

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
STRUCTURAL AND COHESION POLICIES **B**



Agriculture and Rural Development



Culture and Education



Fisheries



Regional Development



Transport and Tourism



**THE LISBON TREATY AND
EU SPORTS POLICY**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

CULTURE AND EDUCATION

THE LISBON TREATY AND EU SPORTS POLICY

STUDY

This document was requested by the European Parliament's Committee on Culture and Education.

AUTHORS

Prof. Dr. Richard Parrish (Edge Hill University, United Kingdom)
Dr. Borja García García (Loughborough University, United Kingdom)
Samuli Miettinen (Edge Hill University)
Prof. Dr. Robert Siekmann (T.M.C. Asser Institute, The Netherlands) (project manager)

RESPONSIBLE ADMINISTRATOR

Mr Goncalo Macedo
Policy Department Structural and Cohesion Policies
European Parliament
B-1047 Brussels
E-mail: poldep-cohesion@europarl.europa.eu

EDITORIAL ASSISTANCE

Ms Lyna Pärt

LINGUISTIC VERSIONS

Original: EN.
Translations: DE, FR

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-cohesion@europarl.europa.eu

Manuscript completed in September 2010.
Brussels, © European Parliament, 2010.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

CULTURE AND EDUCATION

THE LISBON TREATY AND EU SPORTS POLICY

STUDY

Abstract

A study providing a panorama of the possibilities of EU sports policy at a time when these are being reviewed after the approval of the Lisbon Treaty. In particular, the study assesses from a legal point of view, the potential of the new TFEU to enable the EU to attain the objectives of greater fairness and openness in sporting competitions and greater protection of the moral and physical integrity of sports practitioners whilst taking account of the specific nature of sport.

IP/B/CULT/IC/2010-028

September 2010

PE 438.607

EN

CONTENTS

LIST OF ABBREVIATIONS	5
TABLE OF CASES	7
EXECUTIVE SUMMARY	9
INTRODUCTION	15
1. SPORT POLICY AND THE SPECIFICITY OF SPORT UNDER ARTICLE 165	17
2. CONSTITUTIONAL CONSTRAINTS ON EU ACTION	21
3. THE ‘SPECIFIC NATURE’ OF SPORT, ‘FAIRNESS’ AND ‘OPENESS’ IN THE CONTEXT OF EU FREE MOVEMENT AND COMPETITION LAWS	29
3.1. Collective sale of sports rights	29
3.2. Rules designed to promote the local training of players	29
3.3. Rules regulating the status and transfer of players	30
3.4. Anti-doping rules	31
3.5. Player release rules designed to promote national team sports	32
3.6. Licensing conditions, financial fair play and salary capping	33
3.7. Rules regulating players’ agents	35
3.8. Measures regulating betting	36
3.9. Rules restricting club ownership	37
3.10. Rules excluding non-nationals from sporting competitions	38
3.11. The rights of third-country nationals	39
3.12. Rules on national territorial tying	40
3.13. Rules on selection criteria.	41
3.14. Rules concerning the composition of national teams	42
3.15. Rules protecting sports associations from competition	43
4. THE POLICY DIMENSION OF THE NEW EU COMPETENCE ON SPORT	45
4.1. EU sports policy taking account of ‘its structures based on voluntary activity and its social and educational function’	45
4.2. Protection of the ‘physical and moral integrity’ of sportspersons	47
4.3. Promoting ‘cooperation between bodies responsible for sports’	50
4.4. Cooperation with third countries and international organisations	52
4.5. Legislative action under Article 165	53

5. RESULTS OF CONSULTATION EXERCISE	55
5.1. Priorities for a direct EU sports policy	56
5.2. Priorities regarding the impact of EU law and policies on sport	57
5.3. Priorities for the horizontal development of EU sport policy	58
6. CONCLUSIONS AND RECOMMENDATIONS	61
REFERENCES	63
ANNEX	67

LIST OF ABBREVIATIONS

- AG** Advocate General
- CAS** Court of Arbitration for Sport
- EC** European Community
- ECJ** European Court of Justice
- ECR** European Court Reports
- ENIC** English National Investment Company
- EU** European Union
- FIA** Fédération Internationale de l'Automobile
- FIFA** Fédération Internationale de Football Association
- FIFPro** Fédération Internationale des Associations de Footballeurs Professionnels
- F1** Formula One
- G14** Organisation of 14 leading European Football Clubs from 2000 to 2008
- IOC** International Olympic Committee
- OJ** Official Journal
- TFEU** Treaty on the Functioning of the European Union
- UEFA** Union of European Football Associations
- UK** United Kingdom
- UNESCO** United Nations Educational, Scientific and Cultural Organization
- WADA** World Anti-Doping Agency

TABLE OF CASES

Bundesliga Decision 2005/396 OJ 2005 L134/46	24
C-152/08 <i>Real Sociedad de Fútbol SAD, Nihat Kahveci v Consejo Superior de Deportes, Real Federación Española de Fútbol.</i>	35
C-154/04 and C-155/04 <i>Alliance for Natural Health and Others</i> [2005] ECR I-6451	22
C-176/96 <i>Lehtonen and Castors Braine</i> [2000] ECR I-2681	13, 26
C-203/08 <i>Sporting Exchange Ltd v Minister of Justice</i>	32
C-210/03 <i>Swedish Match</i> [2004] ECR I-11893	22
C-243/06 <i>SA Sporting du Pays de Charleroi, G-14 Groupment des Clubs de Football Européens v Fédération Internationale de Football Association (FIFA)</i>	28
C-258/08 <i>Ladbrokes v Stichting de Nationale Sporttotalisator</i>	32
C-265/03 <i>Simutenkov</i> [2005] ECR I-2579	35
C-275/92 <i>HM Customs and Excise v Schindler</i> [1994] ECR I-1039	32
C-325/08, <i>Olympic Lyonnais v Bernard & Newcastle United</i>	13, 26
C-380/03 <i>Germany v Parliament and Council (Tobacco Advertising)</i>	21
C-388/01 <i>Commission v Italy</i>	20
C-434/02 <i>Arnold André</i> [2004] ECR I-11825	22
C-438/00 <i>Deutscher Handballbund v Kolpak</i> [2003] ECR I-4135	35
C-49/07 <i>MOTOE</i> [2008]	16
C-51/96 and C-191/97 <i>Deliège v Ligue francophone de Judo et disciplines Associeés Asb</i> [2000] ECR I-2549	13
C-519/04 P <i>David Meca-Medina and Igor Majcen v Commission</i> [2006] ECR I-6991	13
C-519/04 P <i>Meca-Medina and Majcen</i> [2006] ECR I-6991	27
CAS 2005/A 955 <i>Cádiz C.F., SAD v FIFA and Asociación Paraguaya de Fútbol</i>	44
CAS 2005/A/956 <i>Carlos Javier Acuña Caballero v FIFA and Asociación Paraguaya de Fútbol</i>	44

CAS 2008/A/1485 <i>Midtjylland v FIFA</i> .	44
CAS 98/200, <i>AEK Athens and Slavia Prague / UEFA</i> , 20 Aug 1999	33
Case 106/96 <i>Commission v UK</i>	16
Case 13/76 <i>Donà and Mantero</i> [1976] ECR 1333	18
Case 352/85 <i>Bond van Adverteerders</i>	20
Case 36/74 <i>Walrave and Koch v Association Union Cycliste Internationale</i> ECR [1974] 1405	13
Case 36851, <i>C.U. de Lille/UEFA (Mouscron)</i>	36
Case C-415/93 <i>Union Royale Belge Sociétés de Football Association and others v Bosman and others</i> [1995] ECR I-4921	13
Cases C-115/97, C-116/97 and C-117/97 <i>Brentjens Handelsorderneeming BV v. Stichting Bedrijfspensioenfondsvoor de Handel in Bouwmaterialen</i> [1999] ECR I-6025	29
COMP/37 806: <i>ENIC/UEFA</i>	14
Decision 2003/778 OJ 2003 L291/25	24
Football Association Premier League Decision C(2006) 868	24
T-193/02, <i>Laurent Piau v Commission of the European Communities</i> [2005] ECR II-209	31
T-313/02 <i>Meca-Medina and Majcen v Commission</i> [2004] ECR II-3291	27
UEFA Champions League Decision 2003/778 OJ 2003 L291/25	24
<i>Zenatti</i> Case C-67/98 [1999] ECR I- 7289	32

EXECUTIVE SUMMARY

Background

The principle of conferral stipulates that the European Union (EU) must act within the limits of the powers conferred upon it by the Treaty. Until the entry into force of the Treaty on the Functioning of the European Union (TFEU) in December 2009, sport was not mentioned in the Treaties. This meant that the EU was not granted a competence to operate a 'direct' sports policy. This gave rise to two broad concerns. First, that EU sports policy to date has been guided by the judgments of the European Court of Justice (ECJ) and that single market laws, such as those concerning freedom of movement and competition, have not sufficiently recognised the specificity of sport. A second concern is that EU sports policy has lacked status and coherence. Sport has become associated not only with free movement and competition laws but also with a large number of other EU policy areas including, public health, education, training, youth, equal opportunities, employment, environment, media and culture. However, the ability of the EU to allocate financial resources to this activity and to develop a coherent policy on sport has met with constitutional difficulties given the absence of an express Treaty competence for sport. The competence question has meant that the EU has struggled to give sport high status and comprehensive treatment. This is a concern given that the EU is increasingly being asked by sports stakeholders to provide a coherent response to contemporary challenges in sport.

Aims

The aim of the present study is to provide the European Parliament's Committee on Culture and Education with a panorama of the possibilities of EU sports policy at a time when these are being reviewed after the approval of the Lisbon Treaty. In particular, the study assesses from a legal point of view, the potential of the new TFEU to enable the EU to attain the objectives of greater fairness and openness in sporting competitions and greater protection of the moral and physical integrity of sports practitioners whilst taking account of the specific nature of sport. Structured around 6 chapters, this study explores the significance of Article 165 on current and pending issues in EU sports law and policy. Chapter 1 explores the meaning and origins of key phrases contained in Article 165 including 'European sporting issues', the 'specific nature of sport' and the 'European dimension of sport'. Chapter 2 explains the constitutional limits to EU action in the field of sport. Chapter 3 explores how the general meanings discussed in chapter 1 find legal expression within the context of the application of EU free movement and competition laws. Chapter 4 explains the significance of Article 165 in relation to the EU's ability to carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport. Chapter 5 presents the findings of the study's consultation exercise which was designed to establish interested stakeholders' preferences and priorities for the implementation of Article 165 TFEU. Finally, chapter 6 presents conclusions and recommendations.

The New Article 165 Competence

Article 165(1) TFEU provides that 'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'. Article 165(2) continues that 'Union action shall be aimed at: developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen'. Article 165(3) states that 'The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the

Council of Europe'. Finally, Article 165(4) permits the EU institutions to adopt incentive measures and recommendations, excluding any harmonisation of the laws and regulations of the Member States'. This new competence has raised expectations that the Treaty Article can provide solutions to the two concerns detailed in 'background' above. In this respect, this study draws two main conclusions:

1. Application of eu free movement and competition laws

First, Article 165 will have a limited impact on the EU's legal powers over sport, particularly in relation to the application of internal market laws. This is because Article 165 does not contain a horizontal clause requiring sporting issues, and questions of fairness and openness in sporting competitions, to be taken into account in the exercise of other powers, such as free movement and competition law. This is to be contrasted with other Treaty competencies, such as the provisions on environmental protection and public health, which do contain horizontal clauses. Therefore, from a strict constitutional perspective Article 165 should not alter the existing sports related jurisprudence of the ECJ and the decision making practice of the Commission. This is not to say that sport cannot, will not, or ought not be considered when taking action in other fields. For example, in the sporting case of *Bernard*, the Court confirmed that the Article 165 TFEU reference to the specific nature of sport strengthened arguments that they should be taken into account when examining the legality of restrictions to freedom of movement.¹ However, Article 165 TFEU seems to stop short of imposing a constitutional requirement to do so in either legislative or administrative action. At least in the *Bernard* judgment, reference to the specific nature of sport merely reinforces judicial possibilities which were already open prior to the passage of the Lisbon Treaty.

The absence of horizontality is, in the opinion of the research team, not detrimental to the interests of sports bodies who may have been hoping that Article 165 offers greater protection from the reach of EU law than previously existed. This is because the opportunities to give sports bodies a wide margin of appreciation are substantial even if Article 165 TFEU stops short of imposing a constitutional requirement to do so. For example, in the *Walrave* judgment, the ECJ made a distinction between 'purely sporting rules' that had nothing to do with economic activity, and those that had impacts on economic activity.² The judgment also suggested that nationality discrimination, otherwise clearly prohibited by the Treaties, was not relevant to 'the composition of sports teams, in particular national teams'.³ Although the extent of the exemptions given to sports in both of these interpretations have since been curtailed by modern case law, three modern methods go beyond the limited exemption in *Walrave* and enable sporting practices to receive sensitive treatment even in the absence of legislative special treatment.

First, rules that are 'inherent' to the proper conduct of sport may in some circumstances not fall within the Treaty. Secondly, rules that do fall within the Treaty because they are restrictions of freedom of movement may be justified, by reference to both grounds found in the Treaty itself and to objective justifications developed before the ECJ. Competition law and free movement both also entail grounds of justification found in the Treaties. The third, and more unconventional method, is for the legal framework to be applied to sport in a sensitive way in those cases where it contains few sport-specific exceptions. A review of the existing case law undertaken by the research team confirms that the Court and the

1 Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, paragraph 40.

2 Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* ECR [1974] 1405, paragraph 4.

3 *Walrave* paragraph 8.

Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Indeed, it is worth re-iterating that the ECJ's treatment of Article 165 TFEU in the *Bernard* case supports the view that whilst the new sports competence may have given further weight to sports-related arguments, it has not opened any new previously undiscovered avenues of appeal. This is because the judicial avenues for recognising the specific nature of sport are already well developed by the Court and the Commission.

2. The status and coherence of eu sports policy

On the second area of concern - that EU sports policy has thus far lacked status and coherence - Article 165 TFEU will make a much more definitive contribution. Article 165 allows for the development of a direct supportive and complementary policy in the field of sport. Previously, in order to escape accusations of acting beyond its powers, the EU linked its sports-related funding programmes to existing competencies in the Treaty, such as education policy. The new sports competence contained in Article 165 allows the EU to finance sport directly without the need to justify this action with reference to other Treaty competencies. Thus, the entry into force of the TFEU opens a range of possibilities to EU institutions including, amongst others, funding programmes on social inclusion, health promotion, education and training, volunteering, anti-doping, the protection of minors, combating violence and corruption in sport, the promotion of good governance in sport and supporting the development of a well researched evidence base on current issues in sport.

In the consultation exercise undertaken to inform this study, the respondents identified three priority areas for EU action in the field of sport: (1) sport health and education, (2) the recognition and encouragement of volunteering in sport, and (3) the development of sport activities as a tool for social inclusion. The three priorities feature prominently in almost all of the responses and they are also clearly aligned with the priority areas identified by the Commission in the White Paper on Sport,⁴ the 2009 and 2010 preparatory actions⁵ and the public consultation exercise.⁶ Similar areas, albeit with different headings, were discussed in the European Sport Forum 2010 organised in Madrid and were positively received by the representatives of the sport organisations.⁷

In the White Paper on Sport the Commission recognised that the commercialisation of sport has attracted new stakeholders and this 'is posing new questions as regards governance, democracy and representation of interest within the sport movement'.⁸ The Commission suggested that it can play a role in helping to develop a common set of principles for good governance in sport such as transparency, democracy, accountability and representation of stakeholders. In the White Paper, the Commission argued that governance issues in sport should fall within a territory of autonomy and that most challenges can be addressed through self-regulation which must however be 'respectful of good governance principles'.⁹ In this respect, the reference in Article 165(2) to the promotion of cooperation between bodies responsible for sports adds impetus to the Commission's agenda. In particular, the Commission has long promoted dialogue with the sports movement and has been at the

4 European Commission (2007), White Paper on Sport, COM(2007), 391 final, p. 3-7.

5 European Commission (2009), 2009 annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events, COM (2009) 1685, 16 March 2009.

6 European Commission (2010), Strategic choices for the implementation of a new EU competence in the field of sport, EU-wide consultation report, available online at http://ec.europa.eu/sport/library/doc/a/100726_online_consultation_report.pdf.

7 See the Forum's report published by the European Commission, available online at http://ec.europa.eu/sport/library/doc/b1/sport_forum_madrid_report_11_05_10.pdf.

8 White Paper, section 4.

9 Ibid section 4.

forefront of encouraging social dialogue. Article 165 also adds impetus to efforts to move dialogue between the EU and the sports movement onto a more structured footing. However, given the diversity of the sports movement, structuring dialogue on a meaningful and inclusive basis is a significant challenge for the EU.

A way forward for the Commission in this respect is to use Article 165(2) to develop thematic dialogue with the sports movement over specific issues such as the regulation of agents and the protection of minors. The structure of this dialogue should not assume that any single stakeholder has a monopoly on representation and therefore bilateral dialogue between the Commission and individual stakeholders should be discouraged. Thematic structured dialogue should not lead to 'agreements' such as the so-called Bangemann agreement on player quotas in 1991. In this instance, the ECJ reminded the Commission that it does not possess the power to authorise practices that are contrary to the Treaty.¹⁰ It is also important that structured dialogue, either conducted through the European Sports Forum, bilaterally or thematically, in no way undermines efforts by social partners to conclude agreements within the context of social dialogue committees in sport.

The other innovation brought by Article 165 concerns the possibilities surrounding member state political cooperation. Until the entry into force of Article 165 TFEU, member state political cooperation took place informally outside the formal Council structure. Individual Presidencies often decided to prioritise sport but discussion was restricted to informal meetings of EU Sport Ministers and EU Sport directors and to *ad hoc* expert meetings on priority themes. Article 165 grants the Member States a competence to adopt a more formal and coherent approach to sport and in May 2010, ministers discussed EU sport policy for the first time in a formal Council setting.

Conclusions And Recommendations

Article 165 does not contain a horizontal clause. There are no provisions in the Article that require sporting issues to be taken into account when making policies in other areas, but there are also no provisions in 165 which prohibit the EU from doing so. Regardless of the value attached to Article 165 by the Court and the Commission, its existence is unlikely to alter their existing approach to sport. A review of existing EU sports law cases reveals that Article 165 TFEU will add little further protection for contested sports rules beyond that already provided by the Court and the Commission. In this regard, the review reveals that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Therefore, the often requested production of guidelines on the application of free movement and competition law to the sports sector may not greatly assist the search for legal certainty. The Commission's White Paper on Sport more than adequately explains the legal framework applicable to sport. Furthermore, as the ECJ decided in *Meca-Medina*, contextual analysis and the requirements of proportionality control in EU law necessitate a case-by-case analysis of disputes involving sport. This renders any informal guidelines subject to challenge.¹¹

Rather than passively relying on the reference to the 'specific nature of sport' contained in Article 165 to seek to repel the influence of EU law in sport, the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly

¹⁰ Case C-415/93 Union Royale Belge Sociétés de Football Association and Others v Bosman and Others, [1995] ECR I-4921, paragraph 136.

¹¹ Case C-519/04 P, David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991.

reasoned and backed with robust data. The EU has a strong role to play in facilitating this dialogue, sharing best practice and ensuring that sporting autonomy is conditioned on the implementation of good governance in sport. Efforts at encouraging social dialogue in sport should be maintained and moves towards a structured dialogue should not undermine these efforts. Thematic dialogue with the sports movement should be encouraged.

Article 165 resolves any legal uncertainty concerning the competence of the EU to directly fund sports related programmes. It is now clear that the EU has the competence to directly carry out actions to support, coordinate or supplement the actions of the member states in the field of sport and this competence grants the EU a potentially wide field of action. However, the choice of priority themes should be directly linked to the themes contained in Article 165 and before supporting priority areas, the EU should demonstrate the European dimension in sport and establish the added value of EU action. A focus on a narrow range of priority areas is to be favoured over a broad approach so that the added value of EU action can be demonstrated. In this connection, the consultation exercise reveals that stakeholders favour action in the areas of health enhancing physical education, volunteering and social inclusion. In addition to these areas, there is a need to focus on evidence based policy making and in this connection the EU should fund research and encourage stakeholders to justify their positions with solid data and research.

