

EDGE HILL UNIVERSITY

# The Introduction of the Social Dialogue in the European Professional Football Sector

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Impact on Football Governance, Legal Certainty and  
Industrial Relations

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## INTRODUCTION

*“Together with Commissioners Monti and Reding, I have strongly and repeatedly encouraged the clubs to start or pursue social dialogue with trade union representatives of the football players since the outcome of discussions in March 2001 between the European Commission and FIFA/UEFA on football transfers. The establishment of a structured European sector social dialogue in football could be an effective method to manage the impact of the different European policies in a pro-active way. These policies do not only affect the regulatory framework of football but also employment relations and the social situation in the sector”<sup>1</sup>*

Anna Diamantopoulou, Member of the European Commission, 2003.

With this statement, the search for a Social Dialogue solution to some of football’s on-going problems began. Social Dialogue is a mechanism in the Treaty on the Functioning of the European Union (TFEU) allowing representatives of management and labour to conclude a range of agreements pertaining to the employment relationship between both parties. In 2008, a Social Dialogue committee for European professional football was established and in 2012 it concluded its first agreement on minimum requirements in standard player contracts. This thesis explores the origins and operation of this committee and explains its significance in terms of the search for legal certainty in European football and the impact on football governance and industrial relations more generally.

### **Bosman and the Revision of the Transfer System: Legal Uncertainty**

In 1995 the European Court of Justice (ECJ) ruled in the Bosman case<sup>2</sup> that FIFA’s Regulations on the Status and Transfer of Players (RSTP) formed a restriction on the free movement of workers. Elements of the RSTP were prohibited due to an infringement of Article 39(1) of the EC Treaty (now Article 45 (1) of the TFEU). Accordingly, the transfer system was abolished. Consequently, FIFA and UEFA looked for alternatives to safeguard the

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<sup>1</sup> Letter of Commissioner Diamantopoulou of DG Employment and Social Affairs to Mr. Gerard Slager, chair of the European Federation of Professional Football Clubs (EFFC), 4 February 2003.

<sup>2</sup> Union Royal Belge des Société de Football Association ASBL v Bosman (Case C-415/93) [1995] ECR I-4921.

(re)distribution of revenue in football and the promotion of the stability of contracts and competitions. FIFA altered the system but restrictive elements remained in place.

According to the Commission there was still no balance between the players' right to free movement and the necessity of having stability of contracts and championships. FIFA and UEFA were forced to change this system in accordance with the requirements of EU law. Years of negotiations followed before FIFA finally presented an alternative system. In 2001 the European Commission informally agreed to this alternative transfer system proposed by FIFA and UEFA. The Commission did so by means of an exchange of letters between competition Commissioner Monti and FIFA president Sepp Blatter. This informal method of settlement left space for interpretation and legal manoeuvring by the stakeholders and since then there has been academic legal debate about the illegality of the system<sup>3</sup> and concern expressed from stakeholders about the absence of a settled legal environment. In this regard, the Dutch Employers Organisation in Professional Football (FBO) has been instrumental in assessing if the European Social Dialogue could contribute to a solid foundation for the international transfer system and employment relations in EU professional football.

### **Creation of Awareness of the European Social Dialogue in European Professional Football**

The words of Commissioner Diamantopoulou in 2003 encouraged the FBO to create awareness about the European Social Dialogue amongst football employers in the European Union. The FBO received funding from the European Commission to carry out a project in collaboration with the T.M.C. Asser Institute in the Hague.<sup>4</sup> A second project in 2004 was targeted towards the Member States that joined the EU in 2004.<sup>5</sup> I managed both projects in

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<sup>3</sup> See for example the contributions in European Sports Law and Policy Bulletin, "Contractual Stability in Football" edited by Colucci, M., European Sports Law and Policy Centre, Rome, Italy; Drolet, J. (2006), *Extra Time, : Are the New FIFA Transfer Rules Doomed?*, International Sports Law Journal, 2006 Vol. 1-2, p. 66-73, The Hague: T.M.C Asser press; Dabscheck, B. (2004), *The Globe at their Feet: FIFA's New Employment Rules – I*, Sport and Society, Vol. 7, p.69-94 ; Dabscheck, B. (2006), *The Globe at their Feet: FIFA's New Employment Rules-II*, Sport and Society, Vol. 9, p. 1-18; Parrish, R. (2011), *Social Dialogue in European Professional Football*, European Law Journal, Vol. 17 (2), p. 213-229.

<sup>4</sup> T.M.C. Asser Instituut (2004), Promoting the Social Dialogue in the European Professional Football Sector, Project supported by the European Commission under Budget Heading B3-4000.

<sup>5</sup> T.M.C. Asser Instituut (2004), Promoting the Social Dialogue in European Professional Football, Candidate Countries, Project supported by the European Commission under Budget Heading B3-4000.



my capacity as Manager of European Affairs of the FBO.<sup>6</sup> The FBO expected that the European Social Dialogue could be the appropriate platform to introduce the desired legal certainty and stability to the European Union professional football sector. The stakeholders in football desire legal certainty in order to optimize the functioning of the sector. In a well-functioning sector the stakeholders are able to rely on the validity of the rules that govern their business. In such a case all stakeholders can organise their business or manage their careers in accordance with their personal objectives.

### **Importance of the Need for Legal Certainty in European Union Professional Football**

The importance of legal certainty in football must be seen from a broader perspective than purely restricted to the stakeholders in the sector. It can comfortably be concluded that football is the EU's most popular sport. Football as an individual sports discipline is a major contributor to the economic development of the industry of professional sport.<sup>7</sup> The popularity of football serves as a motivator for the general public to get involved in sport, as consumers and in terms of social benefits. The contribution of sport to the economic growth and employment in the EU has been researched in 2012.<sup>8</sup> The researchers use a harmonised definition of sport and a common methodology to measure the economic importance of sport.<sup>9</sup>

The outcome of the study was the proof that sport is an important economic sector in the EU. The share of sport in the national economies of the Member States is comparable to agriculture, forestry and fishing combined. This share is expected to rise in the future. Sport accounts for 3% of the overall gross value added in the EU.<sup>10</sup> The contribution of sport-related employment on total employment in the EU is 2.12%.<sup>11</sup> Next to the economic impact, sport plays a considerable role in health promotion, education, training and social inclusion

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<sup>6</sup> From 2003-2005.

<sup>7</sup> There are no studies identifying the total economic contribution of the professional football sector to the sport sector as a whole. However, the yearly report by Deloitte gives a solid indication of the value of the professional football competitions in the 'Big 5' leagues: England, France, Germany, Italy and Spain. The 20 top clubs in Europe have generated €4.8 billion turnover in the season 2011/2012. Deloitte (2013), *Captains of Industry, Football Money League*, Sport Business Reports.

<sup>8</sup> SportsEconAustria, project lead (2012), *Study on the Contribution of Sport to Economic Growth and Employment in the EU*, Study commissioned by the European Commission, Directorate-General Education and Culture, Final Report, November 2012.

<sup>9</sup> Supra, p.7.

<sup>10</sup> Supra, p.2.

<sup>11</sup> Ibid.

and networking in the European Union.<sup>12</sup> Legal certainty in football is therefore necessary to maximize the benefits for the stakeholders but also for the position of sport in the EU. Court cases and disputes between sport stakeholders may have a negative effect on the football sector, and as a consequence on sport as a whole, whilst undermining of the economic and policy benefits of sport for the EU.

### **The Social Dialogue Committee in Professional Football (FSDC)**

In 2008 a FSDC in professional football was created. The first tangible result of the FSDC was the conclusion of an Autonomous Agreement on the minimum conditions for employment contracts for professional football players in the EU (Autonomous Agreement). At the time of writing this thesis the Autonomous Agreement is being implemented in the Member States of the EU. The implementation could in the near future also entail the non-EU members of UEFA. After implementation the Autonomous Agreement will introduce legal certainty in relation to the topics that form the minimum standards. However, a number of issues remain unsolved and are, as such, still a source of legal ambiguity. The thesis has as its objective the identification of these issues and seeking to assess if the European Social Dialogue could also serve as the forum that brings legal certainty to these unsolved themes.

The timing of the thesis is logical if one takes into consideration that the issues that are under analysis in the research are under concrete legal threat. First, the world representative body of football players, FIFPRO, has announced that it will challenge the legality of the RSTP.<sup>13</sup> Second, the lawyer who advised Jean Marc Bosman in 1995 has filed a complaint at the European Commission and at a Brussels Court concerning the legality of the UEFA Regulations on Financial Fair Play.<sup>14</sup> Third, a study commissioned by the European Commission concluded that UEFA's Home Grown Player Rule (HGPR) goes beyond what is

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<sup>12</sup> European Commission (2007), *The EU and Sport: Background and Context*, Accompanying document to the White Paper on Sport, SEC(2007) 935, 11 July 2007.

<sup>13</sup> FIFPRO (2013), *FIFPRO announces legal challenge to transfer system*, to be found at: <http://www.fifpro.org/en/news/fifpro-announces-legal-challenge-to-transfer-system?highlight=WyJjaGFsbGVuZ2UiXQ>.

<sup>14</sup> Inside world football, 3 October 2013: Striani and Dupont in court today to start financial fair play challenge, to be found at: <http://www.insideworldfootball.com/world-football/europe/13366-striani-and-dupont-lawyer-in-court-today-to-start-financial-fair-play-challenge>.

proportionate for the objectives that it aims to achieve.<sup>15</sup> Less restrictive alternatives are to be introduced in order to prevent a potential overhaul as a consequence of legal challenge. Fourth, UEFA publicized its intention to completely ban Third Party Ownership in European football.<sup>16</sup> Fifth, the English Association of Football Agents (AFA) is studying the possibility of legally challenging the draft FIFA regulations on Intermediaries, the intended successor of the Player Agent Regulations (PAR).<sup>17</sup>

The thesis will make a contribution to knowledge by examining if the FSDC could be the forum for a negotiated settlement on these disputes concerning the FIFA RSTP, the UEFA FFPR, the UEFA HGPR, TPO and the activities of player's agents. A consequence of the inclusion of these topics in the FSDC could be the creation of legal certainty by means of negotiated settlement as an alternative for litigation. If the thesis concludes that the FSDC could indeed include these unsolved issues in its scope of negotiations another positive element comes to the surface. At the time of writing there are initiatives undertaken to introduce a sectoral Social Dialogue Committee for Sport in general.<sup>18</sup> Positive perspectives in the FSDC could propeller more initiatives or create positive spill-over for sport in general.

## Research Questions

Due to my involvement in the European Commission funded projects dealing with Social Dialogue, I realized that at that stance in time, there were still a series of unresolved issues. The projects had brought to the surface that the Social Dialogue could influence the system of regulating football specific topics, but no answer had been given on the impact on the system of football governance as a whole. In addition, as the projects focussed on the football sector, the potential reverse impact on EU labour law was neglected. The last questions that remained unanswered was to what extent the Social Dialogue could bring legal certainty, via what means.

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<sup>15</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, Negotiated procedure EAC07/2012. This is a research project carried out by the University of Liverpool and Edge Hill University, funded by the European Commission.

<sup>16</sup> UEFA (2013), *No Place for Third Party Ownership in Football*, Published on:

<http://www.uefa.org/aboutuefa/organisation/generalsecretary/news/newsid=1931937.html>.

<sup>17</sup> World Sports Law Report (2013), *Agents Prepare Challenge to FIFA's Intermediary Rules, to be found at:* [http://www.e-comlaw.com/world-sports-law-report/article\\_template.asp?Contents=Yes&from=wslr&ID=1621](http://www.e-comlaw.com/world-sports-law-report/article_template.asp?Contents=Yes&from=wslr&ID=1621).

<sup>18</sup> On 11 and 12 December 2012 the Commission launched a two year test phase in order to allow social partners to make progress towards sectoral Social Dialogue level and to identify where potential problems lie, European Commission (2013), *European Social Dialogue Newsletter*, Social Europe, EU Social Dialogue Liaison Forum – Newsletter Nr. 2, January 2013.

These issues were then strengthened by the developments in the football sector that showed that legal uncertainty became visible due to the threat of legal challenges to the system of governance and regulation of football by rivalling football stakeholders. Therefore, the general objective of the thesis is to assess if the negotiations in the FSDC may include the scope of topics that are under dispute and potential legal challenge in the current regulatory system in European professional football. The intention of the inclusion of these topics in the FSDC is to assess if legal certainty can be obtained. This assessment shall be divided into the following research questions:

- 1) What is the impact of the European Social Dialogue on the governance model of European football?
- 2) What is the impact of the European Social Dialogue in European professional football on industrial relations and collective bargaining in the European Union?
- 3) Is the European Social Dialogue able to introduce legal certainty to the unsolved issues in European professional football?

### *Research Question 1*

The governance model in European professional football is structured in a pyramid model. Decisions and regulations of football governing bodies at the top of the pyramid influence the activities of the actors that are positioned in a layer beneath the the governing body of the individual sport. The research question investigates whether the vertical method of governance can be expected to change in a horizontal model. In the case that the European Social Dialogue serves as a platform for negotiation about certain topics that are of value for the social partners, a potential shift from a vertical model of regulation to a horizontal model is expected. Such a shift in governance towards the empowerment of social partners impacts policy making in the football sector in the EU. Influence on the overall sport is likely to be a consequence. This question takes into consideration the nature of policy-making in the EU and the role of individual actors in this process. The assessment includes the origins for initiatives of stakeholders to influence policy-making.

### *Research Question 2*

The European Social Dialogue is the fruit of a historical debate concerning the extent of influence of the European Union on labour policy of the Member States and employment relations between both sides of the industry. The analysis of the consequence of including the sector of football, with its recognized special characteristics, in the European Social Dialogue is valuable for understanding and the potential development of EU industrial relations and EU labour law in general.

### *Research Question 3*

This research question seeks to identify whether the result of negotiations in the FSDC are enforceable on the level of the national Member States. It follows after a description of the potential topics for inclusion in the FSDC. It will be assessed whether the topics are suitable to be dealt with from the perspective of the European Social Dialogue.

## **Methodology**

The thesis is based on empirical analysis combined with a mixed approach. The research provides strong evidence for the probability of the conclusions and is therefore inductive in nature. I have identified research questions after data collection. The thesis draws on some of the findings from the projects that I managed concerning the creation of awareness of the European Social Dialogue in professional football. However, these projects were carried out prior to PhD registration.

The mixed approach consists of classic black letter methodology. This involves a descriptive analysis of legal texts found in primary sources. These sources are (EU and national) legislation, case law of European courts and sport arbitration courts, regulations of sports governing bodies and academic commentary on these primary sources. In addition to this methodology, a socio-legal approach has been employed. This approach relates better to the purpose and placement of the thesis in the area of policy-making in the EU. It looks at the

influence of law in policy and vice-versa. The thesis is not purely focussed on law as its conclusions impact on governance models and on the potential direction of EU sport policy.

The research is of a qualitative nature. The origins for the legal status quo in sport is under research in the thesis. It deals more with how sport has reached this status quo and what the underlying reasons were. Quantitative analysis as well as comparative legal research are also used but only in relation to a small part of the thesis.

The research parameters of the thesis can be categorized as follows.

*Time:* the research findings are restricted to February 2014. During the time of research potential legal threats became more realistic due to the announcement of FIFPRo that it would challenge the RSTP. In addition, developments concerning a challenge to the FFPR of UEFA and to the initiatives of FIFA to deregulate the player's agents activities had to be included in the thesis. These issues took place during 2013 and the beginning of 2014.

*Scope:* the sector under research is the sector of European Union professional football. However, the thesis' conclusions might have an impact on football governance and regulation on a global level. The Autonomous Agreement can also impact on football governance and employment relations in the member associations of UEFA falling outside of the EU-28. The thesis deals with professional football and not amateur football. The criteria for inclusion in the thesis is if the activity that is carried out by the individual football player falls under the definition of a worker as provided by EU case law. Where 'football' is described it is used as a substitute for 'professional football'. Some issues presented in the conclusions of the thesis are a source for further research. It will also become clear in the near future how the challenges that are now in preparation have evolved and this would justify further academic attention.

## **Chapter Overview**

*Chapter 1* explains policy change in the European Union. It describes macro and micro approaches to European integration. The chapter serves as an illustration of the scenery in which agenda-setting in the creation of football policy in the EU has occurred. It describes

which framework for further analysis is most suitable for the thesis and it helps to understand the bigger picture of the evolution of sports policy in the EU and in football in particular.

*Chapter 2* presents an analysis of the application of EU law to sport and the efforts carried out by the sport governing bodies, UEFA and FIFA in particular, to exclude sport from the application of EU law. The chapter explains the consequences of the introduction of the Treaty Article on sport in the TFEU. It concludes that the current legal framework in which sport in the EU operates enables a distinction into the intensity of EU law impact on sport by means of the Separate Territories Framework. However, the regulatory framework is not unambiguous and it is therefore unable to create legal certainty.

*Chapter 3* introduces the football policy subsystem of the EU. It describes the actors of the sporting autonomy coalition and the football business coalition. An analysis of their beliefs and the origins of these beliefs is described. It is concluded that the actors grouped in the opposing coalitions favour a situation where there is legal certainty but that there is a need for a suitable forum for negotiations to reach enforceable agreements. The chapter contains an assessment of potential fora in which such a negotiation takes place. It concludes that the Court of Arbitration for Sport (CAS) and the European Commission are not the suitable fora and that it must be assessed if the European Social Dialogue could meet the criteria for a suitable forum.

*Chapter 4* focuses on EU labour law. It places the European Social Dialogue in the context of the evolution of EU labour law. It serves to understand the creation of the FSDC and to position the creation of the FSDC within EU labour law. It enables the conclusion on the impact of the FSDC on industrial relations and collective bargaining in the EU.

*Chapter 5* first illustrates the route towards the creation of the FSDC in 2008. It then describes the Autonomous Agreement: its content, enforcement and method of implementation on the level of the Member States of the EU and potential implementation in UEFA member associations. It concludes by posing that there are other issues outside the issues contained in the Autonomous Agreement that may benefit from negotiated settlement through the FSDC negotiation procedures. The chapter also contains a literature review on the application of the Social Dialogue to professional football.

*Chapter 6* presents an historic overview leading to the creation of the current RSTP in professional football. It analyses what topics that are currently regulated by FIFA in their RSTP could be (better) placed in the FSDC in order to enable a more stable form of regulation and legal certainty for the actors in football.

*Chapter 7* performs the same function as Chapter 6 but in relation to key UEFA, as opposed to FIFA, regulations, namely Club Licensing, Financial Fair Play and the Home Grown Player Rule.

*Chapter 8* looks at two other issues that deserve a separate analysis due to their nature. The topic of TPO is currently under scrutiny of UEFA and FIFA. A total ban is proposed by UEFA. The chapter analyses the scope of the definition of TPO and its origins. It then assesses whether TPO could be placed within the FSDC. A similar approach is used with regard to the regulation of the activities of Player's Agents. FIFA's intentions to deregulate the profession are described. The FSDC as a platform for negotiation of future agent regulations will be analysed and elaborated upon.

*Chapter 9* contains the conclusions. A list of thirteen conclusions is provided and the contribution to knowledge is underlined.

## **Contribution to knowledge**

The general contribution of the thesis is an addition to the under-researched area of the application of the European Social Dialogue in professional football. Except for Parrish the other authors of academic contributions concerning the topic have focused on a descriptive exercise or have used the European Social Dialogue to better position the main problem of their research.<sup>19</sup> In Chapter 5 a literature review is given. This thesis is the only work in

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<sup>19</sup> The literature overview contains the following authors and works: Meier, H.E.(2004), From Bosman to Collective bargaining agreements, The regulation of the market for professional soccer players, *International Sports Law Journal*, 2004, 3-4, The Hague: T.M.C. Asser Press; Parrish, R. and Miettinen, S.(2008), *The Sporting exception in European Union Law*, The Hague: T.M.C. Asser Press, 2008; Parrish, R.(2011), *Social Dialogue in European Professional Football*, *European Law Journal*, Vol. 17, No.2, March 2011, p. 213-229; Geeraert, A., Scheerder, J., Bruyninck, H, (2013), *The governance network of European football: introducing new governance approaches to steer football at the EU*, *International Journal of Sport Policy and Politics*, Vol 5., Nr.1, p. 113-132.; Geeraert, A., Colucci. M. (2012), *The 'Social dialogue' in European professional football*, *Comparative Labor Law and Policy Journal*, Vol. 33, Nr. 1.



academic legal literature describing the application of the European Social Dialogue to football to this extent. The application of the European Social Dialogue to the unsolved issues is a novelty in the sense that an elaboration on these issues has not yet occurred.

The thesis may be positioned as a further definition or as an example of the models for sports regulation presented by Foster.<sup>20</sup> The application of the European Social Dialogue to football may be seen as a concretisation of the model of supervised self-government.

The conclusions originate from the perspectives of:

- (I) the governance of sport and of football in particular;
- (II) the necessity for the creation of legal certainty; and from
- (III) the perspective of industrial relations and collective bargaining.

Specifically, the conclusions represent a contribution to knowledge in the following areas, whereby the conclusions refer to one (or more) of the three areas in which a contribution is been made:

- 1) The European Social Dialogue as a form of Supervised Self-Governance (I);
- 2) The European Social Dialogue as a Forum for Negotiated Settlement (I);
- 3) The Social Dialogue as Part of the Structured Dialogue in Sport (I);
- 4) The FSDC as a Source for Legal Certainty (II);
- 5) The FSDC and the Definition of the Boundaries of Article 165 TFEU: ‘fairness’ and ‘openness’ (I), (II) and (III);
- 6) The Evolution of EU Labour Law by Promoting the Flexibility of Approach and Implementation and Enforcement of Negotiation Results through Association Regulations (I) and (III);
- 7) The Evolution of EU Labour Law by Enabling Influence on Labour Relations in Candidate and Third Countries (I) and (III);
- 8) Redefining the Separate Territories Framework (I), (II) and (III);
- 9) Restructuring the Pyramid – Introduction of the Horizontal Model of Governance or Co-Negotiation (I) and (III);

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<sup>20</sup> Foster, K. (2000), *How can Sport be Regulated?* In Greenfield, S. & Osborn, G. (eds.) (2000), *Law and Sport in Contemporary Society*, London: Frank Cass.

- 10) Connections with the US Model of Collective Bargaining (I) and (III);
- 11) Introducing the Labour Exemption in EU Sports Law (I), (II) and (III);
- 12) Enhancing the Debate on Lex Sportiva (II);
- 13) The European Social Dialogue as a Venue for the Settlement of Unsolved Issues (I), (II) and (III).

# CHAPTER ONE

## Explaining Policy Change in the European Union

### Introduction

This chapter serves to introduce the framework that is favoured for further analysis of the thesis. The thesis elaborates on the work of Parrish, the introduction of the Separate Territories Framework in EU sports policy.<sup>21</sup> However, in order to determine if indeed this theoretical framework is most suitable, an illustration of the scenery in which agenda-setting in the creation of football policy, and regulation, in the EU has occurred. The Social Dialogue is presented as a potential tool for European integration. Therefore also micro and macro theories for European integration will be touched upon.

### Models of Sports Regulation

Parrish's study on EU sports regulation revealed tensions within the EU on how the EU's legal order should relate to sporting activity.<sup>22</sup> Is sport a business, the commercial value of which is being undermined by restrictive practices employed the governing bodies, or does sport require a strong regulatory steer from those governing bodies so that the specificities of sport can be protected free from the oversight of judicial bodies? Parrish described the emergence of a sports policy subsystem within the EU. It is characterized by two competing advocacy coalitions, one favoring the superiority of legal norms and market forces within EU sports policy (the single market coalition), the other supporting the promotion of socio-cultural ideas within EU sports policy (the socio-cultural coalition). Each coalition is empowered or constrained by the institutional structure, both formal and informal, of the EU. Denied influence in one venue, coalition actors go venue shopping in order to achieve their goals elsewhere. Parrish applies an actor-centered institutional model to explain how subsystem competition was managed by the EU's executive and judicial bodies. In particular, Parrish presented the separate territories framework in order to explain how the single market and socio-cultural tensions evident within the sports policy subsystem have been managed. The separate territories refers to the definition of a territory of sporting autonomy, an approach favoured by the socio-cultural coalition, and a territory of legal intervention, an approach broadly favoured by the single market coalition.

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<sup>21</sup> Parrish, R. (2003), *Sports Law and Policy in the European Union*, Manchester: Manchester University Press.

<sup>22</sup> Idem.

The thesis researches the sector of professional football. This sector is characterized by activities between actors that can be categorized in two types of rivalling coalitions. The football governing bodies are in favour of more autonomy to regulate and organize their activities. On the other hand, the football players and football clubs wish to have more influence on the governance of football. Parrish's research seems to be best suitable to this thesis as the activities between the coalitions in football may trigger initiatives and actions that serve as initiators for policy change. The combination of an actor centred approach with an assessment on the suitability of available platforms and institutions for enhancing debate, within the geographical framework of the European Union, potentially makes Parrish's work most suitable for application in this thesis. The thesis may serve to further develop his theory.

Although his work outlined one of the earliest theoretical accounts of EU involvement in sport, it neglected to examine the contribution Social Dialogue could make to reconciling single market and socio-cultural tensions within the subsystem. The present thesis seeks to achieve this whilst adding to our theoretical understanding of where the boundaries of the separate territories framework lie.

Reconciling these tensions within the framework of European Union law is problematic given that sport possesses both significant commercial and social characteristics. Foster's study of models of sports regulation informs this debate.<sup>23</sup> Foster examines five models of sports regulation. The first is the *pure market model*. Sport is seen as a business and it is subject to the same regulation as any other type of economic activity. Clubs and other competitors in sports are seen as profit maximizing entities and the application of ordinary laws helps safeguard their economic interests, particularly in relation to restrictive practices employed by sports governing bodies. A flaw with the pure market model lies in its failure to take account of the specific market conditions sports bodies operate within and the need for governing bodies to restrict individual freedoms so that the general sporting interest prevails. For example, mutual interdependence characterizes the sports market and clubs compete to retain an interest in the survival and strength of their competitors. If the pure market model were to

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<sup>23</sup> Foster, K. (2000) *How can Sport be Regulated?* In Greenfield, S. and Osborn, G. (eds.) (2000), *Law and Sport in Contemporary Society*, London: Frank Cass.

be applied, the weaker sporting participants would not survive and sporting competition would be eliminated.

In order to ensure a monopoly does not result from the application of the pure market model, competition law is applied in the *defective market model*. The *consumer welfare model* protects the weaker parties in the sports market, particularly the fan and the players, two stakeholders who have historically possessed limited economic power in relation to the clubs. This can be achieved via the enactment of protective legislation. The current regulatory state of sport is best reflected in the *natural monopoly model*. A natural monopoly is characterized by a single seller with a unique product who is able to create barriers for the easy entry in the market by other sellers. Such a private monopoly ignores the application of competition law and the public interest. The governing bodies of sport operate as one such a single seller although this pattern of governance has attracted support from the Independent Football European Review.<sup>24</sup> Foster argues that the need for regulation stems from the fact that professional football currently is a natural monopoly.<sup>25</sup>

At the opposite end of the regulatory spectrum to the pure market model is the *socio-cultural model*. The principles underpinning this model are essentially sporting in nature. In other words, sporting values predominate over commercial considerations with the social and cultural significance of sport being protected from legal interventions designed to release sports commercial potential. The governing bodies of sport strongly argue for the application of this model as it shields them from the application of law and allows them freedom to devise rules designed to promote and protect the specificities of sport.

Foster argues that a form of ‘supervised self-government’ may reconcile these commercial and sporting interests.<sup>26</sup> Supervised autonomy may be beneficial for a number of reasons. First, sports governing bodies have acquired in-depth knowledge of their respective sports and this wisdom should be respected. Second, the cost of self-regulation is borne by sport itself and is not the public. Third, self-regulation is likely to produce better compliance. However, Foster does not advocate total self-regulation for some formal state regulation within sport

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<sup>24</sup> Arnaut, J. (2006), *Independent European Sport Review*. [www.independentfootballreview.com](http://www.independentfootballreview.com)

<sup>25</sup> Foster, K. (2000) *How can Sport be Regulated?* In Greenfield, S. and Osborn, G. (eds.) (2000), *Law and Sport in Contemporary Society*, London: Frank Cass, p. 272.

<sup>26</sup> Foster, K. (2000) *How can Sport be Regulated?* In Greenfield, S. and Osborn, G. (eds.) (2000), *Law and Sport in Contemporary Society*, London: Frank Cass, p. 269.

serves the public interest. Modern sport has drawn in many stakeholders and traditional patterns of sports governance are increasingly being criticized by a growing number of these stakeholders who feel prevailing governance structures are not undemocratic and do not afford all stakeholders a more even share in the distribution of power within sports structures.<sup>27</sup> The implication is that external regulation of sporting activities can impose good governance on sport. However, little attention has been focused on how stakeholders themselves can co-operatively transform governance standards without the need to resort to litigation or rely on external regulation. In this regard, the literature on sports regulation has tended to ignore the contribution of Social Dialogue in sport.

The establishment of a Social Dialogue committee in European professional football has significantly advanced the debate as to which regulatory model for sport is favoured by the EU. Currently, EU free movement and competition law is applied to the sports market whenever sport is practiced as an economic activity, although the specificities of sport can be considered within the relevant tests applicable for both. If the current Social Dialogue committee works effectively and produces a series of binding agreements between representatives of clubs and players, the prevailing regulatory model will shift to one more closely related to Foster's supervised autonomy model. This thesis not only explores the extent to which Social Dialogue has the potential to offer such a regulatory shift, but also how this informs and advances the current theoretical literature on policy change within the EU. It is to this literature that the thesis now turns.

## **Macro Theories**

### ***Communications Theory***

Communication theorists, otherwise known as transactionalists, focus on how a sense of identity within a political community can be forged.<sup>28</sup> From this perspective, the greater the interaction between Europeans, the greater the likelihood that they accept as legitimate new and emerging bodies such as the EU. Despite lacking competence to develop a sports policy, the EU has identified sport as a means through which the European project can achieve

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<sup>27</sup> Foster, K. (2000) *How can Sport be Regulated?* In Greenfield, S. and Osborn, G. (eds.) (2000), *Law and Sport in Contemporary Society*, London: Frank Cass, p. 270-80.

<sup>28</sup> Deutsch, K. *et al* (1957), *Political Community: North Atlantic Area*, New York, NY: Greenwood Press.

greater legitimacy in the minds of its apparently disengaged citizens. EU policy interventions in sport have, since the Adonnino recommendations in 1984, placed faith in the ability of sport in ‘forging identity and bringing people closer together’.<sup>29</sup> Sports policy initiatives are littered with symbolic references to common ‘heritages’, shared ‘values’ and European ‘models’ (such as the European ‘model’ of sport). Communications theory may have application to sport in so far as sport, particularly professional football, now operates in a genuinely Europeanized labour in which players and even spectators cross national borders to work or consume sport. Nevertheless, transactionalism encountered criticism in the 1960s because despite the increasing communication between Europeans, the sense of a common European cultural identity had not emerged. It is reasonable to assume that sport can breach the modern gap between the EU and its citizens particularly given that sporting loyalties are deeply embedded nationally rather than supranationally.

### ***Neo-functionalism***

Initially pioneered by Haas<sup>30</sup> and later revitalized by Lindberg<sup>31</sup>, neo-functionalism stands as a leading theoretical explanation for European integration. Neo-functionalism assigns a crucial role to the state or a supranational central organisation within the integration process. This in contrast to its forerunner functionalism, which opposed the idea of a territorial authority and favoured a universal perspective or functionally based cross-national approach towards integration.<sup>32</sup> For Haas, the central perspective is that economic rationale is the source for political integration in a process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdictions over the pre-existing national states. Haas established neo-functionalism as probably the most recognized, elaborate, ambitious as well as criticized theory of European integration.<sup>33</sup> He described Western Europe of the 1950s as a living laboratory in which a wide range of sectors, traditionally under the control of nation states, required greater international collaboration. The emergent European

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<sup>29</sup> Declaration 29, Treaty of Amsterdam.

<sup>30</sup> Haas, E. (1957), *The Uniting of Europe*, Stanford CA: Stanford University Press.

<sup>31</sup> Lindberg, L.N (1963), *The Political Dynamics of European Economic Integration*, Stanford CA: Stanford University Press

<sup>32</sup> Mitrany, D. (1943), *A Working Peace System*, Chicago: Quadrangle.

<sup>33</sup> Barani, L. (2005), *The Role of the European Court of Justice as a Political Actor in the Integration Process: The Case of Sport Regulation After the Bosman Ruling*, Journal of Contemporary European Research, Vol. 1, Nr. 1.

Union acted as the ‘agent of integration’ with the integrative dynamics being driven by functional and political spill-over.

Functional spill-over refers to situations where ‘policies made pursuant to an initial task can only be made real if the task itself is expanded, as reflected in the compromises made among the states interested in the task’.<sup>34</sup> Muttimer characterized this as ‘problems in one area will raise problems or require solutions in another’.<sup>35</sup> Evidence supporting the logic of functional spillover was provided by the experience of the 1951 European Coal and Steel Community where the realization of the benefits provided by this organisation necessitated a wider, more general level of economic integration as embodied in the 1957 Treaty of Rome. More recently, proponents of neo-functionalism point to how the economic project of establishing the Single European Market, embodied in the Single European Act of 1987, established the terrain and drive behind the politically integrationist Maastricht project of 1992. As Pollack suggest, ‘the existence, timing and content of Community regulatory policies [such as sport] are explicable primarily in terms of functional spillover from the common market’.<sup>36</sup> Others, such as Sandholz and Zysman claim that the Single European Act was only possible due to the failing domestic politics of the Member States, the relative decline of the US and the rise of Japan. These elements created an environment in which the European Commission could exercise policy entrepreneurship and mobilize an international coalition in favour of the unified internal market.<sup>37</sup>

Complementing functional spill-over is political spill-over. Political spill-over is based on the idea of pluralist democratic societies within Member States that shift their policy making or policy influencing attention from focusing on the level of the member states towards the supranational level. These societies consist of actors or interest groups that come to realize that the supranational level, as a newly formed institution or political arena, is a better medium to pursue their material interests than the previous platform of inter-societal conflicts, namely their national institutions or political arenas. Consequently, the loyalty of these groups

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<sup>34</sup> Haas, E. (1961), *International Integration. The European and Universal Process*, *International Organisation*, Summer 1961, p. 368.

<sup>35</sup> Muttimer, D. (1989), *1992 and the Political Integration of Europe*, *Journal of European Integration*, XIII, No.1.

