to the Commission: the European Council expected it, at the very least, to be receptive to the positions of FIFA and UEFA in the ongoing negotiations on new transfer rules (García, 2011, p. 24).

Tony Blair and Gerhard Schröder went even further. In 2000 and 2001, they issued a joint statement, expressing their concern for a liberalisation of the transfer market in football and confirming their

support for FIFA and UEFA. Blair in particular exercised political pressure on the Commission to abandon their initial plans of a thorough liberalisation of the football market, working together not only with Schröder, but also with the governments of Spain, the Netherlands and Italy (García, 2011, pp. 24-26). The European Commission acts autonomously in its Competition competencies, but it however does not operate within a political vacuum. In that respect, it is quite safe to assume that political pressure by Member States contributed heavily in favour of FIFA and UEFA with regard to the final settlement on the new FIFA transfer system in 2001 (Niemann and Brand, 2008, p. 98; García, 2011, p. 26).

In March 2001, the involved parties finally reached an agreement on new transfer regulations with an exchange of letters between Commissioner Mario Monti and FIFA President Joseph Blatter (European Commission, 2001a). The final settlement was far from a complete liberalisation of the transfer market and can be interpreted as a compromise between the original stances of FIFA and the Commission after the Bosman ruling, although it has been considered to be particularly beneficial for the governing bodies (Parrish, 2003a, p. 147).

During the negotiations, UEFA had taken the lead on behalf of the football community. García (2007b, p. 210) describes how the long and intense negotiations between UEFA and the European Commission on new FIFA transfer rules eventually resulted in a strong partnership. The period of confrontation after the Bosman ruling definitely seemed to belong to the past and a new era of constructive and positive dialogue had dawned.

7. The Independent European Sport Review

The Independent European Sport Review (IESR) was the result of a review of European football, initiated in 2005 by the UK Presidency of the European Union and commissioned by UEFA and finally executed by the Portuguese minister of sport, José Luis Arnaut. The IESR (Arnaut, 2006) is aimed at identifying the challenges facing football in the 21st century and providing recommendations for the more effective governance of football. The Review, which had to design a practical implementation of the Nice Treaty, initiated consultation process that in the end had to result in a "White Paper", which in turn had to pave the path towards some kind of constitution for sport in Europe (Szymanski, 2006, p. 207; Eichberg, 2008, p. 1).

Since the IESR was developed in close collaboration with FIFA and UEFA, it deliberately put great emphasis on football, making is difficult to call it a truly independent review (Miettinen, 2006).

Moreover, it therefore did not contain an effective and democratic approach to sports as a whole (Eichberg, 2008, p. 2).

The Report investigated ways in which the "European sports model" -and hereby the hierarchical pyramid structure in football- could be strengthened (Szymanski, 2006, p. 207). It recommended a list of necessarily political interventions at the European level (Arnaut, 2006, pp. 116-119) and made a strong case for the protection of sporting autonomy and the retreat of EU law. Thus, some have branded it a clever PR exercise by UEFA in conjunction with allies within the EU institution (García, 2008, p. 183).

8. The White Paper on Sport

The proposal to include an article on sport in the 2004 Treaty establishing a Constitution for Europe, which would never be ratified, required the Commission to review its approach to sport. In July 2007, the European Commission adopted its first comprehensive initiative on sport. The 2007 White Paper on Sport (European Commission, 2007a), issued by the European Commission, was the result of a consultation process which started in 2005 following the reconsideration of the Commission's dialogue with the sports movement (European Commission, 2006; 2007c). Together with other high-level meetings held between the Commission throughout 2004-2006, that process resulted in the White Paper on Sport, which defined the Commission's sports policy for a period of at least 5 years. In general, the Commission adopts only two or three white papers per year (see Europa, 2012), containing officially drafted proposals for EU action in certain policy areas. This underscores the longer-term value and political weight of the document in the field of sport.