On the face of it, Article 165(4) also appears to be unequivocal concerning the prohibition on harmonisation of the laws and regulations of the member states. This statement might encourage claims that the laws and regulations of the member states cannot be harmonised in so far as this would affect sporting practices. However, an examination of past prohibitions of harmonisation and their treatment by the ECJ suggests that harmonising measures can be taken despite this type of prohibition so long as the harmonising measures are nominally based on another Treaty competence. Despite similarly worded prohibitions of harmonisation in the fields of social policy, education, vocational training, culture, and public health, the EU has in practice achieved convergence in legislation through other legal bases.

INTRODUCTION

The principle of conferral stipulates that the EU must act within the limits of the powers conferred upon it by the Treaty. Until the entry into force of the Treaty on the Functioning of the European Union (TFEU) in December 2009, sport was not mentioned in the Treaties. This meant that the EU was not granted a competence to operate a 'direct' sports policy. This gave rise to two broad concerns:

First, there is a concern that EU sports policy to date has been guided by the European Court of Justice (ECJ) and that single market laws have not sufficiently recognised the specificity of sport. EU single market competences, particularly those relating to free movement and competition law, exert an indirect influence over sport. Following the judgment of the ECJ in *Bosman*, many sports bodies argued that the lack of a Treaty competence for sport resulted in single market laws, designed to regulate overtly economic activities, being applied to sporting contexts without due consideration for the specific nature of sport.¹² The judgment of the Court in *Meca-Medina* is often cited as another example of the insensitive application of single market laws to sporting contexts.¹³ *Meca-Medina* received particular criticism for promoting a case-by-case approach to assessing the legality of contested rules, rather than allowing for a more holistic assessment of the specific nature of sport.

A second concern is that EU sports policy has lacked status and coherence. Sport has become associated not only with single market competences, but with a large number of other EU policy areas including, public health policy, education, training and youth policy, equal opportunities and disabilities policy, employment policy, environmental policy, media policy and cultural policy. However, the ability of the EU to allocate budgetary appropriations to this activity was limited by its lack of competence to act in the field of sport. Following *UK v Commission*¹⁴ the Commission was compelled to suspend some of its sports-related funding programmes and attach these to areas of existing competence in the Treaty such as education policy. The competence question has meant that the EU has struggled to give sport high status and comprehensive treatment, particularly in an era where the EU is being increasingly asked by sports stakeholders to provide a coherent response to contemporary challenges in sport.

A potential solution to the above two issues is for sport to find its place within the EU's constitutional framework. On two occasions, during the Amsterdam and Nice Treaty negotiations, proponents of a Treaty article for sport failed to persuade the Member States of the value of such a move. The convening of the Convention on the Future of Europe set in motion a process resulting in the ratification of the Lisbon Treaty and the adoption of an article for sport in the Treaty on the Functioning of the European Union (Articles 6 and 165).¹⁵

Structured around 6 chapters, this study explores the significance of this article on current and pending issues in EU sports law and policy. Chapter 1 explores the meaning and origins of key phrases contained in Article 165 including 'European sporting issues', the 'specific nature of sport' and the 'European dimension of sport'. Chapter 2 explains the

12 For a useful list of critical comments from sports organisations see Chappelet, J-L., (2010), *Autonomy of Sport in Europe*, Strasbourg: Council of Europe, pp.89-108.

13 See for example, Infantino, G., *Meca-Medina: a step backwards for the European sports model*, accessed at: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480401_DOWNLOAD.pdf.

14 Case C-106/96 *UK v Commission* ECR [1998] I-02729.

15 All article references, unless otherwise stated, are to the TFEU.

constitutional limits to EU action in the field of sport. Chapter 3 explores how the general meanings discussed in chapter 1 find legal expression within the context of the application of EU free movement and competition laws. Chapter 4 explains the significance of Article 165 in relation to the EU's ability to carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport. Chapter 5 presents the findings of the study's consultation exercise which was designed to establish interested stakeholders' preferences and priorities for the implementation of Article 165 TFEU. Finally, chapter 6 presents conclusions and recommendations.

1. SPORT POLICY AND THE SPECIFICITY OF SPORT UNDER ARTICLE 165

Article 165(1) TFEU refers to the promotion of 'European sporting issues' and 165(2) establishes that Union action should be aimed at 'developing the European dimension in sport'. These phrases suggest that sport plays an important role in European society and that the EU has a role to play in promoting this and combating common threats and challenges. The European dimension in sport must however be carefully defined. Not only are spectator loyalties strongly aligned to nation states, but sport in Europe is organised according to national traditions and constitutional arrangements. In this respect, patterns of governmental involvement in sport follow one of two models. Some states adopt an *interventionist* sports legislation model in which the state adopts a legislative framework regulating sport, whilst others favour a *non-interventionist* model in which the state plays a less direct and often merely facilitating function.¹⁶ The autonomy of sporting organisations and representative structures in Europe has also been recognised by the EU.¹⁷ These features preclude the EU assuming a primary responsibility for sport. This is acknowledged in the wording of Article 6 TFEU which states that in terms of sport, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. Article 165 confirms that these actions exclude the harmonisation of national laws.

Despite the complexity and diversity of sport in Europe, there are however certain features, values and traditions that give sport a European dimension. Sport is often employed by Member States as a means of achieving public policy goals in related fields such as health, social inclusion, education and employment. Indeed most, if not all, Member States are facing challenges in the areas of obesity, discrimination, violence and racism and it is within these contexts that sport can play a role. However, the 'European dimension' in sport should not be confused with a 'European model of sport'. Whilst it is true that some sports are organised on a pan-European basis by a European governing body, the diversity of European sport is such that defining a European model and selecting policy choices on the assumption that such a model exists, is inadvisable. In this regard, the EU should only provide support to activities where the European dimension in sport can be demonstrated and where the added value of EU action can be clearly established.

The EU's progressive establishment of a single market has also given sport a European dimension. For example, the lifting of nationality restrictions and the reform of the international transfer system following the *Bosman* judgment promoted the greater movement of players across national borders. In parallel, technological developments in European broadcasting, partly supported by the EU's progressive liberalisation of the broadcasting market, transformed the sporting landscape by giving sport, and particularly football, access to a new source of income. This commercialisation of sport has increased incentives to litigate. The development of a European legal dimension has provided stakeholders with rights and enforcement opportunities through which these can be defended.

16 See Chaker, A.N. (1999), Study of National Sports Legislations in Europe, Strasbourg: Council of Europe.

17 European Commission (2007), White Paper on Sport, COM(2007), 391 final, p.13, hereafter referred to as White Paper on Sport.

The reference in Article 165(1) to the 'specific nature of sport' is significant insofar as it will be raised in the context of future challenges to sporting rules based on *inter alia* the application of EU free movement and competition law. Whilst it is widely accepted that in some instances sport operates under different conditions to those found in 'normal' industries, the boundaries of the concept of the 'specificity of sport' are contested. If too few specificities are recognised sports markets may not operate effectively, yet recognising too many may undermine the fundamental rights of stakeholders within the sector.

Since the *Walrave* judgment of 1974, the ECJ has contributed to the debate on the meaning of the term specificity of sport. In *Walrave* the Court held that the prohibition on nationality discrimination 'does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity'.¹⁸ Later in *Bosman* it added that 'in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results...must be accepted as legitimate'.¹⁹ In *Deliège* the Court held that 'limiting the number of participants in a tournament... is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services'.²⁰ At the same time the Court in *Lehtonen* found that late transfers could substantially alter the sporting strength of teams in the course of the championship thus calling into question the proper functioning of sporting competition.²¹ In *Meca-Medina* the Court recognised as legitimate the need to 'combat doping in order for competitive sport to be conducted fairly', safeguard 'equal chances for athletes, athletes' health,', ensure 'the integrity and objectivity of competitive sport' and protect 'ethical values in sport'.²² Most recently in *Bernard* the Court held that '...in considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken ...of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU'.²³

The Commission has also added to the debate on the meaning of the specific nature of sport. In the *ENIC* Decision the Commission rejected a complaint against UEFA's rules on club ownership on the grounds that the measure was necessary to safeguard the public's perception that games played represent honest sporting competition.²⁴ In the White Paper on Sport the Commission argued that there exists specificity of sporting activities and rules such as separate competitions for men and women, limitations on the number of participations in competitions, or the need to ensure competitive balance in sport. In addition, the Commission cited examples of specificity of sports structure which includes

18 Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* ECR [1974] 1405 paragraph 8. Hereafter referred to as *Walrave*.

19 Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921, paragraph 106.

20 Joined cases C-51/96 and C-191/97 *Deliège v Ligue francophone de Judo et disciplines Associées Asb* [2000] ECR I-2549. Hereafter referred to as *Deliège*.

21 Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 54.

22 Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, hereafter referred to as *Meca-Medina*.

23 Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, paragraph 40.

24 Case COMP/37 806: *ENIC/UEFA*, hereafter referred to as *ENIC*. See also Commission Press Release IP/02/942, 27 June 2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.

the autonomy and diversity of sport organisations, the pyramid structure of European sport, solidarity in sport, the organisation of sport on a national basis and the principle of a single federation per sport.²⁵

The first significant member state contribution came by way of the Amsterdam Declaration on Sport which emphasised 'the social significance of sport... in this connection special consideration should be given to the particular characteristics of amateur sport'.²⁶ This was followed by the Nice Declaration on the 'specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies'.²⁷ In addition, the Independent European Sport Review, a report undertaken at the initiative of the UK sport minister, Richard Caborn, detailed a number of specificity arguments and explained why rules designed to promote these features were compatible with EU law.²⁸

A number of other key documents elaborate the meaning of the phrase specific nature of sport including recent European Parliament Reports such as the Belet and Mavrommatis Reports.²⁹ In addition, statements from sports stakeholders are relevant and these include the UEFA/FIFPro Memorandum of Understanding which details their understanding of the specificity of sport, the Statement of the European Team Sports, the Common Position of the Olympic and Sports Movement on the Implementation of the New Treaty on the Functioning of the European Union and the Common Position of members of the European Elite Athletes Association and Sport PRO-UNI Europa on the effects of the Lisbon Treaty on sport.³⁰ Elsewhere, the Court of Arbitration for Sport has interpreted the reference to the specificity of sport contained within the FIFA regulations on the Status and Transfer of Players.³¹

From the above, it is evident that a number of specificity themes are emerging. These include the mutual interdependence of the sports market, the need to ensure solidarity between participants, the need to ensure competitive balance, the need to ensure the regularity and proper functioning of competitions, the need to encourage the training and education of young players, the need to promote stadium attendance and participation at all levels, the need to protect national teams, and the need to ensure fairness and the integrity of competition. Some of these specificities remain contested.³² Nevertheless, so as

25 White Paper on Sport, p.13.

26 Declaration 29 to the Treaty of Amsterdam.

27 Presidency Conclusions, (2000), Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, Nice European Council Meeting, December 2000.

28 Arnaut, J.L., (2006), Independent European Sport Review, p.33. Accessed at http://www.independentfootballreview.com/doc/Full_Report_EN.pdf.

29 European Parliament (2007), Resolution of the European Parliament on the Future of Professional Football in Europe, A6-0036/2007, 29 March. (The Belet Report). European Parliament Resolution of May 8 2008 on the White Paper on Sport (2007/2261(INI)), (The Mavrommatis Report).

30 See FIFPro / UEFA Memorandum of Understanding, 11/10/07 accessed at: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/81/881781_DOWNLOAD.pdf

See also Statement of the European Team Sports, 11/07/07 accessed at: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/560675_DOWNLOAD.pdf

For the Common position of the Olympic and Sports Movement see: <http://www.euoffice.eurolympic.org/cms/getfile.php?98>

For the Common position of the EAAA / Sport PRO-UNI Europa see: http://www.euathletes.info/uploads/media/EU_ATHLETES_Common_Position_Paper_FINAL.pdf

31 See for example CAS 2008/A/1519-1520, Matuzalem.

32 The literature is too voluminous to summarise here but see for instance, Andreff, W & Szymanski, S. (2006), Handbook on the Economics of Sport, Cheltenham: Edward Elgar; Downward et al (2009), Sports Economics: Theory, Evidence and Practice, Oxford: Elsevier; Késenne, S. (2007), The Economic Theory of Professional Team Sports, Cheltenham: Edward Elgar; Szymanski, S. (2009), Playbooks and Checkbooks, Princeton: Princeton University Press; Jeanrenaud, C., & Késenne, S., (2009), The Economics of Sport and the Media, Cheltenham: Edward Elgar; Groot, L., (2008), Economics, Uncertainty and European Football, Cheltenham:

to provide maximum protection for these specificities, and the regulatory means of achieving them, the sports movement itself should take a lead in defining the meaning of specificity. It should also take a proactive approach to ensure its regulations are sufficiently justified and grounded on solid data, and to demonstrate that they are proportionate to the objective pursued. This definition of the specificity to sport should be built into the relevant sports regulations following open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The EU has a strong role to play in facilitating this dialogue and ensuring that sporting autonomy is conditioned on the implementation of good governance in sport.³³ For example, best practice in this respect is demonstrated by the European Commission's promotion of social dialogue in European sport. There is a strong case for the social partners, acting within the context of a social dialogue committee, to self-define the meaning of specificity and the most appropriate means of achieving such objectives. Through other means, such as structured dialogue, the EU can assist the sports governing bodies and interested stakeholders in framing rules that are likely to comply with the EU law.

Edward Elgar; Szymanski, S., (2010), *The Comparative Economics of Sport*, Basingstoke: Palgrave Macmillan; Szymanski, S., (2010), *Football Economics and Policy*, Basingstoke: Palgrave Macmillan.

33 For a more detailed discussion see Chaker, A-N., (2004), *Good Governance in Sport: A European Survey*, Strasbourg: Council of Europe.

2. CONSTITUTIONAL CONSTRAINTS ON EU ACTION

Sport has been subject to indirect regulation under the founding EU Treaties since long before the Lisbon Treaty. The ECJ has consistently declared that sport is subject to EU law when it is practiced as economic activity.³⁴ Thus, a sporting practice that restricts freedom to work³⁵ or to provide services,³⁶ or competition,³⁷ is prohibited unless it is deemed justified and proportionate. Even government acts in allocating sporting powers have been deemed subject to the Treaties where they encouraged sporting bodies to abuse a dominant position in the national market.³⁸

Despite the direct impact of internal market rules, such as the prohibition of discrimination, on many commercial sports, the limits of EU competence have remained slightly unclear. Direct funding for sport has been restricted by the lack of competence, but funding has subsequently been channelled through areas such as Education where the EU had budgetary powers.³⁹ Some Member States have been reluctant to apply and transpose those legislative instruments that might be considered to apply to sport, even when consistently pursued to do so by the Commission.⁴⁰ Even the EU legislature has at times sought to offer sport exemptions, such as the reference to non-profit activities in the directive on services in the internal market.⁴¹ Thus, although case law has been relatively clear as to the impact of EU law on sport and on the application of appropriate EU rules to economic activities within amateur and professional sports, the practical application of these rules has been neither complete nor uniform.

Article 165 TFEU represents a new development in so far as it expressly mentions sport as an area of EU action. However, evidence and literature on both this and the proposed sports competence in the Constitutional Treaty suggests that this development is evolutionary rather than revolutionary.⁴² There are as yet few precedents to offer guidance on how this Article will be interpreted and what the many qualifications to the EU sports competence will mean in practice. However, Article 165 TFEU is closely modelled on former Article 149 EC and resembles other historical Treaty articles on soft competences, including former Article 152 EC. Unlike Article 165 TFEU, some of these have been tested before the ECJ. Parallels drawn between the present sports competence and other, historical soft competences will inform the discussion in this chapter.

34 See for example Walrave.

35 See for example Bosman.

36 See for example Deliège.

37 See for example Meca-Medina.

38 See Case C-49/07 MOTOE [2008], Judgment of the Grand Chamber of 1. July 2008, hereafter referred to as MOTOE.

39 See Case 106/96 Commission v UK; the subsequent European Year of Education through Sport was based on a pre-existing competence to fund educational, rather than sporting, initiatives.

40 See for example Case C-200/08, on the ongoing refusal of certain Member States to recognise the qualifications of ski instructors.

41 See recital 35 of Directive 2006/123, which states that 'Non-profit making amateur sporting activities are of considerable social importance. They often pursue wholly social or recreational objectives. Thus, they might not constitute economic activities within the meaning of Community law and should fall outside the scope of this Directive.'

42 Van den Bogaert, S., and Vermeersch, A., 'Sport in the European Constitution: All Sound and No Fury?' Maastricht University Working Paper No 2005/8 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977456; Van den Bogaert, S., and Vermeersch, A., (2006), 'Sport & the European Treaty: A Tale of Uneasy Bedfellows?', *European Law Review*, 31, pp. 821-840; Vermeersch, A., (2009), 'The Future EU Sports Policy: Hollow Words on Hallowed Ground?', 3-4 *International Sports Law Journal* pp. 3-7.

As has been observed above, the EU operates on the basis of the principle of conferral: it is only able to exercise those powers that have been conferred on it.⁴³ In this respect, the Article 165 TFEU sports competence contains several reservations as to the powers which have been conferred upon the EU. Whilst powers are awarded in order to 'contribute to the promotion of European sporting issues, while taking account of the specific nature of sport', it is not clear that 'taking into account... the specific nature of sport' is a horizontal obligation which applies to the exercise of other EU powers. This compares unfavourably with Article 168 TFEU on public health. Like Article 165, it provides for incentive measures and expressly excludes harmonisation. However, unlike Article 165 the Article 168(1) requires that 'A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities', thus mainstreaming this level of protection of human health into all Union action.

In other words, the EU may, and may indeed be required to, take into account the specific nature of sport when exercising its powers under Article 165(1) TFEU to 'contribute to the promotion of European sporting issues'. However, it is less clear that it is constitutionally required to take into account sporting issues or the specific nature of sport when considering non-sporting legislation that could have impacts on sport. If this interpretation is correct, the Treaty article on sport differs substantially from the horizontal clauses in the TFEU which relate to some other competences. Most notably, the EU has historically been obliged to take into account environmental protection requirements, now enshrined in Article 11 TFEU, which states that '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities...'. The TFEU mainstreams several other considerations into all EU action: Title II general provisions list the promotion of equality between men and women,⁴⁴ 'the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health',⁴⁵ combating discrimination on the basis of 'sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'⁴⁶ and 'Consumer protection requirements'⁴⁷ as questions that must be taken into account even when legislating outside these fields.

Thus, an internal market measure that is not aimed at environmental, equality, or consumer protection regulation must on the basis of Articles 8, 9, 10, and 12 TFEU nevertheless take account of all of these issues. This is the case even when the measure is not based on a legislative competence to achieve any of these mainstreamed interests but instead finds a legal basis for example in the very general Article 114 TFEU power to take measures for the 'establishment and functioning of the internal market'. It does not appear likely that Article 165 TFEU has inserted a similar horizontal requirement to consider sport, much less the specificity of sport, when taking action in other fields. Thus, whilst it seems a reasonable interpretation that direct EU action based on Article 165 TFEU must take into account the specific nature of sport, the validity of legislation in other fields is unlikely to be compromised by a failure to consider its impact on sporting activities.

43 See Article 5 TEU and Article 7 TFEU.

44 Article 8 TFEU.

45 Article 9 TFEU.

46 Article 10 TFEU.

47 Article 12 TFEU.

This is not to say that sport cannot, will not, or ought not be considered when taking action in other fields. Indeed, some noteworthy recent initiatives do precisely this, and as a consequence occasionally attempt to exclude certain impacts on sport.⁴⁸ Sporting interests are also key considerations in ECJ case law. In the *Bernard* judgment, the Court confirmed that the Article 165 TFEU reference to the specific characteristics of sport strengthened arguments that they should be taken into account when examining the legality of restrictions to freedom of movement.⁴⁹ However, Article 165 TFEU seems to stop short of imposing a constitutional requirement to do so in either legislative or administrative action. At least in the *Bernard* judgment, reference to the specific characteristics of sport merely reinforces judicial possibilities which were already open prior to the passage of the Lisbon Treaty.