<sup>36</sup> Pollack, M. (1994), *Creeping Competence: The Expanding Agenda of the European Community*, *Journal of Public Policy*, Vol. 14, Nr. 2, p. 118

<sup>37</sup> Sandholtz, W. and Zysman, J. (1989), *1992: Recasting the European Bargain*, *World Politics*, Vol. 42, p.95-128.



eventually shifts from the national to the supranational arena, a process following the logic of utilitarian rationality.<sup>38</sup>

These twin spill-over effects are self-reinforcing. As competencies in one area are transferred to another, new spill-over is triggered and a feedback loop in favour of the integration process established. This gives neo-functionalism its teleological character.<sup>39</sup> It also generates a third type of spill-over referred to as cultivated spill-over. Seizing on the force of functional and political spill-over, key supranational actors take the lead in supporting further integration. Whilst the logic of cultivated spill-over has been applied to the actions of the European Commission, less attention has been focused on the role of the European Court of Justice who has acted in a judicially active manner to advance economic integration into new fields. Burley and Mattli<sup>40</sup> argue that the ECJ has constitutionalised the Treaty through a process in which law has spilled over from purely economic sectors to new (including social) spheres. Thus once the principle of freedom of movement had been secured, it became necessary to apply it to all economic fields in order to prevent the erosion of the principle. This approach provides an apparently persuasive explanation of the ECJ's judgment in *Bosman*. Furthermore, once the Court decided that sport was as an economic activity and subject to the principles of free movement, then the linkage between sport and competition law became more likely. A series of high profile sports related competition investigations followed the *Bosman* judgment. Once the application of these areas of law became politically problematic in the social and cultural context of sport, further spill-over took place as the Member States intervened in order to provide political guidance on the relationship between sport and EU law. The hardening of these interventions via the insertion of a sports competence in the Lisbon Treaty further point to the strength of a neo-functional explanation.

### ***Intergovernmentalism***

Neo-functionalism became contested by those who observed that the empirical data

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<sup>38</sup> Supra, 1.

<sup>39</sup> Meier, H.(2009), *Emergence, Dynamics and Impact of European Sport Policy – Perspectives from Political Science*, in Gardiner, S., Parrish, R., and Siekmann, R. (2009), *EU Sport Law and Policy: Regulation, Re-regulation and Representation*, The Hague: TMC Asser Press, p. 10.

<sup>40</sup> Burley, A. M. and Mattli, W. (1993), *Europe Before the Court. A Political Theory of Legal Integration*, International Organisation, Vol.47, Nr.1, Winter 1993.

contradicted the basic preconditions of this theory.<sup>41</sup> Intergovernmentalism soon established itself as a counterweight to neo-functionalism. Intergovernmentalists criticize the importance attributed to the supranational state as a source for igniting regional integration. Within the framework of the EU, intergovernmentalists are of the opinion that neo-functionalism failed to stress the importance of national Member States and the fact that they have continuously tried to protect their sovereignty and are at pains to prevent the uncontrolled transfer of competencies toward the supranational level.<sup>42</sup> For Moravcsik, state preferences are negotiated and formed at the state level following interaction with societal interest groups. Economic interdependence then compels nation states to engage with other states through regional organisations such as the EU. The extent to which these state preferences are then altered or successfully defended at EU level depends on the states' bargaining power within this organisation.

Intergovernmentalists assert that the Member States only transfer or delegate powers or jurisdiction when it aligns with their own interests. Meier describes that Member States may be seen as 'principals' that transfer limited powers to the supranational level institutions and force them to act as their 'agents' in order to ensure that all interstate parties are committed to the result of their bargaining.<sup>43</sup> A tool for the prevention of 'agency drift' is the fact that Member States have the ultimate voice in organizing and regulating the European Union and its institutions.<sup>44</sup> In this connection, Member States retain the ultimate control function that can be employed to resist agency drift, Treaty revision. Ultimately, therefore, the Member States can, if so desired, act as the brake on European integration.

## Micro Theories

Accompanying the macro theories of European integration is a body of literature seeking to understand the day-to-day dynamics driving policy change in the EU. This literature, and its

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<sup>41</sup> Hoffmann, S. (1964), *The European Process at Atlantic Cross Purposes*, Journal of Common Market Studies, Vol.3, 1964. Hoffmann, S. (1966), *Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe*, Daedalus, Vol.95.

<sup>42</sup> Moravcsik, A. (1991), *Negotiating the Single European Act*, in R. Keohane and S. Hoffmann (1991) (eds), *The New European Community: Decision Making and Institutional Change*, Boulder, Co: Westview Press, 41-84. Moravcsik, A. (1993), *Preferences and Power in the European Community*, Journal of Common Market Studies, Vol. 31, Nr.4, 473-524.

<sup>43</sup> Meier, H.(2009), op.cit., p. 15.

<sup>44</sup> Ibid.

relevance to the debate on policy change within the sporting context, has been explored by Houlihan.<sup>45</sup> Houlihan argues that, traditionally, general policy analysis focused on problem identification, agenda setting and policy formulation. This focus depended on the uncritical assumption of the separation of fact from value and it drew heavily on a methodological framework derived substantially from a neo-positivist and rationalist epistemology, the privileging of quantitative methods and the search for generalizable results. When it became clear that governments' intentions combined with financial investments resulting in targeted programmes did not lead to the desired result, the attention of policy analysts turned from problem identification to a concern to better understand the process of policy implementation. Other groupings and actors became more important in the policy process. Instead of a top-down approach, the bottom-up approach of policy making was stressed including the role of 'street-level' bureaucrats such as teachers and sport coaches and their role in the policy process.<sup>46</sup>

Houlihan explored three theoretical frameworks relevant to this thesis: the stage model, institutional analysis and the multiple streams framework. His selection of these frameworks reflect their illustration of the relationship of policy analysis to changing government preoccupations and the debates in the broader social sciences. They are also the most fully developed frameworks and they have already stimulated empirical application and critical evaluation. Houlihan argued that the frameworks should satisfy four essential criteria. First, the frameworks should have the capacity to explain both policy stability and change. For the analysis of changing policy in sports this element is essential as policy in sport changes rapidly. Houlihan argues that current policy change analysis tends to be expressed in terms of the differing weight given to structure, agency and ideas. Second, the framework must have the capacity to illuminate a range of aspects of the policy process. Especially in the sports sector, there is a need for a holistic approach that examines the inter-relationship between actors, aspects and / or stages. The third criterion is applicability across a range of policy areas. Houlihan argues that any framework would benefit from having applicability beyond its own policy area. The comparison with other policy areas allows the researcher to acquire a better insight in the area under investigation. In addition, the applicability across a wider range of areas also allows for the identification and examination of the way in which sport has

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<sup>45</sup> Houlihan, B. (2005), Public Sector Sport Policy, Developing a Framework for Analysis, *International Review for the Sociology of Sport*, 40/2 (2005), 163-185.

<sup>46</sup> Ibid.

been influenced by adjacent policy areas. Sport has been affected by activity from other policy areas such as health, education and internal market. Finally, Houlihan suggests that in order to avoid a mere snapshot of the policy development the framework should cover a range of time between 5 and 10 years. This timeframe allows the researcher to distinguish minor fluctuations in policy direction from actual change and to identify the significant explanatory factors for such change.

### ***The Stages Model***

The stages model dominated policy analysis between 1970 and the late 1980s. This model divides the policy process into a series of stages following the rational actor model. The framework can be used to research the complete process of policy change but is more often used to analyse different segments in the policy process. The nine stages model has been introduced by Hogwood and Gunn.<sup>47</sup> The nine stages are the following: deciding to decide (agenda setting), issue filtration (deciding how to decide); issue definition, forecasting, setting objectives and priorities, options analysis, policy implementations, evaluation and review, and policy maintenance, succession or termination. The stages model has been used in a number of important studies on, for example, agenda setting<sup>48</sup>, implementation<sup>49</sup> and evaluation.<sup>50</sup> Houlihan employs the stages model in his research into public policy responses to football hooliganism in England and doping in Britain (1990, 1991). The major criticism of Hogwood and Gunn's framework is its inability to map the policy process in detail. It goes beyond the fact of why an issue reaches an agenda and does not take the economic and political forces into consideration that compel governments or policymakers to act. Houlihan presents five criticisms of the stages model. First, the framework is too descriptive and does not provide a causal explanation. Second, it is inaccurate in its description insofar as it fails to capture the 'messiness of policy-making'<sup>51</sup> and it implies a false degree of rationality in the policy process. Third, it has a top-down bias and often focuses on legislation rather than other forms of policy-making. Fourth, it theorizes parts of the policy process rather than the process as a

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<sup>47</sup> Hogwood, B. and Gunn, L. (1984), *Policy Analysis for the Real World*, Oxford: Oxford University Press.

<sup>48</sup> Kingdon, J. (1995), *Agendas, Alternatives and Public Policies*, New York, NY: Harper Collins.

<sup>49</sup> Pressman, J., and Wildavsky, A. (1973), *Implementation*, Berkeley: University of California Press.

<sup>50</sup> Lincoln, Y.S, and Guba, E.(1987), *Ethics: The Failure of Positivist Science*, Review of Higher Education, Vol. 12, p.221-240.

<sup>51</sup> John, P. (1998), *Analysing Public Policy*, London: Continuum, p. 36.

whole. Finally, it is too simplistic in its image of policy-making as a neatly sequential and linear or cyclical process.

In relation to the adequacy of the stages model as a research framework for sports policy analysis, Houlihan argues that the framework is weak in its explanation of stability and change due to its failure to illuminate the underlying power relations that underpin the policy process. It is also weak in identifying patterns of policy making and agenda setting as it is more focused on capturing particular moments in the policy process. Despite of its ability to be applied to a cross range of policy areas, Houlihan is not convinced of the stages model as a suitable framework for sports policy research.

This makes the stages model less suitable for application in this thesis. Here the focus is placed on actor activity leading to a stage and less on actor activity in a particular stage. The entire process leading to a particular stage, or from one stage to another (from the creation of the Social Dialogue Committee to the conclusion of an Autonomous Agreement) is of interest for the research. Also, the policy process in professional sports on the level of the EU is, due to the complex relation of governance interdependency and hierarchy of law, less linear than the approach in the stages model.

### ***Institutional Analysis***

Due to the growing dissatisfaction with top-down models of policy analysis which adopt a strict focus on governments, policy analysts began to turn their attention towards the role of institutions in the policy process. According to Thelen and Steinmo,<sup>52</sup> institutions shape how political actors define their interests and structure their relations of powers to other groups. Institutions are defined in two ways with reference often made in the literature to ‘old’ and ‘new’ institutionalism.<sup>53</sup> Old institutionalism stresses the formal administrative, legal and political dimensions of organisations. From this perspective, institutions are easily identifiable as physical entities such as agencies, departments, parliaments and so forth. Institutions impose constraints on actors and thus play an important role in either advancing policy

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<sup>52</sup> Thelen, K, Steinmo and Longstreth, F. (1992), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, Cambridge: Cambridge University Press.

<sup>53</sup> Armstrong, K. and Bulmer, S.(1998), *The Governance of the Single European Market*, Manchester: Manchester University Press.

change or policy inertia. This is because institutions as organisational entities structure the rules of the policy making game. For example, formal decision making rules operating within the EU, such as qualified majority voting, impose constraints on how policy can be amended. Similarly, the EC Treaty confers certain competencies to the EU institutions and they may only act within the confines of those competencies. Until the entering into force of the 2009 Lisbon Treaty, the EU did not possess a competence to develop a sports policy. Consequently, the EU's influence on sport was indirect, coming by way of the application of established Treaty competencies such as free movement and competition laws to sporting contexts.<sup>54</sup> These institutional 'rules of the game' clearly affect the choices and strategies of actors wishing to pursue their policy agenda.

Alternatively, from a new institutionalist perspective, institutions can be conceived of as cultural constructions possessing not only formal rules and procedures but also their own values, norms and beliefs. Armstrong and Bulmer<sup>55</sup> identify two schools within the new institutional literature. Rational choice new institutionalism stresses how institutions constrain or empower actors and affect their choice of action. By contrast historical new institutionalism asserts that the historical culture of an organisation can significantly affect policy choices. For example, whilst the EU may possess the formal decision making rule of qualified majority voting in the Council, an informal culture of unanimity may render this formal requirement less influential and result in policy becoming 'path-dependent' or 'locked in'.<sup>56</sup>

In sports policy research institutionalism can demonstrate a growing track record of application. In relation to the organisational infrastructure of UK sport acting as a significant

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<sup>54</sup> Tokarski, W., Steinbach, D., Petry, K., Jesse, B. (2004). *Two Players- One Goal. Sport in the European Union*. Oxford: Meyerand Meyer Sport.

<sup>55</sup> Armstrong, K. and Bulmer, S.(1998), *The Governance of the Single European Market*, Manchester: Manchester University Press.

<sup>56</sup> Pierson, P. (1996), *The Path to European Integration: A Historical Institutional Analysis*, *Comparative Political Studies*, 29:2, 123-63

variable in shaping policy, Houlihan<sup>57</sup> cites the work of Houlihan and White,<sup>58</sup> Green,<sup>59</sup> Henry,<sup>60</sup> Pickup<sup>61</sup> and Roche.<sup>62</sup>

Houlihan considers institutional analyses to have a number of clear strengths when applied as a framework for policy change analysis in sport.<sup>63</sup> First, it draws attention to the behaviour of both actors and the structures within which they operate. Second, it does not ignore the role and significance of state institutions in the policy process. Third, the framework can be applied to a wide number of policy areas. However, Houlihan identifies the fact that institutional analysis is limited in the ability to explain stability and change and that it is limited in the capacity of illuminating a range of aspects of the policy process due to its focus on structure over agency. Houlihan concludes his assessment of the framework by stating that at best the framework is under theorized and at worst that it privileges institutions on the basis of weak evidence.

### ***Multiple Streams Framework***

Kingdon's multiple streams framework has been widely employed in policy studies generally although it has received little attention with sports policy studies. Chalip<sup>64</sup> used the framework as an element in researching New Zealand sport policy and Bergsgard<sup>65</sup> analysed decision making in Norwegian sport. Kingdon employs the concept of a 'stream' to explain the processes involved in agenda setting.<sup>66</sup> The *problem stream* is composed of indicators that demonstrate the existence of the problem, focusing events that call attention to the problem,

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<sup>57</sup> Houlihan, B. (2005), *Public Sector Sport Policy, Developing a Framework for Analysis*, International Review for the Sociology of Sport, 40/2 (2005), p. 170.

<sup>58</sup> Houlihan, B. and White, A (2002), *The Politics of Sport Development: Development of Sport or Development Trough Sport*, London: Routledge

<sup>59</sup> Green, M. (2003), *An Analysis of Elite Sport Policy Change in Three Sports in Canada and the UK*, unpublished PhD thesis, Loughborough University.

<sup>60</sup> Henry, I. P. (2001) *The Politics of Leisure Policy*. 2nd ed. Palgrave, Basingstoke.

<sup>61</sup> Pickup, D. (1996), *Not Another Messiah: An Account of the Sports Council 1988-1993*, Bishop Auckland: Pentland Press.

<sup>62</sup> Roche, M., (1993), Sport and Community: Rhetoric and Reality in the Development of British Sport Policy, in J.C. Binfield and J. Stevenson (eds), *Sport, Culture and Politics*, Sheffield: Sheffield Academic Press.

<sup>63</sup> Houlihan, B. (2005), *Public Sector Sport Policy, Developing a Framework for Analysis*, International Review for the Sociology of Sport, Vol. 40, Nr. 2.

<sup>64</sup> Chalip, J. (1996), *Critical Policy Analysis: The Illustrative Case of New Zealand Sport Policy Development*, Journal of Sports management, Vol. 10, Nr.3, p.310-324.

<sup>65</sup> Bergsgard, N.A. (2006), *Norwegian Sport Politics and Policy: A Reflection of General Trends or Deviant Case*, International Review for Sociology of sport, Vol.41, Nr. 1, 7-27.

<sup>66</sup> Kingdon, J. (1995), *Agendas, Alternatives and Public Policies*, New York, NY: Harper Collins.

and feedback usually in the form of public opinion on existing programmes. The *policy stream* is composed of specialists in a given policy area, such as interest group experts, career bureaucrats, academics, staffers, or policy advocates, such as citizen advocates, who have an increased awareness of the problem and are striving for a solution. Potential solutions and alternatives to the problem emerge from this stream. Finally, the *politics stream* refers to the arena in which issues reach the agenda and decisions are potentially taken. It refers to the wider political environment of elections, government changes and public opinion. Occasionally, the streams align to allow a *policy window* to open. Policy change takes place within this window.

Kingdon's model has relevance for our understanding of EU sports regulation generally and issues of Social Dialogue specifically. The wider 'problem' with EU sports regulation centres on perceptions that EC law is not sports sensitive and this is having negative consequences for sport. Within the policy stream float possible solutions such as making wider use of the sporting exception in EC law, recognizing wider objective justifications for *prima facie* restrictive rules, making wider use of Article 81(3) and even granting sport an exemption from EU law through a Treaty revision. The two streams cannot necessarily be coupled unless there is movement in the politics stream. The Bosman judgment established the issue of sports regulation as an issue of high public salience. Two years following Bosman an intergovernmental conference met to discuss Treaty revision. Thus a policy window opened, the result of which saw the Amsterdam Declaration on the social significance of sport adopted. This established a political agenda on the question of how to safeguard the specificity of sport within the EU's legal order. This agenda ultimately led to the Lisbon Treaty's statement on protecting the 'specific nature of sport'.<sup>67</sup>

Applying Kingdon's model to the Social Dialogue takes a similar form. First is the problem. Issues previously resolved by the sporting stakeholders themselves were instead reaching the courts and thus contributing to legal uncertainty in the sector. The private regulations of sports bodies were being challenged by litigants who cited inconsistencies with national and EU law. Furthermore, some stakeholders became dissatisfied with their representation within the sport and sought to challenge existing governance structures through recourse to the courts. Second, a range of policy solutions emerged including the possible use of a structured Social Dialogue

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<sup>67</sup> Article 165 TFEU.



facilitated by the EC Treaty to bring together representatives of clubs and players in order to create greater legal certainty between the stakeholders and remedy the perceived lack of democratic representation with prevailing governance structures. The politics stream arguably assists the establishment of a Social Dialogue. Since 1997, the Treaty has allowed for such developments, culturally the desire to see harmonious labour relations is rooted in European society, Social Dialogue in sport has official support from within the European Commission and employers and employees (clubs and players) are recognizing the potential benefits of Social Dialogue. Therefore a policy window may be opening in which Social Dialogue can lead to policy change within professional sport in Europe.

Kingdon's main contribution is his focus on the power of ideas and the focus on how solutions 'search' for problems rather than the focus on pressure and influence. Hence given certain propitious conditions, solutions within an organisation are joined to problems. The opening of a policy window increases the likelihood that the 'solution' will be adopted. Although appealing, Kingdon puts 'too much distance between the policy and the political stream'.<sup>68</sup> He therefore de-emphasizes the crucial role played by competing policy advocates and as such his work lacks an advocacy analysis. Sabatier's ACF is an attempt to view Kingdon's 'streams' as more closely related. Kingdon's work also lacks an institutional analysis. Kingdon does note that 'institutions, constitutions, procedures, governmental structures, and government officials themselves affect the political, social, and economic system as much as the other way around'.<sup>69</sup> Furthermore, Kingdon notes that 'federalism also enhances possibilities for innovation - if a new idea isn't possible in one venue, it might be possible in another, and entrepreneurs can shop around for the most favourable venue'.<sup>70</sup> Kingdon's work therefore reflects an old institutionalist tradition and perhaps pays insufficient attention to the insights offered by new institutionalism.

### ***The Advocacy Coalition Framework***

From a pluralist perspective power within society is dispersed among interest groups who compete for the ear of the government. The government is either considered a neutral powerbroker in this process or, as we have seen above, a non-neutral actor with its own

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<sup>68</sup> Sabatier, P. (1998), *The Advocacy Coalition Framework: Revisions and Relevance for Europe*, Journal of European Public Policy, 5:1 March 1998, p. 151.

<sup>69</sup> Kingdon, J. (1995), *Agendas, Alternatives and Public Policies*, New York, NY: Harper Collins, p. 229.

<sup>70</sup> Kingdon, J. (1995), *op.cit* p. 230.

objectives, privileging some groups within the policy process over others. The realities of the policy process tend to suggest that access to the decision makers is not as open as ideal type pluralist accounts suggest. For example, well resourced (economically, politically or in terms of knowledge) interest groups are advantaged. Houlihan<sup>71</sup> (1991, 1997) recommends the policy communities approach as one such pluralist model which assists our understanding of UK sports policy. This approach asserts that sports policy is discussed within the context of a policy community. Such a community is constructed around a network of actors (including governmental officials and interest groups). The officials are the source of sports policy whilst the interest groups wish to influence it. A policy network implies a symbiotic relationship between these two players. In other words the decision maker needs the interest group for advice in order to produce better policy and the interest group needs influence in order to benefit from the eventual policy outcome. This approach therefore implies that policy emerges from bargaining between the parties rather than imposition by the state. Nevertheless, some policy areas are controlled by ‘insider’ groups at the expense of groups excluded (outsider groups). The status of ‘insider group’ being conferred on an interest group is increased if that group is well resourced in terms of the knowledge they bring to the network (as well as their finances). The experience of sports policy in the UK suggests that the sports policy community may have held tight control over some areas such as avoiding much statutory regulation of their activities. However, in other areas the sports policy community lacks cohesion. For example, Houlihan<sup>72</sup> examined conflict within the sports policy community over hooliganism, drug use and school-aged sport.

Rather than focusing on stable networks of actors, Sabatier’s Advocacy Coalition Framework (ACF) places more emphasis on competition between actors who operate, not within one particular venue, but within a policy subsystem.<sup>73</sup> These advocacy coalitions develop strategies to translate their beliefs into public policy. An important aspect of this is the ability of one group to topple the supremacy of another within the subsystem. By doing so, they can redirect public policy in a direction more favourable with their beliefs. Sabatier’s framework is based on three core basic premises.<sup>74</sup> First, understanding the process of policy change requires a time perspective of a decade or more. Second, the most useful unit of analysis for

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<sup>71</sup> Houlihan, B.(1991), *The Governance and Politics of Sport*, London: Routledge.

<sup>72</sup>Houlihan, B.(1991), *The Governance and Politics of Sport*, London: Routledge

<sup>73</sup> Sabatier, P. (1998), The Advocacy Coalition Framework: Revisions and Relevance for Europe, *Journal of European Public Policy*, 5:1 March 1998.

<sup>74</sup> Ibid.

understanding is to focus on activity within ‘policy subsystems’, these being created by the interaction of actors from different institutions interested in a policy area and seeking to influence policy in that given area. Third, that public policies can be conceptualized in the same manner as belief systems, i.e. as sets of value priorities and causal assumptions about how to realize them.<sup>75</sup>

The focus on the aggregation of interests within coalitions operating within policy subsystems is perhaps Sabatier’s main contribution. Sabatier argues that usually policy subsystems are composed of between two and four advocacy coalitions, each composed of actors from various governmental and private organisations who share a set of normative and casual beliefs and engage in a non-trivial degree of coordinated activity over time.<sup>76</sup> Each coalition attempts to direct policy in a direction consistent with their belief system. These belief systems are structured into: deep core beliefs, which are basic values and convictions of coalitions and are less suitable for serving as a basis for compromise with other coalitions with differing deep core beliefs; policy core beliefs which consist of the strategies and preferences that are needed to translate the deep core beliefs into feasible policy initiatives; and secondary policy core beliefs, which are narrower beliefs concerning, for example, the seriousness of the problem.<sup>77</sup>

By strategically using available resources, coalitions adopt various strategies in an attempt to influence and change policy in multiple venues. Weible states that actors often ‘venue shop’, looking for institutional access where they might have a competitive advantage.<sup>78</sup> These venues include elections, decisions by executive bodies, votes in Parliament or litigation. Sabatier and Weible<sup>79</sup> identify a set of resources available to actors:

*Access to legal authority to make policy decisions:* Some coalitions may contain insider

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<sup>75</sup> Sabatier, P. (1998), op.cit., p. 99.

<sup>76</sup> Sabatier, P. (1998), op.cit., p. 103.

<sup>77</sup> Sabatier, P. (1998), op.cit., p. 103-104.

<sup>78</sup> Weible, C. (2006), *An Advocacy Coalition Framework Approach to Stakeholder Analysis: Understanding the Political Context of California Marine Protected Area Policy*, Journal of Public Administration Research and Theory, April 26, p. 7.

<sup>79</sup> Sabatier, P. and Weible, C. (2005), *Innovations in the Advocacy Coalition Framework*. Paper presented at the annual meeting of the American Society for Public Administration, Milwaukee, WI, cited in Weible, C.(2006), *An Advocacy Coalition Framework Approach to Stakeholder Analysis: Understanding the Political Context of California Marine Protected Area Policy*, Journal of Public Administration Research and Theory, April 26.

members who are in positions of formal authority. If so, the coalition's direct access to decision makers becomes a valuable resource.

*Public opinion:* Coalitions can use positive opinion polls to their advantage, particularly as it increases the legitimacy of their cause.

*Information:* Information is a key resource for coalitions as it provides an evidence base to counter the arguments of their competitors, a means of convincing decision-makers of the validity of their cause and a resource to influence public opinion. Knowledge of, for example, the political or legal process also makes for efficient and effective strategies.

*Mobilizable troops:* Advocacy coalition's will attempt to mobilize public support and expand the conflict as a means of imparting pressure of decision-makers to change policy. The use of the public, for example to write letters, raise funds or protest, is common among those coalitions who are under-resourced in financial terms.

*Financial resources:* Clearly, a coalition that is well financed will stand a better chance of influencing policy than one who is not. Money is important as it can be used to acquire other resources, such as influence and research.

*Skillful leadership:* Of critical importance to any coalition is the question of leadership. Whilst factors external to the subsystem can open a window of policy change, this opportunity can go unexploited if a coalition lacks leadership skills. Coalition leaders also articulate the belief system for other coalition members, thus helping to unit those members behind a common cause. They also play an important role in attracting additional resources to the coalition and they help define the most appropriate strategy to adopt and which institutional venue to exploit.

Conflicting strategies from various coalitions are mediated by 'policy brokers' whose main concern is to find a reasonable compromise that will reduce conflict.<sup>80</sup> The ACF predicts two precursors to major policy change: changes in beliefs of a dominant coalition or changes in available resources and venues. These are brought about by external shocks, policy-oriented

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<sup>80</sup> Sabatier, P. (1998), op.cit., p. 104.

learning or a hurting stalemate. External shocks are events that take place outside the subsystem but which have the potential to affect policy within it, by altering the balance of resources within the subsystem, altering prevailing belief systems with a coalition or by opening or closing venues through which coalition strategies can be pursued. Examples of external shocks include major socio-economic changes such as economic recession or the rise of social movements; changes in public opinion; changes in the systemic governing coalition; and policy decisions and impacts from other subsystems.<sup>81</sup>

Policy-oriented learning refers to ‘relatively enduring alterations of thought or behavioural intentions that result from experience and/or new information that are concerned with the attainment or revision of policy objectives’.<sup>82</sup> Such learning informs and can alter the belief system of a coalition.

The third source of policy change is a scenario when ‘all major coalitions view a continuation of the current situation as unacceptable, they may be willing to enter negotiations in the hope of finding a compromise that is viewed by everyone as superior to the status quo’.<sup>83</sup> This state of ‘hurting stalemate’ implies that each coalition has the ability to impose unacceptable costs on one another.<sup>84</sup> Sabatier outlines the conditions for such a successful negotiated settlement. These are: (a) a stalemate wherein all coalitions view a continuation of the status quo as unacceptable; (b) the negotiations are conducted in private and last for a period of at least six months and; (c) there is a facilitator (policy broker) respected by all parties and viewed by them as relatively neutral.<sup>85</sup> Sabatier refers to the outcome of this negotiation, not as a victory for coalition over another, but as a ‘power sharing’ arrangement among the coalitions.<sup>86</sup> This arrangement will be sustainable if the parties to it consider the distribution of the benefits to be fair and if old coalition leaders are replaced by new blood.<sup>87</sup> Within the context of EU sports regulation, it is observable that a number of venues have been promoted as source of this reconciliation including the staging of the European Sports Forum, the use of stakeholder

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<sup>81</sup> Sabatier, P. (1998), op.cit., p. 104.

<sup>82</sup> Ibid..

<sup>83</sup> Sabatier, P. (1998), op.cit., p. 119.

<sup>84</sup> Zartman, W. (1991), *Conflict and Resolution: Contest, Cost, and Change*. Annals of the American Society of Political and Social Science, 518: 11-12, cited in Weible, C., (2006), *An Advocacy Coalition Framework Approach to Stakeholder Analysis: Understanding the Political Context of California Marine Protected Area Policy*, Journal of Public Administration Research and Theory, April 26, p.7.

<sup>85</sup> Sabatier, P (1998), op.cit., p. 119.

<sup>86</sup> Ibid.

<sup>87</sup> Sabatier, P. (1998), op.cit., p. 120.

conference and public consultation exercises and even the creation by the sports movement of a ‘sports court’ – the Swiss based Court of Arbitration for Sport. The establishment of a Social Dialogue committee for professional football can also be seen in this light.

The ACF has been applied to a large number of case studies.<sup>88</sup> Its value lies in the emphasis it places on the subsystem as the essential unit of analysis and focus on the power of beliefs and strategic maneuvering by actors within the subsystem. It also highlights the circumstances in which rival coalitions compromise with each other in order to negotiate a mutually acceptable settlement. Nevertheless, as Schlager notes, the ACF does not explain ‘why actors holding similar beliefs form coalitions to collectively press their goals’.<sup>89</sup> In other words, what incentives are there for actors to act collectively when they can benefit from the efforts of others without having to pay their associated costs.

Its sports related application remains limited. Green and Houlihan’s account of elite swimming and track and field athletics is one such example of a sports specific application of the ACF.<sup>90</sup> The authors identify the emergence of such an advocacy coalition in UK swimming and athletics with the role of UK Sport and the growing dependency by the sports governing bodies on lottery funding being two key issues. A much weaker advocacy coalition is taking shape in recreational sport due to its limited access to funding. Therefore whilst a desire to shift governmental priorities and access funding may promote the growth of advocacy coalitions in the UK, in the EU the emergence of rival coalitions has been more associated with attempts to secure a regulatory environment consistent with the coalition’s beliefs.<sup>91</sup> This reflects the regulatory as opposed to distributive nature of EU sports policy.

Whilst Parrish’s description of the EU’s sports policy subsystem certainly informs the framework adopted in this thesis, his work is in need of an update. The sports policy subsystem presented by Parrish in 2003 has changed significantly in recent years.

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<sup>88</sup> Sabatier, P. (1998), op.cit., p. 100-101.

<sup>89</sup> Schlager, E. (1995), *Policy Making and Collective Action: Defining Coalitions Within the Advocacy Coalition Framework*, Policy Sciences, Vol.28, p.244.

<sup>90</sup> Green, M., and Houlihan, B.(2005), *Elite Sport Development: Policy Learning and Political Priorities*, London: Routledge.

<sup>91</sup> Parrish, R. (2003), *Sports Law and Policy in the European Union*, Manchester: Manchester University Press.

First, the composition of the subsystem has changed with a number of new organisations emerging which have altered the balance of power within the subsystem. For example, in 2008 the European Club Association was formed to replace the G14.

Second, the range of available institutional venues for the coalitions to exploit has expanded. Major developments since 2003 include the 2006 European Court of Justice judgment in *Meca-Medina*, the first sports related competition law judgment of Court. In 2007 the European Commission published the White Paper on Sport and in 2009, the Lisbon Treaty entered into force which for the first time in December 2009 which established sport as a competence of the EU.

Third, the subsystem has greatly matured since 2003 and evidence suggests that subsystem activity has contributed to legal uncertainty and the onset of a position resembling a hurting stalemate.

Fourth, Parrish's 2003 study did not assess the significance of Social Dialogue for sports regulation which at the time was not considered a viable option given the lack of a representative employer association to represent the interests of professional football clubs.

Therefore, the framework that will be used for further analysis departs from Parrish's 2003 study and is applied by taking into consideration the above-mentioned changes occurred in the past decade.

## **Conclusion**

This chapter has provided an overview of macro and micro theoretical approaches to European integration. The macro approaches help to understand the bigger picture of the evolution of sport policy into a topic on the European agenda. The description of the Communications theory allows us to understand the efforts that have been made by the European institutions, such as the Council and the Parliament, to involve sport in the European Union's field of policy making powers. This occurred mainly to create enthusiasm for a bigger unity in Europe. This approach has lost significance in relation to the evolution of sport into professional sport with a more commercial output.

It is this spill-over effect, characteristic for neo-functionalism, that has ignited other policy areas to influence sport. When sport is an economic activity the European Commission was able to exercise powers that were initially designed to shape other areas. The influence of the EU on sport raises issues when provisions on free movement and competition law become a reality in sport. As a consequence the sports governing bodies defend their autonomy by claiming their mandate for regulation on the basis of the protection of the specificity of sport. Neo-functionalism can also be connected to the evolution of EU labour law; economic integration spill-over to the social field, eventually leading to the creation of social partner participation in legislative initiatives by means of the European Social Dialogue.

The interdependence between societal interest groups makes an intergovernmentalist approach useful for analyzing policy change. However, for research in the professional sports sector it is less relevant. As regards to the topic of the thesis there are little connections to activity that sources on the national level of the Member States with decisive impact on policy change on the supra level of the EU. On the contrary, it is the impact from an EU approach that has led to actor activity and advocacy coalitions based on opposite beliefs. Hence, the impact of EU law has created legal uncertainty and has divided the sport sector in two different coalitions, striving for policy change in their desired direction.

The focus on the actors and their role in the complex nature shifts the focus to micro integration theories. Institutional analysis focuses on the organisational structures and their impact on policy. As regards the thesis it can be argued that the role of the Commission in allowing social partner to participate in Social Dialogue if they meet certain criteria, has an impact from an institutional perspective. The stages model may also be of assistance in defining actor activity and policy influence on the level of one specific stage in policy making. However, the most suitable micro theories for the topic of research is the multiple streams framework of Kingdon and the ACF of Sabatier.

Kingdon describes how policy problems originate, how these problems assess various types of solutions and, finally, how one policy window is open for the specific type of solution. This could be the route that the Social Dialogue may follow for topics that are being analysed in the thesis. By adding the ACF to this approach a more complete theory comes to the surface. A theory that places particular attention to actor activity. The combination of these theories is to be found in the method in which Parrish researches EU sports policy. His approach is



therefore applied and further elaborated because the changes in the regulatory landscape of professional football will be applied.

In the following Chapter the application of EU law on sport shall be examined. It will be argued that the relation between the EU regulatory framework, based on EU competences, has left the sports movement in doubt about the boundaries of its autonomy. The search for legal certainty that follows allows an actor centered approach.

## CHAPTER TWO

### Application of European Union Law to Sport

#### Sport and the EU Treaty

Article 5 of the Treaty on European Union and Article 7 of the Treaty on the Functioning of the European Union (TFEU) stipulate that the institutions of the European Union can only act in accordance with the powers that are conferred upon by the Treaty. Treaty provisions have direct effect and are the source for the creation of secondary legislation, such as Directives and Regulations. Article 2 of the TFEU sets out a three tier system of competences. *Exclusive* competences are those reserved exclusively for the EU. Member State action in these areas is only permitted if so empowered by the Union. The exclusive competences of the EU are the customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and the common commercial policy.<sup>92</sup> *Shared* competences are those shared between the Union and the Member States. The Union and the Member States can legislate and adopt legally binding acts in the shared areas of the internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; the area of freedom, security and justice; and common safety concerns in public health matters.<sup>93</sup> In certain other areas, the Union only possesses the *supporting* competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of supporting measures are not permitted to entail the harmonisation of Member States' laws or regulations. The supporting competences are: the protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and **sport**; civil protection; and administrative cooperation.<sup>94</sup>

The sports competence is a new addition to the EU's powers, granted by way of Article 165 entering into force in 2009 following the ratification of the Lisbon Treaty. Prior to that, the

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<sup>92</sup> Article 3 TFEU.