As it grants a central role to sports federations and furthermore recognises their autonomy, the societal role of sport and the specificity of sport, the White Paper seems rather conservative in nature (Eichberg, 2008; Rogulski and Miettinen, 2009). However, even though the White Paper does not seem to be detrimental for the sports bodies at first sight, emphasising their autonomy and the specificity of sport, there was very strong criticism from both FIFA and the International Olympic Committee (IOC) (IOC and FIFA, 2007). The reasons were that firstly, the White paper did not officially recognise the sports bodies as the official and sole governing bodies for their respective sports; and secondly, the Commission stated that, although it recognised the specificity of sports, there was no change to be expected in their competition and internal market policies (Eichberg, 2008; Rogulski and Miettinen, 2009, p. 250). Nevertheless, the third reason is probably the most important one. The Commission refused to recognise one specific organisational model as typical for

the European sports world. In other words, the European model of sport was no longer acknowledged as being the single model of sport in Europe, hereby implicitly questioning the traditional hierarchic pyramid structure mentioned above. The Commission acknowledged the emergence of new stakeholders like FIFPro, European Professional Football Leagues (EPFL) and the European Club Association (ECA), who questioned the legitimacy of football's traditional governing bodies (Garcìa, 2009, p. 274).

Moreover, the European Commission addressed the main challenges in the field of sports and the autonomy of sports associations is made contingent upon their adherence to principles that are "respectful of good governance" (European Commission, 2007a, section 4). In that regard, the White Paper strongly encouraged the use of social dialogue in the sports sector, because "[it] can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions" (European Commission, 2007a, section 5.3). The Commission acknowledged the difficulty to predetermine the form of a social dialogue in the sport sector and therefore, it declared to be ready to "examine any request to set up a sectoral social dialogue committee in a pragmatic manner" (European Commission, 2007a, section 5.3).

9. The EU sectoral social dialogue committee for professional football

Bipartite dialogue between the European employers and trade union organisations takes place within EU sectoral social dialogue committees. The EU provides an interesting platform for the conclusion of binding or voluntary labour agreements (See Colucci and Geeraert, 2012). On the occasion of the 2001 informal agreement on new FIFA transfer rules, the EU Commission invited FIFA and UEFA to encourage clubs to start or pursue social dialogue with the representative bodies of football players. The Commission recognised that social dialogue could have been an effective method to find common solutions on employment matters between clubs and players. Thereunto, it offered its assistance to the establishment of a social dialogue in the sports sector at the EU level and ever since, the Commission has been supporting projects for the consolidation of social dialogue in sport in general and in football in particular.[133]

[133] A list of these projects can be found at Commission Staff Working Document, The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport (Europea Commission, 2007b, footnote 149.

In the professional football sector, projects funded by the Commission relating to the encouragement of social dialogue in the sports sector have had a substantial impact on the emergence of suitable social partners for a social dialogue in European professional football. On 10 December 2007, a request was submitted to the Commission for the establishment of a Social Dialogue Committee in the Professional Football sector by the International Federation of Professional Footballers´ Associations- Division Europe (FIFPro) and Association of European Professional Football Leagues (EPFL).[134]

In March 2008, the Commission confirmed the representativeness of FIFPro and EPFL and later on, the European Club Association (ECA). The Employment and Social Affairs Commissioner and the Education, Training, Culture and Youth Commissioner launched a new social dialogue committee, bringing together FIFPro, EPFL and ECA. Given the specificity of sport governance, the social partners invited the European Federation of Football Association (UEFA) to chair their dialogue. The aim of the committee was to improve employment relations for all players and reduce disputes through dialogue. Hereto, minimum requirements for professional players' contracts were the first issue to be discussed in the committee (European Commission, 2008a). The EU Sectoral Social Dialogue Committee in the Professional Football sector started in July 2008, following the signing of the Rules of Procedure by the participating parties. According to the latter document, the ESSDC is composed by up to a maximum of 54 representatives, equally composed from both sides of industry (European Commission, 2008b, art. 3). The employers' side is composed of representatives from EPFL and ECA. On the workers' side, FIFPro Division Europe (hereafter FIFPro) provides representatives for the committee. The social partners agreed to invite the UEFA President to chair the ESSDC (European Commission, 2008b, art. 4).