The opportunities to give sports governing bodies a wide margin of appreciation are substantial even if Article 165 TFEU stops short of imposing a constitutional requirement to do so. It is clear that the EU legal framework is already capable of accommodating many sporting practices where it considers it appropriate to do so, even if those practices might be called into question were they to be found in other contexts. The best example of legislation which expressly seeks to achieve this is Recital 35 of the Services Directive, which seeks to provide exemptions to non-profit activity carried out to financially support sport.⁵⁰ However, most of the rules tailored to sport can be found in case law. In the *Walrave* judgment, the ECJ made a distinction between 'purely sporting rules' that had nothing to do with economic activity, and those that had impacts on economic activity.⁵¹ The judgment also suggested that nationality discrimination, otherwise clearly prohibited by the Treaties, was not relevant to 'the composition of sports teams, in particular national teams'.⁵² Whilst the extent of the exemptions given to sports in both of these interpretations have since been curtailed by modern case law,⁵³ *Walrave* shows that judicial avenues for the special treatment of sport may be available even in the absence of an express constitutional exemption for sport. Three modern methods go beyond the limited exemption in *Walrave* and enable sporting practices to receive sensitive treatment even in the absence of legislative special treatment. First, rules that are 'inherent' to the proper conduct of sport may in some circumstances not fall within the EU Treaty. Secondly, rules that do fall within the EU Treaty because they are restrictions of freedom of movement may be justified, by reference to both grounds found in the Treaty itself and to objective justifications developed before the ECJ. Competition law and free movement both also entail grounds of justification found in the Treaties. Third, the legal framework may be applied to sport in a sensitive way in those cases where it contains few sport-specific exceptions.

48 See for example Recital 35 in Directive 2006/123, which seeks to provide some exemptions to non-profit activities carried out to support amateur sports. For a counter-example, see the professional qualifications framework and the ongoing, decades-long Ski instructors saga, recently revisited in case C-200/08.

49 Case C-325/08 at paragraph 40.

50 See Recital 35 of Directive 2006/123.

51 *Walrave* paragraph 4. Although this originally suggested that non-economic sporting activity was outside the scope of the Treaty and was subject to EU law 'only in so far as it constitutes economic activity', subsequent cases do not impose the same delimitation, including economic activity but failing to rule out impacts on non-economic activity. See in this respect for example *Bosman*.

52 *Walrave* paragraph 8.

53 See for example Case 13/76 *Donà and Mantero* [1976] ECR 1333, paragraph 19. On the development of the 'sporting exception', see Parrish, R., and Miettinen, S., (2008), *The Sporting Exception in European Union Law*, The Hague: TMC Asser Press, pp. 73-101.

The first of these methods involves judicial recognition that some practices ‘inherent’ to sport are not contrary to EU law. According to ECJ case law, ‘inherent’ rules are exempt because they are not restrictions of free movement or competition, and are therefore not governed by those Treaty provisions. Thus, in *Deliège*, the Court considered that national selection criteria which enabled only a limited number of athletes to participate were inherent to the conduct of high-level sport, and therefore did not in law constitute restrictions of free movement.⁵⁴ Similar reasoning was applied in *Meca-Medina* to explain why anti-doping rules were not *de jure* restrictions of economic competition under Article 101 TFEU even though they *de facto* clearly restricted athletes from competing in sporting events with the aid of doping.⁵⁵ Thus, recognition of the ‘inherent’ nature of a sporting practice could offer one method of minimising the impact of EU law where it might otherwise apply.⁵⁶

The second method clearly supported by modern case law involves justifying rules which would ordinarily be considered restrictions of free movement or competition. Both freedom of movement and competition may be restricted by reference to justificatory grounds found in the Treaty. For freedom of movement these include the public policy, public health, and public security derogations⁵⁷ as well as an exception for employment in the public service.⁵⁸ Agreements which restrict competition may be exempted on economic grounds expressed in Article 101(3) TFEU: If an otherwise prohibited agreement ‘contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit’ and is proportionate, it may be permitted. In addition to the grounds found in the Treaty, the ECJ has accepted reference to other, sometimes sports-specific objective justifications which can be relied upon when applying the ordinary EU rules to sport. It could be argued that in accepting and developing these, the Court has demonstrated its sensitivity to the specific features of sporting activities. These might in competition law be reasons why a practice is not a restriction within the meaning of Article 101 TFEU or an abuse under Article 102 TFEU.⁵⁹ They are also a very clearly established category under the freedom of movement provisions of the TFEU.⁶⁰ In EU free movement law, rules which (unlike ‘inherent’ rules) do constitute restrictions can be justified if they are proportionate and pursue a legitimate objective.⁶¹ Such legitimate objectives have included for example ‘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’.⁶² There is no reason to believe that the list should be exhaustive, and that other objective justifications could not be invoked. Indeed, in the *Bernard* case, the ECJ suggested that the specific features of sport, some of which are listed in Article 165 TFEU, might even affect its interpretation of

54 *Deliège* paragraph 64.

55 *Meca-Medina* paragraphs 42 and 45. If a rule is outside the scope of the Treaty, so too, arguably, is any examination of proportionality. Free movement and competition may differ in this respect: whilst proportionality did not feature in the *Deliège* judgment, the Court pointedly observed in the *Meca-Medina* case that there was no evidence to suggest the disproportionality of the doping rules.

56 Whilst there are many similarities between ‘inherent’ rules in free movement and competition, they may yet be conclusively demonstrated to enjoy analytically different treatment.

57 See for example Article 45(3) and (4) TFEU. A detailed examination of these is beyond the scope of this Study.

58 In the context of self-employment, a similar exception is included for activities involving the exercise of official authority.

59 See for example paragraph 45 in *Meca-Medina* which refers to ‘legitimate objectives’ in the context of rules ‘inherent in the proper conduct of sport’. There are sound constitutional reasons beyond the scope of this study which explain the awkward marriage between ‘inherent’ rules and ‘legitimate objectives’.

60 In relation to persons, see the prohibitions in Articles 21 TFEU (citizens), 45 TFEU (workers), 49 TFEU (establishment), 56 TFEU (services), and 63 TFEU (Capital) as well as Articles 30-36 TFEU which govern goods.

61 See for example *Gebhard*, paragraph 37.

62 *Bosman* paragraph 106.

proportionality, namely whether a practice 'is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it'.⁶³ However, sporting practices must conform to the general principles of EU law when they are within the scope of the Treaty. Thus, the *Meca-Medina* judgment turned not on whether it was legitimate to control doping in sport, but whether the rules that were in place to achieve that aim were proportionate. In freedom of movement cases, similar requirements apply to objective justifications: proportionality requires that measures which justifiably restrict freedom of movement must be the least restrictive measures and that they must be suitable for achieving their aims.⁶⁴

Thirdly, it is also possible to demonstrate some sensitivity when applying the internal market legal framework to sport. Examples of this include portraying conventional competition decisions as questions of sport, applying freedom of movement rules in unusual ways, and in at least one case, issuing a decision that seems at odds with the framework on which it is based. In some cases, it has been argued that the ordinary framework has been applied in an unusual way in sporting contexts. Perhaps the best example of the sensitivity to sporting interests is the Commission's decision to approve the 3+2 rule in European football which was subsequently successfully challenged in *Bosman*. The *Deliège* judgment can be argued to apply the otherwise conventional market access test in an unusually permissive way to rules restricting athletes' access to sporting competitions.⁶⁵ In *Bosman*, even the Court of Justice seemed in principle open to the possibility of justifying direct nationality discrimination with reference to reasons not found in the Treaty even though direct nationality discrimination is ordinarily only justifiable on the basis of limited grounds found in the Treaty.⁶⁶ Some decisions claim, without accessible analysis, that a particular sporting practice is not contrary to EU law. A notable example of this is the unreported *Mouscron* decision which concerned a restriction that teams may only use domestic stadia as home game venues. In its press release, the Commission suggested that these were 'not called into question' by EU law⁶⁷ even though intentionally partitioning the internal market is generally considered an anticompetitive act almost beyond any justification. In a speech prior to the Commission's *UEFA Champions League* decision, the Competition Commissioner suggested that collective selling may be justified if it contributed to solidarity in sport.⁶⁸ However, the subsequent decision was silent on this matter and was in fact based on an application of conventional competition rules.⁶⁹ Thus, in at least these cases, it could be argued that the Commission and the Court have applied the ordinary internal market rules to sport in a way that is at the very least sensitive to the particular needs of sport. The examination of the ways in which EU law has been applied to sport and developed to better suit the needs of sport suggests some sensitivity to the needs of the sport even before the insertion of the sports competence into the Treaty on the Functioning of the European Union.

63 Bernard paragraph 40.

64 See generally Gebhard paragraph 37.

65 See further Van den Bogaert, S., (2000), 'The court of justice on the Tatami: Ippon, Wazari or Koka?' *European Law Review* 554-563 at pp. 560-561.

66 *Bosman*, paragraphs 131-135, contrasting with both earlier and later case law on this point: See for example Case 352/85 *Bond van Adverteerders* paragraph 32 and Case C-388/01 *Commission v Italy* paragraph 19.

67 See 'Limits to application of Treaty competition rules to sport: Commission gives clear signal' press release IP/99/965, 9th December 1999.

68 Monti, M., (2001), 'Competition and Sport, the Rules of the Game', speech at conference on Governance in Sport, 26/02/2001, Brussels.

69 Decision 2003/778 OJ 2003 L291/25.

If Article 165 TFEU neither requires sport to be mainstreamed into the ordinary legislative process nor encourages special treatment beyond the substantial concessions already made prior the Lisbon Treaty, the question then arises whether it excludes the regulation of sport through other Treaty legal bases. At first sight, Article 165(4) TFEU suggests some limits: The sporting competence entails the adoption of ‘incentive measures, excluding any harmonisation of the laws and regulations of the Member States’. This might encourage claims that the laws and regulations of the Member States cannot be harmonised in so far as this would affect sporting practices. However, an examination of past prohibitions of harmonisation and their treatment by the ECJ suggests that other competences remain unaffected by a limit to a sector-specific competence such as that found in Article 165(4) TFEU. Consequently, measures to harmonise such areas can be taken despite this type of prohibition so long as the harmonising measures are nominally based on another Treaty competence.

Despite similarly worded prohibitions of harmonisation in the fields of social policy,⁷⁰ education,⁷¹ vocational training,⁷² culture,⁷³ public health,⁷⁴ the EU has in practice achieved convergence in legislation through other legal bases. In *Bosman*, the Court observed that a link to cultural issues (a supporting competence much like the present Article 165 TFEU) could not affect the application of internal market rules to sport.⁷⁵ The surprisingly unequivocal case law on this point is exemplified by the *Tobacco Advertising* judgments. These demonstrate that a prohibition on harmonisation found in one Treaty article is likely to impose very few, if any, limits on the use of other legal bases to that effect. In *Tobacco Advertising II*, the ECJ was asked to consider whether Article 95 EC (now 114 TFEU) could be used to prohibit tobacco advertising even though Article 152(4) EC (now 155(5) TFEU) expressly prohibited ‘any harmonisation of the laws and regulations of the Member States’ for public health purposes. The ECJ accepted that public health considerations may be a ‘decisive factor’ in harmonising legislation based on the general internal market harmonisation competence⁷⁶ despite the prohibition on harmonising measures in the field of public health.⁷⁷ It noted that even though the public health competence could not be relied upon to prohibit tobacco advertising, since it expressly excluded harmonising measures, the limit applied only to the public health competence and thus did not preclude other competences that potentially allowed such measures to be adopted. It is striking that the ECJ considered this to be the case even if the ultimate motives of the legislator were to protect public health through harmonising measures of the sort that were prohibited. Thus, the use of the internal market competence successfully avoided the constitutional restriction on public health measures. So long as the measures in fact contributed to the functioning of the internal market and conditions for the exercise of the general power of harmonisation were therefore formally met, the other motives of the legislator were irrelevant. As AG Kokott has later summarised the case law on the public health prohibition of harmonisation, these ‘judgments state that the lawfulness of a measure adopted by the legislature can be affected only if it is manifestly inappropriate in relation to the objective which the competent institution seeks to pursue.’⁷⁸

70 Article 137(2)(a) EC.

71 Article 149(4) EC, the predecessor of Article 165 TFEU.

72 Article 150(4) EC.

73 Article 151(5) EC.

74 Article 152(4)(c) EC.

75 *Bosman* paragraph 78.

76 Article 95 EC, now Article 114 TFEU.

77 See Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising)*, paragraph 92.

78 Case C-558/07 point 74, citing Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 46; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 48; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 52.

Article 165(4) TFEU reads much like the former public health competence as regards its prohibition on harmonisation. Unless the case for excluding sport is made with more success than that for excluding harmonisation with public health impacts, it seems unlikely that Article 165(4) TFEU will prevent harmonising legislation with impacts on sport so long as that legislation is formally based on a Treaty article other than Article 165 TFEU. Article 114 TFEU allows for general measures to harmonise legislation for the purposes of furthering the internal market, but is hardly the only legal base that could be used to regulate sport. For example, Article 46 TFEU enables the EU to 'issue directives or make regulations setting out the measures required to bring about freedom of movement for workers'. Although many such measures have applied to all workers, there is no constitutional bar to legislation which achieves this in the context of one specific sector. Thus, Article 46 TFEU could in theory be used to create legislation enabling the freedom of movement for employed sportspersons.

Even though Article 165 TFEU is unlikely to substantially limit powers found in other parts of the Treaties, those powers that the EU has which are derived solely from Article 165 TFEU are clearly limited. In addition to the express prohibition of harmonisation based on Article 165 TFEU, it should be noted that measures contributing to objectives in Article 165 TFEU are '*incentive measures*'. Similar words can be found in the Treaty provisions on other supporting competences.⁷⁹ It is not entirely clear at which point a constitutionally permitted incentive measure becomes a prohibited harmonising measure. However, given the Court's lenient approach to the analogous public health prohibition, whether Article 165 TFEU permits hard legal measures seems an academic question since these could in all likelihood be justified with reference to other Treaty provisions such as Article 114 TFEU even where they were clearly intended to also govern sports.

The ECJ's treatment of Article 165 TFEU in the *Bernard* case supports the view that whilst the new sports competence in Article 165 TFEU may have given further weight to sports-related arguments, it has not opened many new previously undiscovered avenues of appeal. In the only judgment at the time of writing to have considered Article 165 TFEU, the ECJ embarked on a rather traditional analysis of the domestic rules in question. It briefly observed that sport was subject to EU law,⁸⁰ and confirmed a professional sportsperson was a worker within the scope of Article 45 TFEU.⁸¹ The form in which the domestic rules were found, namely a collective agreement, did not prevent the EU treaty from applying to them.⁸² The Court's reasoning continued on orthodox grounds, reasserting the established principle that freedom of movement protects not only from discrimination, but also from domestic practices which 'preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement'.⁸³ After finding that domestic rules could constitute a restriction to that worker's freedom of movement, the Court then identified justifications to such restrictions. It is in this context that the ECJ finally relied on Article 165 TFEU. Even then, its reference was not an attempt to justify treating sport in a particular, different way, but merely provided further support for justifications already accepted prior to the Treaty reforms.⁸⁴ This justification was ultimately rejected on the basis of conventional analysis. Whilst the Court accepted that a training compensation scheme could in principle constitute a justified restriction to free

79 See for example Articles 149, 167, 168, 169 and 173 TFEU all of which provide for the exclusion of harmonisation. It seems likely that the Tobacco Advertisement judgments will be revisited in other contexts.

80 *Bernard* paragraphs 27-28.

81 *Bernard* paragraph 29.

82 *Bernard* paragraphs 30-32.

83 *Bernard* paragraph 34.

84 *Bernard* paragraph 40.

movement,⁸⁵ on the facts of the case it was not proportionate because it went beyond what was necessary to compensate for the actual costs of training.⁸⁶ Thus, whilst the *Bernard* case did not explore the constitutional boundaries of the EU's new sporting competence, in employing Article 165 TFEU merely as a further consideration in its conventional analysis, the Court provided few reasons to believe that the new sporting competence has any substantial impact on the pre-existing *acquis* which applies to sport. Thus, whilst Article 165 TFEU introduces solid foundations for funding sporting activities, it neither encourages nor requires restrictions to the regulation of economic sporting activity under other legal bases. Recognition for the specificity of sport continues to be possible under these provisions even if they are not materially altered by the introduction of Article 165 TFEU.

85 *Bernard* paragraph 45.

86 *Bernard* paragraphs 46-48.

3. THE 'SPECIFIC NATURE' OF SPORT, 'FAIRNESS' AND 'OPENNESS' IN THE CONTEXT OF EU FREE MOVEMENT AND COMPETITION LAWS

Not all rules of sports governing bodies designed to promote the specificities of sport discussed in chapter 1 have been tested against the requirements of EU law, particularly those relating to free movement and competition. Article 165(2) TFEU *inter alia* aims to develop the European dimension in sport by '*promoting fairness and openness in sporting competitions*'. This chapter discusses the possible impact of the words '*fairness*' and '*openness*' in relation to a number of ongoing issues in European sport.

3.1. Collective sale of sports rights

The collective sale of sports media rights is an established, although not universally adopted, commercial practice within the sports sector. Collective selling gives rise to competition law concerns as it amounts to a horizontal restriction under Article 101(1) TFEU. Nevertheless, collective selling is defended on the grounds that it allows rights holders to maximise revenues thus facilitating the redistribution of wealth within sport. This promotes both grass roots development and competitive balance. In a line of competition law decisions, the European Commission has insisted that whilst the collective sale of sports rights is permissible under European law, exclusivity - the practice of selling rights to one broadcaster - is not.⁸⁷ For example, in the UEFA Champions League case,⁸⁸ the Commission exempted the agreement under Article 101(3) TFEU by concluding that the new collective selling regime improves production and distribution by creating a quality branded league focused product sold via a single point of sale which allows consumers to benefit. Collective selling, it concluded, is indispensable in terms of UEFA achieving these objectives and is unlikely to eliminate competition in respect of a substantial part of the media rights in question. The Commission was satisfied that the unbundling of the rights into packages should enhance the possibility for more broadcasters to acquire Champions League rights. It is clear from this assessment that the exemption decision was made out with reference to the economic exemption criteria established in 101(3) TFEU and not to wider social-cultural concerns, whether Treaty based or not. Article 165 TFEU does not adjust the proposition that the grounds for exempting a sporting practice must be located within the exemption criteria contained in Article 101(3) TFEU. The reference to the 'specific nature of sport' contained with Article 165 cannot be cited as the reason for exempting a practice should the 101(3) exemption criteria not be satisfied.⁸⁹

3.2. Rules designed to promote the local training of players

New eligibility criteria were incorporated into the 2006/07 UEFA regulations. The rule has the effect of reserving a number of places in a club's 25 man squad to 'locally trained players'. A locally trained player is either a 'club trained player' or an 'association trained player' who has been registered with his/her current club for a period, continuous or non-continuous, of three entire seasons or of 36 months whilst between the age of 15 and 21. Nationality does not form part of the eligibility criteria. UEFA argues that the rule is needed in order to promote fairness in European competitions, particularly in relation to the promotion of competitive balance, the need to encourage the education and training of

87 UEFA Champions League Decision 2003/778 OJ 2003 L291/25. Bundesliga Decision 2005/396 OJ 2005 L134/46. Football Association Premier League Decision C(2006) 868.

88 Decision 2003/778 OJ 2003 L291/25.

89 See however the possibility that such a rule is 'inherent' to the proper organisation of sport, discussed above.

young players and the need to protect national teams. Before Article 165 TFEU entered into force, the European Commission indicated that the rule was potentially compatible with EU law as, although the measure may lead to indirect nationality discrimination, it pursues the legitimate objectives of promoting training for young players and consolidating the balance of competitions.⁹⁰ Consequently, the entering into force of the TFEU does not alter this already favourable assessment.

Similarly, Article 165 TFEU does not alter the Commission's negative assessment of the 6+5 rule proposed by FIFA. This proposal states that a football club must begin a game with at least six players entitled to play for the national team of the country where the club concerned is located. As with UEFA's rule, FIFA aims to promote fairness in European competitions by guaranteeing equality in sporting and financial terms between clubs, promoting junior players, improving the quality of national teams, and strengthening the regional and national identification of clubs and a corresponding link with the public.⁹¹ According to the Commission, the proposal is incompatible with EU free movement law as the measure gives rise to direct nationality discrimination. Article 165 TFEU does not offer protection for such discriminatory acts as the defences remain restricted to those cited in Article 45 TFEU, namely public policy, public security and public health.⁹² The absence of horizontality between Articles 165 and 45 TFEU means that sport specific considerations, based on the specificity of sport, do not require the reinterpretation of the defences cited in Article 45. The 60th FIFA Congress meeting in Johannesburg in June 2010 decided to withdraw the 6+5 proposal.