<sup>93</sup> Article 4 TFEU.

<sup>94</sup> Article 6 TFEU.

EU did not possess the competence to develop a sports policy. Article 165(1) TFEU suggests 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) states 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’.

The entry into force of Article 165 TFEU was welcomed by sports governing bodies who considered that it corrected the historic bias evident in successive EU Treaties towards economic integration. This bias, it was claimed, had the effect of subjecting sporting practices to other Treaty competencies that were not originally designed to be applicable to sport.

The governing bodies of football claimed that this had the effect of undermining the autonomy and specificity of sport. Article 165, it is now argued, acts as a reminder to the Court of Justice of the EU and the European Commission that the *specific nature of sport* should be taken into account in the application of other Treaty competences. Of particular concern to the football authorities was the current and future impact on sport of the application of existing Treaty provisions on non-discrimination, citizenship rights, the right of freedom of movement for workers and competition law.

### ***Non-Discrimination and Freedom of Movement Rules***

The non-discrimination principle is enshrined in what is now Article 18 TFEU. It states that ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’. Article 20 TFEU suggests that ‘Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not

replace national citizenship'. According to Article 20, EU citizens have 'the right to move and reside freely within the territory of the Member States'. This right is given specific expression for workers in Article 45 TFEU. It argues that 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. Article 45(3) details a right, subject to limitations 'justified on grounds of public policy, public security or public health' to '(a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. Article 45(4) provides that the provisions of the Article do not apply to employment in the public service.

Article 49 TFEU governs the freedom of establishment. It argues that 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited'. Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms. Article 56 TFEU governs the freedom to provide services. It states that 'restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

Collectively, Articles 45, 49 and 56 are known as the 'free movement rules'. When applying these rules to sport a number of elements must be satisfied. First, an individual can rely on EU free movement law as the Treaty provisions have a direct, vertical as well as horizontal effect.<sup>95</sup> Rules concerning free movement are applicable when a citizen or party challenges a law or act of a public authority but there exists also an extension to rules of sports governing bodies such as the FIFA regulations on the status and transfer of players. Challenges can be heard before the European Courts but also before national courts via the preliminary reference

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<sup>95</sup> Barnard, C. (2010), *The Substantive Law of the EU*, Oxford: Oxford University Press, Chapter 8-14.

procedure of Treaty Article 267 under which national courts can seek guidance from the European Court on the interpretation of the free movement rules.

The second element concerns the definition of a worker and the extent of the applicability of the free movement rules to athletes in sport. Under CJEU jurisprudence the term ‘worker’ is a matter to be defined by EU law and it means someone who performs services for and under the direction of another in return for remuneration during a certain period of time.<sup>96</sup> This definition therefore includes professional and semi-professional athletes who perform their duties for (in)direct remuneration. Not only athletes that work under an employment contract, as is usual in the majority of European team sports, but also athletes that are considered to be amateurs according to sports governing bodies regulations or national laws, fall under the EU provisions for workers or services. Such was the case for judoka Deliége who carried out her sport while financed by grants and sponsorship income.<sup>97</sup> The main element in the decision concerning the application of free movement rules is if the activity is economic in nature. In addition to this definitional issue of the term ‘worker’ one can add the element concerning the geographical scope of the free movement legislation. The EU has entered into bilateral agreements with a number of third countries. These agreements, mainly partnership agreements, association agreements or cooperation agreements, may contain non-discriminatory provisions that are applicable to non-EU nationals when these individuals conduct remunerated activity in sport. Such was the case in CJEU cases *Kolpak* and *Simutenkov*.<sup>98</sup>

In order to clarify whether a sporting rule is in breach of the free movement rules in the Treaty a consistent EU methodology must be applied. The checklist first consists of examining if the rule laid down by a sport governing body constitutes a restriction of free movement. Second, it must be established if, under the specific individual condition, the contested rule is justifiable and proportionate. With regards the first question, it needs to be said that certain rules do not fall under the application of free movement rules to sport. Due to specific sporting interests inherent to the sport, certain rules may be incapable of being

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<sup>96</sup>Lawrie-Blum v Land Baden-Württemberg (Case 66/85) [1986] ECR 2121.

<sup>97</sup>Déliége v LFJ et Disciplines ASBL (Case 51/96 and 191/97) [2000] ECR I-2549

<sup>98</sup>Deutscher Handballbund v Maros Kolpak (Case C-483/00) [2003] ECR I-4135. Simutenkov v Ministerio de Educación y Cultura (Case C-265/03) [2005] ECR I-2579

defined as a restriction and they therefore fall outside the scope of the application of the Treaty<sup>99</sup>. The overview of case law will be illustrated in the following.

Sporting rules that do engage the Treaty are not necessarily incompatible with it. The European Court has consistently held that direct discrimination in sport is forbidden and may only be justified on the grounds of public policy, public security and public health. However, in relation to rules that in principle have an indirect discriminatory effect, relief from the full application of the EU free movement rules is also possible. In *O'Flynn* the Court of Justice defined indirect discrimination as rules which, although applicable irrespective of nationality, only affect migrant workers, or the great majority of those affected are migrant workers, and which are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers, or where there is a risk that they may operate to the particular detriment of migrant workers.<sup>100</sup> As is outlined in the review of the case law below, the European Court has recognised that indirectly, or non-discriminatory, rules that restrict a workers freedom of movement can, subject to a proportionality check, enjoy open ended objective justification. The proportionality test seeks to verify that the contested rule is an adequate method of achieving a result without the possibility that less restrictive rules would be able to reach the same outcome.

### ***Competition Rules***

Competition law is the instrument that safeguards the well-functioning of an efficient Single Market on the territory of the Union with equal opportunities for all undertakings operating in that market. The competition provisions in the EU Treaty are located in Article 101, 102 and 107 TFEU. Article 101(1) provides that, 'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market'. Article 101(3) allows for an exemption system to operate meaning that rules amounting to a restriction under Article 101(1) can be exempt from that provision if the agreement or concerted practice contributes to improving the production or

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<sup>99</sup> See for example, *Meca Medina and Majcen v Commission* (Case C-519/04) [2006] ECR I-6691

<sup>100</sup> *O'Flynn v Adjudication Officer* (Case C-237/94) [1996] ECR 2631, par. 18.

distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 TFEU regulates the abuse of dominant market positions by providing that ‘Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between member states. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts’. A sporting association may hold a dominant position directly or through its members. A direct dominance is a likely situation because sports associations in the European Union hold a practical monopoly due to the structure of European Sports – in other words global and regional sports federations often hold a monopoly position in relation to the organisation and regulation of their sport.<sup>101</sup> Clubs might also abuse a dominant position whenever they co-ordinate activities amongst themselves. Other elements that need to be considered are the nature of substitutability and the geographical market. A specific sports discipline is not easy to be substituted by another.

The state aid prohibitions are contained in Article 107 TFEU. These provide that ‘Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market’. Article 107 has implications for sport if a state fund is directly used to benefit the sports organisation *vis à vis*

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<sup>101</sup> European Commission (1998), *The European Model of Sport*, Consultation Document.

their competitors. State aid use for purely cultural, social, educational, public health or recreational reasons are likely to be exempt.<sup>102</sup>

The application of Articles 101 and 102 to sport needs to respect some elements. The first element that needs to be considered is the application of the term ‘undertaking’ to the sports sector. The CJEU has defined an ‘undertaking’ as “every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed”.<sup>103</sup> Inherent to this definition is the term economic activity which entails “offering goods or services on the market”.<sup>104</sup> The aforementioned definitions indicate that a variety of actors in the sports sector may be considered as acting under EU law. This includes individual athletes (even if they are employees but, for example, enter into independent sponsoring agreements), sport clubs, national sports associations and international sports governing bodies (as an association of undertakings). As regards economic activity it has to be tested if the activity, in which a sports organisation is engaged consists of agreements of an economic nature. Since certain sport rules are not able to create a restriction of competition as they are of purely sporting interest only, they fall outside the reach of EU competition law.<sup>105</sup>

However, and as discussed later, in *Meca-Medina* the Court stated 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”.<sup>106</sup> The Court added that “if the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment,

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<sup>102</sup> In France a public subsidy scheme for professional sports clubs did not constitute illegal state aid because the objectives were to assist in the education of players: European Commission (2001) Press Release- IP/01/599, 25/04/2001. In relation to the aid to the building of infrastructures, the European Commission has illustrated its views on the level of admissibility of state funding in a letter concerning the construction of the Hannover 96 football stadium. According to the Commission it would not constitute illegal aid if: (1) the type of infrastructure involved is generally unlikely to be provided by the market because it is not economically viable; (2) it is not apt to selectively favour a specific undertaking: in other words, the site provides facilities for different types of activities and users and is rented out to undertakings at adequate market based compensation; (3) it is a facility needed to provide a service that is considered as being part of the typical responsibility of the public authority to the general public. See the European Commission White Paper on Sport COM (2007)391, final, Brussels, 11 July 2007, footnote 73.

<sup>103</sup> Höfner and Elsnner v Macroton GMBH (Case 41/90) [1991] ECR I-1979

<sup>104</sup> European Commission (White Paper on Sport COM (2007)391, final, Brussels, 11 July 2007, p. 66.

<sup>105</sup> Walrave v Union Cycliste Internationale (Case 36/74) [1974] ECR 1405, par. 4.

<sup>106</sup> Case C-519/04 *Meca-Medina*, par. 27.



freedom to provide services, or competition”.<sup>107</sup> However, the Court found that the contested rule in question (anti-doping rules) still did not amount to a restriction because of the inherent connection between the rule and securing the legitimate objectives of ensuring fair competition.<sup>108</sup> Competition law must also take account of the definition of the market in which a restriction on competition is identified. The restriction must have an appreciable effect on the relevant EU market, and the broader the definition of the market the less likely it will be that competition is restricted.

In the 2007 White Paper on Sport, the European Commission presented a four-step approach to considering whether contested sporting rules fall foul of EU competition rules.<sup>109</sup> First, is the sport organisation an undertaking or an association of undertakings and does it carry out an economic activity? Second, does the rule in questions restrict competition under Article 101 or does it amount to an abuse of a dominant position under Article 102? The Commission argues that answering this question depends on the overall context of the rule and its objectives, whether the restrictions caused by the rule are inherent and whether the rule is proportionate in the light of the objective pursued. Third, is trade between Member States affected? Finally, can an exemption under Article 101(3) be granted?

## **Free Movement Cases: The Sports Related Jurisprudence of the CJEU**

### ***Walrave and Koch*<sup>110</sup>**

The first sports judgment of the European Court of Justice was the landmark case of *Walrave and Koch* in 1974. Two Dutch nationals were the pacemakers on mopeds for cyclists who participated in cycling championships. The pacemakers were not of the same nationality as the cyclists, although they did form one team. They were denied the opportunity to participate in international tournaments on the basis of their nationality, leading to a complaint being lodged before a national court. The national court referred the matter to the European Court. In its ruling the court confirmed that sporting rules are subject to EU law in so far as the

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<sup>107</sup> Case C-519/04 *Meca-Medina*, par. 28.

<sup>108</sup> Case C-519/04 *Meca-Medina*, par. 45.

<sup>109</sup> European Commission (2007), Commission Staff Working Document, *The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport*, COM(2007) 391 final.

<sup>110</sup> Case 36/74 *Walrave and Koch*.

sports discipline constitutes an economic activity.<sup>111</sup> It added that the prohibition of discrimination on the grounds of nationality does not apply to rules of ‘purely sporting interest’.<sup>112</sup> The Court also developed the principle that not only public authorities but also sports governing bodies may fall under the application of Treaty provisions when they govern collectively employment or services related issues.<sup>113</sup>

### ***Donà and Mantero***<sup>114</sup>

Shortly after *Walrave*, *Donà* concerned nationality discrimination in Italian football. The Court repeated the *Walrave* rule that any discrimination on the basis of nationality with regard to employment, remuneration and other conditions of work and employment as well as the freedom to provide services was prohibited. The contested rule of the Italian football federation was a prohibition of the participation of athletes who were not affiliated to the Italian federation. This discriminated against non-Italian nationals. An important addition to the *Walrave* judgment was that the Court recognised that rules that did restrict the employment of EU nationals could be allowed if the reason for the rule was not economic but related to issues of sporting interest only.

### ***Union Royale Belge Sociétés de Football Association and others v Bosman and others***<sup>115</sup>

The Bosman judgment is widely considered the landmark sports case of the European Court. Bosman played professional football for a Belgian club. After the expiry of his employment contract the club offered him a new contract with far less favourable terms. Bosman declined the contract offer. The player wished to move to a French club. However for this to take effect, the French club was required under the existing transfer rules to pay a transfer fee to the transferring club even though the player was no longer contracted to his former club. Bosman challenged this transfer system on the grounds that his freedom of movement was

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<sup>111</sup> Case 36/74 *Walrave and Koch*, par. 4.

<sup>112</sup> Case 36/74 *Walrave and Koch*, par. 8.

<sup>113</sup> Case 36/74 *Walrave and Koch*, par. 17.

<sup>114</sup> *Donà v Mantero* (Case 13/76) [1976] ECR 133.

<sup>115</sup> *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* (Case C-415/93) [1995] ECR I-4921.

impeded as a consequence of the transfer rules in force. He also challenged the rule that restricted the participation of non-nationals in football teams entering UEFA European competitions. The Court reiterated that sport is subject to EU law in so far as it amounts to an economic activity.

The Court adopted a forthright view on the application of Article 45 (then 48 EC) to the two contested rules. Rejecting the arguments presented by UEFA, the Court found that players could no longer be discriminated against on the grounds of their nationality and clubs could no longer demand a transfer fee for a player who was no longer under contract with his club. However, the Court did acknowledge that sport was different to other industries by finding that ‘in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate’.<sup>116</sup>

### ***Lehtonen and Castors Braine***<sup>117</sup>

In 2000 the Court of Justice handed down its judgment in *Lehtonen*, a case concerning a basketball player from Finland, registered with a Finnish club, who transferred to a basketball team in Belgium. This transfer took place after a transfer deadline that was by the Belgian basketball association. Player transfers after such a deadline were prohibited from taking part in official games. Lehtonen’s club refused to field him on the basis of the regulations. However, he received a fixed monthly remuneration and bonuses and was therefore considered to be a worker performing economic activity. The Court observed that the transfer window operated as a restriction to a workers’ freedom of movement in so far as it limited the time a player could seek alternative employment in another Member state. However, it went on to find that late season 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.<sup>118</sup> Non-discriminatory transfer windows could, therefore, be justified on these grounds as long as the measure remained proportionate to this aim.

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<sup>116</sup> Case C-415/93 *Bosman*, par. 106.

<sup>117</sup> *Lehtonen v FRBSB* (Case 176/96) [2000] ECR I-2681.

<sup>118</sup> Case C-176/96 *Lehtonen*, par. 54.

### ***Deliège v Ligue francophone de Judo et disciplines Associées Asb***<sup>119</sup>

In *Deliège*, the Court ruled on the compatibility of selection criteria of an international judo association in international tournaments. The participation in the tournament was restricted to a limited number of participants per participating country. *Deliège*, a Belgian judoka, contested the rule as she was not allowed to participate. She considered the rule to be contrary to one of the fundamental freedoms of the Treaty, namely, the freedom to provide services. She argued that, even if she was not carrying out her sport under the employment contract, she still fell under the scope of the Treaty because she was carrying out an economic activity as she was remunerated for her efforts and her activity was genuine and effective and could not be regarded as purely marginal and ancillary.

In this case the Court widened the scope of sporting activities that fall under the Treaty's fundamental freedoms. Amateur sport is an economic activity in so far as the activity involves competition organisers, broadcasters, sponsors and viewers. These actors create supply and demand and the key participants such as the athletes carry out an economic activity in that sense. However, the Court also recognised the natural task of sports governing bodies in selecting the participants for international tournaments. The Court argued that governing bodies have the knowledge and experience to do so and it is one of the fundamental aspects of their existence.<sup>120</sup> In addition, the Court stated that the selection rules for international competitions may not in themselves be regarded as constituting a restriction on the freedom to provide services because the selection of athletes derives from a need inherent in the organisation of the sport.<sup>121</sup> If rules are inherent for the conduct of an international high-level sports event they do not impose restrictions.

### ***Kolpak and Simutenkov***<sup>122</sup>

The *Kolpak* and *Simutenkov* cases deal with the employment of non-EU nationals on the territory of the EU that fall under the scope of a EU partnership agreement. In both cases the

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<sup>119</sup> *Déliege v LFJ et Disciplines ASBL* (Case 51/96 and 191/97) [2000] ECR I-2549.

<sup>120</sup> Joined cases C-51/96 and C-191/97 *Deliège*, par. 68.

<sup>121</sup> Joined cases C-51/96 and C-191/97 *Deliège*, par. 69.

<sup>122</sup> Case C-438/00 *Kolpak*, Case C-265/03 *Simutenkov*.

European Court held that if the worker is legally employed he may not be discriminated as regards EU nationals in a similar working condition.

In *Kolpak*, a Slovak national played professional handball with the German handball team TSV Ostringen. The player, Maros Kolpak, had agreed a valid fixed-term employment contract with the club for which he received a monthly salary and had a valid work permit. Because the Slovak Republic was not a Member State of the EU at the time, he needed to have a specific license denoting him as an overseas player (A license). The German Handball Association introduced these licenses for non-EU nationals and the holders of such licenses faced restrictions on their ability to play in competitions as a fixed number of “A” license players were allowed to play simultaneously in one match. Kolpak challenged these rules on the basis of the Association Agreement that the Slovak Republic had signed with the EU. This association agreement entitles Slovak nationals to treatment that is equal to that of the nationals of the Member State in whose territory they reside. This equal treatment concerns working conditions, remuneration and dismissal. As Kolpak was legally employed and residing in Germany, the Court concluded that the Association Agreement precluded the rule from the association to be applied and Kolpak was authorised to participate in all the matches of the team.

In a similar case, a Russian national, Igor Simutenkov, played as a professional footballer for Celta de Vigo in Spain. The Spanish Football Federation adopted a rule that limited the eligibility of non-EU players for clubs participating in the Spanish football competition. The conditions of Simutenkov were to a large extent similar to those of Kolpak. Simutenkov was lawfully employed in Spain but he found his trade restricted due to the rule of the Spanish federation. Simutenkov successfully relied on the Article 23(1) of the EU – Russia partnership agreement which “establishes for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty, which precludes any limitation based on nationality”

## **Bernard<sup>123</sup>**

This case concerned French football player Olivier Bernard who was confronted with an obstacle to his freedom of movement as a worker. The French *charte du football professionnel* makes a distinction in various types of contracts in relation to the age of players.<sup>124</sup> Bernard played at the French club Olympique Lyonnais under an *jeueur espoir* contract, which is for trainee players between the age of 16 and 22. Before the expiry of his contract Bernard decided not to agree on a one year extension of his liaison with Olympique Lyonnais, instead choosing to sign a contract with English Premier League club Newcastle United.

The *charte du football professionnel* contained a clause stating that the club that had employed the player as a *jeueur espoir* had a unilateral right to employ the player by means of his first professional contract. In the case that the player denied to agree to the extension the club could bring an action for damages before the French court, claiming that the contractual breach rooted on the *charte du football professionnel* constituted an infringement of the French *Code du travail*.<sup>125</sup> Olympique Lyonnais started litigation before a tribunal in Lyon, claiming that Bernard should be ordered to compensate the club for the damages it incurred. The tribunal found a unilateral breach and required Bernard and Newcastle United to jointly pay an amount of €22 867.35 for damages to Olympique Lyonnais.

Subsequently the case was appealed and the *Cour d'appel* in Lyon overturned the decision of the first instance tribunal. The appeal court judged that the rule in question constituted an infringement of Article 45 of the Treaty. Olympique Lyonnais appealed against this decision before the *Court de Cassation*. This tribunal made a preliminary reference to the European Court.<sup>126</sup> The key issue was whether a system for the payment of damages, if a player refuses to sign his first professional contract with the club that trained him, fell within the scope of

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<sup>123</sup> Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC (Case-325/08) 16 March 2010.

<sup>124</sup> In the 2013-2014 season the French league distinguishes *apprenti*, *aspirant* and *stagiaires* for players that are still in training, and *élite* and *professionnel* for professional players. The consequences of such a distinction can be found at [http://www.lfp.fr/reglements/chartes/2013\\_2014/3.pdf](http://www.lfp.fr/reglements/chartes/2013_2014/3.pdf).

<sup>125</sup> Weatherill, S. (2010) *The Olivier Bernard Case: How, if at all, to fix compensation for training young players?* The International Sports Law Journal, 2010-2, The Hague: T.M.C. Asser Press.

<sup>126</sup> Case-325/08 *Bernard*, par.10-13.

the free movement of workers. If so, could this French system be justified with reference to the objective of encouraging the recruitment and training of young professional players?

The Court indeed stressed that the *charte de football professionnel* discouraged the freedom of movement of the player.<sup>127</sup> In analyzing the second question the Court confirmed the findings in *Bosman*, stating that an obstacle to the free movement of workers could only be justified in the case of a underlying legitimate objective, taking into consideration the proportionality of the method used. The issue therefore dealt with an acknowledgment of the justness of the end pursued *vis-à-vis* the proportionality of the means that were used to achieve that goal.<sup>128</sup> As the French arrangements were based on the payment of damages due to non-fulfillment of contractual obligations and calculated on the basis of a financial loss for the club, they did not relate to a compensation of the actual training costs incurred by the training club. The Court decided that the French system in the *charte du football professionnel* violated EU law, a more proportionate system for compensating training clubs should be available.<sup>129</sup>

## **Competition Cases: The Sports Related Jurisprudence of the CJEU and the Decision making practice of the European Commission**

### ***Mouscron*<sup>130</sup>**

The so-called home and away rule in professional football means that in competitions where two clubs compete against each other, twice in a given competition or league, the teams must play their home match at their own grounds. In *Mouscron*, Belgian club Excelsior de Mouscron wanted to play one home match against French side FC Metz at the stadium of French club FC Lille, a stadium locate close to that of Mouscron but in another country. The UEFA regulations concerning the organisation of the competition prohibited Mouscron from staging its match in Lille. In a public enforcement proceeding, the municipality of Lille lodged a complaint to the European Commission against the UEFA rule on the basis of Article 102 of the Treaty. The European Commission rejected the complaint on the grounds

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<sup>127</sup> Case-325/08 *Bernard*, par. 35.

<sup>128</sup> Case-325/08 *Bernard*, par. 40.

<sup>129</sup> Case-325/08 *Bernard*, par. 45-50.

<sup>130</sup> Commission Decision of 09/12/99, Case 36851, C.U. de Lille/UEFA (*Mouscron*), unpublished Decision.

that the rule was a purely sporting rule that did not fall within the scope of Articles 101 and 102. On the basis of guaranteeing equality between the clubs, and thus a fair competition, the Commission did not call the legality of the rule in question.<sup>131</sup>

### ***ENIC***<sup>132</sup>

ENIC concerned a rule adopted by 1998 UEFA rule on the integrity of sporting competitions which stated that 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. UEFA defended the rule on the grounds that it is important to protect the uncertainty of the results and ensure the public does not question the integrity of the UEFA competitions. If they did, this would undermine the proper functioning of the competitions. On the basis of Article 102, a complaint was lodged before the European Commission by ENIC who owned stakes in six clubs. ENIC believed that the object of the contested rule was to distort competition as UEFA was motivated by a desire to maintain its monopoly control over the European football market, including the lucrative broadcasting rights.<sup>133</sup> The Commission rejected the complaint on the grounds that 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. As the rule was disproportionate to the aims pursued, the rule did not amount to a restriction and consequently it fell outside the scope of Articles 101 and 102.<sup>134</sup>

### ***FIA***<sup>135</sup>

In 1999 the European Commission opened formal proceedings against the Federation Internationale de l'Automobile (FIA). The FIA is the international association for motor sport with national associations as its members. The FIA is internationally responsible for broadcasting and organizing various competitions such as Formula One. The Commission issued a statement of objections on various grounds. First, the FIA gave away licenses to drivers and race teams to participate in FIA events. If these drivers intended to participate in

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<sup>131</sup> Ibid.

<sup>132</sup> Case COMP/37 806 *ENIC/UEFA*. See also Commission Press Release IP/02/942, 27 June 2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.

<sup>133</sup> European Parliament (2010), *The Lisbon Treaty and European Union Sports Policy*, P.36.

<sup>134</sup> Case COMP/37 806 *ENIC/UEFA*. See also Commission Press Release IP/02/942, 27 June 2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.

<sup>135</sup> See Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776.



other, non-FIA events, their license could be suspended. This was a factual control by FIA to block circuits, drivers and teams with FIA licenses to participate in other than FIA events. The FIA had also entered into complex contracts when dealing with broadcasting rights of the FIA events. The FIA had unilaterally created a rule that it was the owner of the broadcasting rights of all the FIA events authorized by it. These rights were then transferred to one company directed by a former FIA vice-president for a period of hundred years for a one-off fee, thus foreclosing the market for any other competitor. In addition, the FIA imposed heavy fines on broadcasters if broadcast anything that would be deemed to be a potential threat for to the Formula One events. The Commission required the FIA to operate more transparently and solely as a regulator. The Commission disbanded the influence of the FIA on the commercial rights; it removed the anti-competitive elements out of the agreements with broadcasters and forced the FIA to open the market for other motor sport teams and circuit owners by allowing them to participate in and organise other motor sport events.<sup>136</sup>

### ***The 2001 Transfer System Agreement***<sup>137</sup>

Following the judgment of the Court in *Bosman*, FIFA did not immediately amend its international transfer system to bring it into compliance with the judgment of the Court. Therefore, in 1998 the European Commission issued a statement of objections after an official complaint by the Syndicat des Employés, Techniciens et Cadres from Belgium against the FIFA transfer system. In it the Commission identified a number of incompatibilities between the international transfer system and the EU competition law. First was the prohibition of players from transferring to another club following their unilateral termination of contract, even if the player had complied with national law governing the penalties for breach of contract. Second, allowing a club to receive payment for a player leaving a club if the contract has been terminated by mutual consent. Third, encouraging high transfer fees which bear no relation to the training costs incurred by the club selling the player, a practice condemned by the Court in *Bosman* and one which limits the ability of small clubs to hire top players. Fourth, allowing for a transfer fee to be demanded for the transfer of players (both in and out of contract) from a non-EU country to a member state of the EU and *vice versa*. Finally, the Commission objected to players being unable to have recourse to national courts in the event

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<sup>136</sup> Ibid.

<sup>137</sup> Letter from Mario Monti to Joseph S. Blatter, 5.03.01 D/000258.

of a dispute arising out of the interpretation of the transfer regulations.<sup>138</sup> FIFA introduced a new set of transfer rules embodied in the 2001 FIFA Regulations on the Status and Transfer of Players. The key elements of the new system included new provisions on; the protection of minors; training compensation for young players; rules designed to ensure the maintenance of contractual stability; solidarity payments; the introduction of transfer windows and a new dispute resolution system. The new system satisfied the Commission that their concerns had been met and that the case could be closed.<sup>139</sup> A further elaboration on the route towards the draft of the 2001 transfer agreement is to be found in Chapter 7.

### ***Piau***<sup>140</sup>

In 1996 of a complaint was lodged before the European Commission by Multiplayers International Denmark concerning the compatibility of the FIFA player agent regulations regulations with EU competition law. In 1998 French agent Laurent Piau also lodged a complaint, adding that the Regulations were also contrary to Article 56 on the freedom to provide services. Following the Commission's issuance of a statement of objections concerning various aspects of the regulations, FIFA introduced a 2001 version. Piau objected to the examination requirement and the requirement to take out professional liability insurance. He added that the new regulations introduced new restrictions by way of the rules on professional conduct, the use of a standard contract and the rules on the determination of remuneration. These, he argued, were in breach of the competition law provisions contained in Article 101 and possibly Article 102 although Piau appeared to have ceased his complaint relating to Article 49.

Following the Commission's rejection of Piau's complaint in April 2002, the agent lodged an appeal before the General Court, formerly the Court of First Instance (CFI). The General Court 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

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<sup>138</sup> Facts taken from Parrish, R. (2003), *Sports Law and Policy in the European Union*, Manchester: Manchester University Press, p.141.

<sup>139</sup> Case closed by way of letter from Mario Monti to Joseph S. Blatter, 5.03.01 D/000258.

<sup>140</sup> Piau v Commission of the European Communities and FIFA (Case C-171/05) [2006] ECR I-37.

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.<sup>141</sup> Although the Court disagreed with the Commission's assessment that FIFA did not hold a dominant position in the market of services of players' agents, the Court went on to find no abuse of market dominance. On appeal, the European Court of Justice rejected Piau's request that the Commission Decision and the decision of the CFI be annulled. The Court did not explore the substance of Piau's claim relating to freedom to provide services, but dismissed this as a new argument which it could not address insofar as the Commission acted on the basis of Regulation 17/62 and was therefore only obliged to consider competition law.

### ***Meca-Medina***<sup>142</sup>

In *Meca-Medina*, the Court of Justice severely restricted the ability of a sports body to rely on the purely sporting rules defence developed in *Walrave*. Two swimmers filed a complaint against the anti-doping rules of the International Swimming Federation (FINA) based on Article 101 of the Treaty. The Commission rejected the complaint<sup>143</sup> and on appeal the General Court held that the anti-doping rules concerned an exclusively "non-economic aspect of that sporting action, which constitutes its very essence".<sup>144</sup> On final appeal to the CJEU, the Court upheld the ban for the swimmers but it also established the approach to be taken when considering the application of competition law to sport. The Court established 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".<sup>145</sup> This means in practice that every sporting activity that constitutes an economic activity must be assessed in the light of its compatibility with the Treaty and especially those provisions that guarantee free movement of workers and services and competition law. There are no pure sporting elements *per se* that primarily fall outside of the scope of the Treaty. On the specifics of the case, the Court found that the anti-doping rules in

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<sup>141</sup> *Ibid.*

<sup>142</sup> Case C-519/04 *David Meca-Medina and Igor Macjen v Commission* [2006] ECR I-6991.

<sup>143</sup> Decision in Case COMP 38.158 *Meca-Medina and Majcen*, 1 August 2002.

<sup>144</sup> Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291 par. 45.

<sup>145</sup> Case C-519/04 *Meca-Medina*, par. 27.

question still did not amount to a restriction because of the inherent connection between the rule and securing the legitimate objectives of ensuring fair competition.<sup>146</sup>

## **Article 165 TFEU and EU Sports Policy**

The application of EU free movement and competition laws to the sports sector detailed above has not taken place in a legal vacuum sealed from the penetration of political debate and stakeholder lobbying. The relationship between sport and law, and the value of sport to the European integration project, has long been discussed in many policy documents of the EU institutions. The first occasion in which sport was specifically discussed was in the Adonnino report of 1984.<sup>147</sup> The Member States mandated the Committee to explore how, amongst other things, sport could contribute to promoting European integration. The committee identified a range of options including organizing sporting events through various EU countries; the creation of EU teams to compete against other teams of geographical groupings; the wearing of the EU emblem on national teams sport outfits; exchange of sportsmen and the support of sporting activities for specific minority groups.

Sports governing bodies have ever since been reluctant to acknowledge the intervention of EU law to sport as it was a direct threat to the autonomy of these sports bodies to organise and regulate their sector as they pleased, based on the connection of the participating member associations, clubs and athletes to the rules of association. Where the initial pressure coming from the sports governing bodies was targeted towards stressing that sports was of no concern to the EU Union and EU Courts, an interesting change of perspective took off in the 1980s where a shift in lobbying strategy was initiated by the then president of the European Olympic Committee (EOC) Jacques Rogge.<sup>148</sup> The *political turn* that was effectuated by the sports governing bodies in the sense that instead of sheltering their territory from EU inclusion they sought to embrace explicit inclusion of their industry in the Treaty.<sup>149</sup> This attempt was grounded on the rationale that the European Union had designed the Treaties to emphasize the

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<sup>146</sup> Case C-519/04 *Meca-Medina*, par. 45.

<sup>147</sup> European Commission (1984), *Communication from the Commission to the Council, A People's Europe: Implementing the Conclusions of the Fontainebleau European Council* COM (1984) 446, final.

<sup>148</sup> Garcia, B. and Weatherill, S.(2012) *Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon*, *Journal of European Public Policy* Vol. 19 Nr.2, March 2012, p.238-256, London: Routledge.

<sup>149</sup> *Ibid.*

growth and development of the internal market, making it possible for the European Union to bring under its scope of application industries that were not *prima facie* falling under the Treaty but that were affected due to spill-over influence deriving from more general sources of EU law. More specifically, ever since the Walrave judgement the sports governing bodies were confronted with a general and “vague” veil of a potentially unlimited application of EU law to sport from the moment that sport constituted an economic activity; whereby the sphere of application of EU law could only be tempered by a justification why sport should be exempted from the pressure of EU law in every individual case.

The sports governing bodies initiated lobby efforts to specifically include sports in the EU Treaty.<sup>150</sup> By giving sport a specific place in the Treaty the boundaries of the application of EU law could be defined. Legal certainty for the sports governing bodies was strengthened if there would be an explicit recognition of the *status aparte* of sports in relation to the full application of EU law. The governing bodies targeted their lobbying activities towards the preservation of their autonomy and the specificity of sports federations to regulate their game. With this message they defined a strategy to influence EU policy makers by making maximum use of their resources such as their wide networks and their ability to penetrate in the various actors in the multilevelled framework of policy-making in the EU.<sup>151</sup> A constant dialogue with the institutions and relevant actors in the EU was constantly nurtured in order to create as much autonomy for sport as possible by introducing sport as a territory within the sphere of the European Union.

This lobbying of the Member States by the sports governing bodies took place in the run up to the Treaty of Amsterdam which amended the Treaty on the European Union and the Treaties Establishing the European Communities. The Member States could not agree on amending the Treaties to include an article on sport but a Declaration on Sport was annexed to the Treaty of Amsterdam which read: “The conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The bodies of the European Union are therefore called on to listen to sports associations when important questions

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<sup>150</sup> In general for lobbying by the sport governing bodies in the EU sports sector see: García, B. (2003) *UEFA and the European Union, from confrontation to co-operation?* Journal of Contemporary European Research, Vol.3, Nr. 3, P. 202-223.

García, B.(2007), *From regulation to governance and representation: Agenda-setting and the EU's involvement in sport.* Entertainment and Sports Law Journal, Vol. 5 Nr. 1, 2007 to be found at: <http://go.warwick.ac.uk/eslj/issues/Volume5/number1/garcia/>.