The instalment of the SDCPF fits within the context of a general shift in the government of football. In general, there is a shift from the classic unilateral vertical channels of authority in football towards new, horizontal forms of networked governance (Geeraert, Scheerder and Bruyninckx; 2012). ECA, EPFL and FIFPro all have been given a place inside UEFA's structures in the Professional Football Strategy Council (PFSC), although their participation in the actual policy decision making process remains limited. The PFSC is a purely consultative body created to build a network for (social) dialogue and consultation with other stakeholders in the governance of professional football. It informs the Executive Committee, the actual decision making body of UEFA (UEFA 2010, art. 7bis).

[134] EPFL was founded only in June 2005. See EPFL (2011).

10. The Lisbon Treaty: Articles 6 and 165 TFEU

Since the ratification of the Treaty of Lisbon, Article 165 TFEU now grants the EU an express role in the field of sport. The detailed content of this new competence was agreed in 2004 and reaffirmed in 2007. The EU is only able to exercise those powers that have been conferred on it by its Member States.[135] In that sense, a closer look at the new provision reveals that the new EU competence in the field of sports is a very limited one. First of all, the Member States only granted the EU a supporting competence, the weakest type of the three principal types of EU competence.[136] In the areas where the EU has a supporting competence, it can only coordinate or supplement the actions of the Member States. The competence in those areas remains primarily with the Member States. The Union can adopt legally binding acts but it cannot supersede the Member States' competence in such areas and any harmonisation of Member States' laws or regulations is expressly prohibited. Also, the EU can financially support the actions of the Member States that have agreed to coordinate their domestic policies at the EU-level.

Judging by the nature of a mere supporting competence, the EU involvement in the field of sport clearly has its limitations and this becomes even more apparent when looking at the wording of article 165. The provisions are drawn warily and narrowly, adding strong emphasis on the limitations of the supporting competence. It is stressed that the Union shall do no more than "contribute" to the promotion of European sporting issues and that legislation in this field will be confined to *'incentive measures, excluding any harmonisation'*. The reason for this remarkably cautiously drawn provisions is to reassure those who fear the rise of the EU as a sports regulator, i.e. the sport bodies (Weatherill, 2011, p. 12). Since the *Bosman* ruling, International sport organisations have a general agenda which consists of attempting to insulate sport from EU law by means of a legal basis for sport in the Treaty (Foster, 2003; Parrish, 2003a; 2009, p. 8). Nevertheless, they have never come up with convincing arguments that would justify such a drastic measure (Weatherill, 1999, p. 24) but their lobbying did result in the recognition of the autonomy of sporting organisations and representative structures in the non-binding Declarations and the White Paper as discussed above.

The recognition of the autonomy of sport precludes the EU from assuming a primary responsibility for sport, resulting in a weak competence and carefully worded provisions that obliges the EU to

[135] The application of this "principle of conferral", since the entry into force of the Lisbon Treaty located in Article 5 Treaty on European Union (TEU) and Article 7 Treaty on the Functioning of the European Union (TFEU), requires that any action by the Union has a legal basis in the Treaty.

[136] The description of this competence is contained in article 6 TFEU, which stipulates "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: […] education, vocational training, youth and sport […]".

"take account of the specific nature of sport" while exercising its limited powers in the new sporting competence so that sporting associations do not have to fear that their regulatory competences have been encroached upon. EU institutions are however under no horizontal constitutional obligation to take specific nature of sport into account when drawing up legislation in other policy fields such as the internal market -more specifically freedom of movement and competition law (Van den Bogaert and Vermeersch, 2006, p. 9; Weatherill, 2011, p.13). Also, article 165 does not exclude the possibility of using ordinary EU legislative bases to regulate sport. Hence, article 165 cannot be interpreted as a constitutional protection for sport from the application of EU law and therefore the approach from the CJEU as regards sporting rules that might conflict with EU law will more than likely not change.[137]