3.3. Rules regulating the status and transfer of players⁹³

Following the ECJ's judgment in *Bosman*, an agreement was reached between FIFA, UEFA and the European Commission concerning the remodeled international transfer system for football players. The agreement was concluded in March 2001 by way of an exchange of letters between the Commission and FIFA President Sepp Blatter.⁹⁴ In July 2001 FIFA's Executive Committee adopted a new set of international transfer rules in line with the March 2001 principles and these have been subsequently amended. The current regulations were published in October 2009.⁹⁵

These regulations contain a number of restrictions on a player's free movement. The restrictions are defended on the grounds that they promote a fair balance between the interests of the clubs, players and the game as a whole. For example, Article 6 states that 'players may only be registered during one of the two annual registration periods fixed by the relevant association'. In *Lehtonen*, the Court considered that although a transfer window amounted to a restriction, it may be justified as late season transfers could substantially alter the sporting strength of teams in the course of the championship and thus call into question the proper functioning of sporting competition.⁹⁶ Consequently, the ECJ has already recognised that transfer windows can promote fair competition and in this light Article 165 TFEU can offer no further protection for such rules.

90 Commission Press Release IP/08/807, 'UEFA rule on home-grown players: compatibility with the principles of free movement of persons', 28/05/08.

91 As stated in the Institute of European Affairs Report, 'Expert opinion regarding the compatibility of the 6+5 rule with European Community law', 24/10/08.

92 The possibility that the Court may in *Bosman* have invited the extra-Treaty objective justification of such arrangements, discussed in chapter 2 above, has not been successfully attempted.

93 Articles 13-18, FIFA Regulations on the Status and Transfer of Players, October 2009.

94 Letter from Mario Monti to Joseph S. Blatter, 5.03.01 D/000258.

95 FIFA Regulations for the Status and Transfer of Players, July 2001.

96 Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681. Paragraph 54.

Articles 13-18 of the FIFA Regulations are designed to promote contract stability between professionals and clubs. Once again, a number of restrictions on a player's free movement are evident within these provisions, such as the provision for a 'protected period' of a player's contract and the sanctions on that player that flow from a breach of that provision (Article 17). Such restrictions are justified by FIFA on the grounds that they promote contract stability and youth development and that they promote team building and fans' association with teams. Article 20 provides that 'training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during *or at the end of the player's contract*'. Whilst this system places potential restrictions on a player's free movement, the provisions are potentially justified with reference to the need to encourage investment into youth development. In *Bernard*, the first post-TFEU sports case of the Court of Justice, Article 165 TFEU was cited to corroborate the Court's view that the specific characteristics of sport allow football clubs to seek compensation for the training of their young players where those players wish to sign their first professional contract with a club in another Member State.⁹⁷ *Bernard* is notable for the Court's reference to Article 165 although this does not imply a deviation from the Court's traditional treatment of sport. In paragraph 41 of the judgment, the Court reiterated its view first expressed in paragraph 108 of *Bosman* that the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players. Article 165 does not compel the Court to arrive at this assessment, it is simply used to confirm the Court's long held view.

3.4. Anti-doping rules

In *Meca-Medina* the Court of Justice considered a challenge brought by two swimmers against a doping sanction imposed on them following a failed test. Having been suspended for four years, reduced to two on appeal, the swimmers filed a complaint with the European Commission alleging a breach of EU competition laws. The competition law claim was founded on the accusation that the setting of the prescribed doping limit was a concerted practice between the IOC and the 27 laboratories accredited by it, that the limit was scientifically unfounded and could lead to the exclusion of innocent or merely negligent athletes, and that the establishment of tribunals responsible for the settlement of sports disputes by arbitration (such as the CAS) were insufficiently independent of the IOC thus strengthening the anti-competitive nature of that limit.

The Commission rejected the complaint by finding that the contested rules fell outside the scope of the Treaty.⁹⁸ On appeal, the Court of First Instance largely agreed by finding that anti-doping rules concerned an exclusively '...non-economic aspect of that sporting action, which constitutes its very essence'.⁹⁹ On further appeal, the ECJ dismissed this reasoning by finding that 'it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.¹⁰⁰ In determining whether the contested rule fell within the scope of Article 101 TFEU, the Court found that 'account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of

97 Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, judgment of 16 March 2010. The reference to Article 165 TFEU is to be found at paragraph 40.

98 COMP 38.158, *Meca-Medina and Majcen*, Decision of 1 August 2002.

99 Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291 paragraph 45.

100 Case C-519/04 P *Meca-Medina and Majcen* [2006] ECR I-6991 paragraph 27.

competition are inherent in the pursuit of those objectives... and are proportionate to them'¹⁰¹.

In terms of the context in which the doping rule was adopted, the Court took the view that anti-doping measures had as their legitimate objective questions of fairness, equality of arms for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.¹⁰² The anti-doping rules do not infringe EU competition law because they are 'inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes'.¹⁰³ Nevertheless, the court acknowledged that the sanctions attached to anti-doping rules 'are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order to escape condemnation under Article 101 TFEU, anti-doping rules must be limited to what is necessary to ensure the proper conduct of competitive sport'.¹⁰⁴ Anti-doping rules are thus subject to proportionality control. The Court has already accepted that anti-doping measures are necessary in order to ensure fairness in competitions. Article 165 TFEU is unlikely to improve upon this assessment much less be interpreted as a means through which anti-doping measures can escape proportionality control. Indeed, a failure by those imposing anti-doping sanctions to respect the proportionality principle would lead those affected by the sanction to raise the issue of 'fairness' cited in Article 165 TFEU in support of their challenge.

3.5. Player release rules designed to promote national team sports

In the *Charleroi/Oulmers* case, the ECJ was due to hear a challenge to FIFA's mandatory player release rule and the structure of the international match calendar brought by Belgian football club Charleroi and the G14 grouping of leading clubs.¹⁰⁵ The case was settled out of court by way of an agreement based on the grant of a financial compensation package for the clubs and changes to UEFA's governance structures to allow greater representation of the clubs. In return, UEFA secured the disbandment of the G14 association of leading clubs and its replacement with a new European Club Association (ECA) based on a wider membership. Although the case has been settled, Article 165 TFEU would not adjust the basis on which the Court would decide the matter. In terms of the application of EU competition law, the Court would most likely follow the *Meca-Medina* methodology. As with *Bernard*, Article 165 TFEU would no more than corroborate the view that sport possesses special characteristics and that some form of player release and international match calendar fixing is necessary to secure the viability of international sport. It is therefore possible that these two features would be considered to be inherent in the operation of international football and therefore incapable of being defined as restrictions. This assessment would however need to satisfy proportionality control. Less restrictive and more democratic means of achieving the objective were not pursued under the existing system which was therefore susceptible to condemnation under the proportionality principle. Indeed, stakeholders affected by the rule would raise the question of fairness in support of their challenge to the rules.

101 *Meca-Medina* (ECJ) paragraph 45.

102 *Meca-Medina* (ECJ) paragraph 42.

103 *Meca-Medina* (ECJ) paragraph 45.

104 *Meca-Medina* (ECJ) paragraph 47.

105 Case C-243/06 SA Sporting du Pays de Charleroi, G-14 Groupment des Clubs de Football Européens v Fédération Internationale de Football Association (FIFA) reference for a preliminary ruling from the Tribunal de Commerce de Charleroi lodged on 30 May 2006 OJ C/212 2.9.2006 p.11. Removed from the Court register by order of the President of the Court of 25 November 2008 OJ C/69 21.3.2009 p.30.

3.6. Licensing conditions, financial fair play and salary capping

Licensing refers to criteria set by sports federations or leagues that must be adhered to before clubs can participate in competitions. For example, the new 2010 UEFA Club Licensing and Financial Fair Play Regulations establish a set of sporting, infrastructure, personnel and administrative, legal and financial criteria. The new regulations aim to further promote and continuously improve the standard of all aspects of football in Europe and to give continued priority to the training and care of young players in every club; ensure that a club has an adequate level of management and organisation; adapt clubs' sporting infrastructure to provide players, spectators and media representatives with suitable, well-equipped and safe facilities; protect the integrity and smooth running of the UEFA club competitions; and allow the development of benchmarking for clubs in financial, sporting, legal, personnel, administrative and infrastructure-related criteria throughout Europe.¹⁰⁶ The new 2010 regulations also include the new financial fair play requirement, at the heart of which lies the 'break-even requirement'. This enters into force for the financial statements of the reporting period ending 2012, to be assessed during the 2013/14 UEFA club competitions season. Under the scheme, over a period of time, relevant expenses must align with relevant income. If a club's relevant expenses are greater than relevant income for a reporting period, the club has a breakeven deficit. This must not be greater than €5 million although larger deficits, currently up to €45 million, are permitted if covered by contributions from benefactors. The new provisions on financial fair play aim to improve the economic and financial capability of the clubs, increasing their transparency and credibility; place the necessary importance on the protection of creditors by ensuring that clubs settle their liabilities with players, social/tax authorities and other clubs punctually; introduce more discipline and rationality in club football finances; encourage clubs to operate on the basis of their own revenues; encourage responsible spending for the long-term benefit of football; and protect the long-term viability and sustainability of European club football.

In theory such licensing requirements amount to a barrier to entry to the market and are prone to capture within Articles 101 and 102 TFEU. Traditionally, European sport has operated an 'open' model in which sporting success, as opposed to financial criteria, determines access to competitions. Nevertheless, club licensing pursues important objectives, with questions of fairness being paramount. Whilst the Commission and the Court have yet to form a legal opinion on the operation of licensing systems, they may be encouraged to refer to Article 165 TFEU references to fairness. Nevertheless, the formal grounds for deciding this issue are likely to rest on whether the objectives of the UEFA scheme are considered to derive from a need inherent in the organisation of sporting competitions. Providing that these rules do not go beyond what is necessary for the attainment of these objectives, they could be deemed to fall outside the scope of the Treaty competition provisions without reliance on Article 165 TFEU. This finding is heightened given the manner in which the rules were negotiated with representatives of football clubs.

Alternatively, in instances where rules cannot be considered 'inherent', they may benefit from an exemption under Article 101(3) TFEU. Clearly, the Commission would need to assess each contested restriction on its merits rather than accepting from the outset that all rules forming the basis of a licensing scheme are compatible with EU law. It is also to be remembered that Article 165 TFEU cannot be used as the basis for granting an exemption. The reasoning to be employed is to be found only in Article 101(3) TFEU.

¹⁰⁶ UEFA Club Licensing and Financial Fair Play Regulations, 2010 Edition.

In the White Paper on Sport, the Commission acknowledged the 'usefulness of robust licensing systems for professional clubs at European and national levels as a tool for promoting good governance in sport'.¹⁰⁷ The European Parliament's Belet Report stressed the importance of European club licensing in terms of establishing a level playing field in Europe given that clubs now compete on a supranational level through participation in the Champions League.¹⁰⁸ The Independent European Sport Review also favoured its use although stressed the importance of diligent enforcement.¹⁰⁹

In the future, European football may decide to strengthen cost control further by introducing a salary cap. The idea of a football salary cap was mooted in *Bosman*. In the context of discussing alternatives to the disputed international transfer system for players, Advocate General Lenz remarked, 'it would be possible to determine by a collective wage agreement specified limits for the salaries to be paid to the players by the clubs'.¹¹⁰ Further, in *Brentjens* the Court found that collective labour agreements can escape the reach of competition law if the social partners, negotiating in the context of a social dialogue committee, demonstrate that the agreement improves the employment and labour conditions of those covered by the agreement.¹¹¹ As is discussed in chapter 4, a social dialogue committee for professional football was established in 2008. A hard cap imposes a fixed amount on the spending of all clubs whilst a soft cap links spending to a percentage of revenue. As a salary cap restricts the ability of a club to freely recruit players, the prohibitions contained in EU competition law may be engaged. A cap is inherently collusive and may simply be employed in order to allow clubs to maximise revenues and control player wages and influence. However, a strong case might be made for a salary cap to be considered inherent in ensuring the economic viability of teams competing in the league, preserving competitive balance between clubs and encouraging the development of young talent. Consequently, following *Meca-Medina*, a cap might be removed from the scope of Articles 101 and 102 TFEU if the measure does not go beyond what is necessary for the attainment of these objectives.

In this regard, a hard cap, whilst imposing a much greater restriction on commercial freedom than a soft cap, is more likely to find favour in EU competition law. This is because a soft cap may be insufficient to correct competitive imbalance as it disproportionately affects the ability of small clubs to improve their position. This is because larger clubs would continue to be able to spend more on salaries thus aggravating income disparities between clubs. This contrasts with a hard cap which imposes a flat ceiling on the spending of all clubs thus creates a more level playing field assuming that all teams spend the maximum permissible amount. Non-financial variables such as the quality of training regimes are therefore afforded greater prominence. Consequently, whilst a hard cap is arguably pro-competitive, a soft cap, although less restrictive on undertakings, may create structural imbalance within a league. On these grounds, and depending on the economic context in which the cap is imposed, a hard cap is more likely to be considered inherent in ensuring the economic viability of teams competing in the league, preserving competitive balance between clubs and encouraging the development of young talent. Thus a hard cap may escape definition as a restriction under Article 101(1) TFEU. Alternatively, a salary cap

107 White Paper on Sport, p.17.

108 European Parliament (2007), Resolution of the European Parliament on the Future of Professional Football in Europe, A6-0036/2007, 29 March. (The Belet Report).

109 Arnaut, JL., (2006), Independent European Sport Review, p.73. Accessed at http://www.independentfootballreview.com/doc/Full_Report_EN.pdf.

110 *Bosman*, opinion of Advocate General Lenz.

111 Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens Handelsonderneming BV v. Stichting Bedrijfspensioenfondsvoor de Handel in Bouwmaterialen* [1999] ECR I-6025.

may satisfy the exemption criteria contained in Article 101(3) TFEU although the grounds for making such a determination lie in the wording of 101(3) and not Article 165 TFEU.

Article 165 TFEU may have more bearing on a possible free movement challenge to the imposition of a salary cap. A cap would restrict a player's right of free movement if the acquiring club could not recruit new labour due to the cap requirement. Under these circumstances a cap may be challenged under Article 45 TFEU. As a non-discriminatory restriction the body imposing the cap would seek to justify the restriction with reference to the need to ensure the financial viability of the clubs, the need to maintain competitive balance and the need to train young players. In this respect, the body imposing the cap would cite the reference to 'fairness' contained in Article 165 TFEU. As in *Bernard*, the Court of Justice is unlikely to base its judgment on the Article 165 although it may cite it in order to corroborate its view that sport contains a specific nature worthy of protection.

3.7. Rules regulating players' agents

The current FIFA Players' Agent Regulations provide that clubs and players can only call upon the services of agents who are licensed by national associations. The prohibition on the use of unlicensed agents does not apply if the agent acting on behalf of a player is a parent, a sibling or the spouse of the player in question or if the agent acting on behalf of the player or club is legally authorised to practise as a lawyer in compliance with the rules in force in his/her country of domicile. The licensing system, and other potentially restrictive requirements imposed on agents, have the potential to engage some aspects of the TFEU, particularly those relating to competition law and freedom to provide services. A competition law challenge to the FIFA regulations has been heard, and rejected, by the Court of First Instance (CFI) and the Court of Justice.¹¹² In particular, the CFI found that the license system did not result in competition being eliminated, as the system resulted in a qualitative selection process, rather than a quantitative restriction on access to that occupation. This was necessary in order to raise professional standards for the occupation of a players' agent, particularly as players' careers were short and they needed protection. According to the Court, the rule making authority of FIFA was justified as there was a near total absence of national rules regulating agents and there was no collective organisation for players' agents which could be consulted. Therefore, the *Piau* judgment further strengthens the proposition that Article 165 TFEU adds no further protection to the rule making authority of governing bodies in the field of agent regulation than that already acknowledged by the Court.

However, the flaws in the current system of regulation are now recognised by FIFA themselves. It has recently acknowledged that only 25% to 30% of football transfers are carried out by licensed agents.¹¹³ At the FIFA Congress in 2009, the member associations of FIFA therefore voted for 'an in-depth reform of the players' agents system'.¹¹⁴ A working group of the FIFA committee for club football has been established to report on the adoption of a new set of regulations. The working group is composed of representatives from the world players union FIFPro, club representatives and the FIFA legal department. Once adopted the new regulations will supersede those of 2008. At the time of writing the new system has not been made public although the European Parliament has expressed concern that abolishing the existing FIFA licence system for players' agents without setting up a robust alternative system would not be the appropriate way to tackle the problems

112 Case T-193/02, *Laurent Piau v Commission of the European Communities* [2005] ECR II-209. Hereafter referred to as *Piau*, CFI.

113 FIFA Media Release (2009), *FIFA Acts to Protect Core Values*, 15/07/09.

114 FIFA Media Release (2009), *Protect the Game, Protect the Players, Strengthen Glob Football Governance*, 03/06/09.

surrounding agents in football. In this regard the Parliament called for an EU initiative concerning the activities of players' agents.¹¹⁵

The prospect of EU action in this area was first mooted in the White Paper on Sport in which the Commission committed itself to 'carry out an impact assessment to provide a clear overview of the activities of players' agents in the EU and an evaluation of whether action at EU level is necessary, which will also analyse the different possible options'.¹¹⁶ The study was carried out by a consortium of European research institutes and was published in late 2009.¹¹⁷ The study favours a form of self-regulation for agents. It argues that the rules adopted by sports federations will best reflect the specificities of each sport within their own respective jurisdictions. In this connection the study favours the use of an examination-based licensing system for each sport. However, the study argues that in framing and implementing these regulations, the sports federations must be supported by public authorities, particularly the EU. The study indicates that the EU's support should be supporting and co-ordinating in nature, for example taking the form of facilitating dialogue at European level. Consequently, the study does not favour the enactment of specific laws at the EU level. It argues that as only five Member States have enacted specific laws regulating the activities of agents and as these laws do not give rise to obvious restrictions in terms of service provision and establishment, a case for the harmonisation of national laws cannot be made. The study does, however, acknowledge that the lack of evidence of problems with the current pattern of agent regulation may simply reflect the ease by which agents can circumvent regulation.

The discussion concerning whether EU regulation is desirable was addressed by some of the stakeholders participating in the consultation exercise organised within the framework of this study. As explained below in chapter 5, there is no request for direct EU regulation, but for the facilitation and coordination of debate and dialogue among stakeholders. Article 165 TFEU can facilitate this type of EU action in this field, although it is also possible to address the regulation of agents within the framework of the social dialogue or, should legislation become desirable, internal market competences such as Article 114 TFEU.

3.8. Measures regulating betting

Sports organisations have in many Member States come to rely heavily on betting as a source of income. In some states, this has traditionally been subject to state monopolies or concessions that have increasingly come under pressure from ECJ judgments on the freedom of movement and establishment of betting operators. The freedom of movement and establishment for gambling services, including sports gambling can threaten these arrangements. Gambling is a service like any other economic activity, and as such is governed by a conventional free movement analysis.¹¹⁸ Restrictions such as the state concessions which some Member States maintain can be justified either on grounds found in the Treaty or objective justifications recognised by the ECJ.¹¹⁹ Generally, sporting grounds are not invoked in an effort to justify such arrangements. Instead, claims are more often made as to the morality of betting, risks of fraud and crime, and other issues placing gambling services at the fringe of legality and thus susceptible to intense regulation and even state monopolisation. Where the financial dependence of sport on the proceeds of

115 European Parliament Resolution on Players' Agents in Sport, B7-0343/2010, 11/06/10.

116 White Paper on Sport, action point 41.

117 KEA, CDES & EOSE (2009), Study on Sports Agents in the European Union, a study commissioned by the European Commission (Directorate-General for Education and Culture).

118 For an example with references to the wide body of gambling case law, see Case C-203/08 Sporting Exchange Ltd v Minister of Justice (hereafter Betfair), judgment of 3. June 2010, not yet reported, paragraphs 22-30.