<sup>151</sup> Supra, García, B. and Weatherill, S. (2012), P. 242.

affecting sport are at issue. In this connection special consideration should be given to the particular characteristics of amateur sport”.<sup>152</sup>

The Amsterdam Declaration was followed up in 1998 with the European Commission staff working paper entitled “The Development and Prospects for Community Action in the Field of Sport”.<sup>153</sup> In it, the Commission stressed the educational, health, social, cultural and recreational functions of sport. It also stressed that sport fulfils an important economic role in Europe and that a general exemption of sport from European Law could not be allowed. This acted as the basis for the so-called Helsinki Report on Sport (1999) which was a Report from the European Commission to the European Council (of Heads of State and Government) “with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework”.<sup>154</sup>

In this landmark report the Commission stated its intention to give pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions. In section 4 of the Report on “Clarifying the Legal Environment of Sport”, the Commission suggested that sport must be able to assimilate the new commercial framework in which it must develop, without at the same time losing its identity and autonomy, which underpin the functions it performs in the social, cultural, health and educational areas.

The Report continued by stating that while the Treaty contained no specific provisions on sport, the EU must nevertheless ensure that the initiatives taken by the national State authorities or sporting organisations comply with European law, including competition law, and respect, in particular, the principles of the internal market (freedom of movement for workers, freedom of establishment and freedom to provide services).<sup>155</sup>

In this respect, accompanying, coordination or interpretation measures at Community level might prove to be useful. They would be designed to strengthen the legal certainty of sporting

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<sup>152</sup> Declaration 29, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, 1997.

<sup>153</sup> European Commission (1998), *Developments and Prospects for Community Activity in the Field of Sport*, Commission Staff Working Paper, Directorate General X, 29/09/98 and European Commission (1998), *The European Model of Sport*, Consultation Document of DG X. 1998.

<sup>154</sup> European Commission (1999), ‘Report from the Commission to the European Council with a View to safeguarding Sports Structures and Maintaining the Social Significance of Sport Within the Community Framework: The Helsinki Report on Sport’, Com (1999) 644, 1/12/99.

<sup>155</sup> *Supra*, p. 6.

activities and their social function at Community level. However, as Community powers currently stand, there can be no question of large-scale intervention or support programmes or even of the implementation of a Community sports policy.<sup>156</sup>

If it is advisable, as wished by the European Council and the European Parliament, to preserve the social function of sport, and therefore the current structures of the organisation of sport in Europe, there is a need for a new approach to questions of sport both at European level and in the Member States. In compliance with the Treaty, especially with the principle of subsidiarity, and the autonomy of sporting organisations, the Report continues.<sup>157</sup>

The Report further proposes the acceptance of a new approach which involves preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment. In terms of the economic activity that it generates, the sporting sector is subject to the rules of the EC Treaty, like the other sectors of the economy. The application of the Treaty's competition rules to the sporting sector must take account of the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of the results.<sup>158</sup> The Report continues by stating that with a view to an improved definition of the legal environment, it is possible to give examples, without prejudice to the conclusions that the Commission could draw from the in-depth analysis of each case, of practices of sports organisations that could, or could not be, exempt from the application of EU competition policy.

Three types of practices are distinguished in the Report: 1. Practices which do not come under the competition rules, 2. Practices that are, in principle, prohibited by the competition rules, and 3. Practices likely to be exempted from the competition rules. In the Report's Conclusion it is observed that the system of promotion and relegation is one of the characteristics of European sport.

This reference to the system of promotion and relegation is directly linked to the notion of the "European Model of Sport". In 1998 the Commission's DG X (Education and Culture) under

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<sup>156</sup> Ibid.

<sup>157</sup> *Supra*, p. 7, under section 4.2 *The need for convergent endeavours*.

<sup>158</sup> Ibid.

which sport comes, had published a consultation document regarding “The European Model of Sport” in which the organisation and structure of sport in Europe is described.<sup>159</sup> Basically the structure resembles a pyramid with a hierarchy, it was said. The clubs form the foundation of this pyramid, including grassroots level and professional level. Regional federations form the next level, the clubs are usually members of these federations. National federations, one for each discipline, represent the next level. They represent their branch in the European or international federations. They form the top of the pyramid. The direct result is that decisions and regulations that have been created on the top level, trickle down to the level of the grassroots.

A sports article was again discussed during the Nice Treaty negotiations but once more the Member States stopped short of inserting sport into the legal passages of the Treaty. However, in the accompanying Nice Declaration on Sport in 2000 which is annexed to the Presidency Conclusions of the Nice European Council Meeting, the Member States stressed “the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies”.<sup>160</sup> Part of the Declaration reads, “even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured”.

In the Nice Declaration on Sport it is said that sporting organisations and the Member States have a primary responsibility in the conduct of sporting affairs. Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured. The European Council also stresses its support for the independence of sports organisations and the right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular

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<sup>159</sup> *Supra, European Model of Sport.*

<sup>160</sup> Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of Which Account Should be Taken in Implementing Common Policies, Presidency Conclusions, Nice European Council Meeting, 7,8,9 December 2000.



sports, particularly sporting rules and make-up of national teams, in the way which they think best reflects their objectives. It is noted in the Nice Declaration on Sport that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport. While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy, the Declaration says.<sup>161</sup>

Both declarations attached to the Nice and Amsterdam Treaty are vague and non-binding. The sports movement, consisting of sports governing bodies, were still not content with the outcome as the declarations did not grant them enough protection from the inclusive attitude of EU law on their activities and policies and thus would continue to endanger the specific characteristics of sport. The sports bodies preferred a better control on the potential intervention of the EU and a more solid basis for Sport in EU documentation remained a lobbying priority.<sup>162</sup>

The opportunity to bring sport closer to an exemption arose during the Convention of Europe, a body established by the European Council in 2001 in order to pave the way for a Constitution for Europe. The final text that was presented by the Presidency in 2003<sup>163</sup> proposed the inclusion of an article in the Convention of Europe, thus giving sport a formal status in EU laws for the first time in history. Sport was included as article II-282 of the Treaty Establishing a constitution.<sup>164</sup> However, the final implementation of the article only occurred after the process of the establishment of the Constitution of Europe came to a standstill due to rejections by France and the Netherlands.<sup>165</sup> It has to be noted that, in the meantime, during the process of awaiting formal Treaty recognition, the European Commission was working on the White Paper on sport<sup>166</sup>, published in 2007. This White Paper was the culmination of the previous European Commission and European Council documents, as described above, and it served as a guideline for further community action in

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<sup>161</sup> Ibid.

<sup>162</sup> Supra, Garcia, B. and Weatherill, S. (2012), p. 244.

<sup>163</sup> Ibid.

<sup>164</sup> To be found at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:en:HTML>

<sup>165</sup> See also Bogaert, S, and Vermeersch, A. (2005), *Sport in the European Union, all sound and no fury?* A, Maastricht Faculty of Law Working Paper

<sup>166</sup> European Commission, *White Paper on Sport*, (COM) 391 final, Brussels 11 July 2007

the field of sport.<sup>167</sup> It placed emphasis on the social and educational values of sport and recognized the autonomy and specificity of sport, while establishing that the specificity was bordered by the EU competences.<sup>168</sup>

Eventually the Treaty on the Functioning of the European Union was agreed in 2007 and came into force in 2009. The text that was introduced in the draft Convention was transposed to the new treaty in article 165:

*1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.*

*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.*

*2. Union action shall be aimed at:*

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,*
- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,*
- promoting cooperation between educational establishments,*
- developing exchanges of information and experience on issues common to the education systems of the Member States,*
- encouraging the development of youth exchanges and of exchanges of socio educational instructors, and encouraging the participation of young people in democratic life in Europe,*
- encouraging the development of distance education.*
- 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*

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<sup>167</sup> Siekmann, R. *Introduction to International and European Sports Law, Capita Selecta*, The Hague: T.M.C. Asser Press, The Hague, p.76.

<sup>168</sup> *Ibid.*

*youngest sportsmen and sportswomen.*

*3. 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.*

*4. In order to contribute to the achievement of the objectives referred to in this Article,:*  
– *the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,*  
– *the Council, on a proposal from the Commission, shall adopt recommendations.*

There is a growing body of academic literature suggesting that the scope of influence of Article 165 TFEU when it comes to the creation of the legal certainty that was so much desired by the sports governing bodies, is limited.<sup>169</sup> The main result of the inclusion of the article in the Treaty seems to be that the EU now has a source for funding sports by means of a specific sports programme.<sup>170</sup>

Article 165 lacks horizontal effect meaning that it does not require the EU institutions to take into account the specific nature of sport when other Treaty powers, such as those concerning freedom of movement or competition law, are at issue. But it does also not forbid them to do so.<sup>171</sup> Therefore, despite the arguments of sports governing bodies, such as UEFA, that its specific policy interests (see Chapter 3) should fall under the specificity of sport or should be

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<sup>169</sup> For example: Weatherill, S, (2012), *EU Sports Law: The Effect of the Lisbon Treaty* in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law After Lisbon* Oxford: Oxford University Press; Weatherill, S.(2010) 'Fairness, openness and the specific nature of sport: does the Lisbon Treaty change EU sports law?', *International Sports Law Journal* 2010 3-4., T.M.C. Asser Press, Garcia, B. and Weatherill, S.(2012) *Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon*, *Journal of European Public Policy* 19:2, March 2012:238-256, Routledge; Parrish, R, (2013), *Article 165 TFEU*, in Parrish, R., Siekmann, R., Smokvina, V., Bodiřoga-Vukobrat, N. and Sander, G. (eds) 'Social Dialogue in Professional Sports', Shaker Verlag, pP.33-39; Bogaert, S, and Vermeersch. (2005), *Sport in the European Union, all sound and no fury?* A, Maastricht Faculty of Law Working Paper.

<sup>170</sup> For 2014-2020 the Erasmus+ programme has been developed, see: <http://ec.europa.eu/sport/>

<sup>171</sup> See also the conclusions of Parrish, R, Garcia, B, Miettinen, S., Siekmann, R, (2010) *The Lisbon Treaty and EU Sports Policy*, Brussels, 2010, to be found at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/cult/dv/esstudyeusportspolicy/esstudyeusportspolicyen.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cult/dv/esstudyeusportspolicy/esstudyeusportspolicyen.pdf)

embodied by the principles of “fairness” and/or “openness”,<sup>172</sup> as mentioned in 165, the article will most probably not alter much the existing situation as defined by the case law of the ECJ.

The article does place emphasis on the ability of the sports movement to self-regulate their issues. The European Commission leaves space in the Treaty article for the sport movement to self-define the vague terms that are key to the specificity of sport: “openness” and “fairness”.<sup>173</sup> This could be done by means of discussions with other stakeholders and the European Commission, in an open and transparent way.<sup>174</sup>

## Conclusion

This chapter has presented an analysis of the application of EU law to sport. Since the *Walrave* case in 1974, sport has been subject to the application of EU law whenever sport operates as an economic activity. Also, since this first impact on the autonomy of sports governing bodies, the sports movement has searched for a protection against too much influence on the application of EU law in their sector.

The restrictions on the autonomy in the governance of the sport’s movement own business, were felt most significantly in the areas of competition law, free movement and non-discrimination. The cases dealing with these areas have been discussed in this chapter.

As the jurisprudence of the European Courts and decisions of the European Commission were taken on a case-by-case basis, and the sports movement feared a further hollowing out of their sovereignty, it decided to change its approach to the European institutions. Since the 1980s the sports movement has been involved in intense political lobbying in order to persuade the European institutions to recognize the specificity of sport in official legal texts and thus granting them clear guidelines on the boundaries of their autonomy. These lobbying activities have first resulted in soft law documents connected to the Treaties of the EU and in policy

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<sup>172</sup> UEFA’s view on Article 165 to be found at:

[http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167_DOWNLOAD.pdf)

<sup>173</sup> *Supra* 150, Executive Summary, p. 12.

<sup>174</sup> *Ibid.*

documents where the specific characteristics of sport were acknowledged. In the 2007 White Paper on Sport, the actual specificity of sport was first recognized, moving away from focusing on characteristic aspects to a recognition of the specificity of the sector as a whole. The timing of the presentation of the White Paper on Sport was during the aftermath of the rejection of the Convention of Europe and before the entry into force of the TFEU of Lisbon. This Treaty introduced sport in the European official legislative documents in Article 165.

The concrete gain for the sports movement deriving from article 165 has not been recognized. The article creates a basis for funding of EU sport programmes but it does not create legal certainty as regards the specificity of sport *vis-à-vis* to the influence of EU law on the autonomy of the sports sector. The wording of the article is vague, it lacks horizontal effect and it appears merely to corroborate the existing perspectives and case-by-case approach as presented and defended in the existing EU documentation.

This perspective has basically been intact since the publication of the Helsinki report on sport, although it was further clarified after the impact of the *Meca-Medina* case. The policy views and guidelines in the White Paper on Sport are therefore still applicable. Judgments in the field of sport will still be made on a case by case basis because a proportionality will be applied to the issue in question. The source for legal uncertainty for the sports governing bodies remain as Article 165 is not the desired guideline for the application of EU law to sport. Also, this legal uncertainty may encourage litigants to test their cases before courts.

A general distinction can be made regarding issues that are allowed under the Treaty (purely sporting issues) that are likely to be exempted (as the issue at stake is sport specific and that therefore a more flexible application of EU law is allowed) and that are forbidden under the Treaty (that go beyond the required proportionality test of *Meca-Medina*). Parrish introduced in his 2003 research the *Separate Territories Framework* to chart these differences in regulatory approach.<sup>175</sup> This distinction is still relevant for European professional sport.

The purely sporting issues are issues that fall outside of the scope of the Treaty. The sport governing bodies have autonomy to regulate these issues under the conditions set at *Meca-Medina*. The issues that fall under this *conditional autonomy* are rules preventing club

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<sup>175</sup> Parrish, R. (2003), *Sports Law and Policy in the European Union*, Manchester: Manchester University Press.

relocation<sup>176</sup>, transfer windows<sup>177</sup>, selection criteria<sup>178</sup> and rules preventing multiple club ownership<sup>179</sup>.

Issues that are likely to be exempted because they are justified under free movement rules or under competition law, can be placed in the *supervised autonomy* territory. The supervision is carried out by the European Commission as the guardian of the Treaty and by the European Court of Justice. Issues under this *supervised autonomy* are collective sale of broadcasting rights<sup>180</sup>, collective purchasing agreements<sup>181</sup>, restrictions on the cross border transmission of sport<sup>182</sup>, ticketing arrangements<sup>183</sup>, in contract transfer payments<sup>184</sup> and the granting of state aid to sport<sup>185</sup>.

Issues that are incompatible with EU law have been gathered in the *Judicial Intervention* territory. Examples are periods of long exclusivity for sports rights<sup>186</sup>, export bans for sports goods<sup>187</sup>, nationality restrictions<sup>188</sup>, out of contract transfer payments<sup>189</sup> and rules maintaining commercial and regulatory dominance in a sport<sup>190</sup>.

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<sup>176</sup> DN: IP/99/965, 09/12/99, 'Limits to application of Treaty competition rules to sport: Commission gives clear signal'.

<sup>177</sup> Case C-176/96 *Lehtonen*.

<sup>178</sup> Joined cases C-51/96 and C-191/97 *Deliège*,

<sup>179</sup> Case COMP/37 806: ENIC/UEFA. See DN: IP/02/942, 27/06/2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.

<sup>180</sup> Commission Decision of 23/07/2003, COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League. See also Commission press release DN: IP/03/1748 of 16/12/2003, 'Commission reaches provisional agreement with FA Premier League and BSkyB over football rights'.

<sup>181</sup> Case No. IV/32.150. Commission Decision 2000/400/EC, OJ L 151, 24/06/00. See also See Commission Press Releases DN: IP/00/372, 12/04/2000, 'Commission ready to lift immunity from fines to Telefónica Media and Sogecable in Spanish football rights case' and DN: IP/00/1352, 23/11/2000, 'Commission withdraws threat of fines against to Telefónica Media and Sogecable, but pursues examination of their joint football rights'.

<sup>182</sup> Case No. 37.576- UEFA's Broadcasting Regulations, Commission Decision 2001/478/EC OJ L 171, 19/04/01. See also Commission Press Release DN: IP/01/583, 20/04/2001, 'Commission clears UEFA's new broadcasting regulations'.

<sup>183</sup> Case No. IV/36.888- 1998 Football World Cup, Commission Decision 2000/12/EC (2000), OJ L 5, 08/01/2000.

<sup>184</sup> DN: IP/02/824, 'Commission closes investigations into FIFA regulations on international football transfers', 05/06/2002. See also Letter from Mario Monti to Joseph S. Blatter, 5.03.01 D/000258.

<sup>185</sup> DN: IP/01/599, 'Commission does not object to subsidies for French professional sports clubs', 25/04/2001. See also DN: IP/03/1529 11/11/03, the *Salva calico* case.

<sup>186</sup> Case No. IV/36.033- KNVB/Sport (1996), OJ C 228, although see Case No. IV/33.245- BBC, BSB and Football Association (1993), OJ C 94 for a long exclusive contract exempted by the Commission.

<sup>187</sup> Commission Decision of 18/03/92, OJ L131 (*Dunlop Slazenger International*). Also Commission Decision of 21/12/94, OJ L378 (*Tretorn*).

<sup>188</sup> Case C-415/93. *Bosman* [1995]. See also Case C-438/00 *Kolpak*.

<sup>189</sup> Case C-415/93, *Bosman* [1995] ECR I-4291.

<sup>190</sup> DN: IP/01/1523, 30/10/2001, 'Commission closes its investigation into Formula One and

With the introduction of Article 165, sport has not received a general exemption from the Treaty. The specificity of sport is recognized but it does not create legal certainty. That leaves the sports movement with the option to continue its lobbying with the EU and to await the outcome of further disputes before the European Courts in order to receive more certainty. Another option is that, in line with Article 165, an alternative method for is found for giving guidelines on how to apply the vague notion of sport specificity.

The next chapter will analyse the search for legal certainty and for the right forum to come to this legal certainty. It will be illustrated that in professional football this search takes place within an arena that is called the sports policy subsystem. The actors in the subsystem will be described and their motivations for their actions shall be made clear.

## CHAPTER THREE

### The Football Subsystem

#### Introduction

The debate about the future of EU sports regulation takes place within an arena characterised as a sports policy subsystem.<sup>191</sup> The sports policy subsystem took shape following the 1995 *Bosman* judgment. This judgment resulted in dividing visions as to the future of European sports regulation, particularly as it significantly adjusted the labour relations balance of power in European football in favour of the player by granting players greater freedom to exploit new employment opportunities within the European Single Market. In the years following the judgment, the governing bodies of football, namely FIFA and UEFA, attempted to re-regulate the international market for players as witnessed by, amongst other initiatives, the reformation of the international transfer system in 2001,<sup>192</sup> the development of locally trained player quotas<sup>193</sup> and the introduction of Financial Fair Play as a means of controlling player wages<sup>194</sup>. Although their approaches to these issues have not been entirely consistent, FIFA and UEFA have acted as a coalition seeking to promote their core objective of maintaining regulatory control over football by promoting the twin objectives of the autonomy and specificity of sport – two features they considered seriously undermined by *Bosman*. In a 2011 update to his 2003 study, Parrish refers to this coalition as the sporting autonomy coalition.<sup>195</sup>

The approach adopted by the sporting autonomy coalition caused concern within organised club and player interest bodies. Specifically, FIFPRO, the world players union, feared that re-regulation of the player market would undermine contractual freedom and financial gains won in *Bosman*. The major clubs expressed concern that their interests were not sufficiently taken into account by the governing bodies, as witnessed by the player release dispute in *Oulmers*,

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<sup>191</sup> Parrish, R.(2003), *Sports Law and Policy in the European Union*, Manchester University Press.

<sup>192</sup> *Supra*, p. 138-148.

<sup>193</sup> See Article 18.08-18.12 UEFA Champions League Regulations, to be found at [http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/48/42/49/1484249\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/48/42/49/1484249_DOWNLOAD.pdf).

<sup>194</sup> UEFA Club Licensing system and Financial Fair Play regulations, edition 2012 to be found at [http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf)

<sup>195</sup> Parrish, R. (2011), Social Dialogue in European Professional Football, *European Law Journal*, Vol. 17, Nr. 2, p.213-229.



and this was affecting their commercial interests.<sup>196</sup> The clubs and players therefore formed a coalition, referred to by Parrish as the football business coalition, to address these concerns. According to Parrish, each coalition possess the ability to impose costs upon one another and with post-*Bosman* litigation delivering uneven and uncertain results for the coalitions, Parrish suggests that a negotiated settlement is favoured by both coalitions as they acknowledge the existence of a ‘hurting stalemate’ – a state of legal uncertainty. A negotiated settlement is being actively promoted by the European Commission who is acting as a policy broker.<sup>197</sup>

This chapter describes the construction, belief system and institutional resources of these two advocacy coalitions. Drawing on the findings presented in chapters 1 and 2, it explains how their activity has contributed to this ‘hurting stalemate’, how some venues have failed to deliver a negotiated settlement and how the European Commission has attempted to broker a negotiated settlement between the parties, including encouraging the use of Social Dialogue as a venue for negotiation.

## **The Sporting Autonomy Coalition**

### *FIFA*

FIFA is the world governing body for football. It is an association according to Swiss law and registered in the Swiss commercial Register.<sup>198</sup> FIFA has as its statutory objectives: to improve the game of football constantly and promote it globally, to organise its own international competitions; to draw up regulations and provisions and ensure their enforcement; to control every type of Association Football by taking appropriate steps to prevent infringements of the Statutes and to prevent all methods and practices which might jeopardize the integrity of matches and competitions or give rise to abuse of Association Football.<sup>199</sup> According to the FIFA statutes, the association has national football associations (FA) as members.<sup>200</sup> Except for the United Kingdom, every country is only permitted to have one FA that is a member of FIFA. Every FA, no matter what size or how many active football players it has as a member, has one vote to be cast at the Supreme legislative body of FIFA,

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<sup>196</sup> SA Sporting du Pays Charleroi and G14 v FIFA (Case-243/06) OJ 2006/C 212/18, 2 September 2006 and OJ 2009/C69/56, 21 March 2009.

<sup>197</sup> Parrish, R. (2011), *Social Dialogue in European Professional Football*, European Law Journal, Vol. 17, Nr.2, p.213-214.

<sup>198</sup> Article 1 FIFA Statutes.

<sup>199</sup> Article 2 FIFA Statutes.

<sup>200</sup> Article 10.1 FIFA Statutes.

the Congress.<sup>201</sup> The overall FIFA policy is voted by the Congress and the agenda of the Congress is composed by the executive committee of FIFA. The executive committee of FIFA is composed of 24 representatives, this is a president and representatives from the FIFA confederations. FIFA's administration is carried out by the General Secretariat, which employs some 340 staff members in Zurich, Switzerland.<sup>202</sup> At its head is the FIFA General Secretary, who is responsible for implementing the decisions of the Executive Committee. The General Secretary is also responsible for FIFA's finances, international relations, the organisation of the FIFA World Cup™, and other FIFA football competitions. The General Secretariat is comprised of divisions dealing with development, competitions, football administration, legal affairs, finance, business, personnel, services and communications.<sup>203</sup> Several standing committees<sup>204</sup> and in specific cases *ad hoc* committees can be established to assist and inform the executive committee.

FIFA stands on top of the organisational pyramid of football and ensures through its statutes a coherence of the underlying layers of the pyramid to its regulations and governance. The statutes oblige confederations and associations to comply with FIFA regulations and prohibit any interference, such as an interference of the state, in the organisation and composition of the national FA's and the governance of the game of football.<sup>205</sup> The confederations of FIFA are composed of members of FIFA that belong to the same continent.<sup>206</sup> The confederations are allowed to organise international competitions and interclub competitions in accordance with the FIFA statutes. In addition, the member FA's of FIFA are obliged to ascertain that leagues or groups of clubs shall be subordinate to and recognized by that Member. The

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<sup>201</sup> Article 23 FIFA Statutes.

<sup>202</sup> Information to be found at: <http://www.fifa.com/aboutfifa/organisation/>.

<sup>203</sup> <http://www.fifa.com/aboutfifa/organisation/administration/generalsecretary.html>.

<sup>204</sup> The standing committees are: Finance Committee; Internal Audit Committee; Organizing Committee for the FIFA World Cup; Organizing Committee for the FIFA Confederations Cup; Organizing Committee for the Olympic Football Tournaments; Organizing Committee for the FIFA World Youth Championships; Committee for Women's Football and FIFA Women's Competitions; Futsal Committee; Organizing Committee for the FIFA Club World Championship; Referees Committee; Technical and Development Committee; Sports Medical Committee; Players' Status Committee; Legal Committee; Committee for Fair Play and Social Responsibility; Media Committee; Associations Committee; Football Committee; Strategic Committee; Marketing and Television Advisory Board.

<sup>205</sup> Article 10 FIFA Statutes.

<sup>206</sup> Article 20 FIFA Statutes, Members that belong to the same continent have formed the following Confederations, which are recognised by FIFA: Confederación Sudamericana de Fútbol – CONMEBOL; Asian Football Confederation – AFC; Union des associations européennes de football – UEFA; Confédération Africaine de Football – CAF; Confederation of North, Central American and Caribbean Association Football – CONCACAF; Oceania Football Confederation – OFC.

Member's statutes define the scope of authority and the rights and duties of these groups. The statutes and regulations of these groups must be approved by the Member.<sup>207</sup>

FIFA rules have a profound impact on professional football clubs and players. A club and a player have, on the face of it, a simple contractual relationship between one another. However, this relationship is heavily influenced by FIFA regulations. According to the FIFA statutes, the executive committee of FIFA has regulatory powers over the status and transfer of players<sup>208</sup> and the players' status committee controls the adherence of players, clubs and associations to these regulations. In addition to that the executive committee decides on the international match calendar which is binding upon every layer under the FIFA.<sup>209</sup> According to the statutes, FIFA also has governing powers over match agents and players' agents.<sup>210</sup>

## *UEFA*

UEFA, founded in 1954, is the confederation for Europe and has 54 member associations in the European continent.<sup>211</sup> Like FIFA, UEFA is an association according to Swiss law and incorporated in the Swiss Commercial Register.<sup>212</sup> The objectives of UEFA are laid down in the statutes of the organisation. These are to: promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, religion, race or any other reason; monitor and control the development of every type of football in Europe; organise and conduct international football competitions and tournaments at European level for every type of football whilst respecting the players' health; prevent all methods or practices which might jeopardize the regularity of matches or competitions or give rise to the abuse of football; ensure that sporting values always prevail over commercial interests; redistribute revenue generated by football in accordance with the principle of solidarity and to support reinvestment in favor of all levels and areas of football, especially the grassroots of the game; promote unity among Member Associations in matters relating to European and world football; safeguard the overall interests of Member Associations; ensure

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<sup>207</sup> Article 18 FIFA Statutes.

<sup>208</sup> Article 5 FIFA Statutes. The FIFA Regulations on the Status and Transfer of Players are the regulatory framework.

<sup>209</sup> Article 75 FIFA Statutes.

<sup>210</sup> Article 13 and 14 FIFA Statutes. The regulations covering the activities of agents are the Player's Agent Regulations.

<sup>211</sup> See: <http://www.uefa.org/aboutuefaorganisation.history/Chapter=1> .

<sup>212</sup> Article 1 UEFA Statutes.

that the needs of the different stakeholders in European football (leagues, clubs, players, supporters) are properly taken into account; act as a representative voice for the European football family as a whole; maintain good relations with and cooperate with FIFA and the other Confederations recognized by FIFA; ensure that its representatives within FIFA loyally represent the views of UEFA and act in the spirit of European solidarity; respect the interests of Member Associations, settle disputes between Member Associations and assist them in any matter upon request.<sup>213</sup>

The decision making process of UEFA is based on three corresponding layers. The congress consists of a gathering of all 53 member associations in which all associations have one vote, no matter what size or number of members of the association.<sup>214</sup>The Executive Committee of UEFA decides on matters that do not fall under the powers of the congress or any other organ of UEFA. The Executive Committee consists of 15 members composed of representatives from the national associations that are a member of UEFA. There can only be one committee member per association, the committee meets once in every two months. The President of UEFA has sole powers designated to him by the statutes of UEFA. He is able to represent UEFA in relation to other stakeholders in football and to collaborate with the UEFA secretary general. The latter is in charge of UEFA's administrative bodies and is responsible for the day to day management of the organisation. Within the structure of UEFA, and according to their statutory objectives, many committees are active that deal with topics that fall under the regulatory control of UEFA. The committees report back to the Executive Committee and the President and eventually the committee's findings are part of issues brought to the congress in order to seek for decision making.

The committees that are active within UEFA are: National Associations Committee; Finance Committee; Referees Committee; National Team Competitions Committee; Club Competitions Committee; Youth and Amateur Football Committee; Women's Football Committee; Futsal and Beach Soccer Committee; HatTrick Committee; Development and Technical Assistance Committee; Club Licensing Committee; Stadium and Security Committee; Medical Committee; Players' Status, Transfer and Agents and Match Agents; Committee; Legal Committee; Marketing Advisory Committee; Media Committee; Fair Play

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<sup>213</sup> UEFA Statutes Article 3.

<sup>214</sup> UEFA Statutes Article 13 and 18.

and Social Responsibility Committee and the Football Committee<sup>215</sup>. The president, executive committee or secretary generals may appoint expert panels and (*ad hoc*) working groups for special duties<sup>216</sup>.

Next to these committees UEFA incorporates within its structures the professional football strategy council. This council consists of representatives from UEFA, the European Leagues, European clubs and representatives from the European division of the players' unions. The tasks of the strategy council are to: identify solutions to improve collaboration between the various stakeholders of European football; deal with problems pertaining to the Social Dialogue in European professional football matters; and deal with questions related to the UEFA club competitions and their calendars. The Professional Football Strategy Council reports directly to the Executive Committee and exercises a major influence on the decision-making of the Executive Committee. In relation to the influence of the Strategy Council as regards the decision-making of the Executive Committee, there is no concrete example on what can be used to define "major" influence.

In terms of the organisation pyramid, UEFA forms the second layer below FIFA. The regulations of FIFA are directly applicable to UEFA and to the national associations that are a member of FIFA. These national associations are also a member of UEFA and through this membership of UEFA an extra source of governing influence is exposed to associations, clubs and players. One element that falls within the supervision of UEFA, and is a power granted by FIFA, is the composition and control of national and interclub competitions. UEFA has used this delegated power to tighten its grasp over European football and set standards for clubs in order to participate in European interclub competitions.<sup>217</sup>

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<sup>215</sup> UEFA Statutes Article 35.

<sup>216</sup> UEFA Statutes Article 39.

<sup>217</sup> UEFA has specific regulations on the participation in the Champions League and in the Europa League [http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/94/62/40/1946240\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/94/62/40/1946240_DOWNLOAD.pdf) . For participation in both leagues the Club Licensing and Financial Fair Play regulations apply.

### ***The Sporting Autonomy Coalition: Beliefs***

A definition of sports autonomy was provided by Chappelet<sup>218</sup> in his 2010 report on the autonomy of sport in Europe. According to Chappelet the definition takes account of the following aspects:

*The autonomy of sport is, within the framework of national, European and international law, the possibility for non-governmental, non-profit making sports organisations to:*

- 1) Establish, amend and interpret rules appropriate to their sport freely, without undue political or economic influence;*
- 2) Choose their leaders democratically, without interference by states or third parties;*
- 3) Obtain adequate funds from public or other sources, without disproportionate obligations;*
- 4) Use these funds to achieve objectives and carry on activities chosen without sever external constraints;*
- 5) Draw up, in consultation with the public authorities, legitimate standards proportionate to the fulfilment of these objectives.<sup>219</sup>*

Both FIFA and UEFA have sought to safeguard their autonomy to govern football, globally and in Europe, without the restrictive interference of European law. Both actors have aligned in the sporting autonomy coalition to defend their autonomy. The claim for defending their autonomy is based on the argument that sport has its specificities and that this status should act as a filter for the full application of EU law to the sector. In the opposite situation that EU law would be fully applicable to sport, the governing bodies would not be able to sufficiently pursue goals that are connected to fundamental principles that make sport special. The need for maintaining competitive balance in sport, to ensure the regularity of sport competitions, to educate and train young talent, to promote stadium attendance and participation at all levels, to safeguard the integrity of sport and to collect with local communities, are a number of such fundamental principles.<sup>220</sup> Another ground for underlining the necessity of autonomy of the governing bodies is the preservation of the European Model of sport. This pyramid model of

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<sup>218</sup> Chappelet, J. (2010) *Autonomy of sport in Europe*, Council of Europe Publishing.

<sup>219</sup> *Supra*, p. 49.

<sup>220</sup> Parrish, R., Miettinen, S. (2010), *The sporting exception in European Union law*, The Hague: T.M.C. Asser Press, p. 24.

sports regulation<sup>221</sup> interconnects the world governing body in sport to the base that supports the pyramid: clubs and players. In between the top and the base of the pyramid the European governing bodies and the national governing bodies and / or leagues are placed. This structure allows the world governing body to take ultimate responsibility for safeguarding the characteristics of European sport that have been defined by the European Commission<sup>222</sup> and that allow a monopolistic governance of sport because of the admissibility of only one federation per sport.

FIFA and UEFA's quest to protect their autonomy in the governance of football on the basis of the specificity of sport is reflected in the beliefs of both actors. FIFA and UEFA do not place sport above the law, but the fundamental characteristics merit a soft application of the law on sport. Both actors can be seen as moderate when it comes to the degree of influence of the EU on sport. They seek to have a clarification of the boundaries of the penetration of EU law in their sport resulting in legal certainty. This perspective of the governing bodies in football can be distilled from their communications and points of view. Chappelet charts various press releases, between 2003 and 2009, in which both FIFA and UEFA support the need for their autonomy in governing their sport and where they show support for the findings of the Independent European Sport Review.<sup>223</sup>

In the statutes of both bodies their objectives are defined and one of those objectives is that all members should avoid influence of third parties in the management of their affairs.<sup>224</sup> The presidents of both actors have also expressed their views as regards the influence of the EU in football and the necessity to have a more relaxed approach from EU law. After the Bosman case, the then president of UEFA, Lennart Johansson, was quoted as saying that the EU was trying to kill football.<sup>225</sup> In 2009 the current UEFA president Michel Platini expressed in an interview that "There is still a slightly perverse tendency within the European institutions to deny the unity of the football pyramid and to isolate the professional game at the top. And this is done in order to give substance to the false notion that professional football is an economic activity just like any other." And, "Unfortunately, this refusal to recognize the specificity of

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<sup>221</sup> European Commission (1998), *The European Model of Sport*, Consultation document of DG X.

<sup>222</sup> European Commission (1999), *Discussion paper on the European Model of Sport, First conference on Sport in Olympia 21 and 22 of May 1999*, Communication document of DG X, 22 April 1999.

<sup>223</sup> Parrish, R.(2003) op.cit, p. 93-108.

<sup>224</sup> FIFA statutes Article 18, UEFA statutes Article 7 bis sub 2.