In fact, a review of the CJEU's rulings in sport legal disputes will show that it has always taken into account the specificity of the sports sector whilst reviewing sporting regulations on a case by case basis (Van den Bogaert and Vermeersch, 2006, 19; Smith and Stewart, 2011). However, in the recent *Murphy* case[138], the Court referred to Article 165(1) TFEU, stating that *"[…]it is to be noted that, under the second subparagraph of Article 165(1) TFEU, the European Union is to contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational functioning"*.[139] The Court's wording suggests that account *must* be taken of the specific characteristics of sport and its societal function when applying EU law *in general* to sport. However, that line is probably added for the sake of argument only.

So, despite their lobbying since the *Bosman* ruling, the new Treaty provision does not grant sport bodies like FIFA and UEFA an exemption from EU law. Moreover, from a legal point of view, the EU's role in sports is now legitimated in a legal and financial basis which means that sporting bodies can no longer claim that the EU should not be interfering in the sports sector (Weatherill, S., 2011, p. 12). The EU's role should however remain limited to supporting and coordinating activities.

[137] This view is confirmed in the CJEU's treatment of Article 165 TFEU in Case C-325/08, Olympic Lyonnais v Bernard & Newcastle United.
[138] CJEU, Case Joined Cases C-403/08 and C-429/08, *Murphy*.
[139] *Ibid.,* para. 101.

11. European Commission Communication of 18 January 2011 on 'Developing the European dimension in sport'

In a reaction to the new EU competence in sport contained in article 165 TFEU, in January 2011 the Commission published its long-awaited Communication "Developing the European Dimension in Sport" (European Commission, 2011), accompanied by a Staff Working Document on the free movement of professional and amateur sportspeople in the EU. With this publication, the Commission aimed to concretise the new EU competence by proposing a range of specific actions. Setting out areas where an EU added value can be identified, the Commission emphasised that the Communication does not replace the White Paper on Sport, but rather builds on its achievements. Moreover, in a number of the White Paper remains the basis for EU involvement in the field of sport.

The Communication reaffirms the Commission's respect for the autonomy and self-regulation of sport organisations. However, it stresses that good governance is a condition for the self-regulation and autonomy of the sports sector, which also must respect EU law. There is however a remarkable change of tone in the wording of the Commission compared to the treatment of the issue of the autonomy of sporting organisations in the White Paper on Sport. In the White Paper, the Commission limited itself to encouraging the sharing of best practice in sport and offering their help with the development of a common set of principles for good governance in the sector. In its Communication, the Commission stresses that its respect for the autonomy of the sports sector -within the limits of the law- is contingent upon the commitment of the sector to democracy, transparency and accountability in decision-making.

The Commission also indicates that it wants to continue to work on the free movement of sportspeople, issues with the transfer system in football, activities of players' agents and the development of the European social dialogue in sports. Remarkably, where in the White Paper the Commission praised the 2001 FIFA transfer system as "an example of good practice that ensures a competitive equilibrium between sport clubs while taking into account the requirements of EU law" (European Commission, 2007a, p. 15), it now states that "the time has come for an overall evaluation of transfer rules in professional sport in Europe" (European Commission, 2011, p. 12). The Commission will launch therefore a study on the economic and legal aspects of transfers of players and their impact on sport competitions.

The Commission explicitly invited the European Parliament and the Council to support the proposals made in its Communication and to indicate their own priorities for future activities. Thus, in May 2011, the Council adopted a Resolution on a European Work Plan for Sport for the period 2011 –

2014 (Council of the European Union, 2011). Consequently, in February 2012, the European Parliament adopted the Resolution on the European dimension in sport which identifies the challenges for the future in sport following the new article 165 TFEU as envisioned by the European Parliament (European Parliament, 2012).