119 Betfair, paragraph 26.

gambling services has been cited in an effort to justify restrictive or anticompetitive arrangements, the Court has noted that redistribution even for such noble purposes cannot objectively justify a practice that would otherwise be contrary to EU law.¹²⁰ It seems unlikely that Article 165 TFEU will contribute more than a footnote to the long line of orthodox case law on the relationship between sports bodies and the legal regulation of betting in Member States. Whilst the power to promote the moral integrity of sportspersons could be read as an opaque reference to corruption in sport, it is not easy to see how the 'incentive measures' that stop short of the harmonisation prohibited by Article 165(4) TFEU could have a significant impact on the regulation of sports betting. However, in this context the reference to the moral integrity of sportspersons could enhance claims that other legal bases should be used to this effect. For example, it might be argued that the functioning of the internal market in gambling services requires some harmonisation. Such harmonising measures could conceivably be based on Article 114 TFEU. In this context, further, if not decisive, reference could be made to the moral integrity of sportspersons considered in Article 165(2) TFEU. Although corruption is in itself one of the fields in which the EU may always issue criminal law rules under Article 82(1) TFEU, where a harmonising measure is adopted, it could then be further argued that any civil measures must be accompanied by criminal sanctions which could be justified on the basis of Article 83(2) TFEU wherever civil measures are enacted on the basis of Article 114 TFEU. Thus, even though Article 165 TFEU itself provides only for limited forms of action, its rhetoric could be employed to support the use of other EU competences towards ends that are not permitted by reference to Article 165 alone.

3.9. Rules restricting club ownership

The English National Investment Company (ENIC) objected to UEFA's club ownership rules.¹²¹ The contested rules related to club ownership conditions placed on clubs entering UEFA competitions. If two or more clubs are under the common control of a single entity only one is entitled to be entered into a UEFA club competition. The rule is designed to protect the uncertainty of the results and ensure the public has a positive perception as to the integrity of the UEFA competitions with a view to ensure their proper functioning.¹²² Public confidence in a sporting competition could be undermined if the public were to suspect that on-the-pitch competition between two clubs with similar ownership structures was contrived.

ENIC lodged a complaint to the Commission on the grounds that it had been materially affected by this rule as two of its clubs, AEK Athens and Slavia Prague had qualified for the UEFA Cup and that according to UEFA's rule, only one team could participate in the competition.¹²³ The immediate impact on the affected clubs is clear but in a wider context the rule places a restriction on clubs attracting new investment and it restricts the ability of undertakings to supply that investment. The impact on small to medium sized clubs is such that attempts to improve their relative positions vis-à-vis larger clubs through the

120 See recently, Case C-258/08 *Ladbroke's v Stichting de Nationale Sporttotalisator*, judgment of 3. June 2010, not yet reported, paragraph 8, where the redistributive function was noted in argument but ignored by the Court, whose justifications did not include this argument- for good reason, having consistently rejected this since Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECR I-1039 paragraph 60 and *Zenatti* Case C-67/98 [1999] ECR I- 7289 paragraph 36.

121 Case COMP/37 806: ENIC/UEFA, hereafter referred to as ENIC. See Commission Press Release IP/02/942, 27. June 2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.

122 The arguments as to the impact of the rule on the integrity of sporting competition are comprehensively discussed in a Court of Arbitration for Sport (CAS) judgment, CAS 98/200, *AEK Athens and Slavia Prague / UEFA*, 20 Aug 1999, hereafter referred to as CAS 98/200.

123 According to UEFA criteria the club cleared to participate in the competition was Slavia Prague although in the event both teams participated in the 1998/99 season as a result of an interim order issued by the CAS in July 1998.

attraction of investment, and ultimately players, could be frustrated and this could have a negative impact on competitive balance in football. These considerations were sufficient, according to ENIC, for Article 81 EC (now 101 TFEU) to be engaged and breached. Furthermore, ENIC complained that the object of the contested rule was in fact to distort competition and that UEFA was motivated by a desire to maintain its monopoly control over the European football market, including the lucrative broadcasting rights. The imposition of the rule therefore amounted to a breach of Article 82 EC (now 102 TFEU). In order to counter a potential exemption finding, ENIC alleged that the assumption that multi-ownership increases the risk of match fixing or creates such a perception was not demonstrated by any evidence and that even if that were the case, less restrictive means of achieving that objective existed.¹²⁴

The grounds for the rejection of ENIC's complaint are found in the contextual reasoning supplied in paragraph 97 of *Wouters*.¹²⁵ The Commission found that UEFA's rule is a decision taken by an association of undertakings and as such is theoretically caught within the scope of Article 81 EC (now 101 TFEU). However, the object of the contested rule was not to distort competition and that the possible effect on clubs and potential investors was inherent to the very existence of credible pan European football competitions. Furthermore, the measure did not go beyond what was necessary to ensure the legitimate aim of protecting the uncertainty of the results and maintaining the integrity of the competition. As such, the rule was incapable of being defined as a restriction and consequently it fell outside the scope of Articles 81 and 82 EC (now Articles 101 and 102 TFEU). The decision in ENIC therefore strengthens the proposition that Article 165 TFEU cannot be relied on to offer any greater protection for integrity related rules than already exists.

3.10. Rules excluding non-nationals from sporting competitions

It is common practice in some sports for non-nationals to be excluded from individual sporting competitions. In the White Paper on Sport, the Commission committed itself to launch a study to analyse this issue.¹²⁶ The general principle of equality that is one of the fundamental principles of EU law is often difficult to reconcile with these sporting practices. It also runs counter to the principle of 'openness' contained in Article 165 TFEU. The principle of equality requires that similar situations shall not be treated differently unless such differentiation is objectively justified. This fundamental principle of equal treatment finds specific expression in the prohibitions on any discrimination on grounds of nationality laid down in other Treaty provisions such as Article 45 TFEU. The potential for these provisions to be applied in such a way as to prohibit such discrimination raises concerns amongst some Member States and sports organisations who fear for the purity of national competitions. For example, for cultural reasons it has been suggested that the conferment of 'national champion' titles should be reserved for nationals of the Member State within which the competition takes place. There is also concern at the prospect of some athletes being able to take part in the national championships of more than one country. It should also be observed that eligibility rules for international competitions and championships that are based on the representation of states (legal nationality), logically are a (co)determining factor for the nationality of sportspersons in competitions at the national level that are qualifiers for these international competitions.

124 ENIC para 15.

125 ENIC para 31.

126 In the White Paper on Sport the Commission committed itself to study the situation concerning 'the equal treatment of non-nationals in individual sports competitions'. Contract award notice 2010/S 31-043484.

At the time of writing the extent of the discriminatory practices in individual sporting competitions is unknown although it appears that practice varies. For example, the discriminatory measures may involve access to sports, the conditions relating to the actual practice of sports, the determination of national records, or the award of medals or titles. It is also true that the participation of non-nationals in the national championships of sports with direct elimination, such as tennis or fencing, may exert a more significant impact on the outcome of the competition than in other sports. At this stage it is therefore difficult to draw general conclusions.

However, the normal rules governing discriminatory practices will apply. Therefore, the rules in question will be grouped into the following categories: first rules which are inherent in the organisation of the sport and necessary to pursue the objectives outlined and which therefore do not constitute a restriction of EU law; second, those rules which are directly discriminatory and must be justified on the grounds of public policy, public security and public health, third, those rules which are indirectly discriminatory or non-discriminatory but which are capable of justification as long as they remain proportionate; and finally those rules which are discriminatory and cannot be justified and must therefore be dismissed. This standard assessment remains unaffected by the provisions of Article 165 TFEU both in terms of a 'fairness' defence to the rules and an 'openness' challenge to them.

In addition, the reference to 'fairness and openness in sporting competitions' contained within Article 165 TFEU may add further impetus to efforts to remove nationality discrimination in amateur sport. In this respect, one needs to consider the application of the social advantage principle which requires EU migrant workers to enjoy the same social and tax advantages as national workers. The principle of equal treatment in respect of social advantages stems from Article 7(2) of Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers and family members within the Community. As the White Paper on Sport acknowledges, the Court's case law has extended the right to equal treatment in the granting of social advantages to students and non-active persons who are lawfully resident in the host Member State. The Court has recognised the right of citizens of the Union who are lawfully resident in the territory of the host Member State to avail themselves of Article 18 TFEU (non-discrimination on the grounds of nationality) when they are in a situation which is identical to that of nationals.

3.11. The rights of third-country nationals

In *Kolpak*, *Simutenkov* and *Kahveci*, the ECJ examined the level of protection non-discrimination provisions contained within association agreements concluded between the EU and non-EU states affords individuals of those states.¹²⁷ The Court has consistently held that non-EU sportsmen and women covered by such agreements should not be discriminated against in terms of working conditions, remuneration or dismissal when they are legally employed in the territory of the Member State. For example, Simutenkov was a Russian footballer legally employed in Spain but classified as a non-EU player. His request to have his status changed to that of an EU national was rejected on the grounds that the rules of the Spanish Football Federation precluded the issuance of such licences to non-EU/EEA nationals. As only three non-EU players could participate in *Primera División* matches in the 2000/01 season, Mr Simutenkov was liable to suffer a detriment as a result of his non-EU status. A reference to the ECJ was made and the Court found that the relevant provision of the EU / Russia Agreement offered Russian sportspersons protection

¹²⁷ Case C-438/00 *Deutscher Handballbund v Kolpak* [2003] ECR I-4135. Case C-265/03 *Simutenkov* [2005] ECR I-2579. Case C-152/08 *Real Sociedad de Fútbol SAD, Nihat Kahveci v Consejo Superior de Deportes, Real Federación Española de Fútbol*.

from discrimination in terms of working conditions, remuneration or dismissal when legally employed in the territory of the EU. The Court's rulings only protect persons who are already engaged in the labour market. They do not alter entry requirements for non-nationals as these are still set by the Member States. Similarly, the rulings do not confer a right of free movement between the Member States to third country nationals. The prohibition on discriminatory working conditions only relates to circumstances in which the non-national is already legally employed within the member state. As entry requirements for non-nationals still reside with Member States, the reference to 'openness' contained in Article 165 TFEU cannot be interpreted to extend non-national free movement rights further than those already permitted by the Court.

3.12. Rules on national territorial tying

The *Bosman* judgment effectively established a two tier European sports market. On the one hand the judgment liberalised the European player market by granting professional sportspersons enhanced rights of free movement. However, the judgment did not grant similar rights to the clubs as service providers. Therefore, whilst the players operate in a single European market, the clubs are tied to national markets. The reference to 'openness' in European competitions contained within Article 165 TFEU may therefore be cited in support of liberalising not only the player market, but also the product market in which the clubs operate.

In the *Mouscron* case, the Commission rejected a challenge to UEFA's 'home and away' rule on the grounds that it breached Article 82 EC (now 102 TFEU).¹²⁸ In the press release accompanying the unpublished decision, the Commission found that the rule constituted a sporting rule that did not fall within the scope of Articles 81 and 82 EC (now 101 and 102 TFEU).¹²⁹ Commenting on the case in the White Paper on Sport, the Commission stated that the 'the organisation of football on a national territorial basis was not called into question by Community law' as the rule was indispensable for the organisation of national and international competitions in view of ensuring equality of chances between clubs and that it did not go beyond what was necessary.¹³⁰ The notion of purely sporting rules was challenged by the Court in *Meca-Medina*. However, this judgment now introduces the possibility of articulating this as a rule 'inherent' in the organisation and proper functioning of sport although the Court has as yet to accept that the organisation of sport along national lines is an objective that ought legitimately to trump all other foundational policy aims of EU law.

The *Mouscron* decision concerned the temporary relocation of a club into another member state. In other instances, clubs have sought to relocate permanently to another member state but continue to play in the league of the home state. In these circumstances it may be doubted that rules preventing this amount to a rule inherent in the maintenance of nationally rooted sporting competition. This is because the club would continue to play in the same league. Nevertheless, the impact on the football league of the host country would need to be considered as would the impact on the clubs supporters who would face an international journey to attend 'home' matches.

128 Commission Decision of 09/12/99, Case 36851, C.U. de Lille/UEFA (*Mouscron*), unpublished Decision.

129 Commission Press Release IP/99/965, 9. December 99, 'Limits to application of Treaty competition rules to sport: Commission gives clear signal'.

130 European Commission (2007), *The EU and Sport: background and Context*, White Paper on Sport, SEC(2007) 935, 11/07/07, p.71.

It is also possible that some large clubs in smaller markets may want to permanently relocate into a league in another larger national association whilst remaining based in the home state. For example a Dutch club may be interested in playing in the German Bundesliga. Liberalisation of the player market has diminished the sporting strength of some of the leading teams from the smaller markets as their best playing talent migrate to larger markets. Permitting the cross border relocation of clubs would clearly undermine the national segmentation of the product market on which much of European sport is based but it may enhance competitive balance within European football by allowing larger teams from smaller markets to compete more effectively with those teams from larger markets. However, if maintaining the national segmentation of the product market is to be considered a legitimate objective, then transparent and proportionate rules maintaining this segmentation could be considered 'inherent' in the pursuit of that objective. Alternatively, a case could be made for exempting national tying under Article 101(3) TFEU as it contributes to the production of the sporting contest whilst allowing consumers to benefit in the sense that the club is tied to the locality where most of its supporters (consumers) are based.

As potential service providers, clubs could also rely on Articles 49 and 56 TFEU, depending on the permanence of the relocation. As with the application of competition law, a rule 'inherent' in the organisation of sport does not constitute a 'restriction' to free movement. Any restriction¹³¹ can be justified by reference to either the Treaty derogations or Court-created objective justifications so long as it is proportionate.¹³² Although the territorial organisation of sport has yet to be expressly recognised as an objective justification in free movement law, at least the Commission is prepared to entertain analogous arguments in the field of competition law. However, it is not clear whether Article 165 TFEU should gravitate towards such a conclusion. In fact, the references to 'European sporting issues'¹³³ and 'developing the European dimension in sport'¹³⁴ could well be interpreted in future judgments as requiring the elimination of segmentation along national lines in favour of a pan-European approach that ignores national borders. This conclusion is also supported by the failure to recognise such divisions when considering the structures of sport and the alternative focus on volunteering in sport.

3.13. Rules on selection criteria.

In *Deliège*, the referring Belgian court asked the ECJ to consider whether it is contrary to Articles 49, 81 and 82 EC (now 56, 101 and 102 TFEU) to require professional or semi-professional athletes, or those wishing to become so, to be authorized by their federation in order to be able to compete in an international competition which does not involve national teams against each other.¹³⁵ The dispute arose as a consequence of a judokas failure to be selected for participation in the 1996 Paris International Judo Tournament. Each participating national federation could enter a limited number of affiliated athletes irrespective of their nationality. Participation in the Paris tournament enabled judokas to acquire points which would facilitate qualification for selection to the 1996 Atlanta Olympic Games. Ms *Deliège* asserted that the judokas selected in her place had achieved less outstanding results than her own and that her failure to be selected impeded her career.

131 As discussed above, whilst conventional analysis requires that objective justifications are applied to non-discriminatory restrictions, the sports-related case law obscures this point.

132 Case C-55/94 *Gebhard* paragraph 37.

133 Article 165(1) TFEU

134 Article 165(2) TFEU

135 *Deliège*.

The ECJ acknowledged that the choice of criteria is based on a large number of considerations unconnected with the personal situation of any athlete, such as the nature, the organisation and the financing of the sport concerned.¹³⁶ It continued that 'it naturally falls to the bodies concerned... to lay down appropriate rules and to make their selections in accordance with them'.¹³⁷ This is because the governing bodies, in this case the Belgian Judo Federation, possess 'the necessary knowledge and experience' to exercise such judgement and that this is the arrangement normally adopted in most sporting disciplines'.¹³⁸

The Court considered that selection rules for high-profile international tournaments did not restrict access to the labour market.¹³⁹ This enabled the Court to rely on its established distinction between restrictions to market access and rules which merely governed activity after access. Post-access regulation was not subject to the Article 56 TFEU prohibition on restrictions to the freedom to provide services, whilst after *Bosman* obstacles to market access were caught by the EC Treaty free movement provisions. *Deliège* could therefore be explained as an uncontroversial application of the market access/market activity distinction between those non-discriminatory 'obstacles' that can be justified, and those that do not require justification. This conclusion would be beyond dispute if the Court's judgment had ended at paragraph 62.

However, the Court went beyond this. It attempted to explain why rules 'inherent in the conduct of an international high-level sports event' might not in law constitute restrictions of free movement even if they in fact involved some restrictive criteria being adopted.¹⁴⁰ The Court considered it necessary to observe that the selection system was linked to 'a large number of considerations unconnected with the personal situation of any athlete, such as the nature, the organisation and the financing of the sport concerned'.¹⁴¹ Since such regulation did not constitute a 'restriction' or 'obstacle', it was simply not within the scope of examination. A limit on the number of competitors that could be selected did not 'in itself, as long as it derives from a need inherent in the organisation of such a competition, restrict the freedom to provide services'.¹⁴² The court did not carry out a proportionality analysis of the kind that is required for rules that are considered *prima facie* to constitute obstacles. It is clear that should this logic be repeated in any future case involving selection criteria, Article 165 TFEU cannot offer additional protection for such criteria beyond that already been recognised by the Court.

3.14. Rules concerning the composition of national teams

National team sports play a central role in European sport both in terms of its popularity with spectators and its commercial significance for governing bodies. The importance of protecting national team sports is acknowledged by the ECJ as a legitimate objective. In *Walrave* the Court held that the prohibition on nationality discrimination 'does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity'.¹⁴³ Nevertheless, the Court did find that 'this restriction on the scope of the

136 *Deliège* paragraph 65.

137 *Deliège* paragraph 67.

138 *Deliège* paragraph 68.

139 *Deliège* paragraph 61.

140 *Deliège* paragraph 64.

141 *Deliège* paragraph 65.

142 *Deliège* paragraph 69.

143 *Walrave* paragraph 8.

provisions in question must however remain limited to its proper objective'.¹⁴⁴ In *Deliège*, the Advocate General remarked, 'the pursuit of a national team's interests constitutes an overriding need in the public interest which, by its very nature, is capable of justifying restrictions on the freedom to provide services'.¹⁴⁵ Consequently proportionate rules designed by the sports governing bodies to protect national team sports are unlikely to be considered a breach of the TFEU and the entering into force of Article 165 cannot add further protection.

3.15. Rules protecting sports associations from competition

Rules that endow special powers on sporting bodies and thus protect them from competition can fall foul of several Treaty provisions. The abuse of a dominant position achieved through a regulatory role can be contrary to Article 102 TFEU. Action by a Member State, namely the grant of such a regulatory role to an economic actor, can also be contrary to the state's obligations to refrain from compromising competition in the internal market, now under Article 106 TFEU. In the *MOTOE* case, the ECJ noted that where a Member State granted regulatory powers to a sporting body that was also undertaking economic activity, that grant might be liable to lead the economic actor to abuse of their resulting statutory dominant position.¹⁴⁶ As such, the grant of special powers is in these circumstances contrary to the Treaty unless the powers are subject to 'restrictions, obligations and review'.¹⁴⁷ This is a requirement even if there was no clear evidence that the resulting dominant position was in fact abused. As the review of first principles provided in the *MOTOE* judgment demonstrates, it is very difficult to combine economic and regulatory functions in such a way as to prevent both actual abuse and the risk of abuse.¹⁴⁸

Therefore in the absence of clear guidance on the conditions that must be attached to such arrangements, sports governing bodies are best served by separating these functions as was indeed required in the F1/FIA settlement.¹⁴⁹ Article 165 TFEU is unlikely to have a significant impact on the permissibility of arrangements called into question by the *MOTOE* judgment. Whilst the way in which sport is organised in the EU could indeed constitute union action aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports' and thus authorised under Article 165(2), such efforts may be hampered by the restricted means available under Article 165(4). It seems unlikely that rules on sports governance, either confirming or denying the legality of *MOTOE*-type arrangements, could constitute anything other than the kind of harmonising measures that are expressly prohibited under Article 165(4). Therefore if EU legislation is to provide a way beyond the framework outlined in the *MOTOE* judgment, it will be legislation adopted despite, rather than as a result of, the introduction of Article 165 TFEU.

144 Walrave paragraph 9.

145 *Deliège* paragraph 84.

146 Case C-49/07 *MOTOE* [2008] Judgment of the Grand Chamber of 1. July 2008.

147 *MOTOE* Paragraph 52.

