



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

**CULTURE AND EDUCATION**

# **THE LISBON TREATY AND EU SPORTS POLICY**

**STUDY**

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**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.



## **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.<sup>1</sup> 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.<sup>2</sup> 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'.<sup>3</sup> 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

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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,<sup>4</sup> the 2009 and 2010 preparatory actions<sup>5</sup> and the public consultation exercise.<sup>6</sup> 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.<sup>7</sup>

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'.<sup>8</sup> 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'.<sup>9</sup> 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 forefront of encouraging social dialogue. Article 165 also adds impetus to efforts to move

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](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](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.

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 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.<sup>10</sup> 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.<sup>11</sup>

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 reasoned and backed with robust data. The EU has a strong role to play in facilitating this

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

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



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.