CHAPTER 4

CONCLUSIONS

1. Concluding summary

Like all sports, football emerged as an amateur activity. Originating in England, it soon spread around the globe and after World War II, the genuine globalisation of the football economy took off. A change of the media landscape and the intertwined increased merchandising triggered a massive commercialisation of the game in the 1990s. Football became increasingly commercial and more and more the target of, and integrated with, transnational business interests. That created a complex network with growing interdependence between business interests and the football world.

Football is traditionally organised through a hierarchic pyramid network where those at the bottom, i.e. clubs and players, traditionally are not involved in its decision-making processes. This highly undemocratic network first came under pressure due to the intense commercialisation which made clubs and national competitions powerful stakeholders who were no longer satisfied with their lack of participation in the network. The richest clubs and leagues in particular therefore started contesting the legitimacy of football's governing bodies and organised themselves at the European level.

Commercial factors have largely contributed to the growing internationalisation of sport, making it a cross-border activity for which sports bodies have established rules. Many of those rules are captured by EU's internal market competence, making the CJEU a suitable venue for dissatisfied stakeholders to challenge the decisions made at the top of the governing networks of their sports. In *Walrave*, the first CJEU case concerning sport in 1974, the CJEU ruled that EU law is only applicable to the economic aspects of sports. The *Walrave* approach was however not fully enforced as sport remained an activity of marginal economic significance during the 1970s and 1980s and the Council and especially the European Commission treated sport matters as a politically highly sensitive issue. Furthermore, it is very difficult to define noneconomic sporting regulations, which in principle fall outside the scope of EU law.

However, in the 1995 *Bosman* case, the CJEU ruled in favour of a disgruntled player based on the EU rules on free movement of workers. The ruling spurred an emancipation process that eventually

resulted in a strong international players' union and effectuated a definitive EU involvement in sport. Furthermore, the ruling shocked international sports bodies, who did not at all expect EU law to have such severe consequences for their rules. Strengthened in their conviction by the Commission's negotiated settlement approach, they were convinced that they could continue their long-standing self-governance without any interference of state authorities. Here, they clearly failed to acknowledge that sport, and football in particular, was becoming a significant economic activity. The rules by UEFA and FIFA, devised in a previous age, simply did not fit in that new environment.

Thus, at the European level, there is no longer one organisation which unilaterally and exclusively determines policy in football matters. Football policy is increasingly devised by a network that consists of UEFA, the EU and the representative organisations of European clubs, players and footballers. Representative organisations of both clubs and players have even been given a place inside UEFA's structures in the Professional Football Strategy Council, which has averted threats to UEFA's legitimacy as the governing body for European football and certainly also strengthened its control over governance developments in football (Holt, 2009). At the same time, the EU's reactive approach to professional football (Croci, 2009, p. 150) seems to evolve carefully into a more proactive attitude, as is evidenced by the Commission's 2011 Communication on Developing a European dimension in sport.

2. The way ahead?

To conclude, we try to paint a picture of the way ahead for football. We do this on the basis of five themes: governance failures, stakeholder representation, social dialogue, EU law and football broadcasting rights.

2.1 Governance failures

As football has become increasingly commercial and more and more the target of, and integrated with, transnational business interests, a complex network with growing interdependence between business interests and football emerged. That raises the question whether FIFA and UEFA can continue to govern their sport unilaterally in an increasingly complex reality (Geeraert, Scheerder and Bruyninckx; 2012). Financial embezzlements, money launderings, corruption, match-fixing, increasing supporters violence and malicious player agents are all examples of governance failures within football that need a constructive collaboration between different authorities, industry and football bodies (multi-actor) at international, national and local level (multi-level). The problem here is that football's governing bodies are accustomed to control their sport autonomously and hence, they

eschew any external interference in their governance. Given the pertinence of the issues at hand, certain minds within the football community definitely need to be broadened. The history of the fight against doping has learned us that sports bodies may need a big scandal (like the doping Tour in 1998) before they are encouraged to work together with public authorities. Indeed, public-private collaboration in sport is generally built around a single issue following an agenda-setting event. Thus, the recent match-fixing scandals in Italian football could perhaps trigger a multi-level, multi-actor collaboration in the short run.