148 See in great detail Miettinen, S., (2008), 'Policing the boundaries between regulation and commercial exploitation: lessons from the *MOTOE* case', 3-4 *International Sports Law Journal* pp. 11-18.

149 See Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776.

4. THE POLICY DIMENSION OF THE NEW EU COMPETENCE ON SPORT

This study has focused so far on a legal analysis of the implications of Article 165 TFEU. However, given the limited impact of the new Treaty provisions on the application of EU law to sport, the real innovation brought about by Article 165 TFEU is the possibility, for the first time, of developing a direct supportive and complementary policy in the field of sport. The impact of European law on sport over the last two decades has been an 'indirect EU sports policy',¹⁵⁰ but the lack of legal base in the Treaty prevented any attempt to plan a coherent approach to sport that could be based on well defined and thoroughly researched action priorities, objectives, policy instruments and budgetary appropriations. In order to escape accusations of acting beyond its powers, the EU linked its sports-related funding programmes to existing competences in the Treaty, such as education policy. The new sports competence contained in Article 165 allows the EU to finance sport directly without the need to justify this action with reference to other Treaty competencies. Thus, the entry into force of the TFEU opens a range of possibilities to EU institutions including, amongst others, funding programmes on social inclusion, health promotion, education and training, volunteering, anti-doping, the protection of minors, combating violence and corruption in sport, the promotion of good governance in sport and supporting the development of a well researched evidence base on current issues in sport. These and other potential action areas are considered below. This chapter analyses the main areas of attention in the implementation of policy under Article 165 TFEU. The mainstreaming of sport in other EU policies was an objective of the European Commission White Paper on Sport,¹⁵¹ and the new Article might give impetus to that effort, but as it is explained above Article 165 TFEU does not impose an obligation to do so. The analysis of the policy aspects of Article 165 is guided and limited by the strategic objectives set up in the wording of the article itself.

4.1. EU sports policy taking account of 'its structures based on voluntary activity and its social and educational function'

Article 165(1) makes an explicit mention of the voluntary structures and the social and educational functions of sport. These three elements tend to be linked to grassroots sport. However, policies should also consider the contribution of the professional level to the social functions of sport, which was acknowledged in the White Paper on Sport.¹⁵² The promotion of volunteering in sport is seen as a priority mainly for two reasons. First, because volunteers form the lifeblood of sport with a level of employment of up to 86% in Austria (as opposed to 14% paid staff) or 80% in France.¹⁵³ Second, volunteering in sport is often considered a vehicle to achieve social integration and inclusion through the concept of social capital, as pointed out in the report of the group of independent experts assembled by the European Commission.¹⁵⁴

150 Tokarski, W., Steinbach, D., Petry, K., & Jesse, B. (eds.) (2004), *Two Players, One Goal*, Oxford: Meyer and Meyer Sport,.

151 European Commission (2007) *The White Paper on Sport: Frequently Asked Questions*. MEMO/07/290, 11 July 2007, p. 2.

152 White Paper on Sport, p. 3.

153 Study on Volunteering in the European Union (2010), Report for DG EAC submitted by GHK, p. 6. Available at <http://ec.europa.eu/citizenship/eyv2011/doc/Volunteering%20in%20the%20EU%20Final%20Report.pdf>

154 European Commission (2010) Group of independent experts: Report on EU priorities in the field of sport, p. 6, available at http://ec.europa.eu/sport/news/doc/100702_gise_final_report.pdf.

Volunteering is mainly a local or national phenomenon and many of the barriers faced by volunteers and sports organisations originate also at the local and national level.¹⁵⁵ Moreover, the levels of volunteering in Europe vary greatly among Member States: 'Whilst certain EU Member States have longstanding traditions in volunteering and well developed voluntary sectors, in others the voluntary sector is still emerging or poorly developed'.¹⁵⁶ Before taking any decision in this area it is necessary to acquire a detailed knowledge base to analyse volunteering across the European Union. A recent study commissioned by the European Commission is a good starting point, but further knowledge and research should be a priority. Whilst comparative research and exchange of good practices between Member States should be a priority, it might also be advisable to compare volunteering structures in sport with other sectors.

The study on volunteering identified a worrying trend in the increasing average age of volunteers in European sport: it is proving difficult to recruit young volunteers. There is a mismatch between the needs of voluntary organisations and the aspirations of the new generations of prospective volunteers. Younger volunteers would like to see shorter term voluntary activities rather than long-term commitments. The reliance of sports organisations on volunteers is also creating a professionalisation of volunteer activities, where highly specialised skills are in demand by organisations but the volunteers feel overwhelmed by their responsibilities. In order to favour volunteer engagement, it is advisable to devise a dual approach. On the one hand, the removal of legal and bureaucratic barriers to volunteers and to organisations wishing to develop volunteering programmes. The adoption of recommendations after careful study and research could be a suggested way of action. On the other hand, a 'positive policy' encouraging and rewarding volunteering is also advisable. In this respect, active programmes such as the Europe for Citizens programme or Youth in Action should be taken into account. Article 165 TFEU opens the possibility of creating positive incentives to develop volunteering in sport. These could take the form of a specific funding programme (or a priority area within a wider sports programme), but also guidelines and recommendations from the Commission, when requested by the Council. At the same time, sports non-governmental organisations can also create incentives by coordinating their regulations and facilitating, rather than hampering, the mobility of volunteers across Member States. Given the difficulties in attracting young volunteers, mobility and exchange might be a decisive factor, if one is to judge by the success of similar initiatives in fields such as higher education (e.g. Erasmus programme). Those volunteers who are already active and move across Europe to work or study should not find barriers to continue their engagement in their receiving country. Sports organisations should make sure their regulations do not act as barriers, but rather to the contrary, they encourage continued volunteering.

The social and educational function of sport is considered a priority because of the inherent values that sport can foster, such as responsibility, tolerance, fair play or team spirit. Sport can play an important role in education and in that respect the cooperation between the sectors of sport and education should be strengthened. Whilst education is a Member State competence, Article 165 could contribute to generate synergies and networks between governments, schools and sport organisations. On the other hand, sport is often seen as a tool for social inclusion. There is however increasing evidence that integration through sport cannot be achieved without inclusion and integration *in* sport.¹⁵⁷ Thus, the latter

155 Ibid.

156 Study on Volunteering in the European Union (2010), p.6.

157 See for example Mutz, M. and Baur, J., (2009) 'The role of sports for violence prevention: sport club participation and violent behaviour among adolescents', *International Journal of Sport Policy*, 1 (3), pp. 305-321.

should be a priority to maximise the former. Provisions should be made to encourage the participation of excluded groups in sport, such as women. The entry into force of the Lisbon Treaty, which also granted legal status to the charter of fundamental rights, provides an opportunity to design a policy with incentives for the inclusion in sport of other excluded groups such as migrants, elderly people or low-income families. Initiatives that target a variety of excluded groups could be prioritised. Similarly, if the inclusive potential of sport is to be realised provisions to fight homophobia, xenophobia and gender-based violence in sport should be made a priority. In respect of the latter, current provisions on safety in the workplace could be revised to include the practice of sport and at the professional level this could be included in the agenda of the social dialogue (see below).

4.2. Protection of the 'physical and moral integrity' of sportspersons

The protection of the integrity of sportspersons is the second dimension of the new competence mentioned in Article 165. These provisions have been generally interpreted as referring to the fight against doping and the protection of young athletes. The issue of doping can be approached from several angles and, therefore, using different competences. The World Anti-Doping Agency is currently regarded as the leading international organisation in combating doping especially in professional sport, yet its resources and competences are limited. With the provisions of Article 165 TFEU that also refer to cooperation with sport and international organisations EU action could contribute to research and to a better understanding of doping in order to complement WADA. In this respect, a true added value could lie in facilitating cooperation among national anti-doping agencies in EU Member States. Another important aspect is the implication of police cooperation structures, which are already set up, in fighting the trafficking of doping substances. Having said this, EU institutions also need to be aware that there are open debates on the current international anti-doping strategy. First, some experts question its efficacy since doping in professional sport does not seem to have decreased. Second, sport stakeholders (especially the athletes) feel that the governance of WADA and anti-doping regulations need to be improved to be more inclusive. Initiatives of EU institutions in the area of doping need to take into account the case law of the ECJ in *Meca-Medina* as reviewed in this study. In particular they need to ensure that all stakeholders are included in decision-making and that the anti-doping strategies of sports organisations follow sound principles of good governance. Article 165 creates a legal base for the Commission and other EU institutions to facilitate exchange of best practices in the governance of anti-doping. In the White Paper the Commission suggested it was happy to assist in the development of good governance guidelines. Within this framework the Commission has already organised a conference on licensing systems and also a conference on anti-doping. Given the importance of anti-doping regulations, EU institutions are encouraged to include anti-doping structures in any action relating to good governance principles in sport.

Whilst doping in professional sport makes headlines, the independent group of experts consulted by the Commission suggested that the consumption of performance enhancing substances is as big a problem in amateur and non-organised sport. Indeed, the EU presidency trio of Spain, Belgium and Hungary confirmed anti-doping as one of its priorities explaining that they were interested in studying the situation at the amateur level. EU action in the area of doping in professional sport might limit itself to reinforcing the existing structures, if these are considered suitable and effective, but Article 165 TFEU opens the possibility of EU funding initiatives in relation to amateur and non-organised sport. At amateur level, doping could be considered a health issue. Article 165 TFEU precludes any harmonisation of legislation in the field of sport, as does the public health provision in

Article 168 TFEU. However, the horizontal nature of the requirement to provide a high level of health protection may offer opportunities to develop a dual strategy to coordinate sports-related national provisions based on health, which itself must be taken into account when implementing EU policies. EU action could also add value in creating the forum for debate and exchange of information, as well as to give the opportunity to national ministers to debate coordination of policies.

A concern for the protection of young athletes has increased since the *Bosman* judgment liberalised the European labour market for professional footballers. Recently, attempts to re-regulate the players market through the introduction of UEFA's locally trained player initiative has given rise to concerns that such a move encourages the international transfer of minors. In the Belet Report on the Future of Professional Football, the European Parliament stated that it is 'convinced that additional arrangements are necessary to ensure that the home-grown players initiative does not lead to child trafficking, with some clubs giving contracts to very young children (below 16 years of age)' and that 'young players must be given the opportunity for general education and vocational training, in parallel with their club and training activities, and that the clubs should ensure that young players from third countries return safely home if their career does not take off in Europe.' In addition, the 2010 Madrid European Sports Forum discussed a number of issues related to the use of young people in sport including overtraining and exploitation, missed education opportunities, the use of doping substances, and sexual abuse and harassment. Linked to the debate on the transfer of minors is a concern that larger football clubs are attracting young overseas players to their academies and this is undermining the efforts of many smaller clubs to invest in the education and training of young talent. This has a consequential negative impact on competitive balance in European football.

Article 165 TFEU could be interpreted as an invitation to further strengthen the rules governing the international movement of young people, whether at EU level or via the enactment of private arrangements. Nevertheless, it must be recognised that placing restrictions on the international transfer of minors has the potential to engage the EU's provisions on free movement of workers. However, the EU has long recognised as legitimate the need to protect minors in sport and it has itself enacted protective legislation via Council Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work. In addition, the 2000 Nice Declaration on Sport expressed 'concern about commercial transactions targeting minors in sport, including those from third countries, inasmuch as they do not comply with existing labour legislation or endanger the health and welfare of young sportsmen and –women'.¹⁵⁸ Similarly, the European Commission's 2007 White Paper on Sport expressed concerns that whilst the movement of minors in sport across frontiers may fall short of the legal definition of trafficking, the exploitation of young players continues to be a problem in the EU.¹⁵⁹ In particular, the Commission cited reports that an international network managed by agents takes very young players to Europe especially from Africa and Latin America. Those children who are not selected for competitions are then abandoned in that foreign country. This heightens the prospects of them falling into positions where they may experience further exploitation. For the sake of balance, it is also important to acknowledge that the international transfer of minors can benefit young

158 Declaration 29 to the Treaty of Amsterdam. Presidency Conclusions, (2000), 'Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies', Nice European Council Meeting, December 2000.

159 White Paper on Sport.

players, both in terms of their football and general education and also their general social development and financial security.¹⁶⁰

In the White Paper on Sport the Commission acknowledged that the protection of minors in sport would also benefit from more effective regulation of the activities of players' agents, better licensing systems for sport clubs, and social dialogue in the sport sector.¹⁶¹ All three initiatives receive attention throughout this study. In the White Paper, the Commission also committed itself to two initiatives. First, to monitor the implementation of EU legislation, in particular the Directive on the Protection of Young People at Work. Second, to encourage co-operation between the Member States and sport organisations on the protection of the moral and physical integrity of young people through the dissemination of information on existing legislation, establishment of minimum standards and exchange of best practices.¹⁶²

Article 165 strengthens the EU's ability to achieve the above and provides encouragement to the sports organisations to strengthen internal sports regulations designed to protect minors. In particular, Article 19 of the FIFA Regulations for the Status and Transfer of Players places restrictions on the international transfer of minors. These restrictions are theoretically caught by the prohibitions contained in EU free movement law as an EU minor who is considered a 'worker' can seek the relevant protections offered by Article 45 TFEU. Nevertheless, restrictions can be justified on the basis that they pursue, in a proportionate manner, a legitimate objective and as is explained above, the EU considers the protection of minors to be one such legitimate objective. Therefore, Article 165 does not adjust the proposition that proportionately pursued attempts to protect minors are compatible with EU law.¹⁶³

Additional measures designed to deter the international transfer of minors have been suggested. First, a young player could be required to sign his or her first contract with the training club. Clearly this would act as an obstacle to a player's free movement and would require justification. Second, the training compensation criteria for young players contained in the FIFA Regulations on the Status and Transfer of Players could be increased so as to deter clubs from poaching young players and as a way of ensuring training clubs are rewarded for their investment in youth development. One such increase was approved by FIFA in October 2008. However, in *Bosman*, the ECJ held that training compensation costs should relate to the actual cost incurred by the training club.¹⁶⁴ If adopted and challenged, both of these measures would be tested against the orthodox requirements of the justificatory regime and proportionality control contained with EU free movement law. As is explained in chapter 2, Article 165 TFEU offers no additional constitutional protection for such initiatives.

160 For a discussion see Anderson, C. (2009), 'New FIFA Regulations on the Transfer of Minors', *World Sports Law Report*, 7(11), pp.3-5.

161 Commission Staff Working Document, 'The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport', COM(2007) 391 final, p51.

162 White Paper on Sport, points 42 & 43.

163 For Court of Arbitration for Sport jurisprudence see CAS 2005/A 955 Cádiz C.F., SAD v FIFA and Asociación Paraguaya de Fútbol, CAS 2005/A/956 Carlos Javier Acuña Caballero v FIFA and Asociación Paraguaya de Fútbol and CAS 2008/A/1485 Midtjylland v FIFA.

164 Case C415/93 *Bosman*, para. 109.

4.3. Promoting ‘cooperation between bodies responsible for sports’

The EU has long promoted dialogue with the sports movement. From 1991 to 2003 the European Sports Forum brought together representatives of the sports movement. In 1997 the Heads of State and Government released the Amsterdam Declaration on Sport which called ‘on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue’.¹⁶⁵ In addition, in the 1999 Helsinki Report the Commission proposed a ‘new approach’ to sport which involved ‘preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment...[t]his overall vision assumes greater consultation between the various protagonists (sport movement, Member States and European Community) at each level. It should lead to the clarification, at each level, of the legal framework for sports operators’.¹⁶⁶ The discussion on sport at the 2004 intergovernmental conference led the Commission to reconsider its dialogue with the sports movement and in 2005 it launched a consultation process, ‘The EU & Sport: matching expectations’.¹⁶⁷ A second consultation took place in June 2006 entitled ‘The Role of Sport in Europe’. These, and other high level meetings held between the Commission and the European sport federations throughout 2004, 2005 and 2006, informed the Commission’s White Paper package released in July 2007.¹⁶⁸ In the White Paper the Commission recognises that the commercialisation of sport has attracted new stakeholders and this ‘is posing new questions as regards governance, democracy and representation of interest within the sport movement’.¹⁶⁹ The Commission suggests that it can play a role in helping to develop a common set of principles for good governance in sport such as transparency, democracy, accountability and representation of stakeholders.¹⁷⁰ In the White Paper, the Commission argues that governance issues in sport should fall within a territory of autonomy and that most challenges can be addressed through self-regulation which must however be ‘respectful of good governance principles’.¹⁷¹

The EU has identified social dialogue as a means of promoting better governance in sport. The constitutional basis for social dialogue is located within Articles 153-155 TFEU. Social dialogue refers to discussions, consultations, negotiations and joint actions involving organisations representing the two sides of industry, namely employers and workers (the social partners). Nearly 40 social committees exist in the EU covering a wide range of sectors. These committees have concluded a large number of autonomous agreements at the European level which the social partners implement themselves, or which are transformed into binding legislation. The White Paper argued that social dialogue in the sports sector could ‘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’.¹⁷² The White Paper added that ‘a European social dialogue in the sport sector or in its sub-sectors (e.g. football) is an instrument which allows social partners to contribute to the shaping of employment relations and working conditions in an active and participative way. In this area, such a social dialogue could also lead to the establishment of commonly agreed codes of conduct or charters, which could

165 Declaration 29 to the Treaty of Amsterdam.

166 European Commission (1999) The Helsinki Report on Sport, Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework. COM (1999) 644 final, 10 December 1999, p.7.

167 ‘The EU & Sport: matching expectations’: Consultation Conference with the European Sport Movement, 14-15 June 2005.

168 White Paper on Sport.

169 Ibid section 4.

170 Ibid section 4.

171 Ibid section 4.

172 Ibid section 5.3.

address issues related to training, working conditions or the protection of young people'.¹⁷³ The content of an agreement could be potentially wide but it must pertain to the employment relationship between clubs and players. This could include the status and transfer of players, contractual issues, the protection of minors, solidarity payments, the international match calendar, doping, image rights, pension funds, and the use of artificial turf.¹⁷⁴ Social dialogue in the sports sector is underdeveloped with only professional football having so far established a formal social dialogue committee (July 2008). The reference to promoting co-operation between sports bodies contained in Article 165 TFEU validates the Commission's efforts into promoting social dialogue in sport. Since 2001 the Commission has funded a number of projects exploring the viability of social dialogue between representatives of clubs and players.¹⁷⁵ It is to be recommended that this support continues.

Social dialogue is however only one aspect of the structured dialogue and Article 165 implies that this dialogue can be improved. Questions as to the efficiency of the European Sports Forum led to its suspension in 2003. The White Paper on Sport committed the Commission to re-launching the Sports Forum and in 2008 a meeting was held in Biarritz, France. Given the diversity of the sports movement, questions must remain as to the effectiveness of the Sports Forum in its present format. A wide and inclusive membership may struggle to stimulate sufficient debate and mutual learning between parties as stakeholders may be prone to simply state their position. A more streamlined Sports Forum will naturally exclude some stakeholders and provoke resentment amongst them. The recent initiative to create working groups within the Forum was to be tested in the 2010 edition in Madrid, but unfortunately major travel disruption prevented many of the participants from attending. Yet, the level and quality of debates in that edition of the Forum would suggest that it can be a useful tool for dialogue between sports organisations and the Commission. Whilst not abandoning the Sports Forum, the Commission should monitor its value, consider its format, and in time form an opinion as to its usefulness.

As a parallel development, the Commission should further develop its thematic dialogue with the sports movement over specific issues including the regulation of agents and the protection of minors. The structure of this dialogue should not assume that any single stakeholder has a monopoly on representation and therefore bilateral dialogue between the Commission and individual stakeholders should be discouraged. Thematic structured dialogue should not lead to 'agreements' such as the so-called Bangermann agreement on player quotas in 1991. In this instance, the ECJ reminded the Commission that it does not possess the power to authorise practices that are contrary to the Treaty.¹⁷⁶ It is also important that structured dialogue, either conducted through the Sports Forum, bilaterally or thematically, in no way undermines efforts by social partners to conclude agreements within the context of social dialogue committees.