<sup>225</sup> Quoted in Garcia, B. (2007), *UEFA and the European Union, From Confrontation to Co-operation*, Journal of Contemporary European Research Vol. 3, Nr. 3, p. 2002.

sport ... still exists in certain circles, in certain sectors, which consider competition law to be the fundamental law of Europe. We refuse categorically to be held in a straitjacket or tied to prefabricated models that are based on the false equation that professional sport equals a purely economic activity.”<sup>226</sup> FIFA president Blatter was quoted as saying that “Observing the FIFA Statutes is imperative for every member association. These Statutes have proved their credibility, their usefulness and their strength for more than a century. Despite the undisputable respect that the world of football must show national legislation, it must be extremely vigilant with regard to attempts by governments - as well as supranational government organisations - to control the most popular sport on earth, and this is a trend which has become increasingly evident in recent years, especially in Europe.”<sup>227</sup>

As FIFA is the world governing body, being responsible for football on a global level, and UEFA deals with the European member associations, there do exist differences between the exact methods by which both actors approach a specific issue when defending their beliefs. This makes that when the two actors defend a specific objective in collaboration or on the basis of the same convictions than this collaboration can be regarded as a coalition of convenience.

An example of such a concerted approach was the transfer saga after *Bosman*. Both organisations defended the necessity for a transfer system in order to safeguard the promotion of youth development and the protection of minors and to ensure competitive fairness and openness through rules leading to solidarity and redistribution mechanisms. In a joint task force they faced the European Commission when it issued a statement of objections on the restructuring of the transfer rules by FIFA and UEFA in 1997 after the Bosman case.<sup>228</sup>

After the Bosman case the football sector suffered from a concentration of finances that threatened competitive balance in the sport.<sup>229</sup> As the players were free to join clubs after the

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<sup>226</sup> As cited on the UEFA website,

<http://www.uefa.com/uefa/aboutuefa/organisation/president/news/newsid=801478.html#uefa+president+urges+protection+footballs+values> .

<sup>227</sup> As cited on the FIFA website, after a meeting of the FIFA associations committee on 18 October 2006,

<http://www.fifa.com/aboutfifa/organisation/news/newsid=106799/index.html>

<sup>228</sup> Supra, footnote 2. See also for an elaborate overview, Lembo, C. (2011), *FIFA transfer regulations and UEFA player eligibility rules: major changes in European Football and the negative effect on minors*, Emory International law review, pag. 539-585, Vol.25, to be found at: <http://www.law.emory.edu/student-life/law-journals/emory-international-law-review/content/archive/Volume-25/Volume-25-issue-1.html>

<sup>229</sup> Institute of European Affairs (2008), *Expert opinion on the compatibility of the 6+5 Rule with European Community law (Summary)*, study of 24 October 2008, p. 7-8,



end of their contracts and because of the end of the limitations on foreign players FIFA and UEFA feared that clubs would no longer continue to invest in training players and that this phenomenon would lead to the weakening of national teams and the erosion of cultural identification. FIFA and UEFA both defended a system whereby it was favoured for clubs to draft and train local players. UEFA eventually rejected FIFA's proposal due to the fact that it lead to a direct discrimination under EU law. The European Commission eventually accepted the UEFA Home Grown player rule in the sense that a period of four years of analysis was allowed, and FIFA dismissed its ideas about its 6+5 initiative.<sup>230</sup>

A joint defence of their beliefs is also the battle to avoid third party influence in the policies of football clubs. Due to the international transfers of players the use of third party investments to acquire the services of football players became popular in Europe, where it initially was a trend in South America only.<sup>231</sup> In 2007 FIFA included in its regulations a ban on the third party influence in a transfer<sup>232</sup> and UEFA followed as a strong advocate against the use of third party investments in professional football clubs.<sup>233</sup>

A similar approach of both UEFA and FIFA can also be noticed in relation to the content of Article 165 of the TFEU and the relation to the specific nature of sport. Both governing bodies promote the perspective of 165 to defend the specificity of sport as regards EU law. In communications to the media and in their general positioning, both FIFA and UEFA have expressed their views on Article 165. For example, FIFA president Sepp Blatter stressed the importance of Article 165 for the future of sport:

*“Recognition of the specificity of sport is about protecting its universality, the foremost characteristic of its specific nature, in a world which is increasingly divided, and about maintaining its structures, which guarantee balance at the heart of every sport, for example between amateur football and professional football, between club football and international football, and in terms of protecting the national identity of clubs, etc. It is also about the educational and social role of sport, and about safeguarding fair play and the openness of*

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<sup>230</sup> See also Majani, F. (2009), ‘One Step Forward, Two Hops Backwards: Quotas – The Return. An Excavation into the Legal Deficiencies of the FIFA 6+5 Rule and the UEFA Home-Grown Players Rule in the Eyes of European Union Law’, International Sports Law Journal, Vol 2., 2009, The Hague: T.M.C.Asser Press.

<sup>231</sup> Rodrigues, F.X.F. (2007), *O fim do passe e a modernização no futebol Brasileiro (2001-2006)*, 2007, Tese (Doutorado em Sociologia) – PPF/URGS, Porto Alegre 2007 and also Reck, A.(2012), *Third party ownership: current trends in South America and Europe*, in EPFL Sports Law Bulletin, Vol. 10, June-October 2012,

<sup>232</sup> <http://in.reuters.com/Article/2007/10/30/idINIndia-30225820071030>

<sup>233</sup> See UEFA website: <http://www.uefa.org/aboutuefa/organisation/generalsecretary/news/newsid=1931937.html>

*competitions in the face of challenges which are increasingly threatening the uncertainty of sporting results.*”<sup>234</sup>

After Blatter’s quote the news item goes on to mention that “.the reference to sport in the Lisbon Treaty, which also mentions the “specific nature of sport”, provides the necessary instrument to do so”. The Treaty should allow to be looked at differently than other industries.<sup>235</sup> According to Blatter, sport has in the past been confronted by several legal challenges, especially when it came to pure sporting rules. Article 165 should allow sport to be looked at not only from a purely economic point of view, but also from its voluntary structures as well as its social and educational role.<sup>236</sup>

UEFA’s view on Article 165 is in accordance with FIFA’s. In an elaborate reaction to Article 165<sup>237</sup> UEFA defended its activities against the impact of EU law and it called on the Commission to make a firm statement for sport specificity. In general, UEFA’s perspective is well presented in the following passage of the position paper on Article 165<sup>238</sup>:

*“...Under the TFEU, the EU has a supporting competence in the field of sport, meaning that its activities are limited to coordinating, where necessary, sports-related initiatives undertaken at Member States level. The EU may also adopt incentive measures, however, Article 165 expressly excludes any harmonising legislation. The new Article is clearly, therefore, not intended to prejudice the legitimate autonomy and discretionary decision making power of sports federations.*

*However, where EU law does come into play and where it impacts on the activities of sports bodies, Article 165 now requires that the specific nature of sport must be recognised. In other words, while sport is not “above the law”, there is now a provision in the Treaty itself recognising that sport cannot simply be treated as another “business”, without reference to its specific characteristics (the ‘specificity of sport’).”*

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<sup>234</sup> <http://www.fifa.com/aboutfifa/organisation/news/newsid=1141618/index.html>

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> UEFA’s position on Article 165 of the Treaty, to be found at:

[http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167_DOWNLOAD.pdf)

<sup>238</sup> Ibid, p. 2.

The resources that the sporting autonomy coalition may use to try to impose its beliefs upon other actors find their origin in the interdependence of the various layers of the European Sports Model. Due to the link of the members of both FIFA and UEFA through the statutes of these associations it is possible for FIFA and UEFA to impose disciplinary sanctions on members, being associations, clubs and individual players. Therefore, for example, if clubs do not implement a rule that is issued by FIFA, if they allow interference in the management of an association, or if they refuse to release a player for participating for its national team, FIFA can prevent the club or association from participating in the competitions organised under the authority of the governing bodies.<sup>239</sup> Also, the FIFA and UEFA have extensive financial resources to persist in long legal procedures and hire the relevant consultants and experts.

### **Football Business Coalition**

In his description of the two coalitions that are active in the EU sports policy subsystem Parrish illustrates the beliefs that are shared by the actors in the football business coalition.<sup>240</sup> The actors in this coalition claim that football is an economic activity, the commercial potential of which is eroded by the restrictive practices employed by the football governing bodies. In their deep core beliefs the actors are convinced of a free market ethos. In addition, from a policy core perspective, the actors in this coalition seek greater representation in the governance model and decision making model of European professional football and in their quest for greater influence they rely on European Union law to protect their interests regarding the restrictions they encounter in the product and labour market of professional football. They are confronted with these potential restrictions because of the fact that the sporting autonomy coalition could see some primarily restrictive elements to be exempted under the heading of the special status of sport, on a case-by-case basis.

From the perspectives of the actors of this coalition, clubs are undertakings and employers. The players are workers and both sides of the industry support the concept of industrial relations. In addition to that, due to the importance of the influx of money in the industry deriving from commercialization of intellectual property rights, both sides of the industry,

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<sup>239</sup> The examples are duties on the basis of the Regulations on the Status and Transfer of Players and on the FIFA Statutes. The sanctions can be imposed on the basis of FIFA Statutes Article 62.

<sup>240</sup> Parrish, R. (2011), *Social Dialogue in European Professional Football*, European Law Journal, Vol. 17, Nr.2.

workers and employers, regard themselves as the rightful owners of their share in the creation of the spectacle of football.<sup>241</sup>

Parrish points to a variety of actors in the sphere of this coalition. He includes professional clubs, organised player interests, media companies, investors and agents. However, not all these actors share the same deep core beliefs, a conclusion easily drawn from the perspective that a distinction on the basis of industrial relations can be made. An example of opposite beliefs is the different perspective that the players, gathered in the Fédération Internationale des Joueurs Professionnels (FIFPRO), have in relation to the transfer system as regards the clubs. Where the players favour a more liberalised system stressing the free movement of workers, the clubs are more likely to favour a system where contractual stability and freedom of clubs to make profit on player sales is safeguarded.<sup>242</sup>

Their alignment in the football business coalition could therefore be characterized as a coalition of convenience in order to protect their joint interest in achieving greater influence in the regulation of the football sector. The actors in this coalition, for the sake of this thesis, are FIFPRO, the European Club Association (ECA) and the European Premier Football Leagues (EPFL).

FIFPRO is the international body representing the national football players' union on a global level. FIFPRO was created in 1965 and it now has 46 worldwide members, 9 candidate members and 9 observers.<sup>243</sup> It has four divisions: Asia/Oceania, Africa, Americas and Europe.<sup>244</sup> FIFPRO has been recognized by FIFA<sup>245</sup> and UEFA<sup>246</sup> and has been granted a status within UEFA's consultative bodies.<sup>247</sup>

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<sup>241</sup> Blackshaw, I and Siekmann, R (eds) (2005) *Sports Image Rights in Europe*, The Hague: T.M.C. Asser Press, P. 1-13.

<sup>242</sup> FIFPRO has called the view of the ECA chairman naive with regards to the disfunctionalities of the current transfer: [http://Articles.chicagotribune.com/2013-03-05/news/sns-rt-soccer-europetransfersl4n0bx6w5-20130305\\_1\\_fifpro-transfer-system-belgian-player-jean-marc-bosman](http://Articles.chicagotribune.com/2013-03-05/news/sns-rt-soccer-europetransfersl4n0bx6w5-20130305_1_fifpro-transfer-system-belgian-player-jean-marc-bosman).

<sup>243</sup> <http://www.fifpro.org/about>.

<sup>244</sup> Ibid.

<sup>245</sup> Memorandum of Understanding signed in 2006, to be found at: [http://www.rdes.it/RDES\\_3\\_06\\_FIFPRO.pdf](http://www.rdes.it/RDES_3_06_FIFPRO.pdf)

<sup>246</sup> The most recent Memorandum of Understanding was signed in 2012, and can be found at: [http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Players'unions/01/78/06/85/1780685\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Players'unions/01/78/06/85/1780685_DOWNLOAD.pdf)

<sup>247</sup> FIFPRO is part of UEFA's professional football strategy council.

FIFPRO's position as a stakeholder in this coalition can be evidenced on the basis of their objectives that are laid down in their statutes<sup>248</sup> and reflected in the opinions about issues that are of influence in European football.<sup>249</sup> The activity of FIFPRO in defending the interest of players as workers has also been illustrated in FIFPRO's role in the 2001 Agreement on the Regulations on the Status and Transfer of Players (RSTP) The European Commission had gone so far as to grant FIFPRO a decisive role in the implementation of a new transfer system when the governing bodies refused to adjust the transfer system along the lines of the European Commission's objections to it. However, FIFPRO's role was undermined due to internal fragmentation within FIFPRO and it turned out to play a marginal role in the eventual agreement that was established between the governing bodies FIFA and UEFA and the European Commission.<sup>250</sup> More recently, FIFPRO stressed its view on the impact of the transfer system in professional football and the necessity of taking players' interests in consideration, when it commented on a study on the economic and legal impact of the transfer system, carried out by KEA and the CIES.<sup>251</sup> In its criticism of the study, FIFPRO stated, amongst others, "that players and clubs should always be in a position to call upon normal courts in the case of disputes; this is with a view to guarantee proper implementation of EU Law", and: "FIFPRO is of the opinion that it is not necessary to give both parties access to regular courts but only players because of the protective function of labour law."<sup>252</sup>

The ECA is the body representing the professional football clubs and is the successor of the G-14 European economic interest group and the European Club Forum.<sup>253</sup> The ECA was created as a compromise between UEFA, FIFA and the clubs after the settlement in the *Charleroi* case.<sup>254</sup> In the *Charleroi* case the clubs previously grouped in the G-14<sup>255</sup> defended their position as a commercial right owner. The origin for the case was the fact that Sporting Charleroi player Abdelmajid Oulmers returned injured to his club after an international match

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<sup>248</sup> To be found at: [http://www.fifpro.org/img/uploads/file/FIFPro\\_Articles\\_eng.pdf](http://www.fifpro.org/img/uploads/file/FIFPro_Articles_eng.pdf)

<sup>249</sup> FIFPRO have published their views on their website: <http://www.fifpro.org/opinion>

<sup>250</sup> Garcia, B. and Meier, H.E. (2012), *Limits of interest empowerment in the European Union: the case of football*, European Integration, Volume 34. No.4, 359-378, June 2012.

<sup>251</sup> KEA –CDES (2012): *Study on the Economic and Legal Aspects of the transfer system in professional football*, to be found at <http://ec.europa.eu/sport/library/documents/f-studies/study-transfers-final-rpt.pdf>.

<sup>252</sup> To be found at: [http://www.fifpro.org/division/news\\_details/2/2189](http://www.fifpro.org/division/news_details/2/2189)

<sup>253</sup> The European Club Forum was a forum of clubs within the UEFA structures, it was not independent from UEFA.

<sup>254</sup> The case was registered as a preliminary ruling before the European Court of Justice but was withdrawn before a judgment, C-243/06 SA Sporting du Pays de Charleroi and G-14 Groupment des clubs de football Européens v. Fédération internationale de football association (FIFA).

<sup>255</sup> Borussia Dortmund, Bayern Munich, Liverpool FC, Manchester United FC, Olympique Marseille, Paris Saint-Germain, Internazionale, Juventus, AC Milan, AFC Ajax, PSV Eindhoven, FC Porto, Barcelona, Real Madrid. In 2002 Arsenal FC, Bayer 04 Leverkusen, Olympique Lyonnais and Valencia CF joined the grouping.

with his country Morocco against Burkina Faso. As his employer Charleroi did not take out any insurance they had to continue to pay the wages of the player for eight months while he did not play. As the Moroccan FA did not decide to compensate Charleroi decided to go to the Tribunal Commercial de Charleroi. The G-14 joined Charleroi in their litigation and eventually the case was brought for a preliminary ruling under the ECJ.

The clubs claimed that FIFA was abusing a dominant position under the competition law articles of the TFEU. Through lobbying of the clubs and through the pressure connected to the threat of litigation, the clubs were eventually able to find a compromise as regards the compulsory release of players.<sup>256</sup> FIFA and UEFA offered the clubs an insurance and compensation scheme when the players left their clubs to represent their national teams. The compromise on the side of the clubs was that they dismantled the G-14 grouping and that they formed the ECA. The ECA signed a memorandum of understanding with UEFA.<sup>257</sup> In this memorandum of understanding the ECA, UEFA and FIFA officially recognized each other as sole representatives of their members. The ECA agreed to respect the international match calendar, the necessity to perform in international matches and to ensure that none of its members would be part of any legal proceedings against UEFA.<sup>258</sup> In return, UEFA offered the ECA a place in their consultative structures<sup>259</sup> and a share of the income generated by the UEFA national team competitions.<sup>260</sup>

Another source to evidence the legitimacy to place the ECA in the football business coalition can be found in the position paper with the perspectives on major issues impacting European football that the ECA issued in March 2011.<sup>261</sup> The ECA acknowledged that sport has its own specificities but it also stressed that clubs are now enterprises and that they, like the federations, are subject to the laws and regulations which apply to other businesses operating within the EU. Thus, in deciding how, and to what extent, EU law should be applied,

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<sup>256</sup> Annexe 1 of the FIFA Regulations on the Status and Transfer of Players regulates the release of players for their national teams.

<sup>257</sup> To be found at:

[http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Clubs/01/78/06/79/1780679\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Clubs/01/78/06/79/1780679_DOWNLOAD.pdf), the Memorandum of Understanding also included the compensation scheme in case the player returns injured from an international match.

<sup>258</sup> Memorandum of Understanding between UEFA and ECA, art. D.

<sup>259</sup> ECA is part of the UEFA's professional football strategy council.

<sup>260</sup> Memorandum of Understanding between UEFA and ECA, art. C.

<sup>261</sup> ECA position paper (2011), *The clubs' perspectives on the major issues impacting European football*, to be found at <http://www.ecaeurope.com/Global/ECA%20Position%20Paper.pdf>

acknowledgement should be made of the commercial realities faced by sport stakeholders.<sup>262</sup> The ECA agrees with the approach of the European Commission to deal with this assessment on a case-by-case basis as it would be ill-judged to provide a general exemption (or not) to certain rules prematurely. However, the European Commission should assist the stakeholders in defining the extent to which EU law applies to sport in order to create greater legal certainty.

The position paper of the ECA also places clubs in the core of governance when it comes to issues that influence clubs. Indeed, according to the ECA, some progress has been made in granting clubs greater powers, like in the division of income out of the Champions League, but there still remains scope for an increase involvement of the clubs in the decision making structures as decisions continue to be made without proper consultation of the clubs and without their agreement.<sup>263</sup>

The EPFL comprises 29 member leagues across Europe. It was created in 1997 as the association of European Union Premier Professional Football Leagues (EUPPFL). It was restructured to the EPFL in 2005, when its aim became: *“To play a decisive part in the process of positively reshaping the organisation of the game in Europe, by consolidating its position, safeguarding the legitimate interest of the Members and implementing new initiatives for the good of the game. The EPFL is further committed to youth development, community relations, Social Dialogue, social inclusion and education.”*<sup>264</sup>

The EPFL has signed two memoranda of understanding with UEFA, the latest one in 2012.<sup>265</sup> Both organisations have recognized each other and each other’s objectives.<sup>266</sup> The EPFL has been granted a place within the UEFA’s consultative structures.<sup>267</sup>

The position paper of the EPFL contains the association’s view on topics dealing with the relationship between sport and EU law. The EPFL respects the specificity of sport, as recognised by the EU institutions and Member States and well reflected and consolidated in a

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<sup>262</sup> Supra, p. 2.

<sup>263</sup> Supra, p. 3

<sup>264</sup> An overview of the history of EPFL can be found at: <http://www.epfl-europeanleagues.com/history.htm>.

<sup>265</sup> To be found at:

[http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Leagues/01/78/06/83/1780683\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Leagues/01/78/06/83/1780683_DOWNLOAD.pdf).

<sup>266</sup> Ibid.

<sup>267</sup> EPFL is part of the UEFA’s Professional Football Strategy Council.

multitude of national laws and sport regulations as well as other national and international arrangements.<sup>268</sup> However, the conduct and operation of sport must take place within the framework of European law as sport is neither above nor outside the law.<sup>269</sup> These views can be placed within the perspectives of the football business coalition.

As regards their desire to perform a stronger role in the governance of football, the EPFL believes that any key issue affecting professional football needs to involve the leagues and clubs as much as possible. The efforts to become a stronger organisation are evidenced by the EPFL's initiative to create a "world league organisation".<sup>270</sup> This new body includes leagues from other continents.<sup>271</sup>

The shared interests of the EPFL and the ECA can be seen in their reaction to the *Murphy* case<sup>272</sup> and in the defence of the collective selling of broadcasting rights. In *Murphy* a British pub owner broadcasted the matches of the British Premier league through a decoder system obtained from Greece instead of using the UK territory Sky Decoder card. This circumvention of the Premier Leagues exclusivity rule saved her £7,600 per annum. The ECJ decided that national laws or regulations that prohibit the import, sale or use of foreign decoder cards were contrary to the freedom to provide services. What remains under protection are the exclusive copyrights connected to the programmes around the live league matches.

The three parties all defend their interests on the basis of their status as regards actors in industrial relations. This makes them different from the governing bodies of football as the governing bodies do not possess a role in the industrial relations in football in the status of employer. Therefore, the three actors have aligned in relation to a disproportionate effect of the transfer system on the basis of their connection to labour law. The sources may be based on different grounds, but a joint effort in affecting the change or creation of policy is the objective of their alignment.

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<sup>268</sup> EPFL (2008), *Declaration of principles on the future of professional football in Europe*, [http://www.epfl-europeanleagues.com/files/EPFL\\_Declaration\\_of\\_Principles\\_on\\_the\\_Future\\_of\\_Professional\\_Football\\_in\\_Europe.pdf](http://www.epfl-europeanleagues.com/files/EPFL_Declaration_of_Principles_on_the_Future_of_Professional_Football_in_Europe.pdf) p. 1.

<sup>269</sup> Ibid.

<sup>270</sup> See [http://www.epfl-europeanleagues.com/world\\_league\\_association\\_launched.htm](http://www.epfl-europeanleagues.com/world_league_association_launched.htm).

<sup>271</sup> The United States Major Soccer League, the South African League, the United Arab Emirates League and the Thai Premier League: [http://www.epfl-europeanleagues.com/world\\_league\\_association\\_launched.htm](http://www.epfl-europeanleagues.com/world_league_association_launched.htm)

<sup>272</sup> FA Premier League and Ors v QC Leisure and Ors (Case C-403/08) 22 November 2008. See also Daily Telegraph (2011), 9 February 2011, *Premier League gains support from European Clubs against landlady Karen Murphy screening live games*.



The football business coalition has (the threat of) litigation as a resource for pushing their beliefs forward and to influence policy. The main cases are *Bosman* and *Bernard*, two cases that challenged the validity of the transfer system and of the training compensation regulations. In the *Oulmers* case the mere threat of litigation created a window of opportunity for a better bargaining position. However, the outcome of litigation is uncertain. The uncertainty has fuelled several challenges to the existing governance model in football.<sup>273</sup> Another resource is the potential of funding. The three actors all have accumulated enough funds by exploiting their products to fund legal procedures.

### **Hurting Stalemate**

Taking the current situation in the professional football industry into consideration, it can be said that there is a situation of a hurting stalemate. Sabatier described the hurting stalemate situation as a status quo in which rival coalitions have no more options to exploit due to the lack of resources or this inability to enter into new venues.<sup>274</sup> In football there is a deadlock as the parties are able to impose almost unlimited financial burden on each other while in the meantime the threat of litigation remains. This situation of frustration and deadlock may push an actor or coalition to search for a compromise with the rival coalitions because the outcome of this compromise is superior to the status quo. In this search for compromise, policy oriented learning across coalitions takes place on the level of the secondary beliefs of the coalitions and mediation between the stakeholders can take place with the use of a policy broker that will search for a reasonable solution.

The search for a solution that is supported by all coalitions should lead to a status of “power sharing”.<sup>275</sup> This solution can only be found, according to Sabatier, if a professional forum is available for the stakeholders. Therefore the ingredients to find consensus are:

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<sup>273</sup> Parrish, R., (2003) , op.cit., p. 217. The football business coalition has been less successful in cases dealing with club ownership rules, selection criteria, the use of transfer windows to regulate player movement and the players' agent regulations.

<sup>274</sup> Sabatier, P.(1988), *An Advocacy Coalition Framework of Policy Change and the role of Policy-Oriented Learning therein*, in Policy Sciences, Vol. 21.

<sup>275</sup> Sabatier, P. (1998), *The Advocacy Coalition Framework: Revisions and relevance for Europe*, Journal of European Public Policy, Vol. 5, Nr. 1, March, 1998, 102.

- A stalemate wherein all coalitions view a continuation of the status quo as unacceptable;
- The negotiations are conducted in private and last a relatively long time, e.g. more than six months;
- There is a facilitator (policy broker) respected by all parties and viewed as relatively neutral.

### **Fora for negotiated settlement: European Commission and the Court of Arbitration for Sport**

In the following the focus will lie on two institutions that have been and are active in the search for a negotiated settlement between the stakeholders in professional football and finding legal certainty: The European Commission and the Court of Arbitration for Sport (CAS).

#### **The European Commission**

The European Commission has been involved in sport since sport has been recognised to fall under the scope of influence of the Treaty. The first landmark ECJ decision occurred in 1974 in the *Walrave* case in which the ECJ decided that professional sport falls within the scope of Community law when it is carried out as an economic activity. From this perspective professional sport came under the attention of the European Commission due to its role as the guardian of the EU Treaties.

Following the Bosman judgment of 1995, the FIFA rules on the transfer and status of players received criticism from the Commission as the restrictive effects were still *de facto* in place.<sup>276</sup> The Commission considered that the rules needed to be adjusted according to the Treaty provisions guaranteeing a free movement of workers on the territory of the EU. Next to both of these sources of influence the European Commission used sport in order to support

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<sup>276</sup> European Commission, (1998) *Information on the Bosman case*, Sport Info Europe, DG X, Brussels, 1998.

policy in other fields, mainly education, culture and health. This was operationalised through various programmes such as the year of Education Through Sport, the fight against obesity and followed after the recognition of the non-economic values of sport in the annex to the Amsterdam Declaration in 1997.

The attitude of the European Commission to sport was diffuse. Sport stakeholders used the European Commission as a venue for promoting their beliefs and getting policy issues on the agenda but no single entry point was available to the actors. Actors were able to go venue shopping on the basis of their beliefs thus leading to a situation where sports governing bodies would seek to be heard by Commission Directorate Generals mainly dealing with issues based on culture and the preservation of sports traditions, whereas other stakeholders would focus on the application of European law dealing with competition and free movement, with less emphasis on the specificity of sport as a source for exemptions of EU law. The attitude of the Commission to sport was, due to the lack of a Treaty basis for sport, a more reactive one. The Commission reacted to complaints or requests of stakeholders or created activity after decisions of the European Court of Justice. On the other hand, where the European Commission sought to bring extra power to its own existing policies it would use sport in order to promote other policies, such as the fight against obesity, education, forging identity and culture. Sport became an item for the Commission from a spill-over perspective based on both a reactive and pro-active approach. The pro-active approach of the Commission means it can be characterized as a policy entrepreneur, keeping sport on the agenda in order to use it as an alternative route for progressing other policy priorities or even as a stakeholder creating coalitions of convenience with other actors. The position of sport was unclear, let alone of professional sport. The fragmented approach by the various Directorates General, mainly Employment and Social Affairs, Competition and Education and Culture lead to a status quo where the Commission could not bring legal certainty to the sector of professional football as the exploitation of the European Commission as a venue would not bring stakeholders any further.

In 1997 this approach towards sport was the reason for the start of a more structured approach towards sport. Within the DG Education and Culture the Sport Unit was created. A *vice versa* approach towards sport came to the surface leading to a situation in 2000, defined in the Nice Declaration, that the EU would now look to the impact of its decisions and policy on sport and seek to be sport-friendly. With the introduction of the White Paper in 2007 the European

Commission paved the way for a more structured approach towards sport. The Paper provided for a comprehensive vision of the European Commission towards sport. The role of the European Commission shifted after the adoption of the White Paper. The Commission introduced the notion of a structured dialogue with the sports movement on the basis of the following grounds:

*“European sport is characterised by a multitude of complex and diverse structures which enjoy different types of legal status and levels of autonomy in Member States. Unlike other sectors and due to the very nature of organised sport, European sport structures are, as a rule, less well developed than sport structures at national and international levels. Moreover, European sport is generally organised according to continental structures, and not at EU level.*

*Stakeholders agree that the Commission has an important role to play in contributing to the European debate on sport by providing a platform for dialogue with sport stakeholders. Wide consultation with “interested parties” is one of the Commission’s duties according to the Treaties.*

*In view of the complex and diverse sports culture in Europe, the Commission intends to involve notably the following actors in its structured dialogue:*

- *European Sport Federations;*
- *European umbrella organisations for sport, notably the European Olympic Committees (EOC), the European Paralympic Committee (EPC) and European non-governmental sport organisations;*
- *National umbrella organisations for sport and national Olympic and Paralympic Committees;*
- *Other actors in the field of sport represented at European level, including social partners;*

- *Other European and international organisations, in particular the Council of Europe's structures for sport and UN bodies such as UNESCO and the WHO*<sup>277</sup>

In order to foster this structured dialogue the Commission has organised many contact moments and professional fora where the stakeholders could discuss and promote their policy views in front of the Commission. The initiatives of the Commission are divided in three segments: (1) the (re)organisation of a European Sport Forum and thematic discussions with the stakeholders (2) the organisation of conferences<sup>278</sup> and (3) the commissioning of sports specific studies.<sup>279</sup>

The European Sport forum intends to "provide for a more efficient dialogue structure on sport at EU level, including the organisation of an annual European Sport Forum and thematic discussions with targeted audiences, European sport stakeholders in particular".<sup>280</sup> The forum takes place annually. Next to the forum the Commission organises conferences on specific topics, working groups and expert groups. In addition, the Commission is open to receive stakeholders in one-on-one talks or in closed meetings and *ad hoc* committees.

Also, as regards the fostering of dialogue, the European Commission has stated in its White Paper on Sport that in the light of a growing number of challenges to sport governance, the Social Dialogue at European level can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions.<sup>281</sup> As such, the European Commission promotes and encourages social partners in sport to decide issues that affect them both amongst themselves.

In 2009 sport was included in the Lisbon Treaty. The EU now has a competence for sport and that competence is very close to the role that was created for the Commission after the adoption of the White Paper. In Article 165 TFEU the Commission plays a role in 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

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<sup>277</sup> European Commission (2007), *White Paper on Sport*, COM(2007) 391 final, Brussels, 11 July 2007, p. 18.

<sup>278</sup> In the recent past the European Commission's Sport Unit has been involved in the organisation of conferences such as of Club Licensingsystems (2010), Sport Agents (2011), Sport Statistics (2011), Gender Equality in sport (2013).

<sup>279</sup> For an overview of EC commissioned sports studies see: [http://ec.europa.eu/sport/library/studies\\_en.htm](http://ec.europa.eu/sport/library/studies_en.htm).

<sup>280</sup> Point 49 of the Pierre the Coubertin Action plan, annexed to the White Paper on Sport.

<sup>281</sup> *Supra* 256, *White Paper on Sport*, p. 19.

physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

Article 165 requires as one of the Commission's duties the promotion of cooperation between sport bodies while safeguarding the EU's basic policy goals. Therefore, the sport unit of the Commission can be seen as the opening for all sport stakeholders to the EU. The sport unit will continue to collaborate with other DG's if necessary, but its position as a gateway to Brussels for the sport stakeholders, became much stronger.

So the balance between the role of the Commission as a broker or a more advocacy oriented approach, as well as being a mere venue, has switched more towards the broker role. Of course the Commission has a strategy based on its own objectives - that of pursuing the goals of Article 165 and bringing sport more in line with EU legislation - but this role is now targeted towards the facilitation of dialogue with the view to make an end to a deadlock situation.

However, the Commission itself does not intend to impose rules or legislation on stakeholders in professional sport. It intends to leave the decision making to the sport movement itself. The power the European Commission has on the basis of Article 165 is to move the Council to make Recommendations or to create incentive measures through the ordinary legislative procedure together with the Parliament. Both instruments may be strong in pursuing stakeholders to carry out action but they are unable to force harmonisation as the authority to initiate the creation of laws remains at the level of the Member States. The European Commission remains a facilitator for change but on the basis of the Treaty it does not have the power to change or create sports policy by itself.

The European Commission as a forum is suitable for starting negotiations, however the forum is not suitable to devise binding rules and regulations that establish legal certainty within the sector. Therefore, the European Commission itself cannot solve any problems, so as a forum it lacks the power to bring a solid solution. It can only enforce rules in sectors where it has the powers to do so on the basis of the Treaty, therefore, even after inclusion of Article 165, any issue would be referred back to the relevant DG by the sport unit if policy needs to be created or adapted. The Commission works therefore as a policy broker but is not the professional forum that leads to the desired outcome in a deadlock situation in professional football.

## The Court of Arbitration for Sport (CAS)

In the 1980s the international sports organisations reflected on the creation of an independent authority that would be able to pronounce binding decisions in international sport disputes in a flexible and efficient, inexpensive procedure. Following the idea of the then president of the International Olympic Committee (IOC) Juan Antonio Samaranch, a working group was set up by IOC member Kéba Mbaye in order to create the statutes of the Court of Arbitration for sport, a sort of ‘supreme court’ for international sport. The statutes were officially ratified by the IOC in 1984 and the CAS became immediately active. In the early years of its existence the CAS was not very popular amongst sport organisations. Casini accounts for this “difficult childhood”.<sup>282</sup>

At the start of the activities of CAS there were not many cases.<sup>283</sup> The influx of cases grew when doping disputes started to be settled at the CAS,<sup>284</sup> but in the early years of CAS there were simply not many cases, logically also due to a lack of doping detection instruments. The road to CAS was also not yet part of the mind-set of sports governing bodies. The federations used their own internal judiciary bodies to solve sport disputes. In addition to that, the CAS stemmed and was designed as a branch of the IOC, thus the IOC was having financial and regulatory control over CAS to this on. This situation lasted until 1993 when the equestrian Elmar Gundel appealed to the Swiss Federal tribunal in order to dispute the validity of an award.<sup>285</sup> His claim was that the original award<sup>286</sup> was rendered by a Court that did not meet the conditions for impartiality and independent and that these basic principles of a fair trial impeded the CAS from being a proper arbitration court. The Federal Tribunal did recognise the CAS as a true court of arbitration but it also noted that if the IOC would be a party in proceedings before the CAS then the Court’s independence would be put into serious question.

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<sup>282</sup> Casini, L. (2012), *The making of a Lex Sportiva by the Court of Arbitration for Sport*, in: Siekmann, R, Soek, J, (ed), *Lex Sportiva: What is Sports Law?*, The Hague: T.M.C. Asser Press, p. 153.

<sup>283</sup> Ibid.

<sup>284</sup> An overview of the CAS jurisprudence, that is declared free for public consultation, can be found at: <http://www.tas-cas.org/recent-decision>. Besides many football cases, the majority of cases deal with doping related issues.

<sup>285</sup> Swiss Federal Court, 15 March 1993, *Gundel v. Fédération Equestre Internationale*, in BGE 119 II S. 271 et seq.