Governance failures are also to be witnessed within football bodies and clubs. In that regard, FIFA and UEFA need to set the example by demonstrating compliance to a code of general principles of good democratic and corporate governance. Such good governance may then trickle down to the lower regions of the football pyramid. With regard to football clubs, the biggest challenge remains cost control. The UEFA financial fair play regulations may contribute to the solution to the issue, but greater restraint will certainly be required by a lot of clubs in order to comply with them (Deloitte, 2012b).

2.2 Stakeholder representation

While some certain organisations have been given a "voice" in the governance of football, in particular by their inclusion in UEFA's Professional Football Strategy Council, they certainly do not have a "vote". Or, to put it differently: institutionalised consultation does not equal actual participation as the latter requires that affected parties have access to decision making and power (Woods, 1999, p. 44; Young, 2000). UEFA claims that giving representative organisations a place in its Executive Committee would undermine the organisation's capacity to effectively balance the interests within the football community. However, since the actual influence of a representative organisation now depends much on its bargaining power, certain organisations are certainly favoured. In that regard, clubs have always obtained a lot of concessions from UEFA, which is demonstrated by the recently renewed memorandum of understanding between ECA and UEFA in which arrangements are included on an increase of the agreed amount to be distributed to clubs for giving their players away to national teams; an insurance covering the risk of injury while on international team duty; and the international match calendar (UEFA and ECA, 2012).

2.3 Social dialogue

On 19 April 2012, the agreement on minimum requirements for Standard Players Contracts between UEFA, FIFPro, ECA and EPFL, concluded within the European sectoral social dialogue committee in

professional football, was ratified (see Colucci and Geeraert). Next on the agenda are issues concerning contractual stability, particularly with regard to under aged players.

2.4 EU law

Obviously, the CJEU did not rule on every type of sporting rule yet, as it can only rule on the cases it gets and then only insofar as the question of their conformity with EU law is part of the constituent elements of the reference for a preliminary ruling made to it. That leaves many questions on the conformity with EU law of sporting rules unresolved and consequently leads to legal uncertainty. Generally, in case football rules pursue a legitimate (sporting) aim, they may not be deemed to breach EU law when the application of those rules do not go beyond what is necessary for the achievement that purpose. Case law by the CJEU provides invaluable guidance for the application of EU law to sport and as such, it is clear that certain rules may not survive the proportionality test should they ever become under scrutiny before the Court.

The Commission's powers in the field of competition law make it a more cost-effective venue for redress than the private enforcement route via national courts and the CJEU. Through that route, it may take many years before a final ruling is issued and since an athlete's prime years usually do not last that long, cases that involve dissatisfied athletes do not reach the CJEU that often and in case they threaten to do so, they may ultimately be settled outside the Court.[140] However, events from the past have demonstrated that the Commission is quite susceptible to political pressure and lobbying efforts and therefore, it makes no hard use of its far-going competition competence and thus, the application of EU law on sport has clearly been politicised. Consequently, the Commission has always shown a willingness to find compromises in the sports sector, which is not necessarily a bad thing.[141] Nevertheless, ultimately, it is for the CJEU alone to give binding interpretations of the provisions of the Treaty. The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions.

Meanwhile, the sports world in general has devised its own legal system which enables it to settle disputes within its own network and according to its own laws instead of in national or European courts. It is safe to say that the autonomy of sports organisations has been strengthened in recent

[140] See the *Balog* (Blanpain, 1998, p. 188-220) and *Oulmers* (García, 2008, p. 41) cases.
[141] The application of competition law to sports broadcasting rights, for instance, needs to be tailored to the characteristics of sport as a market.

years by the development of a system of sports arbitration which has contributed to the emergence of a body of global sports law/*lex sportiva*.[142]

2.5 Football broadcasting rights

An important tool for the redistribution of wealth between clubs to ensure a competitive balance between them is the joint selling of football broadcasting rights by the national (top) leagues. The Commission has recognised that joint selling may have pro-competitive effects that lead to efficiency gains in the marketing of rights and accepted joint selling arrangements despite the fact that it in principle restricts competition between clubs (European Commission, 2007b). In a number of national European leagues, certain clubs have declared their ambition to break away from the deal their league has negotiated or negotiates with a particular broadcasting company. In Spain, sides like Barcelona and Real Madrid are already able to negotiate individual contracts that dwarf their domestic and European rivals. Given the importance of the marketing of broadcasting rights as a source of revenue for clubs, we have not yet seen the end of this debate.