Outside the Commission structure, dialogue with the sports movement can take place through political initiatives at member state level. Following a recent proposal of the Spanish presidency, EU sports ministers are currently discussing the creation of a permanent structure for dialogue with the sporting movement. Whilst agreement seems to

173 Ibid section 5.3.

174 T.M.C Asser Institute (2008) Study into the identification of themes and issues which can be dealt with in a Social dialogue in the European professional football sector, Report for the European Commission co-authored by the T.M.C Asser Institute, Edge Hill University and the Katholieke Universiteit Leuven, May.

175 These are listed at footnote 149, Commission Staff Working Document, The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport, COM(2007) 391 final.

176 Bosman paragraph 136.

have been reached as to the representation of the European institutions, difficulties persist in deciding on the representation of sport organisations. In this respect, the same recommendation applies that no single stakeholder should be assumed to hold a monopoly on the representation of the relevant sport.

Until the entry into force of Article 165 TFEU, member state political cooperation took place informally outside the formal Council structure. Individual Presidencies often decided to prioritise sport but discussion was restricted to informal meetings of EU Sport Ministers and EU Sport directors and to *ad hoc* expert meetings on priority themes. Article 165 grants the Member States a competence to adopt a more formal and coherent approach to sport. Ministers discussed EU sport policy for the first time in a formal Council setting in May 2010. At this meeting Ministers suggested the following areas for possible EU action: (1) Social and educational functions of sport, (2) Sport structures, in particular those based on voluntary activity, (3) Fairness and openness in sport, including the fight against racism, discrimination and violence; (4) Physical and moral integrity of sportsmen and sportswomen, especially the fight against doping and the protection of minors and (5) Dialogue and close cooperation with the sports movement.¹⁷⁷ This focus on a limited number of priority themes for Member States should be favoured over a more comprehensive programme. Not only does it allow for the development of a coherent rolling agenda on the issue, it also realistically manages the high stakeholder expectations that have accompanied the Article 165 debate.

4.4. Cooperation with third countries and international organisations

The European Commission already analysed in its White Paper on Sport the role of sport in the Union's external relations and in sustainable development: 'As an element of external assistance programmes, as an element of dialogue with partner countries and as part of the EU's public diplomacy'.¹⁷⁸ Article 165 TFEU reinforces that forward looking vision of the Commission and proposes active international cooperation in the field of education and sport, although the competence for action in this field needs to be found elsewhere in the Treaty. EU external action is mostly in the hands of the Member States and therefore the EU sport ministers are a key element to the development of this part of Article 165. The Commission and sport ministers should cooperate to establish an international dimension to the nascent EU sport policy. This could be of significant advantage in relations with partner countries and especially having regard to the problems of child migration analysed above. One of the strategies of EU immigration policy is to engage with countries of origin to reduce the flow of illegal immigrants reaching the Union. It is recommended here to study the inclusion of the sports sector in cooperation and development agreements with third countries in order to enhance the protection of young sportspersons willing to relocate to EU Member States. Similarly, concrete actions in the field of sport could be supported by the EU within the framework of development policy. The social functions of sport already identified through this study are of even more value in developing countries. Sport in this respect is conceived as a policy tool and EU institutions would be advised to cooperate with other international institutions and non-governmental organisations with significant expertise to introduce sport in its development policy. One of the most significant institutional reforms of the TFEU is to reinforce the Union's external service. The new Union service is developing at the time of writing. It is perhaps too early to consider the extent to

¹⁷⁷ Press Release of the Council of the European Union, 3013th Council Meeting, Education, Youth and Culture, Brussels 10-11 May 2010, 9456/10.

¹⁷⁸ White Paper on Sport, p. 9.

which the external service could engage in sport-related issues, but it is worth keeping an open mind and regularly monitoring the new structures to find appropriate opportunities.

The mention of cooperation with international organisations in Article 165 TFEU has been interpreted by some stakeholders as a reference to international sports organisations and thus as a reference to the autonomy of sport and the responsibilities of non-governmental sport organisations. This seems too broad an interpretation, for one could consider that Article 165 refers exclusively to cooperation with states and international organisations in the traditional sense, especially when there is explicit reference to the Council of Europe, an intergovernmental international organisation. The European Council already indicated in the Amsterdam and Nice declarations that EU institutions should consult sport governing bodies when implementing EU policies, therefore the Commission and the European Parliament can draw on the expertise of sport non-governmental organisations to develop the external dimension of EU sport policy. Indeed, an example of the latter can be seen in the memorandum of understanding signed between FIFA and the European Commission in 2006 to make football a force for development in African, Caribbean and Pacific countries. The co-operation with sports organisations is an advantage, but not a requisite.

Finally, the Article calls for cooperation with the Council of Europe. This is of special interest when taken together with provisions elsewhere in the Treaty that give legal personality to the Union, hence enabling the EU to sign to International conventions. One of the possibilities explicitly endorsed by the new provisions in the Treaty is for the EU to sign the Council of Europe conventions related to sport, namely the anti-doping convention and the European Convention on Spectator Violence. The former might be useful for extending anti-doping cooperation beyond the 27 EU Member States, although anti-doping efforts are lately channeled by national governments through WADA and UNESCO. The latter could certainly be part of the ongoing cooperation between Member States to tackle spectator violence. Careful legal and political analysis should be undertaken before such a decision is taken. Further to these possibilities, the work of the Council of Europe in sport should be valued by EU institutions. Mutual contact and coordination are encouraged in order to avoid duplication of efforts.

4.5. Legislative action under Article 165

Article 165(4) TFEU enables the adoption of incentive measures, but does not enable the harmonisation of laws across Europe. As has been observed above, this limits hard legislative instruments to those that are adopted on the basis of other Treaty competences. Since Article 165 TFEU seems in this respect analogous to the public health competence on which some case law does exist, it appears that the mainstreaming of sporting interests during legislative processes could be hindered, rather than enhanced, by Article 165. If the analogy with public health case law holds, the Article 165(4) prohibition on harmonisation cannot prevent legislation with impacts on sport whilst Article 165(1) appears, unlike some other supporting competences such as Article 168(1), not to provide a horizontal clause requiring sporting issues to be considered in all ordinary legislative processes. Thus, whilst ordinary EU legislation is likely to continue to affect sporting issues and Article 165(4) fails to exclude the possibility of using ordinary EU legislative bases to regulate sport, Article 165(1) enables the funding previously denied to purely sporting EU initiatives but provides neither an obvious route towards the development of sports-specific legislation nor a constitutional requirement to mainstream sporting issues into the ordinary legislative process.

5. RESULTS OF CONSULTATION EXERCISE

A consultation effort was designed to complement this study with the views from sport governing bodies, sport stakeholders, other sport non-governmental organisations, public authorities, private companies, academics and practitioners with a knowledge and experience in the field. The call for contributions was sent to a wide range of experts and interested organisations, which were asked to elaborate on their preferences and priorities for the implementation of Article 165 TFEU. A total of 37 contributions from 52 organisations were received.¹⁷⁹

Table 1: Distribution of responses by organisations

ORGANISATIONS	CONTRIBUTIONS
Stakeholders' associations	8
National Olympic Committees	6
Academics, practitioners and think tanks	7
National Governments of EU Member States	4
International sport non-governmental organisations	5
International Sport Federations	3
National Sport Federations	2
IOC ('Olympic and sports movement')	2
International Organisations	1
TOTAL	37

In the contributions received there is a clear representation of the Olympic movement, with 8 submissions from Olympic committees at both national and international level and 4 sport federations also at national and international levels. Thus, the governing bodies of sport presented altogether a majority of 12 responses to the consultation. Sport stakeholders (athletes, supporters, clubs and leagues) have submitted a total of 6 contributions, being the second most represented group in the consultation. The contribution of 4 EU Member State governments is also noteworthy. The present section of the study summarises the most relevant points of the responses received, highlighting those where a very general consensus has been found, but the distribution of responses, which clearly overrepresented the positions of the Olympic movement and the governing bodies of sport, needs to be taken into account when considering the results. Whilst a good degree of consensus can be found in some of the priorities, it is also clear that sport organisations can also present contradictory demands in specific key issues that would be difficult to reconcile with the development of EU sport policy under Article 165 TFEU.

¹⁷⁹ Some of the contributions received were joint efforts by several organisations, especially the views of the 'Olympic and Sports movement' that were presented as endorsed by 18 Olympic Committees and Sports federations.

Thematically, the contributions received could be categorised into three broad groups. First, there is a set of responses proposing very specific priorities for the implementation of policies and programmes under Article 165 TFEU. These are concrete suggestions with articulated policy objectives and suggested courses of action. Second, there are those submissions focusing on interpretation of concepts that could shape not only the policy on sport, but also other EU competences when dealing with sport matters. These contributions highlight the impact of EU law and policies on sport and they request a more explicit recognition of the autonomy of sport organisations and a better definition of the specificity of sport recognised in Article 165 TFEU in order to provide the sporting movement with greater legal certainty. Finally, there is a third group of submissions that can be considered to address an horizontal level, where stakeholders elaborate on the general characteristics that any EU action in the field of sport should have. Each of the three groups is discussed now in turn.

5.1. Priorities for a direct EU sports policy

Three areas emerge as clear consensus priorities for the development of EU sport policy in the consultation. These are: (1) sport health and education, (2) the recognition and encouragement of volunteering in sport, and (3) the development of sport activities as a tool for social inclusion. EU action addressing these three policy objectives would be welcome by the respondent stakeholders. The three priorities feature prominently in almost every one of the responses and they are also clearly aligned with the priority areas identified by the Commission in the White Paper on Sport,¹⁸⁰ the 2009 and 2010 preparatory actions¹⁸¹ and the public consultation exercise.¹⁸² Similar areas, albeit with different headings, were discussed in the European Sport Forum 2010 organised in Madrid and were positively received by the representatives of the sport organisations.¹⁸³ It is becoming increasingly apparent that these areas emerge as the translation of the general principles enshrined in the Treaty into policy objectives where Article 165(1) TFEU calls for the Union to contribute to the promotion of sport's 'structures based on voluntary activity and its social and educational function'.

The majority of contributors have a preference for measures with a clear added value at European level. Thus, it is suggested that EU action should focus on research funding, facilitating the exchange of best practices, elaborating guidelines and on adopting incentive frameworks to encourage civil society, national and sub-national authorities to implement similar policies. The latter is especially stressed in the case of volunteering, where sport organisations contributing to this consultation feel that they face too many regulatory barriers to develop effective volunteering programmes. Some of the most concrete contributions in this area propose, for example, a twofold strategy whereby EU policy shall aim at encouraging legal and even fiscal incentives to volunteering, together with measures to remove obstacles to the free movement and exchange of volunteers within EU Member States. One of the most cited examples of the latter is the need to recognise formally the skills developed by volunteers as part of the EU Lifelong Learning Programme.

There is also a second group of policy priorities that have been put forward in a majority of contributions but do not carry the same degree of consensus that those explained above.

180 See White Paper on Sport (2007), p. 3-7.

181 European Commission (2009), 2009 annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events, COM (2009) 1685, 16 March 2009.

182 European Commission (2010), Strategic choices for the implementation of a new EU competence in the field of sport, EU-wide consultation report, available online at http://ec.europa.eu/sport/library/doc/a/100726_online_consultation_report.pdf.

183 See the Forum's report published by the European Commission, available online at http://ec.europa.eu/sport/library/doc/b1/sport_forum_madrid_report_11_05_10.pdf.

These relate to the integrity of sport and can be summarised as comprising (1) the fight against doping, (2) the relationship between gambling and sport, and (3) the welfare of under-age sportspersons. These priorities feature especially in the contributions submitted by sport governing bodies and sport organisations engaged in the promotion of grassroots sport and sport for all (e.g. the International Sport and Culture Association). Again, these three main headings are also well aligned with the priorities identified by the European Commission¹⁸⁴ and could also be considered as concrete policy translations of Article 165 (2) TFEU when it refers to 'promoting sporting fairness' and 'protecting the physical and moral integrity of sportsmen and sportswomen'.

In relation to anti-doping, EU action would be welcome in two very concrete fields: research funding due to the World Anti-Doping Organisation's limited resources, and facilitating the development of a collaborative network of National Anti Doping Organisations within the EU Member States. In this area it is particularly stressed that EU action is only desired as a valued complement to the ongoing policies of Member States, WADA, UNESCO and sport organisations. The contribution of the Ministry of Education and Culture of Finland, for example, calls to concentrate on areas 'that are currently lacking of European-level cooperation'. The relationship between gambling and sport raises two different concerns. First, the influence of betting practices in sport. Sport governing bodies would welcome any EU actions that could facilitate police cooperation in the fight against illegal betting and corruption in sport. Second, sport organisations express their worries that a possible liberalisation of the betting and gambling market could have negative consequences on the funding of sport, especially at grassroots level, in countries where most sport programmes rely on funding from lotteries. Finally, in relation to the welfare of under-age sportspersons, the collaboration of EU institutions is requested to help in the fight against the trafficking of underage athletes and in the exchange of good practices to ensure the training of minors is correctly designed and monitored.

5.2. Priorities regarding the impact of EU law and policies on sport

The second category of priorities expressed in the consultation refers to the impact of EU legal provisions on sport, rather than to the active development of a future EU sports policy. This clearly originates in the reference within Article 165(1) to the need to take 'account of the specific nature of sport', crystallising the references to the specificity of sport that can be found in the Amsterdam and Nice declarations on sport and many rulings of the ECJ. The contributions in this category do not present however the same degree of consensus and, therefore, it is necessary to point out from the outset that initiatives under these priorities would be more difficult to adopt with the general support of sport stakeholders.

The main action requested in the contributions is the elaboration of a definition for the specificity of sport which is as complete as possible. This is a top priority for the 'Olympic and sports movement' and sport governing bodies, with support of Member States' governments. The governments of Finland, Germany and the Netherlands specifically call for the drafting of guidelines in the application of competition policy and other EU legal provisions to sport. It is argued by sports organisations that guidelines on the application of EU law to sport would increase legal certainty, hence reinforcing their autonomy and efficiency in the governance and regulation of sport. In view of the analysis in this study, it is however difficult to see how the guidelines that are demanded would add greater legal certainty for sports organisations when the case law of the ECJ is fairly consistent.

184 See notes 180-183 above.

The notion of the specificity of sport is widely supported by EU Member States, as reflected in the conclusions of the European Council in 1997, 2000 and 2008, but the specific request to draft extensive guidelines is however less concrete. The European Parliament, on the other hand, has already clearly requested the Commission to elaborate guidelines on the application of competition policy to sport.¹⁸⁵ As explained elsewhere in this study, the European Commission argued in the White Paper on Sport that the ECJ's case law prevents the adoption of guidelines because the application of competition policy provisions has to be analysed on a case-by-case basis.

The division within EU institutions in this respect mirrors the disagreements among sport organisations. Whilst governing bodies and Olympic committees support the development of the specificity of sport, other stakeholders such as athletes, clubs and leagues clearly warn in their contributions that the definition of sport's specificity ought to respect workers and stakeholders' rights, especially as the TFEU renders legal the Charter of Fundamental Rights. Thus, the elaboration of guidelines does not represent a top priority (if at all) for these actors. Those who support, in principle, the specific nature of sport as a concept worth exploring (e.g. the European Professional Football Leagues or the European Clubs Association) request to be consulted and involved in any exercise whose result might be an interpretation of the application of EU law to sport.

5.3. Priorities for the horizontal development of EU sport policy

The third group of priorities presented in the contributions refers to the way in which stakeholders would like to see EU actions implemented, rather than to the content of the policies. This is seen as extremely important in a large majority of the contributions and, therefore, it merits attention when considering the course of action in the development of policies under Article 165 TFEU. First, there is a unanimous call for EU institutions to focus on added value and European-level initiatives. This reiterates the provisions contained in Articles 6 and 165 TFEU on the level of competence, but the insistence in this respect suggests there might be an anxiety among the respondents that EU institutions risk usurping the competences of Member States and, especially, the competences of sport organisations. A strict application of the principle of subsidiarity, with due respect for the autonomy of sport, is requested by sport governing bodies and Member State governments alike.

Second, there is also an agreement to support the need for a knowledge-based policy. This has two main implications. On the one hand, there is a common call for the EU to fund research in sport-related areas, with the economic impact of sport and anti-doping being the most commonly cited. On the other hand, sport stakeholders such as athletes and supporters demand to be consulted as a source of expertise in the elaboration of policy initiatives within their remit.

¹⁸⁵ European Parliament (2007), Resolution of the European Parliament on the Future of Professional Football in Europe, A6-0036/2007, 29 March. (The Belet Report), paragraph 55.

Third, in terms of policy instruments, direct regulation by the EU is not a priority of the contributors to the consultation. In the area of sports agents requests were made in the past for the European Commission to study the possibility of regulation,¹⁸⁶ but stakeholders now prefer EU institutions to facilitate debate and information exchange to adopt sound self-regulation. Thus, EU institutions are requested mostly to facilitate the development of networks, the comparison of policies across EU Member States and the cooperation among sport organisations and public authorities. There is, however, one area where an important number of stakeholders request active promotion by the European Commission: social dialogue in the sports sector. Contributions by athletes and by football supporters call on the EU institutions to support and promote social dialogue as a tool for good governance.

Finally, there is a common call for EU institutions to keep sports organisations involved in the development and implementation of EU sport policy. In this respect Article 165(2) TFEU calls for the EU to promote 'cooperation between bodies responsible for sport' and Article 165(3) demands that 'the Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport'. None of these provisions expressly call to cooperate *with* sport organisations in the development of EU sports policy, but the Amsterdam and Nice Declarations pointed out the Member States' willingness to keep them involved. The Commission and the European Parliament have so far proved able to engage with the sports sector. Stakeholders have expressed their unanimous desire to collaborate with EU institutions, putting their expertise at their disposal. Moreover, there is also a request made especially by Olympic committees and governing bodies that the implementation of any future EU programme in the field of sport prioritises the participation of local sports organisations.

186 White Paper on Sport, p. 16.

6. CONCLUSIONS AND RECOMMENDATIONS

Article 165 does not contain a horizontal clause. There are no provisions in the Article that require sporting issues to be taken into account when making policies in other areas, but there are also no provisions in 165 which prohibit the EU from doing so. Regardless of the value attached to Article 165 by the Court and the Commission, its existence is unlikely to alter their existing approach to sport. A review of existing EU sports law cases reveals that Article 165 TFEU will add little further protection for contested sports rules beyond that already provided by the Court and the Commission. In this regard, the review reveals that the Court and the Commission have already been highly receptive to the notion that sport contains a 'specific nature'. Therefore, the often requested production of guidelines on the application of free movement and competition law to the sports sector may not greatly assist the search for legal certainty. The Commission's White Paper on Sport more than adequately explains the legal framework applicable to sport. Furthermore, as the ECJ decided in *Meca-Medina*, contextual analysis and the requirements of proportionality control in EU law necessitate a case-by-case analysis of disputes involving sport. This renders any informal guidelines subject to challenge.¹⁸⁷

Rather than passively relying on the reference to the 'specific nature of sport' contained in Article 165 to seek to limit the influence of EU law in sport, the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly reasoned and backed with robust data. The EU has a strong role to play in facilitating this dialogue, sharing best practice and ensuring that sporting autonomy is conditioned on the implementation of good governance in sport. Efforts at encouraging social dialogue in sport should be maintained and moves towards a structured dialogue should not undermine these efforts. Thematic dialogue with the sports movement should be encouraged.

Article 165 resolves any legal uncertainty concerning the competence of the EU to directly fund sports related programmes. It is now clear that the EU has the competence to directly carry out actions to support, coordinate or supplement the actions of the Member States in the field of sport and this competence grants the EU a potentially wide field of action. However, the choice of priority themes should be directly linked to the themes contained in Article 165 and before supporting priority areas, the EU should demonstrate the European dimension in sport and establish the added value of EU action. A focus on a narrow range of priority areas is to be favoured over a broad approach so that the added value of EU action can be demonstrated. In this connection, the consultation exercise reveals that stakeholders favour action in the areas of health enhancing physical education, volunteering and social inclusion. A majority of respondents also identified the fight against doping, the relationship between gambling and sport and, the welfare of under-age sportspersons. In addition to these areas, there is a need to focus on evidence based policy making and in this connection the EU should fund research and encourage stakeholders to justify their positions with solid data and research.