<sup>286</sup> CAS 92/A/63 *Gundel v. FEI*.

The Gundel judgment ignited a new phase at the CAS. Gundel forced a process towards a completely independent Arbitration Court. This reform led to a structure of the CAS that was approved at a meeting in Paris on 22 June 1994. The agreement was signed by the highest authorities in sport representing the IOC, the Association of Summer Olympic International Federations (ASIF), the Association of Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC). Through this cooperation and consensus of a major part of the representative bodies in sport there was a serious adherence of individual sports bodies, clubs and athletes to the jurisdiction of CAS. The latter two are bound to CAS arbitration via arbitration clauses, in individual contracts or in statutes or collective agreements. In addition to being the appeal body for these sport organisations, the CAS is also the appeal body in relation to doping matters judged on the basis of the World Anti Doping Code (WADA Code).<sup>287</sup>

In 2003 in another case in which in the initial arbitration procedure the IOC was a party before the Swiss Federal Tribunal<sup>288</sup> the CAS new administrative structures after *Gundel* were challenged. The essential question was if the links that the CAS has, especially its financial links, to the IOC, sufficiently guaranteed an impartial and independent trial for the parties in litigation. The Swiss Federal Tribunal argued, in an extensive judgment, that the structure of the CAS, implemented after the Paris agreement, had the necessary independence to pass judgment in cases in which the IOC was a party and that there should be no fear for partiality or prejudice.<sup>289</sup> Currently the CAS deals with over 300 cases per year.<sup>290</sup>

There are three types of activities<sup>291</sup> that are carried out by CAS. The Court is the supreme court in sport arbitration cases that are brought before the case through specific arbitration clauses that exist between two parties, stemming from clauses in two-party contracts, a mutual choice for the CAS after a conflict has arisen or a link to CAS through the statutes and regulations of the governing body of a particular sport. This task of the CAS starts with a legal procedure and ends with the pronouncement of an arbitral award. Another function of the CAS is that of a mediation tribunal. This function of the CAS helps parties to find an

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<sup>287</sup> For the Appeal procedures before CAS on the basis of the WADA Code see Article 13 of the Code, to be found at: [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf).

<sup>288</sup> Danilova and Lazuntina v IOC and FIS (2003) 3 Digest of CAS Awards 2001-2003 649, 688.

<sup>289</sup> Ibid. See also Anderson, J. (2010) *Modern Sports Law, A textbook*, Hart Publishing, Oxford, p. 82-83.

<sup>290</sup> <http://www.tas-cas.org/20question>

<sup>291</sup> Supra, 261, Casini (2012), p.156-157. For a description on the activities of the Court of Arbitration for sport can be found on the website of CAS: [www.tas-cas.org](http://www.tas-cas.org).



amicable solution to their conflicts. And the last function of the CAS is to give Advisory opinions about sports matters. The CAS is based in Lausanne and has a branch in New York as well. During major international sporting events such as the Olympic Games the CAS sets up *ad hoc* tribunals to deal efficiently with cases that pop up during these events. For every occasion specific procedural rules are made.

The role of CAS in football-related cases has grown immensely since FIFA recognised the CAS as a tribunal to deal with the appeals of the FIFA's own internal jurisdiction through its Dispute Resolution Chamber (DRC) and the Players' Status Committee (PSC). In a circular letter of 2002<sup>292</sup> FIFA expressed its acceptance of the CAS to this role to the member associations and it has grounded the function of CAS in its statutes.<sup>293</sup> Since its adaption of this procedure the football cases before the CAS account for a large part of all the activities of the CAS. The CAS has thus influenced football in a significant way.

In literature about the CAS there is a lively long-standing and on-going debate about the role of the CAS or about the potential role of the CAS.<sup>294</sup> A returning focal point is the status of the CAS jurisprudence. Amongst these academics there is much discussion about the existence and / or extent of a *Lex Sportiva* based on the CAS decisions. On one side of the spectrum Nafziger describes *Lex Sportiva* as “*The concept of a coherent and influential corpus of practice, has been identified with the lex mercatoria or law merchant, a venerable source of law that is said to form the foundation of international commercial practice and commercial arbitration*”<sup>295</sup> On the other side, Anderson, reflecting on the work of Erbsen and Foster explains that “the concept of *Lex Sportiva* remains a nebulous one, and, certainly, one that should not be used to grant the institutional and regulatory mechanisms of international sport an autonomous legal character that is in some way elevated from state and public

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<sup>292</sup> FIFA (2002), *FIFA Introduces Right to Appeal at CAS*, Circular Letter 827, 10 December 2002.

<sup>293</sup> Article 66 of the FIFA Statutes.

<sup>294</sup> See for example: Foster, K. (2003), *Is there a global sports law?*, Entertainment law, Vol 2, nr.1, spring 2003, p.1-18; Blackshaw, I., Siekmann, R., Soek, J, (eds) (2006), *The Court of Arbitration for Sport 1984-2004*, The Hague: T.M.C. Asser Press, for a general description and for *lex sportiva* in particular the Article in this work of Erbsen, A, *The substance and illusion of a lex sportiva*. See further Anderson, J. (2011); Casini, L, (2012) see supra 95) and others such as Nafziger, J. (2012), *The principle of fairness in the Lex Sportiva of CAS Awards and beyond* (pag.251-272) Beloff, M. (2012), *Is there a lex sportiva* (69-90) in Siekmann, R., Soek, J., *Lex Sportiva: What is sports law*, The Hague: T.M.C. Asser Press.

<sup>295</sup> Nafziger, J. (2012), *Lex Sportiva*, in Siekmann, R., Soek, J., *Lex Sportiva: What is sports law* T.M.C. Asser Press, The Hague, 2012, p. 54.

law.”<sup>296</sup> It can therefore be said that there is no clear definition about what a *Lex Sportiva* is or entails. *Lex Sportiva* in the overview above relates to decisions of sports governing bodies and awards in appeal procedures at CAS. For the sake of this thesis I will use the viewpoint that the idea of the function of a *Lex Sportiva* should be a uniform body of sports law that exists as an umbrella over the mosaic landscape of national sports laws or general laws that are applied to sport.

If *Lex Sportiva* is regarded as a uniform body of sports law then it could be a basis for the creation of legal certainty in the field of sport and, as a consequence, also for football. In this sense, the ambiguity of the potential outcome of a conflict based on a difference in beliefs between the rival coalitions will be concluded by a binding award from the CAS arbitrators. The CAS could, as such, have a role in the creation of legal certainty. On the one hand this could be the consequence of a binding outcome in litigation that would in that situation be an ultimate forum for rival coalitions to place their potential disputes. The award of the CAS would express the outcome of the dispute and hence a reconciliation between coalitions would be imposed upon the actors. On the other hand, if the CAS would produce binding *Lex Sportiva* then the threat of having a judgement that could lead to a binding outcome would bring parties closer together and serve as a source for an outcome in a hurting stalemate situation.

In addition to these, the CAS also has a mediation role<sup>297</sup> and it provides advisory opinions.<sup>298</sup> Actors within the coalitions could seek to reach a compromise by making use of these CAS powers and CAS could therefore emerge as a venue for the settlement of disputes. In order for the football policy sub-system to make use of the CAS as a forum, the CAS needs to be a place where there should be a stable, neutral and enforceable outcome of negotiations possible that would reconcile all actors and lead to fertile soil for policy oriented learning to take place. In order for a forum to be successful it needs, according to Sabatier, to meet the criteria of being prestigious enough to force professionals from different coalitions to participate and be dominated by professional norms.<sup>299</sup> In addition, a condition for the professional football

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<sup>296</sup>Sabatier, P (1998), *The Advocacy Coalition Framework: Revisions and Relevance for Europe*, Journal of European Public Policy, 5:1 March 1998, p.91.

<sup>297</sup> CAS mediation rules to be found at: <http://www.tas-cas.org/mediation-rules>,

<sup>298</sup> The advisory opinion does not constitute an award and is not binding: <http://www.tas-cas.org/en/20questions.asp/4-3-221-1010-4-1-1/5-0-1010-13-0-0/>

<sup>299</sup> Supra, *White Paper on Sport*, p. 156.

sector to accept the forum are that an enforceable and consistent outcomes are possible, as the main issue at stake is the search for legal certainty.

The CAS is funded by the ICAS and the parties to a procedure carry their own costs. This is a fair entry-level to the CAS as a forum for a settlement. An ordinary procedure at the CAS lasts between 6-8 months. This is the time of the settlement of a legal dispute and not of the time that negotiations would take place. If this duration comes on top of the negotiations that have forced a procedure towards CAS.

The composition of the CAS can, in principle, be regarded as neutral and objective. In an arbitration procedure the parties choose their arbitrator from a list of 284 options.<sup>300</sup> These arbitrators are selected after applying for a position at the CAS in accordance with the CAS statutes:

*“In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs”*<sup>301</sup>

In an ordinary procedure there is one neutral president and two arbitrators each chosen by one of the parties. These arbitrators are forced to apply Swiss law if no choice for another jurisdiction has been made in the contractual relations between the parties that have brought their dispute forward to arbitration. Despite the fact that the arbitrators must have a background in sports this does not mean that there is a common ground for the approach to a problem.<sup>302</sup> Due to the lack of an international coherent body of sports law and due to the difference in status of the sports sector in the European jurisdictions, it depends on the origin of the parties on how a dispute will be settled. For example, the issue of third party influence is regarded differently amongst EU member states.<sup>303</sup> For example, the approach in England is completely different to that in Portugal. If an award in relation to a dispute regarding TPI between an English and a Portuguese party in football is at stake and a decision of the panel

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<sup>300</sup> <http://www.tas-cas.org/arbitrators-genlist>.

<sup>301</sup> Article S14 statutes of CAS.

<sup>302</sup> Ibid.

<sup>303</sup> See for a more elaborate description further in Chapter 8.

of arbitrators is the outcome of deliberations between the parties, then the outcome is probably to be different than the same problem, under the same factual conditions, if the parties come from another jurisdiction.

Casini stresses that CAS has been relevant in developing new legal principles in such a case and thus constructing a new form of global sports law, consisting of *principia sportiva*. Also the role of CAS in the interpretation of sports law and regulations can be acknowledged and it can be a source for further harmonisation of sports law.<sup>304</sup> Despite these positive effects, the CAS does not serve as a useful professional forum for reconciling difference in beliefs. Hence, the actors that compose the coalitions in the professional football *subsystem* have different EU backgrounds. The awards of the CAS are only binding upon the parties, therefore there is no creation of a binding precedent. This is a key element for the success of a professional forum in a process leading to policy change, the CAS lacks this element. In past cases, dealing with essential football topics that are the core of the difference in approach between the coalitions, it has turned out that the CAS awards lead to ambiguity and instead of providing legal certainty they create vagueness.

In conclusion it appears that CAS may serve as an extra tool to provide legal certainty but that there is too much of a discrepancy between the outcomes of the awards. This inconsistency could refrain the actors in the coalitions from looking at the CAS as the forum for finalizing a negotiation between the coalitions. The CAS is more suitable for reconciling a conflict between two individual actors. The route to the CAS is also normally a negative one: it is chosen if parties are unable to reach a friendly settlement. This is another essential element of negotiations, a spirit of constructiveness and a joint wish to end an unacceptable status quo.

## **Conclusion**

In this chapter the stakeholders in the football sector have been placed in a football policy subsystem composed of a sporting autonomy coalition and a football business coalition. The sporting autonomy coalition seeks to diminish the influence of European Union law on the governance of the football sector. FIFA and UEFA are the actors in this coalition. The actors

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<sup>304</sup> *Supra*, *White Paper on Sport*, p. 157.

of the football business coalition have in common that they are involved in industrial relations as they represent employers or workers. The coalitions have opposite beliefs and the search for compromise and legal certainty has led to a status quo in which the rival coalitions have no more options to exploit due to the lack of resources or to the inability to enter into new venues. The actors may also, alternatively or in addition, consider the status quo unsatisfactory, time consuming, or expensive. Therefore, within the football international football sector, there is a deadlock as the actors are able to impose almost unlimited financial burden on each other while in the meantime the threat of litigation remains.

In order to find a compromise the interests of the parties could be brought together in a forum that is prestigious enough to force them to participate and that is dominated by professional norms. The European Commission and the CAS have been analysed but both institutions cannot act as a professional forum. The Commission has a role more connected to that of a policy broker and the CAS is an arbitration tribunal that does not grant generally binding outcomes of disputes. Therefore, if both institutions are used as fora, the threat of litigation and thus legal uncertainty remains.

In its White Paper the European Commission has promoted Social Dialogue as a source for the discussion of challenges between employers and athletes.<sup>305</sup> With the lack of success of both fora described above, the remaining chapters explore the potential of Social Dialogue as a potential forum for reaching an agreement between the coalitions that leads to legal certainty. In the following chapter the background of Social Dialogue will be examined before the thesis explains of how Social Dialogue operates, and can continue to operate, within professional football.

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<sup>305</sup>European Commission (2007), *White Paper on Sport*, COM(2007) 391 final, Brussels, 11 July 2007.

## **CHAPTER FOUR**

### **European Union Labour Law and European Social Dialogue**

#### **Introduction**

The previous two chapters have highlighted that legal uncertainty characterizes the European professional football sector and that rival coalitions are in a position of deadlock. It is also clear that the relation between a player and a club in European professional football can be characterized as employer and employee one, and the sector can be regarded as a truly European labour market. In the search for a possible forum that could introduce legal certainty within professional football, the thesis will now further explore the viewpoint that the sector is a labour market or industrial sector. In many European industrial sectors the existence of a Social Dialogue is a common feature. The European Commission has encouraged the social partners in sport to pursue a Social Dialogue to discuss issues that are of common concern to employers and workers. The main aim of the following two chapters is to assess whether a Social Dialogue, under the umbrella level of the EU, could serve the football sector as a source for the creation of legal certainty. The European Social Dialogue (ESD) will be embedded in the greater framework of European labour law. First, the evolution of EU labour law will be presented. Second, the focus will be on the European Social Dialogue, the preconditions for a Social Dialogue and the functioning of the ESD as a legal instrument. By doing this, the introduction of the application of the Social Dialogue in professional football will be better explained in Chapter 5.

#### **Evolution of EU labour law**

The main purpose of the creation of the European Economic Community (EEC) was to secure peace by means of economic cooperation. The primary aim was to create a well-functioning common market with a free trade for goods, services and production factors within the borders of the territory of the EEC. Connected to the functioning of a common market is the movement of labour; a free economic market requires an efficient allocation of labour. This notion turned out to be the starting point for EU labour law as we know it today. However, in the period before the signing of the 1957 Treaty of Rome, it was thought that economic integration would create a spill-over effect to social and labour policy. The functioning of the

common market and the consequential economic growth would ensure an optimum allocation of resources and it would bring about a raised standard of living for the workers in the EC.<sup>306</sup> This 'laissez-faire perspective,<sup>307</sup> combined with the general view of the Member States that social policy and labour law was a specific territory for the national Member States to preserve the integrity and political stability of their respective political regimes, led to little pressure for harmonisation of labour laws at the start of the EEC. The lack of pressure to harmonize was reflected in the Treaty of Rome, which contained a Title on Social Policy that only stimulated Member States to improve social conditions of workers and the standard of living by means of harmonisation. It did not contain any direct enforceable right for citizens. The provisions related to social policy that were to be included in the Treaty of Rome were all rather limited in scope, the only exception being Article 119 concerning equal pay for men and women. This article was addressed to the Member States and contained some substance for concrete action. The other social provisions were Article 117 (agreement upon the need to improve working conditions and standard of living for workers and to make possible their harmonisation while the improvement is being maintained); Article 118 (the promotion of close cooperation between the Member States and the coordination of action in all social policy fields); Article 121 (implementation of common measures, in particular as regards social security for migrant workers); Article 122 (requiring the Commission to include a chapter on social developments in its annual report to the European Parliament) and Article 128 (the requirement for the Council to lay down general principles for implementing a common vocational training policy).

The lack of a motivation for harmonizing social policy did not impede the creation of the pillar for the evolution of EU labour law: the free movement of workers. Prior to the signing of the Treaty of Rome the ministers of foreign affairs issued the important Spaak report.<sup>308</sup> In this report it was stressed that, although limited action was needed in the field of social policy in order to create a well-functioning common market, the free movement of workers needed to be regulated. The Spaak report recommended that the right of free movement supposed that a worker should have the same rights and conditions as the nationals of the host state to take up and pursue employment in another Member State including the right to legally reside in the

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<sup>306</sup> Szyszczak, E. (2000), *EC Labour law*, European Law Series, Longman, Harlow, p. 6.

<sup>307</sup> Ibid.

<sup>308</sup> Rapport des Chefs de Délégations, Comité Intergouvernemental, 21 April 1956. The complete text of the report can be found at: [http://aei.pitt.edu/996/1/Spaak\\_report\\_french.pdf](http://aei.pitt.edu/996/1/Spaak_report_french.pdf) (*Spaak report*)

host state if employment was found.<sup>309</sup> These recommendations were introduced into the Treaty and laid down in the articles 45-48. In connection with Article 123, the establishment of the European Social Fund, these articles facilitated the employment and geographical and occupational mobility of the workers.

As mentioned earlier, for the first years after the Treaty of Rome in 1957 it was clear that European labour law was based on an economic model. The precedence of economic objectives over social objectives led to a two-tiered approach. These developments were contrary to the usage on the national level of the Member States where economic and social policy were mostly interlinked. The EEC prospered in economic terms but the social situation of the workers was downgraded and with the lack of an institutional basis for concrete action the Member States ran the risk of destabilizing their own national systems. Even though the Commission recognised that the future of the EEC would be judged not only on economic prosperity but also on social progress,<sup>310</sup> little activity came forth of the period after 1957. Only the free movement of labour served as a basis for law making activity, more specific the provisions of secondary law by means of Council Regulation 1612/68 on free movement of workers.<sup>311</sup> It was not until the 1970s that a change in this separation of economic and social approach came to the surface.

### ***The 1970s***

The end of the 1960s and the beginning of the 1970s were characterised by social unrest in the EEC caused by a unparalleled growth between social standards and economy and the consequences of the oil shocks of 1970.<sup>312</sup> It can be said that this collective feeling marked the turning point for social Europe. The realisation that Europe was on the eve of change became clear to the public in the period before the accession of three new Member States in 1973. On this day the heads of the governments of the EU Member States, gathered in Paris, stressed in a communiqué that vigorous action in the social sphere was to them as important as achieving economic and monetary union with participation of both sides of the industry in economic and

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<sup>309</sup> Supra, *Spaak Report*, p. 19-10 and 60-1.

<sup>310</sup> As noted in the first general report on the activities of the Community, 17 September 1958.

<sup>311</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, Official Journal L 257, 19/10/1968 p. 0002 – 0012.

<sup>312</sup> Although there does exist some academic debate about the exact turning point, see Nielsen, R., and Szyzszak, E. (1997), *The Social Dimension of the European Union*, Copenhagen Business School Press, p. 25.



social decisions.<sup>313</sup> Almost simultaneously the European Court of Justice judged in the famous *Defrenne* case,<sup>314</sup> dealing with sex discrimination, that the equal pay provision of Article 119 EC “forms part of the social objectives of the Community, which is not merely an economic union, but at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of the people of Europe...”<sup>315</sup>

The political change of viewpoint and the push of the ECJ towards workers protection earmarked the fact that the EEC was not reaching its objective of creating a social Europe by means of a laissez-faire approach in the social field. Mere incentives for social policy based on economic integration spill-over led to social suffering for individuals as well as companies.

Social action was necessary to give the EEC a “human face”.<sup>316</sup> The European Commission responded to these developments by drafting a Social Action Programme (SAP) in 1974. The SAP involved more than 30 measures to be adopted in the social field. However, these measures could be embedded within the three main objectives: the attainment of full and better employment in the Community, the improvement of living and working conditions, and the increased involvement of management and labour in the economic and social decisions of the Community and of workers in companies. The SAP was the starting point for intense legislative action related to social aspects.<sup>317</sup> The word “related” opposes the idea that direct social legislation could be drafted and implemented in the EEC. In fact, legislation could only be directly related to employment law and not (yet) to a broader social sphere as envisaged by the 1973 communiqué. The reason for this was that harmonisation of laws in the field of labour was only possible under, or with reference to, Article 100 of the EC Treaty, hence if the establishment or functioning of the common market was in question. It is arguable that this change in the development of European Labour law of the 1970s brought a new model for legal policy to light, that contained social elements as an integral part of the establishment and

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<sup>313</sup> According to the Heads of State: “*vigorous action in the social sphere is to them just as important as achieving Economic and Monetary Union. They consider it absolutely necessary to secure an increasing share by both sides of industry in the Community’s economic and social dimension*” EC Bull. 10/972 P.s 6 and 19.

<sup>314</sup> *Defrenne v. SABENA* (Case 43/75) [1976] ECR 455

<sup>315</sup> *Ibid*, par. 10.

<sup>316</sup> Although there does exist some academic debate about the exact turning point, see Nielsen ,R., and Szyszczak, E. (1997), *The Social Dimension of the European Union*, Copenhagen Business School Press, p. 25.

<sup>317</sup> Barnard, C. (2006)., *EC Employment Law*, Oxford University Press, p. 9.

functioning of the common market.<sup>318</sup> In addition, due to the fact that initiatives that touched upon social issues needed to be adopted under general Treaty bases, it was ensured that Member States kept control over their national employment law systems; the bases for legislation required unanimous agreement of the Member States.

However, the 1970s contributed to the development of EU labour law by passing three important directives: on the approximation of laws of the Member States relating to the principle of equal pay for men and women (75/117/EEC); on the approximation of laws of the Member States relating to collective redundancies (75/129/EEC) and the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (77/187/EEC). The directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion of working conditions (76/207/EEC) was based on Article 235 EC Treaty.

By the end of the 1970s the end of a prosperous time of harmonisation reached its end. The expansion of EU labour law stagnated due to recession, high unemployment, competition of the unregulated labour markets of the Far East. These developments increased the motivation to deregulate labour markets and to introduce more flexibility in relation to workforce. The start of the 1980s were characterised by stagnation in the development of EU labour law.

### ***Thatcher vs. Delors***

The British Prime Minister Margaret Thatcher was the personification of neo-liberalism in the EEC of the beginning of the 1980s. She advocated a reduction of socio-political intervention, which she argued was harmful for enterprises in industrial competition with the US and Japan, where there were less rigid social and working standards but stronger economies than in the EEC.<sup>319</sup> As the Member States had a veto right concerning social, or socially connected, legislation, the European social movement came more or less to a standstill. However, the British influence appeared to have a French counterpart in the form of President Mitterand. In contradiction to the British perspective, the head of the French government promoted the idea of a European Social Area and submitted this as a memorandum to the European Council.<sup>320</sup>

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<sup>318</sup> Fuchs, M. (2004), *The bottom line of European Labour Law (part 1)*, The International Journal of Comparative labour law and industrial relations, Summer 2004.

<sup>319</sup> Kenner, J. (2003), *EU Employment Law*, Oxford, 2003. p. 71.

<sup>320</sup> Hervey, T. (1998), *European Social Law and Policy*, Longman, Harlow, p. 20.

Mitterand's intention was to improve the cooperation between the social partners at Community level; the advancement of employment opportunities by the Community and an improvement in information and consultation procedures in the field of social protection. These views and recommendations appeared to be largely similar to the objectives set out in the 1974 SAP and it did not take a long time before these recommendations were put into practice. In 1984 the newly appointed European Commission was headed by Mitterand's protégé, Frenchman Jacques Delors. One of his most important activities was the introduction of the Single European Act (SEA) in 1986.<sup>321</sup>

### ***The Single European Act***

In 1986 the contours of the Community became more defined as the first concrete steps towards the Single Market were taken. The Single European Act (SEA) had as its most important goal the creation of an area without obstacles for the free movement of goods, people, services and capital. By the end of 1992 this goal needed to be attained and the liberalization of trade would eventually lead to a new impulse for the economic growth of the Community.<sup>322</sup> At first sight this seemed to be the only element that would have consequences for social development of the Community: a growing economy leading to more jobs. However, a more detailed look at the SEA shows that, at least, three landmark modifications were introduced. With the SEA the Social Dialogue was promoted by Delors.<sup>323</sup> Both sides of the industry were involved in talks on how to improve the involvement of the Social Partners in the social development of the Community. Secondly, the SEA reformed the Communities structural funds. One of the beneficiary areas of these structural funds is social and economic cohesion within the Internal Market, the funds that could be liberated proved to be a helpful for the development of Community labour market policies. The third innovation, however, turned out to be the most significant: the extension of the instrument of qualified majority voting to include Article 118a EC Treaty (now amended article 153 TFEU) to adopt measures on health and safety of workers. Although this amendment only introduced the possibility to impose minimum harmonisation standards on the Member States, it had the important and revolutionary consequence that the veto right of the Member States concerning changes in

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<sup>321</sup> Supra Nielsen, R., and Szyszczak, E. (1997), op.cit. p. 29.

<sup>322</sup> In general the European Union's website informs about the Single European Act and other treaties: [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_singleact\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm)

<sup>323</sup> Supra, Szyszczak (2000), op.cit., 9.

social policy of the EU on many social issues disappeared.<sup>324</sup> This was especially of influence for the position of the UK, whose standpoint concerning social harmonisation had caused a standstill for social Europe. The circumvention of the UK's veto power made that Article 118a (153 TFEU) was used as the soil for three directives in the following years.<sup>325</sup>

Nevertheless, the main focus of the SEA of 1986 was economic growth and the opening of the market. The social benefits of this objective were, at first sight, less clear than the obvious danger of the SEA: the fear for unemployment due to the shift of the production and the workforce to lower cost countries. It was for this reason that Delors stressed the importance of social cohesion in order to convince the citizens to support the SEA.<sup>326</sup> He shared the vision of Mitterand, he was convinced that social improvement and economic development could perfectly co-exist and evolve in the same pace. There was a need for a true European Social Area.

This vision coincided with political developments at that time which put pressure on notions of solidarity and that viewed social welfare as a collective activity rather than the responsibility of individuals, and social citizenship, the normative claim that egalitarian provision of welfare needs is superior to individual neo-liberal provisions.<sup>327</sup> It had to be made clear that Europe exists for its citizens, and not the other way round. It was the time for “a People's Europe”, not surprisingly also the title of the influential Adonnino report.<sup>328</sup> To stress these developments all the Member States, except the UK, signed a Community Charter of Fundamental Social Rights in 1989.

The Social Charter contained 26 rights which had to be implemented through an Action Programme. The legal status of the Social Charter has never been very clear. It can be characterized as a form of soft law, a moral obligation for the Member States to respect these social rights. It has therefore been characterised as a “social wish list”<sup>329</sup> and a bitter failure.<sup>330</sup> However, the Charter and its attached Action Programme were useful in refocusing labour law issues around social / fundamental rights issues and the starting up of a dialogue on

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<sup>324</sup> Supra, *Barnard* (2006), op.cit., p. 12.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Supra, *Hervey* (1998), op.cit., p. 10.

<sup>328</sup> The Adonnino Report, *A people's Europe: Reports from the ad hoc committee*, Bull. Supp 7/1985, P. 14.

<sup>329</sup> Supra *Barnard* (2006), op.cit., p. 13.

<sup>330</sup> Vogel-Polsky, E., (2013), *What future is there for Social Europe following the Strassbourg Summit?*, Industrial Law Journal, Vol. 19, p. 65.

labour law intervention at the EC level after a decade of stagnation.<sup>331</sup> The Action Programme did create a boost for social Europe. The legislative result of the Action Programme was seventeen directives, from these seventeen, six dealt with direct labour law issues, where the others mainly dealt with health and safety in the workplace. As the directives were to be based on the EC Treaty the outcome was also binding for the UK.<sup>332</sup>

### ***The 1990s: From Maastricht to Amsterdam, Lisbon and Nice***

The recognition of the principle of subsidiarity and the creation of the Economic and Monetary Union (EMU) were the biggest changes that were visible after Maastricht; the first steps towards a single currency were taken and the economic tests for the Member States came into force. However, the Maastricht Treaty of the European Union also introduced a change of focus as social aspects became much more identifiable in the new Treaty. The Treaty came at a time in which there was, again, a high unemployment rate and a fear amongst the Member States for uncontrolled inflationary growth. In addition, it was the end of the cold war and a reunification of Eastern and Western Europe came in sight together with the probability of a two-speed process of integration.<sup>333</sup> The Community's response to these fears was reflected in Article 2 EC: "*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.*" Included in the new additional activities of the Commission were the policies of Article 3 in the 'social sphere comprising a European Social Fund'; 'the strengthening of economic and social cohesion' and a 'contribution to education and training of quality'. A budgetary boost by the Member States of the financial resources of the EU made that these new activities could be put into practice soon after the implementation of the new Treaty.

Other changes that were introduced by the EU Treaty and that influenced the development of EU labour law were, besides the abovementioned articles, changes to the titles on education,

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<sup>331</sup> Supra , Szyzcsak (2000), p. 13.

<sup>332</sup> Ibid.

<sup>333</sup> Supra Barnard (2006), p.16.

social policy and vocational training; where the Community was given (restricted) competence.

These changes were not included integrally in the new Treaty due to the reluctance of the UK to implement these social changes. The UK's positioning in the debate around the acceptance of the Treaty endangered the ratification of the Treaty as a whole. In order not to jeopardize the next landmark step of the Community a 'solution' was found in placing the social policy initiatives in a separate Protocol and Agreement, Social Policy Agreement (SPA) to the Treaty.<sup>334</sup> For the first time an agreement was reached by the twelve Member States that could only lead to binding agreements that were applicable to eleven Member States, the UK negotiated an opt-out for any initiative coming forth of the Social Chapter and for the EMU. The legal status of the SPA stayed unclear as the Agreement was attached to the Protocol and the Protocol was attached to the agreement, this making it part of the Treaty and thus part of EU law.

As regards the contents of the SPA, three significant results came forth out of the SPA. For the first time the concept of citizenship was introduced in the Treaty making the approach more individual and allowing the citizens rights and duties, such as the right to free movement in the EU and the right to vote in any European Member State's local elections.

In Article 2 of the SPA the Community's competence in the social field was broadened, and more importantly, qualified majority voting was introduced for a number of new areas: working conditions; information and consultation of workers; equality between man and women with regard to labour market opportunities and treatment at work and the integration of those excluded from the labour market. In the second paragraph of this article a decision procedure on the basis of unanimity for the Council of Ministers was introduced for various social policy areas: social security and protection of workers; protection of workers when their employment contract is terminated; representation and collective defence of the interest of workers and employers, including co-determination and conditions of employment for legally resident third country nationals. Three areas were not explicitly mentioned as a field of competence for the EU: pay; the right of association and the right to strike or impose lock-outs.

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<sup>334</sup> *Supra Barnard* (2006), p.17.

The third major change, and for this purpose the most important one, was the new role that was envisaged for the Social Partners. For the first time the Community attributed powers to bodies not directly integrated within the Community policy-making framework. This process will be outlined in detail later.

Even if the developments after Maastricht seem positive, it was not a very active period when it comes to legislative activity; only four Directives were concluded. The fact that the UK did not participate in any activity in relation to social policy had a considerable impact on this. The situation was about to change at the start of 1997 when the UK opted back into the Social Chapter due to the change in the domestic government to labour.<sup>335</sup> The following developments in the social sphere were now applicable to all 15 Member States. It was the time when the influence of the EMU could be noticed, Rhodes described this period after the introduction of the EMU “welfare without work”: expensive social welfare programmes in the Member States unsupported by high levels of employment which risked putting the EMU countries in breach of the economic criteria that were agreed upon.<sup>336</sup> The consequence for the social situation and the evolution of EU labour law was that the single currency and the open market in the EU made that, although labour policy and employment law was still a domestic field of activity and falling under the subsidiarity principle, the social policy in one Member State became relevant for the other states. The constraints and interdependencies generated by EMU pointed to the need for some form of transnational policy co-ordination in the field of employment.<sup>337</sup>

The Amsterdam Treaty took these aspects into consideration and operated as a source for change. The Amsterdam Treaty was able, due to the reunification of the EU, to merge the two previous pillars of labour law in the EU: the SPA and the articles dealing with labour law in the EC Treaty. The Treaty of Amsterdam placed the result of these two documents in a new Title in the Treaty ‘The Union and the Citizen’. Another major change was the implementation of the Employment Title in the Treaty. The objective of Article 3 (now

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<sup>335</sup> *Supra Barnard* (2006), p. 22.

<sup>336</sup> Rhodes, M. (2005), *Employment Policy: Between Efficacy and Experimentation*, in Wallace, Wallace and Pollack (eds.) , *Policy making in the European Union* , Oxford University Press, 2005, p. 281. Also, on impact of EMU in British employment law: Rhodes, M.(2001), *The Political Economy of Social Pacts: ‘Competitive Corporatism’ and European Welfare Reform*, in Pierson, P. (2001), *The New Politics of the Welfare State*. Oxford University Press, p. 165-94.

<sup>337</sup> *Supra, Barnard*, p. 25.

amended and Article 9 TFEU) of the Treaty was amended in the sense that a new task, ‘a high level of employment and social protection’, was added. The objectives led to activity based on article 145 of the Treaty. This article states that the Member State will work towards a coordinated strategy for employment. Articles 145-149 further defined this strategy which became known as the European Employment Strategy. It marked a shift from the protection of the individual worker towards the need for a high rate of employment in Europe; full participation of the citizens and guaranteeing equal opportunities for all. Connected to this new approach is also a new form of stimulating and creating policy. The focus on the legislative process disappeared and has made way for the so-called open method of cooperation (OMC). The OMC is characterized by focussing on the coordination of labour markets and employment policies.

The OMC was one of the most important topics to be fine-tuned at the 2000 Lisbon summit. The goal of the Lisbon summit was to make the EU the most competitive and knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion. The social objectives are directed towards the full employment in the EU. One of the means of reaching these objectives was through the OMC, an approach focused on benchmarking, best practices, and exchanges of experiences. It is a soft law instrument and can be seen as an ideal tool to promote social policy creation in the EU: the Member States’ power is not reduced in the field of social policy but the focus is on the harmonisation of the laws. This marks one of the most important aspects of the Lisbon summit, the social aspects and the shift away from the community method of harmonisation and including a wider range of actors in the sphere of policy making. These landmark changes are still in evolution at this moment. The subsequent Nice Treaty change little to the situation described above.

The more significant social impact of the Nice Treaty was the adoption of the Charter of Fundamental Rights.<sup>338</sup> This Charter served as a codification of existing fundamental (social, political, economic and civil) rights and brought them under one European Union umbrella. It stressed the importance of the protection of fundamental rights in the Union as a “founding principle of the Union and an indispensable prerequisite for her legitimacy”.<sup>339</sup> The Charter

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<sup>338</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF> .