[142] According to Foster (2003), "lex sportiva is a dangerous smoke-screen justifying selfregulation by international sporting federations". (p.17) He defines *lex sportiva,*or "global sports law" as *"a transnational autonomous legal order created by the private global institutions that govern international sport. Its chief characteristics are first that it is a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federations, and second that it is not governed by national legal system*s" (Foster, 2003, p.2).

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ABOUT THE AUTHORS

Arnout Geeraert holds an MSc in International and Comparative Politics from KU Leuven and an LLM in International and European Law from the University of Brussels (VUB). He is a PhD candidate at the Faculty of Social Sciences and a researcher at HIVA (Research Institute for Work & Society), and the Policy in Sports & Physical Activity Research Group, Department of Kinesiology at the University of Leuven, Belgium. His research focuses on the strengthening of democratic processes in international sports governance and the role of the EU therein. Arnout Geeraert is involved in the Preparatory Action in the Field of Sport on good governance, funded by the European Commission's Sport Unit. He is managing the Certificate of Advanced Studies in European Sports Law & Policy at KU Leuven, in which he also lectures. He has published articles in international journals on the role of the EU in sport and he is co-editor of a forthcoming book on sports governance.
E-mail: arnout.geeraert@kuleuven.be

Hans Bruyninckx is the director of HIVA (Research Institute for Work & Society), full professor of international relations at the Institute for International and European Policy, University of Leuven (Belgium), and a senior member of the Leuven Centre for Global Governance Studies. He has almost 20 years of experience in policy-oriented research at different universities and teaches international relations courses with an emphasis on global governance and environmental and sustainable development issues. He has been an advisor for Flemish, Belgian and European policy processes and also for business actors regarding the issues of sustainability. Hans Bruyninckx's research emphasises the influence of the various globalisation processes on the global governance of environmental problems and sustainable development. Particular attention is paid to underlying theoretical and conceptual frameworks. The translation and testing of innovative and critical social theories (such as network and flows perspectives) to multi-level governance arrangements of global environmental and sustainable development issues are at the core of this team's research efforts.
E-mail: hans.bruyninckx@kuleuven.be

Jeroen Scheerder is associate professor in the Department of Kinesiology and head of the Policy in Sports & Physical Activity Research Group at the University of Leuven, Belgium. His research focuses on policy-related and socio-economic aspects of sport and leisure-time physical activity. He is (co-)author of about 30 peer-reviewed articles that have been published in international journals, and the editor/author of about fifteen books on sport, participation and policy. He is (co-)promoter of nine doctoral research projects in the fields of sport policy, sport sociology and sport marketing. Together with fellows from the Mulier Institute in the Netherlands he is the founding promoter of the MEASURE project, i.e. a European research network on sport participation and sport policy. Jeroen Scheerder lectures in the fields of public sport policy and public sport management. He is a guest professor at the universities of Cassino, Cologne, Jyväskylä, Kaunas and Porto, and was a visiting professor of sport sociology at the Faculty of Political & Social Sciences, Ghent University (2005-2007). He was a lecturer in the Intensive Programme on *Sport in the EU and its member states* (2008-2010) and is a lecturer in the Intensive Programme on *European Identity through Volunteering in Sport* (2011-present). He is a staff member/lecturer in the *Advanced Studies in European Sports Law & Policy* at the KU Leuven and a guest lecturer in sport policy in the *Expert Class sin Professional Sport Management* at the University of Brussels (VUB). Endurance sports are one of his passions.
E-mail: jeroen.scheerder@faber.kuleuven.be