On the face of it, Article 165(4) also appears to be unequivocal concerning the prohibition on harmonisation of the laws and regulations of the Member States. This statement might encourage claims that the laws and regulations of the Member States cannot be harmonised in so far as this would affect sporting practices. However, an examination of

187 Case C-519/04 P, David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991.

past prohibitions of harmonisation and their treatment by the ECJ suggests that harmonising measures can be taken despite this type of prohibition so long as the harmonising measures are nominally based on another Treaty competence. Despite similarly worded prohibitions of harmonisation in the fields of social policy, education, vocational training, culture, and public health, the EU has in practice achieved convergence in legislation through other legal bases.

REFERENCES

EU Documents

- Educational, Audiovisual & Culture Executive Agency, (2010), *Study on Volunteering in the European Union*, Report for DG EAC submitted by GHK, p. 6. Available at <http://ec.europa.eu/citizenship/eyv2011/doc/Volunteering%20in%20the%20EU%20Final%20Report.pdf>
- European Commission (1999) *The Helsinki Report on Sport*, Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework. COM (1999) 644 final, 10 December 1999, p.7.
- European Commission (1999) *'Limits to application of Treaty competition rules to sport: Commission gives clear signal'* press release IP/99/965.
- European Commission (2005) *'The EU & Sport: matching expectations': Consultation Conference with the European Sport Movement*, 14-15 June.
- European Commission (2007) *The White Paper on Sport: Frequently Asked Questions*. MEMO/07/290, 11 July 2007, p. 2.
- European Commission (2007) *Staff Working Document, 'The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport'*, 391 final, p51.
- European Commission (2007), *The EU and Sport: background and Context, White Paper on Sport*, SEC (2007) 935, 11/07/07, p.71.
- European Commission (2009), *2009 annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events*, COM (2009) 1685, 16 March 2009.
- European Commission (2010) *Group of independent experts: Report on EU priorities in the field of sport*, p. 6, available at http://ec.europa.eu/sport/news/doc/100702_gise_final_report.pdf
- European Commission (2010), *Strategic choices for the implementation of a new EU competence in the field of sport, EU-wide consultation report*, available online at http://ec.europa.eu/sport/library/doc/a/100726_online_consultation_report.pdf
- European Commission Press Release IP/08/807, *'UEFA rule on home-grown players: compatibility with the principles of free movement of persons'*, 28/05/08.
- European Parliament (2007), *Resolution of the European Parliament on the Future of Professional Football in Europe*, A6-0036/2007, 29 March. (The Belet Report). European Parliament Resolution of May 8 2008 on the White Paper on Sport (2007/2261(INI)), (The Mavrommatis Report).
- European Sport Forum (2010) *EU Sport Forum*, Organised by the European Commission in Madrid, available at: http://ec.europa.eu/sport/library/doc/b1/sport_forum_madrid_report_11_05_10.pdf

- FIFA Media Release (2009), *FIFA Acts to Protect Core Values*, 15/07/09.
- FIFA Media Release (2009), *Protect the Game, Protect the Players*, Strengthen Global Football Governance, 03/06/09.
- FIFPro / UEFA Memorandum of Understanding, (2007) accessed at: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/81/881781_Download.pdf
- Institute of European Affairs Report, (2008) *'Expert opinion regarding the compatibility of the 6+5 rule with European Community law'*.
- KEA, CDES & EOSE (2009), *Study on Sports Agents in the European Union*, a study commissioned by the European Commission (Directorate-General for Education and Culture).
- Presidency Conclusions, (2000), *Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies*, Nice European Council Meeting, December 2000.
- Press Release of the Council of the European Union, 3013th Council Meeting, *Education, Youth and Culture*, Brussels 10-11 May 2010, 9456/10.

Literature

- Anderson, C. (2009), *'New FIFA Regulations on the Transfer of Minors'*, *World Sports Law Report*, 7(11), pp.3-5.
- Andreff, W & Szymanski, S. (2006), *Handbook on the Economics of Sport*, Cheltenham: Edward Elgar.
- Arnaut, J.L., (2006), *Independent European Sport Review*, p.33. Accessed at http://www.independentfootballreview.com/doc/Full_Report_EN.pdf.
- Chaker, A-N., (2004), *Good Governance in Sport: A European Survey*, Strasbourg: Council of Europe.
- Chappelet, J-L., (2010), *Autonomy of Sport in Europe*, Strasbourg: Council of Europe, pp.89-108.
- Declaration 29 to the Treaty of Amsterdam. Presidency Conclusions, (2000), *'Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies'*, Nice European Council Meeting, December 2000.
- Downward et al (2009), *Sports Economics: Theory, Evidence and Practice*, Oxford: Elsevier.
- Groot, L., (2008), *Economics, Uncertainty and European Football*, Cheltenham: Edward Elgar.

- Infantino, G. (2006), *Meca-Medina: a step backwards for the European sports model*, accessed at: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480401_DOWNLOAD.pdf.
- Jeanrenaud, C., & Késenne, S., (2009), *The Economics of Sport and the Media*, Cheltenham: Edward Elgar.
- Késenne, S. (2007), *The Economic Theory of Professional Team Sports*, Cheltenham: Edward Elgar.
- Miettinen, S., (2008), 'Policing the boundaries between regulation and commercial exploitation: lessons from the MOTOE case', 3-4 *International Sports Law Journal* pp. 11-18.
- Monti, M., (2001), 'Competition and Sport, the Rules of the Game', speech at conference on Governance in Sport', 26/02/2001, Brussels.
- Mutz, M. and Baur, J., (2009) 'The role of sports for violence prevention: sport club participation and violent behaviour among adolescents', *International Journal of Sport Policy*, 1 (3), pp. 305-321.
- Parrish, R., and Miettinen, S., (2008), *The Sporting Exception in European Union Law*, The Hague: TMC Asser Press, pp. 73-101.
- Szymanski, S. (2009), *Playbooks and Checkbooks*, Princeton: Princeton University Press;
- Szymanski, S., (2010), *The Comparative Economics of Sport*, Basingstoke: Palgrave Macmillan;
- Szymanski, S., (2010), *Football Economics and Policy*, Basingstoke: Palgrave Macmillan.
- Tokarski, W., Steinbach, D., Petry, K., & Jesse, B. (eds.) (2004), *Two Players, One Goal*, Oxford: Meyer and Meyer Sport.
- Van den Bogaert, S., (2000), 'The court of justice on the Tatami: Ippon, Wazari or Koka?' *European Law Review* 554-563 at pp. 560-561.
- Van den Bogaert, S., and Vermeersch, A.(2006), 'Sport in the European Constitution: All Sound and No Fury?' Maastricht University Working Paper No 2005/8 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977456
- Van den Bogaert, S., and Vermeersch, A., (2006), 'Sport & the European Treaty: A Tale of Uneasy Bedfellows?', *European Law Review*, 31, pp. 821-
- Vermeersch, A., (2009), 'The Future EU Sports Policy: Hollow Words on Hallowed Ground?', 3-4 *International Sports Law Journal* pp. 3-7.

ANNEX

TEXT OF STAKEHOLDERS CONSULTATION LETTER

Dear Sir/Madam,

With the entry into force of the Lisbon Treaty in December 2009, the European Union (EU) acquired a specific competence in the field of sport for the first time. Sport is mentioned in Article 6 of the Treaty on the Functioning of the European Union (TFEU), as one of the policy fields where the Union has competence to support, coordinate or supplement the actions of its Member States.

The 'new' Article 165 TFEU sets out the details of sports policy. It states that the "Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function". More specifically, the objectives of sports policy are described as being to: (1) promote fairness and openness in sporting competitions and cooperation between bodies responsible for sports and (2) protect the physical and moral integrity of sports practitioners, especially the youngest among them.

The existence of a new specific competence is expected to open up new possibilities for EU action in the field of sport. However, EU competences over the Single Market have already had a considerable impact on sport and these will remain as important as ever. The European Court of Justice (ECJ) has over the years developed extensive and important case law that has had major implications on the world of sport. At the same time, the EU has already had an influence on sport in exercising its 'soft law' powers in closely related areas such as education, health and social inclusion via its respective funding programmes.

Moreover, the lack of a specific legal competence has not prevented the European Commission from building up the beginnings of an EU sports policy, as outlined in the 2007 White Paper on Sport and its associated "Baron de Coubertin Action Plan", which began to be implemented in 2008. The Commission has also directly financed certain sporting projects under the sports 'preparatory action' in 2009.

The entry into force of the Lisbon Treaty has spurred the European Commission to begin work on a proposal for fully-fledged EU sports programme and on a policy communication on sport and the Lisbon Treaty. These two items are expected to be sent to the European Parliament for consideration in the second half of 2010.

In light of the above, the **European Parliament's Committee on Culture and Education (CULT)** has commissioned the **T.M.C. Asser Institute** to undertake a study whose objective is to provide a panorama of the possibilities of EU Sports Policy at a time when these are being reviewed after the approval of the Lisbon Treaty. In particular, it should assess, from a legal point of view, the potential of the new TFEU to enable the EU to attain the objectives of greater fairness and openness in sporting competitions and greater protection of the moral and physical integrity of sports practitioners whilst taking account of the specific nature of sport.

The study should make use of existing literature and ECJ case-law on the topics concerned, notably recent jurisprudence dating from after the entry into force of the Lisbon Treaty. It should also take into account the relevant (European Parliament (EP) resolutions (notably on the White Paper on Sport and on the Future of Professional Football in Europe). Given the forward-looking nature of the brief, the literature and legal review

should only constitute a starting point to be complemented by direct information-gathering and discussion with parties interested in the development of EU Sports Policy, including sports associations or clubs at both professional and amateur level, pan-European umbrella organizations representing sport, national and EU civil servants, the private sector and academics.

If you wish to participate in the stakeholders consultation for this study, we would appreciate it if you could send us your views on what the EU's priorities for sport should be, by 1 July 2010 at the latest.

You may address your answers, preferably by e-mail, to R.Siekmann@asser.nl and/or by fax to: +31 (0)70 3420359 or +31 (0)70 3420346 to the T.M.C. Asser Institute to the attention of Dr Robert Siekmann.

I look forward to receiving your reply.

Yours faithfully,

Dr Robert C.R. Siekmann

Director

ASSER international Sports Law Centre

R.J. Schimmelpennincklaan 20-22

2517 JN The Hague

P.O. Box 30461

2500 GL The Hague

The Netherlands

Tel.: +31 (0)70 - 3420342/345/300

Fax: +31 (0)70 – 3420359/346

E-mail: [**R.Siekmann@asser.nl**](mailto:R.Siekmann@asser.nl)

STAKEHOLDERS WHO WERE INVITED TO RESPOND TO CONSULTATION

For the purpose of direct information gathering and discussion with parties interested in the development of an EU Sports Policy, the following **categories of organisations and persons** were consulted:

International “umbrella” organisations:

- International Olympic Committee (IOC)
- European Olympic Committee (EOC EU Office)
- Association of National Olympic Committees (ACNO)
- General Association of International Sports Federations (GAISF)
- Association of IOC Recognized International Sports Federations (ARISF)
- Association of Summer Olympic International Federations (ASOIF)
- Association of International Olympic Winter Sports Federations (AIOWF)
- International Assembly of National Organisations of Sport (IANOS)
- International Paralympic Committee (IPC)

International and European sports federations per sport (Olympic sports): Aquatics (FINA / LEN); Canoeing/Kajak (ICF / ECA); Cycling (UCI / UEC); Gymnastics (FIG/UEG); Volleyball (FIVB and CEV); Equestrian (FEI and EEF); Wrestling (FILA and CELA); Archery (FITA and EMAU); Athletics (IAAF and EAA); Badminton (BWF and EBU); Basketball (FIBA and FIBA Europe); Boxing (AIBA and EBA); Fencing (FIE and EFC); Field hockey (FIH and EHF); Football (FIFA and UEFA); Handball (IHF and EHF); Judo (IJF and EJU); Modern Pentathlon (UIPM); Rowing (FISA); Sailing (ISAF and EUROSAF); Shooting (ISSF and ESC); Table Tennis (ITF and ETTU); Triathlon (ITU and ETU); Weightlifting (IWF and EWF); Skating (ISU); Ice Hockey (IIHF); Curling (WCF and ECF); Skiing (FIS and ESF); Biathlon (IBU); Luge (FIL); Bobsleigh (FIBT).

National sports federations and associations per sport in the 27 EU Member States.

Clubs (international/European “umbrella” organisations), for example: European Association of Sports Employers (EASE); EPFL (football/leagues); ECA (football/clubs); ULEB (basketball); AIGCP and IPCT (professional cycling).

N.B. Clubs from the most important sports per country at amateur and professional level were consulted for the purpose of the study (for example, France: football, rugby; Germany: football, ice hockey, handball, basketball; Italy: football, basketball; Netherlands: football, field hockey; Austria: football; Spain: football; United Kingdom: football, rugby, cricket).

International and European players’ unions: EURO-MEI UNI (sports employees);

European Elite Athletes Association; UBE (basketball); FIFPro Europe (football); CPA (professional cycling).

EU civil servants: Sport Unit, Directorate-General for Education and Culture, European Commission; Directorate-General Education and Culture (Social Dialogue in sport).

National civil servants: sports directors in the 27 EU Member States (Government Departments and/or Agencies in each Member State with primary powers in the area of sport).

ASSER International Sports Law Centre's standing network of sports law experts in the 27 EU Member States (academics and practitioners):

- Austria: Ingo Braun, Baier Böhm Law Firm, Vienna
- Belgium: Dr An Vermeersch, European Institute, Law Faculty, Gent
- Bulgaria: Boris Kolev, international sports lawyer and co-chairman of the NGO Bulgarian Legal Society, Sofia
- Cyprus: Dr Gregory Ioannidis, Law School, University of Buckingham, United Kingdom, and Christodoulos G. Vassiliades & Co Law Firm, Nicosia
- Czech Republic: Katerina Radostova, Erad Legal Law Firm, and Law Faculty, Charles University, Prague
- Denmark: Prof. Dr. Soren Sandfeld Jakobson, Law Department, Copenhagen Business School, Frederiksberg
- Estonia: Katarina Pijetlovic, Faculty of Law, International University Audentes, Tallinn
- Finland: Tauno Palotie, Veikko Palotie & Co Law Firm, Helsinki
- France: Jean-Michel Marmayou, Paul Cézanne University, Marseille
- Germany: Prof. Dr Peter Heermann, Law Faculty, University of Bayreuth
- Greece: Prof. Dr. Panagiotopoulos, advocate and Law Faculties, Athens and Peloponnese Universities
- Hungary: Dr Andras Nemes, Faculty of Physical Education and Sport Sciences, Semmelweis University, and President of SPORTJUS, Budapest
- Ireland: Laura Donnellan, School of Law, University of Limerick
- Italy: Lucio Colantuoni, Law School Genoa and Milan University
- Latvia: Sarmis Spilbergs, Klavins & Slaidins LAWIN Law Firm, Riga
- Lithuania: Jaunius Gumbis, Lidelka, Petrauskas, Valiunas & Partners Law Firm, Vilnius
- Luxembourg: Jean-Luc Schauss, Loyens & Loeff Law Firm, Luxembourg
- Malta: Dr Anthony Galea, Deguara Farrugia Law Firm, Sliema
- Netherlands: Prof. Dr Stefaan van den Bogaert, Law Faculty, University of Leiden
- Poland: Prof. Dr. Andrzej J. Szwarc, Department of Law and Administration. Adam Mickiewicz University, Poznan
- Portugal: Alexandre Mestre, A.M. Pereira, Saragga Leal, Oliveira Martins Law Firm, Lisbon
- Romania: Prof. Dr Alexandru Virgil Voicu, Faculty of Physical Education and Sport, "Babes-Bolyai" University, Cluj-Napoca
- Slovakia: Jozef Corba, Faculty of Law, Pavel Jozef Safarik University, Kosice

- Slovenia: Prof. Dr Peter Grilc, Law Faculty, University of Ljubljana
- Spain:
 - Juan de Dios Crespo Pérez, Ruiz Huerta & Crespo Sports Lawyers, Valencia
- Sweden: Erik Ullberg, Wistrand Law Firm, Goteborg
- United Kingdom: Prof. Dr Stephen Weatherill, Somerville College, University of Oxford

SportAccord, The International Association of Sportslaw Practitioners and Executives (ASPE), the International Association of Sports Law (I.A.S.L.) and the International Sports Lawyers Association (I.S.L.A.) were also consulted for the purpose of the Study.

The European Sports Law and Policy Initiative (ESLPI), founded in 2009 by Professors Michele Colucci and Frank Hendrickx, University of Leuven, was consulted for the purpose of the Study.

Following an invitation extended by the European Commission at the Consultation Conference “The EU & Sport: Matching Expectations” in 2006, a large number of organisations asked to meet with the Commission on issues related with the White Paper on Sport in 2006 and 2007. These consultations included meetings and contacts with the organisations and bodies listed in the White Paper on Sport (Annex III: consultations with stakeholders). These organisations and bodies again were consulted within the framework of this Study.

Additionally, organisations connected with specific topics of the Study were consulted: sports betting: European Lotteries (state-licensed lotteries and toto companies) and EGBA (private, commercial lotteries); media rights: European Broadcasting Union (EBU); doping: Association of National Anti-Doping Organisations (ANADO) and national anti-doping organisations in the 27 EU Member States (NADO’s); European players’ agents: EFAA (football) and AEBA (basketball).

Organisations connected with other, additional topics dealt with in the White Paper on Sport, were consulted: physical education and public health: Fédération Internationale de Médecine Sportive (FIMS); active citizenship: association Sport et Citoyenneté/Sport and Citizenship; social inclusion and integration: European Association for Sport and Social Integration (E.A.S.I.); racism and violence in sport: Football against Racism in Europe Network (FARE); sponsorship: The European Sponsorship Association (ESA); supporters: Supporters Direct.

An internet-based, on-line consultation targeting all interested organisations and individuals was open during an 6-week period as from the beginning of the Study’s operation.

STAKEHOLDERS WHO RESPONDED TO CONSULTATION

Intergovernmental organisations

Council of Europe

National Governments of EU Member States

Ministry of Education and Culture, Finland (Sports Division)

Federal Ministry of the Interior, Germany (EU and international sports affairs)

Government of Malta

Ministry of Health, Welfare and Sport, The Netherlands

Department for Culture, Media and Sport, United Kingdom

International sports federations

FIFA

UEFA

International Olympic Committees

EOC EU Office

National Olympic Committees

NOC of Denmark

CNOSF (France)

COSL (NOC of Luxembourg)

Maltese Olympic Committee

Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF)

Olympic Committee of Slovenia

National sports associations

British Swimming and Amateur Swimming Association

International employers (leagues, clubs) organisations

EPFL (Association of European Professional Football Leagues)

ECA (Europa Club Association (football))

International employees (players) organisations

EU Athletes (European Elite Athletes Association)

The PGAs of Europe (The Professional Golfers' Associations of Europe)

National employees (players) organisations

FNV Sport (The Netherlands)

Professional Players Federation (PPF) (football)

International agents associations

Association of European Basketball Agents (AEBA)

Other international non-governmental organisations

SportAccord

ENGSO (European Non-Governmental Sports Organisation)

ISCA Europe (International Sport and Culture Association)

Sport and Citizenship / Sport et Citoyenneté

EAS-Network (The European Athlete as Student Network)

Sport Rights Owner's Coalition (SROC)

Supporters Direct Europe

European Women and Sport (EWS)

Academics

Hellenic Center of Research on Sports Law (H.C.R.S.L.) (Athens, Greece)

Oxford University (United Kingdom)

Practitioners (law firms)

Christodoulos G. Vassiliades & Co. LLC (Nicosia, Cyprus)

Ulys (Brussels, Belgium and Paris, France)

F&D Avvocati (Milan, Italy)

Lidelka, Petrauskas, Valiunas ir partneriai LAWIN (Vilnius, Lithuania)

Loyens & Loeff (Luxembourg, Luxembourg)

CMS Derks Star Busmann (Utrecht, The Netherlands)

Ruiz Huerta & Crespo Sports Lawyers (Valencia, Spain)

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **B** STRUCTURAL AND COHESION POLICIES

Role

The Policy Departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Agriculture and Rural Development
- Culture and Education
- Fisheries
- Regional Development
- Transport and Tourism

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu/studies>

PHOTO CREDIT: iStock International Inc., Photodisk, Phovoir



ISBN 978-92-823-3243-6