<sup>339</sup> Article 6.1 of the Charter of Fundamental Rights.



did not have any legally binding effect at the time of the adoption during the Nice Treaty amendment, as it did not intend to create new rights.<sup>340</sup>

However, the most striking novelty<sup>341</sup> on the social and employment level that was introduced with the adoption of the Lisbon Treaty in 2009 was the conversion on the status of the Charter of Fundamental Rights.<sup>342</sup> The Lisbon Treaty granted the Charter the same rights as the Treaty.<sup>343</sup> These rights are primarily vertical rights, placing rights and obligations on EU institutions and Member States *vis-a-vis* individuals, however, due to status of the European Court of Justice as an EU institution the application of the Charter in judgements of the ECJ may lead to some form of horizontal effect.<sup>344</sup>

The time between the Nice Treaty and the Lisbon Treaty has been characterized by the failure to meet the expectations as laid down in the 2000-2010 Employment Strategy. By the time of the mid-term revision it already became clear that the objectives were not going to be reached in time.<sup>345</sup> The same targets<sup>346</sup> of the Employment Strategy remained in 2010 but the EU's new ten year strategy, EU 2020, included them slightly different, focusing not on employment protection but on employment creation. The new strategy is focused on overcoming the deep financial crisis in which the European Union finds itself, but it also targets new objectives of smart growth, sustainable growth and inclusive growth.<sup>347</sup>

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<sup>340</sup> Preamble to the Protocol: "Whereas the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles".

<sup>341</sup> Another novelty was the explicit mentioning of the Social Partners instead of "management and labour" in Article 152 TFEU, thus stressing the recognition of the Social Partners in the policy making process concerning EU social harmonisation.

<sup>342</sup> The Charter makes the rights more visible but it still is a concretization of already existing rights. The UK and Poland both wanted to "opt-out" from the application of the Charter in order to express that the intervention of the EU did not go so far as to undermine fundamental rights on the national level of these two Member States. Poland and the UK agreed in Protocol 30, Article 2 that "*To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom*"

<sup>343</sup> Article 6 (1) TFEU.

<sup>344</sup> To this effect an analogue interpretation of the case *Kücükdeveci v Swedex GmbH and Co KG* (Case C-555/07) (2010) [2010] IRLR 346 could be possible. In this case an employer discriminated his employee on the grounds of her age. In this case there were contradicting provisions of national law and the Court appears to suggest that general principles of law may have a certain form of horizontal effect.

<sup>345</sup> Barnard, C. (2012), *Employment law, (fourth edition)*, Oxford University press, p.25.

<sup>346</sup> The EU intended to reach an overall employment rate of 70 per cent by 2010, over 60 per cent for women and an employment rate for men and women between 55-64 of 50 per cent. See also Barnard, C., *Employment law, (fourth edition)*, Oxford University press, (2012) p. 24.

The EU2020 objectives and the Charter may influence social policy and the evolution of EU labour law in the coming years. According to Barnard<sup>348</sup> the EU2020 strategies<sup>349</sup> have had an impact for five reasons: it was the EU's next big project after the Internal Market (1992), the EMU (1999) and the big bang enlargement (2003-2005), but now with a more social aspect as contrasting the economic aspects; the OMC has been introduced as the method to replace the classic Community Method on harmonisation; in this respect more social stakeholders are allowed to improve the legitimacy of governance within the EU. Not only the role of the Social Partners is enhanced, other stakeholders from civil society more generally are included; the shift from employment protection to employment creation and last but not least, the concept of 'flexicurity': creating better jobs and more security for the vulnerable individuals on the labour market while taking into consideration the changing ethos in the labour market.

The Charter may have its greatest importance in providing the Court with a foundation for applying or referring to fundamental rights and thus to reconcile social rights with economic objectives.<sup>350</sup>

### **Social Policy and Law Making: Diversity and Flexibility**

The translation of social policy into EU legislation is based on the competence laid down in 153 of the TFEU.<sup>351</sup> According to Sections 1 and 2 of 153 TFEU the Union has the power to employ the ordinary legislative procedure<sup>352</sup> to use minimum standards Directives to support and complement the activities of the Member States, after consulting the Committee of the Regions and the Economic and Social Committee, in the following areas:

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<sup>348</sup> *Supra*, Barnard (2012).

<sup>349</sup> *The European Union is working hard to move decisively beyond the crisis and create the conditions for a more competitive economy with higher employment. The Europe 2020 strategy is about delivering growth that is: smart, through more effective investments in education, research and innovation; sustainable, thanks to a decisive move towards a low-carbon economy; and inclusive, with a strong emphasis on job creation and poverty reduction. The strategy is focused on five ambitious goals in the areas of employment, innovation, education, poverty reduction and climate/energy.* [http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/priorities/index\\_en.htm](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/priorities/index_en.htm)

<sup>350</sup> Charter of Fundamental Rights.

<sup>351</sup> The predecessors of Article 153 TFEU were Article 118a and Article 153 of the Nice Treaty. See further Barnard (2012) for a description on the eVolution of these Articles and the law making competence of the EU.

<sup>352</sup> Article 294 TFEU.

- (a) improvement in particular of the working environment to protect workers' health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

There are general limitations on the authority of the Union to legislate under Article 153 (2)<sup>353</sup>, one concerns the fact that the Directive must seek to avoid to impose unnecessary constraints that would impede the creation and development of SME's and that the legislative efforts only entail minimum standards for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Other boundaries of EU competence are given by the frontiers provided by the principles of subsidiarity<sup>354</sup> and proportionality.<sup>355</sup> Subsidiarity limits the reach of EU legislation in the sense that it should leave space for the national legislators of the Member States to use their national measures to reach the objectives envisaged by EC policy makers. If the national legislator cannot achieve the objectives proposed by the Community action then the Community legislator is allowed to continue the legislative efforts. The principle of proportionality is centred around the Articles 5(4): the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty. In this case the Union can only take action if the test of effectiveness

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<sup>353</sup> Barnard (2012) p. 55.

<sup>354</sup> Subsidiarity in general: A.Toth (1994) *A legal Analysis of Subsidiarity*, in D. O'Keeffe and P. Twoney (eds), *Legal issues of the Maastricht Treaty* Chancery: London. Also see in the same Volume essays by J. Steiner and N. Emiliou and N. Emiliou, (1992), *Subsidiarity: An effective barrier against the "Enterprises of Ambition"* , ELREv. 383.

<sup>355</sup> European Commission (2007), *Commission White Paper* COM(94)333, 11

and scale are satisfied and any of the taken measures is proportionate. The Commission introduces three questions that need to be answered in order to assess if the proportionality of the action is in balance with the outcome:

- What is the Union dimension of the problem?
- What is the most effective solution given to the means available to the Union and the Member States?
- What is the real added value of common action compared with isolated action by the Member States?

The objective of legislation on the basis of Article 153 TFEU is harmonisation in the field of social policy and employment law. However, the labour regulatory landscape of the Member States is very diverse and in order to reach a common ground based on harmony the right instrument needs to be selected. In order to be successful the instrument should be flexible enough in its output. The instrument that is primarily used as the legislative driving force for minimum harmonisation is the Directive.<sup>356</sup> The Member States maintain their ability to detail the implementation of the minimum standards (floor of rights) according to the needs of its national labour policy and the national method of operation. The Directive itself can contain a ‘flexibility’ clause in the sense that it exempts the obligatory implementation of its content if a regulation respecting the general principles of the Directive is already in force in the Member State concerned and the two regulatory frameworks can be operational together in a ‘spirit of cooperation’.<sup>357</sup> Also, especially due to clashes between the Anglo-Saxon and Romano-Germanic jurisdictions, some Member States are allowed more time to implement a Directive.

The second method of answering to the needs of diversity by means of a flexibility approach is the use of soft law. The majority of the EU legislation in the social policy field under the 1974 and 1989 initiatives of the Social Action Programmes was legally binding. From 1995 the Action Programmes contained more measures that were persuasive rather than coercive in nature. The Commission supported a new view that stressed that the recourse to the most

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<sup>356</sup> The practice of using Directives to harmonize social policy was endorsed by the Council Resolution on Certain Aspects for a European Social Policy: “Minimum standards constitute an appropriate instrument for achieving economic and social convergence gradually while respecting the economic capabilities of the individual Member States. They also meet the expectations of workers in the European Union and calm fears about social dismantling and social dumping in the Union”.

<sup>357</sup> *Barnard* (2012) p. 64.

binding instruments should only be made as a last resort.<sup>358</sup> Eventually the attempts to apply soft law measures in order to obtain the right balance between reaching policy objectives despite of the national diversity in social systems, culminated in the overall support for the OMC as a policy instrument for EU harmonisation in the social field, as a pillar for the EU 2020 programme.

A last source of flexibility stems from the role of the Social Partners in the European Union. In essence it can be said that the social partners have obtained an extensive responsibility as a potential co-legislator and that the instruments provided to them support a large degree of initiative and flexibility. As the true connoisseurs of social and labour issues, due to their day-to-day involvement on the ‘work-floor’ the Social Partners are able to touch upon the specificities and target the right instrument and method to implement EU policy. The role of the Social Partners and the Social Dialogue will be discussed next.

### ***Social Dialogue and Collective Bargaining under the EU Treaty***

The term ‘Social Dialogue’ does not have a uniform definition as its meaning differs in the various jurisdictions in which it exists.<sup>359</sup> In a broad sense, Social Dialogue can be described as all sorts of bipartite or tripartite discussions concerning labour problems involving both sides of the industry and governmental authorities aimed at wider understanding, resolutions, preparing or implementing policies, which may lead to binding agreements. A narrower meaning is that the term Social Dialogue entails all discussions and negotiations between both sides of the industry with a view to conclude binding agreements.<sup>360</sup> For the purpose of this research the meaning of the EU Social Dialogue will be based on the literal text of Articles 154 and 155 of the TFEU.

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<sup>358</sup> SEC(92) 1990 final. Cram, L., (1997) *Policy making in the EU: Conceptual Lenses and the Integration Process*, Routledge: London. Cram describes the Commission as a ‘purposeful opportunist’ in that it uses soft law measures among others to ‘soften-up’ the Member States, paving the way for the Commission’s preferred course of action should a ‘policy window’ open up.

<sup>359</sup> For example Eichhorst, W., Kendzia, M.J., Vandeweghe, B., (2011), *Cross-Border Collective Bargaining and Transnational Social Dialogue*, IZA Research report no. 38, July 2011, p. 17 et seq..

<sup>360</sup> For further information about the eVolution and the functioning of the European Social Dialogue in general, see amongst others: Barnard, C. (2006), *EC Employment Law*, Oxford University Press, p. 758 and further; Franssen, E. (2002), *The legal aspects of the European Social Dialogue*, Intersentia, Antwerp – Oxford – New York, Peters, S.M., Beltzer, R.M. (eds), (2013), *Inleiding Europees Arbeidsrecht*, Monografieën Sociaal Recht, Kluwer.

Article 154:

- 1) The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.
- 2) To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.
- 3) If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.
- 4) On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 153. The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 155:

- 1) Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.
- 2) Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2). In that case, it shall act unanimously.

On the basis of these articles the rights and powers of labour and management, the social partners, can be abstracted. Whenever the Commission comes up with the initiative to draft, revise or influence policy that is connected to social issues, it is compulsory for the Commission to consult management and labour on this. These consultations enable labour and management to leave their mark on the Commission's initiative in a two-stage consultation process. Management and labour will give their view on the Commission's initiative in the first stage, they have six weeks to prepare and submit their feedback. It might be possible that management and labour advise the Commission to withdraw the initiative in this stage or to

inform about the possible direction or the feasibility of the proposal in general. In a second stage a consultation on the actual content will follow and management and labour are allowed to give their opinion and or recommendations. However, the right that is given to both sides of the industry goes much further; management and labour have the power to intervene and the power of direct initiative.

The power to intervene means that management and labour can take over the negotiation process of the Commission and draft their own agreement on the matter in question: 'bargaining in the shadow of the law'.<sup>361</sup> The scope of their negotiations does not lie within the boundaries of the Commission's proposal. They may include in their negotiations every aspect that they deem necessary. The social partners have nine months to come to an agreement and present this agreement to the Commission, this procedure is limited in order for the social partners not to obstruct European Policy making. If social partners fail to agree in those nine months, or decide not to negotiate further, the Commission has to assess the situation and it can proceed with presenting its own proposal. In case of successful negotiations between management and labour the Commission will propose the result to the Council in order for the Council to take a decision. It then depends on the content of the agreement if the Council takes a decision with qualified majority or with unanimity. The consequence of this legislative path to agreements is that the result has an *erga omnes* effect. The decision of the Council takes the form of a directive. This aspect is even more interesting when one realizes that the social partners also have the right of own initiative to come to agreements. There is no clear definition on what may fall under an agreement in this context. It may entail joint statements, especially important as a form of 'soft law' or lobbying instrument, but also framework agreements. These agreements may then be implemented in the various member states.

Article 155 lists the two methods in which an agreement may be converted to the level of the Member States. One method is the way of implementation by means of procedures and practices familiar in the Member States. In practice this means that an agreement on the EU level will 'drip down' to the national level by means of implementation in a collective

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<sup>361</sup> Bercusson, B. (1992) 'Maastricht: A fundamental change in European labour law', *Industrial Relations Journal* Vol. 23, Nr.3, p.177-90.

bargaining agreement. Goerke and Piazzolo<sup>362</sup> are of the opinion that the likelihood that this form of implementation will be used is to be negligible. First, the incentives to pursue this option are small as *all* collective contracts would have to contain the same clauses to guarantee universal coverage. Second, the laws of only a few states<sup>363</sup> have provisions to extend agreements *erga omnes*, which could be used to apply bilateral agreements of the social partners to all employers and employees. This statement became more true after the “big bang” accession of 10 new Member States in 2004, Bulgaria and Romania in 2007 and Croatia in 2013, whose systems of industrial relations’ traditions increases the diversity in the European social landscape.<sup>364</sup>

In a similar method to the process described above, the social partners are able to negotiate about every topic that they deem necessary. However, the power of the social partners lies especially in the fact that the results of their negotiations may be converted into a directive. This conversion is only possible if the negotiation result contains elements that may be placed under Article 153 of the Treaty: improvement of the working environment and conditions to protect workers’ health and safety; information and consultation of workers; equality between men and women with regard to labour market opportunities and treatment at work; and the integration of persons excluded from the labour market. These are the elements that are able to be passed by the Council on the basis of qualified majority voting. Article 153 sub 3 includes other issues that can be part of agreements but that need unanimity voting by the Council: social security and social protection of workers; protection of workers when their employment contract is terminated; representation and collective defence of the interests of workers and employers, including co-determination; conditions of employment for third country nationals legally residing within Community territory, as well, as financial contributions for the promotion of employment and job creation. There are four issues which are explicitly excluded from the range of negotiation issues: provisions concerning payment;

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<sup>362</sup> Goerke, L. and Piazzolo, K. (1998), *Decision making under the EU’s Social Chapter*, International Review of Law and Economics, Elsevier, Vol. 18, Nr. 2, June 1998, p. 217-237.

<sup>363</sup> For example in the Netherlands a collective bargaining agreement on a sector level can have an *erga omnes* effect after the procedure of *algemeen verbindend verklaring* via the legal route of the *Wet algemeen verbindendverklaring van CAO’s*. Even non associated workers are bound to (certain) elements concluded in the collective bargaining agreement. Also in Belgium such an extension is possible, see Devos, M. (2003), *The legal framework for collective bargaining: Belgium*, in: Blanpain, R. (ed.), *The Actors of Collective Bargaining, a world report: XVII World Congress of Labour law and social security, Montevideo, 2003*, Bulletin of comparative labour relations, Vol. 52, p. 65.

<sup>364</sup> See also: Branch, A. (2006), *The Evolution of the European Social Dialogue towards greater autonomy: challenges and potential benefits*”, The international journal of comparative labour law and industrial relations, No. 21, p. 321-346.



the right to strike and the right to impose lock-outs. A quick look at these provisions show that the range of potential matters that could be the basis for a conversion of an agreement into mandatory laws is very extensive and the powers granted to the social partners gives them the status similar to that of legislators.

### ***Social Partners: Negotiations and Agreements***

Academic literature, as discussed below, has focused on the extent of the social partners' powers to create legislation that has an *erga omnes* effect. Also, in the case that the social partners do create legislations with such a binding effect, is there enough democratic legitimacy in the process of lawmaking in such a case?

As stated above, the social partners bargain in the shadow of the law. This process starts when the social partners are consulted by the Commission on the basis of Article 154 and decide to take over the negotiations from the Commission. On the contrary, when the social partners negotiate about topics coming from Article 153, initiated by themselves, there are questions about the role of the Commission, as the keeper of the Treaty and of the Council as the legislator. What is the influence of these institutions on the negotiation result of the social partners?

First, the Commission is obliged to assess the representativeness and the mandate of the social partners, and the legitimacy of the agreement. According to Goerke and Piazolo<sup>365</sup> the dominating legal interpretation of the Social Chapter is that the Commission is not granted discretion. This is also the opinion of the Economic and Social Council, because the procedure set out in Article 4 (now Article 153 TFEU) is not designed to seek the Commission's approval for a collective agreement, but rather to use the Community's legislative machinery to endow agreements with the legal standing that they otherwise would not have. In addition to this, Goerke and Piazolo<sup>366</sup> state that, there is no textual evidence contained in the Social Chapter that indicates that the Commission can assess the agreement in terms of the criteria listed in its communication. Also, the first draft for Article 4 of the Social Chapter contained the following clause: "where management and labour so desire, the

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<sup>365</sup> *Supra*, Goerke and Piazolo (1998).

<sup>366</sup> *Ibid.*

Commission *may* submit proposals to transpose the agreement referred to in paragraph 1 into Community legislation.” Because this optional clause (*may*) was replaced by a more restrictive clause (*shall*) in Article 4 Section 2, it is arguable that a limitation of the Commission’s discretion was intended. According to Goerke and Piazzolo<sup>367</sup> it is the general legal opinion that there is no doubt on the Council’s discretion because the general division of power between Commission and Council implies that the Council is not bound to the Commission’s proposal and is therefore not constrained by the social partners’ agreement. However, in that respect, the Social Chapter nor the Treaties contain rules in the case that a social partner agreement has been rejected. This implies that the Commission and the Council do not have the power of discretion.

As regards Commission or Council amendments to the social partner agreements, Goerke and Piazzolo mention that the Commission would not have the right to amend the agreement because the agreement would then no longer represent the social partners’ mutual view. In addition, the Council would also be bound to the agreement of the social partners. The Commission claims that, just like on national level, the Council is not allowed to amend such agreements. The amendment of these agreements would be in contrast with the principle of subsidiarity. The Council does have the right to reject a proposal in their view.

Keller and Sörries also state that according to the Commission the Council should not enjoy substantial rights of change and that it (the Commission) threatens to withdraw a proposal if the Council tries to change the agreement of the social partners.<sup>368</sup> Britz and Schmidt<sup>369</sup> judge on the basis of (old) Article 211(1)<sup>370</sup> of the Treaty that the Commission has as its duty to judge if an agreement is compatible with Community law and that it therefore has the right to reject an agreement to be forwarded to the Council. As regards the Council, Britz and Schmidt comment that the Council alone bears the political, as well as the legal, responsibility for Community law. Thus, it must be free to decide whether it wishes to grant the joint request of

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<sup>367</sup> Ibid.

<sup>368</sup> Keller, B. and Sörries, B. (1999), *Old wine in new bottles?*, Journal of European Social Policy, Vol. 9, 1999, p. 111-125

<sup>369</sup> Britz, G and Schmidt, M. (2000), *The institutionalised participation of management and labour in the legislative activity of the European Community: A challenge to the principle of democracy under Community law*, European Law Journal, Vol. 6, Nr. 1, 2000, p. 45-71.

<sup>370</sup> This Treaty Article has been replaced in the TFEU with the system of Articles 288-291 TFEU. In the new system the delegation of implementation powers from the Council to the Commission is made obligatory. See also: Samulenaite, J. (2010), *Delegation of powers in the EU before and after the Treaty of Lisbon: Comitology in the CCCTB*, Aarhus school of business, 2010, to be found online at: <http://pure.au.dk/portal/files/13512/visas.pdf> .

management and labour for the implementation of an agreement. Britz and Schmidt also argue that it seems that the powers of amendment are not available; it would undermine the right of autonomous negotiation granted to management and labour under Article 155.<sup>371</sup> Franssen<sup>372</sup> shares this view and adds that the status of the proposal would change if the Council could amend it; it would then be a Commission proposal that would be ‘sent back’ after amendment. The oddity would then be that the Commission would be forced to re-consult the social partners under article 153.

In conclusion, the Commission and the Council have limited powers to amend agreements between management and labour concluded on EU level. The Commission may only reject an agreement based on a marginal test concerning the legitimacy of the agreement. In addition, it seems unlikely that the Council would reject a proposal from the social partners. The important role that has been attributed to the social partners has been stressed, they can be regarded as external legislators. Barnard<sup>373</sup> gives four explanations and justifications for the involvement of the social partners which she distils from Community documentation regarding the emergence of the social partners as key actors in social policy. She addresses the issue of subsidiarity; the social partners are part of the interaction between the Community and the Member States in the social arena; effectiveness; legitimacy and democracy. The issue of legitimacy is closely connected to an important aspect of the Social Dialogue, namely representativity.

### ***Representativeness of Social Partner Organisations***

The European Commission has defined three criteria that social partner organisations need to fulfil before they can be admitted to the Social Dialogue.<sup>374</sup> The organisations in question must:

- *be cross-industry or relate to specific sectors or categories and be organised at European level;*

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<sup>371</sup> Supra, *Britz and Schmidt* (2000).

<sup>372</sup> Supra, *Franssen, E.* (2002), op.cit.

<sup>373</sup> Barnard, C.(2002), *The social partners and the governance agenda*, European Law Journal, Vol. 8, 2002, p. 80-101.

<sup>374</sup> European Commission (1993) *Communication concerning the application of the agreement on social policy presented by the Commission to the Council and the European Parliament*, COM (93) 600, Brussels.

- *consist of organisations which are an integral and recognised part of Member States' collective bargaining structures and are competent to negotiate agreements, in addition to being as far as possible representative of all Member States;*
- *have adequate structures to ensure their effective participation in the consultation process.*

In its 1996 Communication<sup>375</sup> the Commission added two more criteria dealing specifically with the Article 155 (2) agreements. The Commission needs to examine if those involved in the negotiation have a genuine interest in the matter and can demonstrate significant representation in the domain concerned. This indicates that an organisation active in one particular sector could not conclude an agreement that would lead to an *erga omnes* binding effect in another sector in which the organisation is not sufficiently represented. Franssen adds to the Commission criteria extra elements that in her perspective need to be respected.<sup>376</sup> According to her the membership of the European, as well as the national, organisations must be voluntary; the European organisations must have internal democratic decision making procedures; the European organisations must be mandated by their national affiliates to conclude European agreements and membership of the European organisations should exist in at least three quarters of the European Member States. Gilles<sup>377</sup> and Betten<sup>378</sup> argue that the representativity of social partner organisations should also be measured according to the amount of people that are covered by an 155(2) agreement converted into a Directive. The Court of First Instance (CFI) (General Court) added a similar criterion as a result of the UAPME case<sup>379</sup>. In this Case UAPME argued that, since it had been consulted in the 'informal' 154 consultation stage of a Directive concerning parental leave, it should have been invited to be involved in the negotiations that would formally lead to a proposal to the Council. The CFI stated that the Commission and the Council have to ascertain whether, having regard to the content of the 153 (2) agreement in question, the signatories, taken together, are sufficiently representative to justify the Council to turn a European agreement

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<sup>375</sup> European Commission (1996) Communication concerning the Development of the Social Dialogue at Community level, COM (96)448, Final.

<sup>376</sup> Supra Barnard (2012) p. 91.

<sup>377</sup> Gilles, T. (1999)., *Das Zustandekommen und die Durchführung von Sozialpartnervereinbarungen im Rahmen des Europäischen Sozialen Dialogs*, European University Studies, Vol. 2755, 1999, p. 295.

<sup>378</sup> Betten, L.(1998), *The Democratic Deficit of Participatory Democracy in Community Social Policy*, European Law Review, Vol. 23, Nr. 1, 1998, P. 32.

<sup>379</sup> UEAPME v Council of the European Union (Case T-135/96) [1998] 17 June 1998.

into a Directive.

In order to find out if a social partner organisation is representative the European Commission carries out a representativity check. In principle all the organisations that have been specified in the 1993 communication are able to negotiate an agreement, according to the Commission. As an extra check the Commission organises informal meetings with organisations that have not participated in the negotiations after an agreement has been reached. During this meeting the Commission invites the organisations to communicate possible defects in the agreement, such as the possible lack of representativeness. These organisations can influence the follow-up of the agreement in this manner.<sup>380</sup>

### ***Levels of Social Dialogue***

The Social Dialogue as anchored in the TFEU can take place at three levels. The intersectoral level, the sectoral level and company level. The intersectoral level is the umbrella level of the EU. It is a Social Dialogue on a generalist inter-professional level and it thus is the most important level of Social Dialogue, being the source for the most elaborate outcome of negotiations and the highest level of political influence.<sup>381</sup>

The intersectoral Social Dialogue entails various platforms for negotiation and action. Every year the Social Dialogue Committee gathers representatives from the cross-industry social partners in order to have an (informal) Social Dialogue. The meetings contain three sessions, one for each side of the industry and one plenary session. An outcome of these meetings could be the creation of specific working groups and the organisation of seminars on issues related to industrial relations. The Social Dialogue Committee is also responsible for the follow-up of the outcome of negotiations between the cross-industry social partners. Finally, an institutionalised basis for negotiation and a source for forward motions concerning the Social Dialogue are the regular Social Dialogue summits, headed by the president of the European Commission.

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<sup>380</sup> *Supra Barnard* (2012), Chapter 4.

<sup>381</sup> Elaborate information on the intersectoral social dialogue can be found at the website of the European Commission DG Employment and Social Affairs: <http://ec.europa.eu/social/main.jsp?catId=479andlangId=en>.

The intersectoral Social Dialogue includes six representative cross-industry organisations.<sup>382</sup> The European Trade Union Confederation (ETUC) represents workers across the industries at European level. ETUC was set up in 1973 and it includes 81 organisations from 36 European Countries, including all EU Member States, and 11 European Industry federations with some 60 million members. When it comes to issues related to the European Social Dialogue ETUC can take decisions by means of its executive committee when it is supported by 2/3 of its members. The 11 federations include the majority of European branch trade unions, which allow for some coordination across sectors.<sup>383</sup>

The Confederation of European Business (Businesseurope) was set up in 1958 and is the largest employers' organisation in Europe in terms of economic coverage. It includes 39 employers' associations from 33 European countries, including all EU Member States. It represents some 20 million businesses in Europe. Decisions are taken unanimously by the council of presidents.<sup>384</sup>

The European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP), set up in 1961, is an employers' association for public sector entities, networked businesses and in some countries local authorities. Decisions are taken by the general assembly.<sup>385</sup>

The European Association of Craft, Small and Medium Sized Enterprises (UAPME) represents over 78 member organisations including national cross-sectoral federations of Small and Medium Sized Enterprises federations and other European organisations representing small businesses. According to its own figures it represents more than 11 million businesses employing 50 million workers. After the abovementioned case before the ECJ UAPME reached an agreement with Businesseurope allowing it to take part in the European Social Dialogue.<sup>386</sup>

Eurocadres represents professional and managerial staff in Europe, in all branches of industry,

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<sup>382</sup> [http://ec.europa.eu/employment\\_social/social\\_dialogue/interprof\\_en](http://ec.europa.eu/employment_social/social_dialogue/interprof_en).

<sup>383</sup> To be found at the website of ETUC: <http://www.etuc.org/r/5>.

<sup>384</sup> To be found at the website of Businesseurope: <http://www.businesseurope.eu/content/default.asp?P.ID=582>.

<sup>385</sup> To be found at the website of CEEP:

[http://www.ceeP.eu/index.php?option=com\\_contentandview=sectionandid=7andItemid=55andc43417316a8c0dd b72ab1893be164a25=cd68ccff031967be5b4229e5ee0e21d](http://www.ceeP.eu/index.php?option=com_contentandview=sectionandid=7andItemid=55andc43417316a8c0dd b72ab1893be164a25=cd68ccff031967be5b4229e5ee0e21d).

<sup>386</sup> To be found at the website of UAPME: <http://www.ueapme.com/spiP.php?rubrique1>.

the public and private services and administrative departments. It is a member of the ETUC and has more than 5 million members.<sup>387</sup>

The European Confederation of Executives and Managerial Staff (CEC) is a professional organisation but it is independent of ETUC. It represents European branch federations and 17 national organisations uniting some 1.5 million executives and professionals in 14 EU countries.<sup>388</sup>

The sectoral Social Dialogue as we know it today evolved out of the first platform for negotiation between a European policy maker and the actors from a specific sector. The Treaty establishing the European Coal and Steel Community in 1952, contained an article dedicated to the setting-up of a Consultative Committee composed of an equal number of workers, producers, consumers and dealers of these industries.<sup>389</sup> The (executive) High Authority was obliged to consult the Committee whenever it concerned general objectives and programmes. After that, with the creation and evolution of the European Union and EU labour law, came the introduction of sectoral joint advisory committees in the 1960s. The purpose of these joint committees was to broadly assist the European Commission in the drawing up and implementation of Community Social Policy aimed at improving and harmonising living and working conditions in their respective sectors.<sup>390</sup> To this end the sectors were able to produce joint opinions and reports; carry out seminars and influence the Commission on their own initiative. Eventually these committees had to create the basis for European level collective bargaining. The impetus for the creation of these joint committees was two-fold. The first 'wave' was comprised of five sectoral joint committees that evolved due to the fact that these sectors became part of common EU policy. These first five sectors were agriculture (1963 establishment of a joint advisory committee and 1974 institutionalised as a joint committee); road transport (1965); inland waterways (1967) establishment of a joint advisory committee and in 1980 institutionalised as a joint committee); fisheries (1968 establishment of a joint advisory committee and in 1974 institutionalised as a joint committee) and railways (1972).<sup>391</sup>

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<sup>387</sup> To be found at the website of Eurocadres: <http://www.eurocadres.org/spiP.php?rubrique14>.

<sup>388</sup> To be found at the website of CEC: <http://www.cec-managers.org/about-us.html>.

<sup>389</sup> Dufresne, A. (2006), *The eVolution of sectoral industrial relations in Europe*, in Dufresne, A., Degryse, C., Pochet, P. (eds.), *The European Sectoral Social Dialogue: actors, developments and challenges*, Peter Lang, Brussels, 2006, p.50-81.

<sup>390</sup> Ibid., p. 51

<sup>391</sup> Ibid., p. 52

The second wave was caused by the trend towards liberalisation in the end of the 1980s and the first half of the 1990s, of industrial sectors and the necessity for the sectors to react to these developments and to assist the European Commission in the improving and harmonising of living and working conditions. These sectors were sea transport (1987); civil aviation (1990); telecommunications (1990) and postal services (1994).

Simultaneous with the establishment of these second generation joint committees, informal working parties were created. These informal working parties were less ambitious in their output as regards the joint committees and they stressed the importance of creating links based on mutual trust and understanding. In this sense it also responded to the reluctance on the side of the employers to be organised at European level. Due to the lack of pressure from the side of the Commission, unlike sectors where EU policy was being created and the joint committees were obliged to act, these informal working parties were successful in drafting texts based on mutual interests such as training and education. These informal working parties were created in the following industries: sugar (1969); Horeca (1983); Commerce Retail (1985); Commerce Wholesale (1987); Insurance (1987); Banking (1990); Footwear (1991); Construction (1992); Textiles and Clothing (1992); Private Security (1993); Woodworking (1994) Electricity (1996); Personal Services (1998) and Tanning and Leather (1999).

Thus it appears that already for more than 30 years there exists activity in specific sectors when it comes to industrial relations and social partner activity. However, it was only in the late nineties that the European Commission began to signal the importance of the sectoral Social Dialogue.

In 1996 the European Commission issued a communication on the Social Dialogue that contained an entire section to the sectoral Social Dialogue.<sup>392</sup> In this communication the European Commission proposed a reform to the above described method of operation of the sectoral Social Dialogue. It states that it regrets that the potential of the joint committees and informal working parties as consultative bodies has not been used to the full outside of mandatory consultations. And when the opinion of the bodies had been sought, according to the Commission, the “sectoral bodies have often been unable to give their opinion until after

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<sup>392</sup> European Commission (1996), *Communication concerning the Development of the Social Dialogue at Community level*, COM (96)448, Final.



the Commission has adopted the text in question”.<sup>393</sup> One of the reasons that was given for this result was the fact that the possibility for the social partner in a specific sector to react on policy initiatives was limited to social aspects of the proposal rather than to economic policy considerations. The Commission was of the opinion that the compartmentalisation of the social and economical aspects needed to be bridged and it proposed a reform as regards to move some of the tasks relating to the joint committees and informal working parties from DG V to the relevant sectoral DG’s. Under this system, which aims for a rationalisation of consultative bodies, the responsibility and administrative structure, at least for the Joint Committees which cover a Common Policy of the EU, retaining responsibility for coordination, for dialogue on social policy and for monitoring the effectiveness of Social Dialogue and its input into employment policies.<sup>394</sup>

Another main issue that justified a reform was the heavy budgetary and administrative burden that stemmed from these bodies. The objectives that the Commission had in mind for reform were therefore: a reduction of the number of members of each committee; to cover all strategic sectors and to improve inter-sectoral information and coordination.<sup>395</sup> The Commission wanted to avoid that the bodies would grow with every expansion of the European Union. With the second objective the Commission envisaged to include sectors in which the social partners were clearly active and that the issues that were included in negotiations should cover priority issues dealing with social implications of the relevant social policy as well as questions of general interest to the sectoral social partners. The last objective intended to bring together representatives from the different sectoral dialogues for information from the Commission likely to interest them”.<sup>396</sup>

With its decision of 20 May 1998<sup>397</sup> the Commission took action according to the advice above and it introduced a renewed sectoral Social Dialogue: Sectoral Social Dialogue Committees (SSDC’s). These SSDC’s comprise a maximum of 40 members evenly divided between workers and employers.<sup>398</sup>

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<sup>393</sup> Ibid., p. 6, point 31.

<sup>394</sup> Ibid., p 6.

<sup>395</sup> Ibid., p. 7.

<sup>396</sup> Ibid., p. 7.

<sup>397</sup> European Commission (1998), *Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level (notified under document number C(1998) 2334) (98/500/EC)*.

<sup>398</sup> Supra, *Dufresne (2006)*, op.cit.,p.70.

The social partner organisations that wish to start up negotiations within a SSDC make a joint request to the European Commission. After a representativity check the European Commission may give a green light to the social partners. The check is carried out using the same criteria as are applicable to the intersectoral social partners. Delegations are composed according to internal procedures. The meetings of a SSDC is always attended by a Commission representative that acts as a secretary. The chairperson of such a meeting may also be a Commission representative, at the joint request of the partners. The rules of procedure and the annual work programme are expected to be drawn up by the social partners themselves. General topics are discussed in annual meetings and more specific topics and detailed information is discussed in particular working groups. In order to disseminate outcomes of negotiations and to receive external input round table sessions, seminars and conferences may be organised with European Commission funding.<sup>399</sup>

At this time there are 41 SSDC's.<sup>400</sup>

### ***Social Dialogue on enterprise level***

The Social Dialogue on an enterprise level or Euro-Company level has received impetus after the Directive on European Works Councils (ECWD) in 1994<sup>401</sup>, this being the key-development in this area. The directive serves as the basis for the creation of intra-company fora consisting of representatives of workers and management. The ECWD provides for information and consultation of employee representatives based on a contractual model. The enterprise level Social Dialogue is of less importance to the thesis; the focus will below be on the sectoral Social Dialogue.

The results of the sectoral Social Dialogue on the various levels can be categorized in a choice of manners. The European Commission has a system of categorization which can be found at the Employment and Social Affairs website.<sup>402</sup> A clear overview is also given by Pochet.<sup>403</sup>

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<sup>399</sup> Supra, *Dufresne*, (2006), op.cit., p.70.

<sup>400</sup> All sectors and all documents pertaining to the sectors can be found at:

<http://ec.europa.eu/social/main.jsp?catId=480&langId=en&intP.Id=1824>

<sup>401</sup> Directive 2009/38/EC Of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

<sup>402</sup> To be found at: <http://ec.europa.eu/social/main.jsp?catId=521&langId=en>, the different types are categorized under the pull-down menu.

The latter will be used here.

Pochet distinguishes various types of joint documents and provides a quantitative analysis of the activity of the social partners on a cross-industry as well as on sectoral level. The categories of agreements are:

*Agreements:* this category responds to agreements initiated between the European social partners (pursuant to Article 155), intended for national organisations and with a follow-up and procedure determining precise mechanisms and deadlines for implementation. Agreements may or may not be converted into directives.

*Recommendations:* This category comprises texts whose provisions are drawn up by the European social partners, intended for national organisations and for which a follow-up and evaluation procedure is laid down at national and European level. There is deemed to be follow-up if the text of the joint document sets out (reasonably precise) procedures for national implementation and for a European level evaluation of this follow-up at a given point in time. This is therefore a procedural definition. Follow-up as defined here should not be confused with implementation, which relates to substantive aspects.

*Declarations:* this category corresponds to ‘declarations of intent’ drawn up by the European social partners, intended for national organisations or for themselves, and where no explicit follow-up procedures are set out in the text or where the procedure is vague.

*Tools (for training and action):* This category comprises various sub-categories: studies (only studies carried out jointly by the social partners and not by European and / or national consultants); handbooks; glossaries or databases.

*Rules of procedure:* these are recognition agreements between the social partners.

*Common positions:* this category corresponds to texts addressed to the European institutions. These texts may be produced under very different circumstances. Sometimes the prime purpose of a common position is very obvious but, in other cases, it may be vague due to

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<sup>403</sup> Pochet, P. (2006), *A quantitative analysis*, in Dufresne, A., Degryse, C., Pochet, P. (eds.), *The European Sectoral Social Dialogue: actors, developments and challenges*, Peter Lang, Brussels, 2006, p. 83-87.

being watered down by the numerous matters covered.

In addition, Pochet has distinguished the themes which have been covered by the various documents. The themes are health and safety; Training; Employment; working time; Social Dialogue; enlargement; working conditions; non-discrimination; sustainable development; economic and or sectoral policies; social aspects of community policies.<sup>404</sup>

The most recent overview of the results of the ESSD was provided by the European Commission in 2010 in its staff document on the functioning and potential of European sectoral Social Dialogue.<sup>405</sup> In this document the Commission stresses the importance of the sectoral committees and also promotes more synergies between the parties. The representative social partners should also be open for allowing other representative bodies in on their invitation in order to strengthen representativeness where possible.

The total outcome of texts up to 2010 was over 500 joint documents.<sup>406</sup> The overview of the results shows that between 1998 (third generation Social Dialogue) and February 2010 a total of 338 joint outcomes were registered. Of these outcomes<sup>407</sup> there were 6 agreements that were backed by a Council decision,<sup>408</sup> 4 autonomous agreements,<sup>409</sup> 41 process oriented texts,<sup>410</sup> 63 declarations,<sup>411</sup> 164 joint opinions<sup>412</sup> and 60 tools.<sup>413</sup>

A general conclusion of this overview is that the Social Dialogue in practice is much more a consultation mechanism in combination with an instrument that produces non-binding texts. The majority of texts are codes of conduct, guidelines, etc - in essence, soft-law initiatives. This development may not, in principle, relate to the 'romantic' idea that was advocated by

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<sup>1</sup> Ibid.

<sup>405</sup> European Commission, *Commission Staff working document on the functioning and potential of European Sectoral Social Dialogue*, SEC (2010)964 final 22 July 2010, Brussels.

<sup>406</sup> Ibid, p. 6.

<sup>407</sup> Below the definitions of the sort of agreements were published in Weber, S. (2009), *Autonome Sozialdialoge auf EU-Ebene. Zur Problematik der Implementation von 'Texten der neuen Generation'*, Industrielle Beziehungen, Vol. 15, Nr. 1, p. 53-75.

<sup>408</sup> Member States are responsible for transposition and implementation.

<sup>409</sup> Implemented in accordance with the practices specific to management and labour and the Member States. Primarily the Social Partners are responsible.

<sup>410</sup> Identification of policy priorities, guidelines and codes of conduct, policy orientations. These agreements require a regular reporting and follow-up.

<sup>411</sup> Outlining future work and activities, no implementation or follow-up provisions.

<sup>412</sup> Provide input to the European institutions and/or public authorities. No follow-up, implementation or monitoring provisions.

<sup>413</sup> Internal documents, practical advice.

Delors in the 1980s, it does fit in the picture of the new approach towards EU labour law which is directed towards the implementation of the Lisbon Strategy by means of the Open Method of Cooperation. Under this development the social partners are supposed to take more initiatives and strive for more autonomy, as also supported by the European Commission.<sup>414</sup>

Despite this new approach, more focused on consultation, it cannot be denied that the Social Dialogue has been successful in establishing consensus about issues relevant to social partners in a specific sector. This has been illustrated in a EU Social Dialogue newsletter where the best practices in 29 sectors.<sup>415</sup> The social partners were invited to present their achievements over the last years. The overviews provided by the social partners contained four EU wide agreements. In the industrial sectors Hospitals and Healthcare,<sup>416</sup> Multisectoral,<sup>417</sup> Railways<sup>418</sup> and Personal Services / Hairdressing<sup>419</sup>, agreements have been reached. These agreements were made on the umbrella level of the EU and have been implemented in the national Member States. The agreements in these sectors cover millions of workers and show the potential impact of the EU Social Dialogue.

Despite this success, the perspective of the movement of the Social Dialogue from negotiation to consultation remains vivid in academic literature.<sup>420</sup> This is in a way a realisation that the Social Dialogue does not have as the main purpose to create EU labour law. Pressing elements for this to evolve in that way are lacking at this moment. The only tool for pressuring the social partners, and mainly the employers, to conclude binding agreements is

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<sup>414</sup> See also Branch, A. (2005), *The evolution of the European Social Dialogue towards greater autonomy: challenges and potential benefits*, The International Journal of comparative labour law and industrial relations, Vol. 21, Nr. 2, p. 321-346. See also both the 1998 and 2010 Communications.

<sup>415</sup> European Commission, EU Social Dialogue Liason Forum (2014), *EU Social Dialogue Newsletter nr. 5: Success Stories on Sectoral Social Dialogue achievements in Europe*.

<sup>416</sup> Framework agreement on prevention from sharp injuries in the hospital and health care sector. This framework agreement affects 12.5 million workers active in the healthcare sector in the EU. European Commission, EU Social Dialogue Liason Forum (2014), *EU Social Dialogue Newsletter nr. 5: Success Stories on Sectoral Social Dialogue achievements in Europe*, p. 45.

<sup>417</sup> Agreement on workers health protection through the good handling and use of crystalline silica and products containing it. This agreement was turned into a directive and now covers half a million workers at 6.400 industrial sites in around 34 countries. European Commission, EU Social Dialogue Liason Forum (2014), *EU Social Dialogue Newsletter nr. 5: Success Stories on Sectoral Social Dialogue achievements in Europe*, p. 62.

<sup>418</sup> Agreement on working conditions of mobile workers in cross-borders services. European Commission, EU Social Dialogue Liason Forum (2014) *EU Social Dialogue Newsletter nr. 5: Success Stories on Sectoral Social Dialogue achievements in Europe*, p.73.

<sup>419</sup> European Framework Agreement on the protection of occupational health and safety in the hairdressing sector. European Commission, EU Social Dialogue Liason Forum (2014), *EU Social Dialogue Newsletter nr. 5: Success Stories on Sectoral Social Dialogue achievements in Europe*, p. 66.

<sup>420</sup> Dufresne, A. (2006) *The Evolution of sectoral industrial relations in Europe*, in Dufresne, A., Degryse, C., Pochet, P. (eds.), *The European Sectoral Social Dialogue: actors, developments and challenges*, Peter Lang, Brussels, 2006, p.50-81.

the threat of community legislation. As this threat is not a very vivid one in most cases, social partners do not see the need to become very active. This would change if there would exist, for example, a collective right to strike in the European Union. But this collective right is lacking and seems to be difficult to create.

Various authors<sup>421</sup> have characterized this development as a weakness of the Social Dialogue. The reality is that, perhaps, the vision was too optimistic in the early days of Social Dialogue. In practice, judging on the current sectors, an umbrella collective bargaining agreement, on the (minimum) contents of an employment relationship is very difficult to obtain when one realizes the differences in national labour law regulations. These difficulties have also been illustrated by Franssen<sup>422</sup> when describing the implementation of the telework agreement. In the case of the telework agreement the social partners had to implement the agreement on a national level within three years. However, the implementation differed from Member State to Member State. In some countries the social partners agreed to implement the agreement by means of an instrument not characterized as collective bargaining. In other countries the implementation has been achieved through legislation and in again another number collective bargaining agreements were used as a framework.

Pochet<sup>423</sup> has previously charted why, in some sectors, the weakness and lack of outcome can be explained. In summary the employers favour a more consultative dialogue, and not a too politicised discussion where trade unions bring issues into the scope of the negotiations that, according to the employers, do not fit in Social Dialogue. Also the fear of extra costs is mentioned. From the side of the workers the lack of the political will of the employers is identified as the main impediment. Pochet charts the more objective impediments as: national unique structures that cannot be compared with other countries and different negotiation methods. In addition to this, the subsidiarity issue is raised in order to hold EU negotiations back; the specificity and the complexity of sectors make that they cannot be managed on an umbrella EU level. Finally, a lack of resources and poor organisation of the Social Dialogue meetings and the general economic situation such as company closures which are not

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<sup>421</sup> Blanpain, R. (2007), *The European Social Dialogue and voluntary framework agreements*, In Blanpain, R. (ed.), *European framework agreements and Telework: law and practice, A European and Comparative Study*. The Hague, Kluwer, p. 31-39; Keller, B., Sörries, B. (1998), *The sectoral social dialogue and European social policy: More fantasy, fewer facts*, European Journal of Industrial Relations, Vol. 4, Nr. 3, p. 331-348.; Franssen, E. (2007), *De Europese Sociale Dialoog*, Arbeid Integraal, 2007, Vol 1.p.19-42.

<sup>422</sup> Franssen, E. (2007), *De Europese Sociale Dialoog*, Arbeid Integraal, Vol 1.p. 25-26.

<sup>423</sup> *Supra*, Pochet (2006), P. 111-112.

conducive to dialogue and solidarity.

Despite the proven difficulties of obtaining the result of an *erga omnes* EU agreement, the Social Dialogue does possess the characteristics to reach such an agreement. It depends on the factors of the individual sectoral committee if a concrete agreement may be concluded.

## **Conclusion**

In this chapter the European Social Dialogue has been placed within the larger framework of the evolution of EU labour law. From the moment that Europe felt that it was necessary to show a more ‘human face’ the evolution of labour law shifted towards a more participatory one. Industrial relations developed and along the years the social partners became more autonomous in regulating their sectors.

This regulation of the sector may eventually culminate in the conclusion of binding agreements that have an *erga omnes* effect in the total European Union. This effect is reached by means of the issuing of a Directive by the Council on the initiative of the Commission. In the case that the social partners request the Commission to put a request for a Directive forward to the Council than both EU institutions are only permitted to marginally test the agreement reached by the social partners. Another option is to implement the agreements by means of procedures familiar to the national level of the different member states.

The focus of the chapter was the sectoral Social Dialogue. Although there have not been many autonomous agreements in the course of the years, and other obstacles for success as regards the output of documents coming from the Sectoral Social Dialogue have been identified, it appears to be clear that in theory the Sectoral Social Dialogue can be an instrument to create legal certainty amongst the Member States.

This legal certainty is, as has been illustrated in the previous chapter, much desired in the European professional football sector. The European Social Dialogue has also been introduced in European Professional football. The next chapter assesses whether the Social Dialogue has been able to introduce legal certainty and if the level of certainty is sufficiently reached.





## CHAPTER FIVE

### Social Dialogue in European Union Professional Football

#### Introduction

In April 2008 a Sectoral Social Dialogue Committee for professional football (FSDC) was established. In 2012 that committee concluded its first agreement on the minimum requirements for standard player contracts in the professional football sector in the European Union and for the rest of the UEFA territory (the Autonomous Agreement).<sup>424</sup> This chapter focuses on the historical background that led to the establishment of the FSDC. The historical overview includes the first steps towards a FSDC that were supported and funded by the European Commission. The route to the final composition of the FSDC will be also be considered. The chapter will contain an analysis of the content of the Autonomous Agreement and the implications connected to the implementation of the agreement. After that, an analysis of the reactions to this Autonomous Agreement will be presented. Finally, it will be determined if and how the Autonomous Agreement may create legal certainty. The next chapter will then analyse what issues fall outside of the scope of the Autonomous Agreement and whether discussions within the FSDC can lead to agreements in these key areas of European football governance.

EU Framework directive on fixed-term work: The transfer system under threat  
In June 2008 a Council Directive on fixed-term work came into force: *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work*.<sup>425</sup>

The directive was the result of industrial relations negotiations on a cross-industry level. The partners that negotiated this directive were the CEEP, UNICE and ETUC.

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<sup>424</sup> Currently UEFA has 54 Members. All the EU Member States are UEFA members and the non EU Member State members are Albania, Andorra, Armenia, Azerbeidzjan, Belorussia, Bosnia-Hercegovina, Faeröer Islands, Georgia, Iceland, Israel, Kazachstan, Liechtenstein, Macedonia, Moldova, Montenegro, Norway, Ukraine, Russia, San-Marino, Serbia, Switzerland and Turkey. Some EU Member States have more than one association within their territory, such as the United Kingdom (Northern Ireland, Scotland, Wales and Gibraltar).

<sup>425</sup> Published in *Official Journal L 175*, 10/07/1999 P. 0043 – 0048 To be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0070:EN:HTML>

The directive emphasizes the necessity for an equal treatment and non-discrimination of workers with a fixed-term contract as regards workers with a contract for indefinite time. By means of setting minimum conditions that limit the successive use of fixed-term contracts, the workers are protected against abuse. The Member States are obliged to implement one or more of the following measures regarding the use of fixed-term contracts:

- Objective reasons justifying the renewal of fixed-term employment contracts;
- Determining the maximum allowed total duration of fixed-term employment contracts;
- Determining the total number of times that such agreements are allowed to be renewed.<sup>426</sup>

The directive does not exclude employment contracts in professional sports from its scope. Therefore, it can be concluded that contracts in European Union professional football also need to meet the requirements laid down in the directive. According to the regulations of FIFA, contracts in professional football are contracts for a minimum duration, from the effective date of commencement until the end of the football season with a maximum duration of five years.<sup>427</sup> FIFA makes the exception that the duration may be subject to different lengths on the basis of necessary consistence with national laws. The directive indicates that the normal working relationship between an employee and employer should remain a contract of indefinite time. Therefore, it can be assumed that if a contract of a fixed-term lacks an objective justification or that its renewal lacks an objective justification, this contract may be converted into a contract of indefinite time.

After the *Bosman* case the transfer system in professional football changed. Pre-*Bosman* the payment of transfer fees was based on the permission given by the player's previous club for him to join his new employer. The club had to give permission to the actual 'transfer', only after that permission the registration would move from one club, or league, to another.

With *Bosman* the application of EU legislation on free movement of workers forced this system to an end. The football governing bodies introduced a revised transfer system in 2001 that replaced the source for payment of 'fees' whenever a player moved from one country to another to carry out his profession as a football player for a new employer. The 'transfer fee' became a payment for a preliminary ending of the employment contract, by the payment of

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<sup>426</sup> Directive 1999/70/EC, Clause 5.

<sup>427</sup> FIFA Regulations on the Status and Transfer of Players, Article 18 (2).

damages due to a unilateral breach of one of the signatory parties to the contract or through the payment of a sum that would establish the consent of the club to end the contract by mutual agreement.<sup>428</sup>

Today, the system of the payment of ‘transfer fees’ is based on the use of contracts for a fixed-term. This can also be understood from the FIFA Regulations on the Status and Transfer of Players.<sup>429</sup> In the case that the use of the fixed-term contracts, or the successive use of fixed-term contracts, would be short of a foundation on an objective justification just as the directive requires, a conversion into a contract of indefinite time could be the consequence. In that case, a club as an employer would run the risk that the football player would only have to respect a legally stipulated notice period to leave his club for another. In that case, the basis for the payment of a fee to the player’s previous club would disappear and the only entitlement for a compensation would derive from the system of the payment of training and education compensation,<sup>430</sup> however this would only apply to players under the age of 23 and it could constitute only a fraction of the potential total amount that could be generated by the transfer of the player.

### **Dutch Employers’ Organisation in Professional Football (FBO) Researches Impact of Directive 1999/70**

Concerned at the potential implications of the directive, the Dutch employers’ organisation in professional football (the FBO) carried out research to assess the impact of the directive in five European Member States. The FBO is the employers’ representative in Dutch professional football and has all 38 professional clubs in the Netherlands as its members, from the first and the second division. The FBO was established in 1968 and has ever since been part of the industrial relations structure in football, with the Vereniging Voor Contractspelers (VVCS) and ProProf as its counterparts in the negotiation of the collective bargaining agreement in Dutch professional football. In 1999 the conclusion of a collective bargaining agreement in the Dutch professional football sector became a necessity in order to save the

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<sup>428</sup> A more elaborate description of the 2001 Agreement will follow in Chapter 6.

<sup>429</sup> Especially Articles 13 to 17 deal with the stability of contracts.

<sup>430</sup> The system of training compensation has been under scrutiny of the European Court of Justice in the *Bernard* case, see before. The current system is laid down in the Regulations on the Status and Transfer of Players Article 20 and Annex 4 of the aforementioned regulations. A more elaborate description on the functioning of the system of training compensation shall follow in Chapter 7.

post-*Bosman* transfer system. The reason for this was that a law on the use of fixed-term contracts came into force in the Netherlands.<sup>431</sup> This *flexlaw* was in line with the requirements of the EU directive on fixed-term contracts, curtailing the use of fixed-term and requiring special justifications for the use of successive fixed-term contracts to prevent abuse. The *flexlaw* provided only one solution for allowing unlimited successive use of fixed-term contracts. This was by means of the conclusion of a collective bargaining agreement between representative organisations from both sides of the industry.<sup>432</sup> Therefore the collective bargaining agreement in Dutch professional football has saved the practice of payments of transfer fees in the *Post Bosman* era.

After the timeframe for implementation of the EU directive in all the EU Member States had elapsed, research was carried out under the authority of the FBO. Five EU Member States (UK, Belgium, Germany, Netherlands and Portugal) were assessed. The aim of the research was to determine if, and how, the directive had been implemented on the level of that Member State and what the impact was, or could be, on the contracts that were used in the professional football industries of those countries.

The main conclusion of the FBO research was that if the professional football sector wished to maintain the transfer system based on the 2001 transfer agreement then it should try to introduce a collective bargaining agreement in the European Professional football sector.<sup>433</sup> However, in order to create a Social Dialogue in the European Professional football sector two equal partners were needed. At that time FIFPRO was already actively promoting its role as a social partner, but a representative from the side of the employers did not exist yet.

The FBO held talks with representatives from DG Employment and Social Affairs of the European Commission and it came to the conclusion that the employers in the European Professional football sector needed to be made aware of the necessity to create an employers' organisation. Only after the creation of an employers' organisation that would meet the criteria as established by the European Commission in its 1993 Communication on the representativeness of social partner organisations, a Social Dialogue could be established.

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<sup>431</sup> Publication Staatsblad nr. 332 1998, Wet flexibiliteit en zekerheid, laid down in Book 7 of the Dutch civil code, Article 7:668a.

<sup>432</sup> Article 7:668a Dutch civil code.

<sup>433</sup> Branco Martins, R. (2002), *European Sport's First collective labour agreement*, issued by the FBO.

## Creation of the European Federation of Football Clubs (EFFC)

The FBO was the founding partner of the EFFC. The EFFC was specifically created to carry out a project to create awareness about the European Social Dialogue in the European Professional football sector.<sup>434</sup> The EFFC intended to inform stakeholders about the concept of the Social Dialogue on the level of the individual Member States as well as at European level. Its aim was to facilitate the start of consultations between management and labour at Community level and, in pursuance thereof, the establishment of contractual relations. The EFFC attached the status of an academic research platform to itself. However, it did communicate the idea that, in the case the stakeholders in professional football deemed it necessary to establish a social partner on employers' side, the EFFC could be used as a vehicle to initiate a Social Dialogue in professional football.<sup>435</sup>

The EFFC was not only involved in a project promoting the Social Dialogue in the 'old' 15 Member States,<sup>436</sup> it also carried out a similar project together with the T.M.C. Asser Institute in the countries that were about to accede to the EU in 2004, at that time still Candidate Countries.<sup>437</sup> Both projects were co-funded by the European Commission under Budget Heading B3-4000. This budget heading of the European Commission enables the Commission to support the financing of consultations, meetings, negotiations and other operations designed to achieve the objectives of the social objectives of the Union.<sup>438</sup> Simultaneously FIFPRO carried out similar projects in the beginning of the past decade. The first project in 2002/2003 was intended to create awareness about the Social Dialogue and to assess who could be FIFPRO's counterpart in industrial relations. This project ran simultaneously with the first EFFC project. The second project in 2003/2004 looked at organizing regional meetings

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<sup>434</sup> T.M.C. Asser Institute (2004), *Promoting the Social Dialogue in the European professional football*, Project supported by the European Commission under a grant through budget heading B3-4000.

<sup>435</sup> *Promoting the Social Dialogue in European Professional Football*, International Sports Law Journal, 2003, Vol. 3, T.M.C. Asser press.

<sup>436</sup> The project consisted in organizing Round Table sessions in the EU, whereby the EU was divided into "areas of influence" in order to enlarge the scope of the project to involve all EU member states. The country reports can be found at [http://www.asser.nl/Default.aspx?site\\_id=11andlevel1=13907andlevel2=13939](http://www.asser.nl/Default.aspx?site_id=11andlevel1=13907andlevel2=13939)

<sup>437</sup> T.M.C. Asser Instituut (2004), *Promoting the Social Dialogue in European Professional Football, Candidate Countries*, project supported by the European Commission under budget heading B3-4000, the project can be found at [http://www.asser.nl/upload/sportslaw-webroot/cms/documents/cms\\_sports\\_49\\_1\\_Social%20Dialogue%20ed.pdf](http://www.asser.nl/upload/sportslaw-webroot/cms/documents/cms_sports_49_1_Social%20Dialogue%20ed.pdf).

<sup>438</sup> The call for proposals is renewed on a yearly basis but it was renamed. The call can be found on the following webpage. <http://ec.europa.eu/social/main.jsp?catId=629andlangId=enandcallId=373andfurtherCalls=yes>.

and to establish a Social Dialogue committee.<sup>439</sup> The latter was not successful in obtaining its objective, however FIFPro took the first steps by introducing an informal tripartite football dialogue with stakeholders UEFA and the EPFL. This dialogue was chaired within the structure of UEFA.<sup>440</sup> A third project in 2004/2005 looked at further streamlining the process from national collective bargaining structures to European Social Dialogue.<sup>441</sup>

As the focus of this historical description lies on the employers' side, the main conclusions of the studies by the EFFC will be given. This conclusion can be divided into two parts. First, the question about the desirability of a Social Dialogue on the level of the European Union. Second, the issue of representation: after a tour through Europe, what organisation turned out to be fit to represent the interests of the employers on the umbrella level of the EU?

The study embarked on the statement that the interconnection and friction between the various legal sources of regulatory influence in European professional football lead to legal uncertainty; as described in chapter two and three. In order to achieve (more) legal certainty the study pointed that the fact that the Social Dialogue was embedded in the EU Treaty could lead to more certainty due to the prevalence of EU law over rules and regulations of sports governing bodies. According to the study, it would be highly desirable to use the Social Dialogue as a framework for concluding a basic EU collective bargaining agreement in football which could help establish greater legal certainty in the following areas:

- The basic employment contract in football would be a fixed-term contract including a minimum and maximum duration;
- The duration and nature of the work, including a definition of 'professional football player';
- Minimum harmonisation of the conditions of employment of third-country nationals, including a code of conduct for employment and recruitment of third-country players;

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<sup>439</sup> Université Catholique de Louvain, Institut des Sciences du Travail, (2006), *Study on the representativeness of the social partner organisations in the professional football players sector*, project no. Vc/2004/0547, February 2006, p. 32, footnote 64.

<sup>440</sup> For comments by the relevant stakeholders please see the website of the Swiss players' union: <http://old.safp.ch/news/detail.php?lang=0andid=37>. See also *Independent European Sport Review*, 2006. A report by J.L. Arnaut. p. 91.

<sup>441</sup> Awarded grants under budget heading 04.03.03.01: Industrial relations and social dialogue <http://ec.europa.eu/social/main.jsp?catId=632andlangId=en> see 2005.

- A social security scheme for players, for example, including a ‘bridging pension’;
- Post-career education for players;
- Contract stability, including the final introduction of a system which is binding upon all parties in football;
- Creating and formalising a code of conduct for the preliminary breach and termination of contracts, ensuring full applicability of the outcome of the *Bosman* case.<sup>442</sup>

Regarding the feasibility issue, the study concluded that the European Commission could not easily decide what organisation could be able to represent the employers in football as there was no explicit employers’ organisation active at that moment. The study analysed the composition of the EPFL and was unable to tell with certainty if the EPFL would qualify as a social partner.<sup>443</sup> The main reason for this questionability was that out of the 14 member leagues of the EPFL in 2003 only seven of the member leagues were part of national collective bargaining structures. Other reasons were the mandatory membership of the leagues for the clubs, which is contradicting the fundamental principle of freedom of association, and the close connection with the national football association, putting the independence of the organisation into question. The study recommends the Commission to carefully assess which parties should play a role in the composition of a potential sectoral Social Dialogue committee.

In 2005 the grouping of the major football clubs in the EU, the G-14, commissioned the T.M.C Asser International Sports Law Centre to research the potential role of the G-14 grouping as a social partner.<sup>444</sup> The Centre concluded that although the G-14 grouping did not meet the requirements as laid down by the European Commission for social partners to participate in the Social Dialogue, it could have a role in an “informal Social Dialogue” or

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<sup>442</sup> Branco Martins, R. (2003), *Social Dialogue in the European Professional Football Sector – A European Football Match Heading for extra time*, International Sports Law Journal 2003, 3-4, The Hague: T.M.C. Asser Press. The Article was a reflection of the conclusion of the first project carried out by the EFFC.

<sup>443</sup> Ibid, p. 5.

<sup>444</sup> An extract of the study was included in the Article Siekmann, R. (2006), *Study into the Possible participation of EPFL and G14 in a Social Dialogue in the European Professional Football Sector*, International Sports Law Journal 2006 3-4. T.M.C Asser Press.

that it may be granted an exception on the basis of the concept of the specificity of sport.<sup>445</sup> The Centre also made a comparison to other sectors where the approach to potential social partner organisations was more flexible.<sup>446</sup>

After the presentation of the study of the EFFC and the FIFPRo, the European Commission requested that the Université Catholique de Louvain (UCL) research the representativeness of social partner organisations in professional football. This type of project is commonly carried out prior to the creation of a sectoral Social Dialogue committee.<sup>447</sup>

The UCL concluded, contrary to the findings of the T.M.C. Asser Institute, that the EPFL was representative enough to participate in the European Social Dialogue. It then became clear that the road for the envisaged social partners in professional football, the EPFL and FIFPRo, was open to jointly ask the European Commission to establish a sectoral Social Dialogue committee.

During this process, however, the G-14 was involved in the *Oulmers* case where as a compromise the G-14 was dismantled and the ECA was created. Officially the ECA does not meet the social partner requirements. ECA does not consist of members that are social partners on the level of the Member States. Also, the individual clubs are not representative social partners but individual employers. Nevertheless, both the EPFL and FIFPRo agreed to the participation of the ECA in the EU Social Dialogue. The motivation was that the ECA complemented representativeness left open by EPFL.

### **The Creation of the European Sectoral Social Dialogue Committee in the Professional Football Sector (FSDC)**

On 10 December 2007 FIFPRo and the EPFL jointly submitted a request to the Commission for the establishment of a sectoral Social Dialogue committee. In a letter dated 13 March 2008 the Commission confirmed that the conditions for the creation of a FSDC existed. As a

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<sup>445</sup> Ibid, P. 80 - 81.

<sup>446</sup> In the aviation sector for example, social partner and committee structures adapted to the growth of the budget airlines by allowing an organisation representing the interests of these airlines into the sectoral social dialogue committee.

<sup>447</sup> Université Catholique de Louvain, Institut des Sciences du Travail, (2006), *Study on the representativeness of the social partner organisations in the professional football players sector*, project no. Vc/2004/0547, February 2006.



consequence,<sup>448</sup> in order to be installed, the social partners needed to establish their rules of procedure and appoint a chair to their committee.

This procedure highlights the specific position of sport, due to the role of UEFA, and also the ECA, in the FSDC. UEFA is not a social partner as it does not meet the criteria as established by the Commission. However, UEFA does have, according to the social partners, a role to perform in the European Social Dialogue as an ‘associate party’. A similar status has been given to the ECA.<sup>449</sup> According to the Rules of Procedure the status of an associate party is similar to the status of a social partner in the Committee, where the decisions shall be taken by consensus.<sup>450</sup> Moreover, the social partners have agreed to appoint UEFA as the chairperson for the FSDC. The chairperson conducts the meetings and presents the agenda.<sup>451</sup>

The interconnection between the Social Dialogue and general football issues is also stressed due to the fact that the agenda of the Social Dialogue committee is composed in the meetings of the Professional Football Strategy Council (PFSC), where the same members as the FSDC are present.<sup>452</sup> This council was established by UEFA and operates within UEFA structures. The objectives of the PFSC are to maintain the European model of sport in the professional football sector. It is a platform to listen to the clubs, leagues, players and member associations in order to inform the Executive Committee of UEFA on all relevant issues.<sup>453</sup>

This interconnection is a disputable issue. In practice the social partners have now bound themselves to the jurisdiction of UEFA through the connection with consultative bodies that are part of the UEFA structure. By connecting the powers to influence the functioning of the FSDC to the PFSC a decisive pressure can be placed on the social partners by UEFA. In this case, UEFA places its decision making powers outside of their own structures. This could

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<sup>448</sup> In line with Commission Decision 98/500/EC Article 5.1.

<sup>449</sup> *Rules of Procedure for the European Social Dialogue Committee in the professional football sector*, preamble. The documentation of the FSDC can be found at the website of the European Commission dealing with Sectoral Social Dialogue. There is a specific part dealing with professional football: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>.

<sup>450</sup> Ibid., Article 9.

<sup>451</sup> Ibid., Article 4.

<sup>452</sup> See for the composition and objectives of the PFSC:

<http://www.uefa.org/stakeholders/professionalfootballstrategycommittee/index.html>

<sup>453</sup> A relevant issue is the fight against match-fixing. The parties of the PFSC have issued a joint statement “*European Football united for the integrity of the game*”, to be found at [http://www.uefa.org/MultimediaFiles/Download/uefaorg/Clubs/01/93/51/24/1935124\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/uefaorg/Clubs/01/93/51/24/1935124_DOWNLOAD.pdf) and the first overall need for a financial fair play regulation was confirmed in this structure [http://www.uefa.com/multimediafiles/download/pressrelease/uefa/uefamedia/87/97/76/879776\\_download.pdf](http://www.uefa.com/multimediafiles/download/pressrelease/uefa/uefamedia/87/97/76/879776_download.pdf).

feed the idea that due to the pure consultative nature of the committees within UEFA, UEFA remains an organisation that lacks democracy.<sup>454</sup>

For example, a key issue for the collective of teams participating in the UEFA competitions, is the composition and distribution of income from the exploitation of these leagues. The majority of ECA members compete in these competitions on a yearly basis.<sup>455</sup> A stagnation of discussions on the level of the PFSC when dealing with this issue could influence the agenda and decision making in the FSDC. The connection might endanger the scope and the objective of the European Social Dialogue by decreasing the FSDC to a mere platform for discussions on issues that were pre-determined by UEFA.

The rules of procedure and the working programme of the FSDC were officially launched on 1 July 2008 in a meeting in Paris.<sup>456</sup> The working programme lays down the objectives of the parties involved. The parties aim to strengthen the possibilities of social partners to shape the future developments regarding employment in the professional football sector and to articulate European levels of Social Dialogue.<sup>457</sup> The parties agree to accept the Social Dialogue as a valid instrument for the implementation of agreements on labour related matters reached within the Professional Football Strategy Council.

The most important objective was the work connected to discuss and, where agreed, promote and develop the concept of '*the European Professional Football Player contract minimum requirements*' (MRSPC). This work started in 2008 and could be seen as a further elaboration on the work that was carried out in the tripartite dialogue that was established after FIFPRO's initial projects in the European Union.

Since 2008 there has been a yearly plenary meeting and specific topic related working group meetings, all scheduled by a steering group. In the first plenary meeting in November 2008 the rules of procedure were presented and the composition of specific working groups was laid down. The first working groups dealt with the evolution of the Autonomous Agreement

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<sup>454</sup> See also García, B. (2007), *UEFA and the European Union: From Confrontation to Cooperation*, Journal of Contemporary European Research, Vol. 3, No. 3, 2007, P. 202-223.

<sup>455</sup> Membership of the ECA is only open to clubs that have participated in the European club competitions.

<sup>456</sup> European Commission (2008), *Footballers and Employers launch new forum for EU social dialogue*, European Commission Press Release - IP/08/1064 01/07/2008, to be found at [http://europa.eu/rapid/press-release\\_IP-08-1064\\_en.htm](http://europa.eu/rapid/press-release_IP-08-1064_en.htm) .

<sup>457</sup> FSDC Work Program 2008-2009: Objectives.

into an Autonomous Agreement and with the state of play as regards the implementation of the agreement.<sup>458</sup> The next plenary meeting took place in Brussels on 28 February 2011.

It took three years to hold the next plenary session as the time in between was characterized by reluctance from UEFA, the ECA and the EPFL. The reluctance led to a situation of deadlock. The reason was the fact that FIFPRO, after the 2008 FSDC establishment, sought to transform the agreement that was concluded on the MRSPC into an agreement that would not only be binding on the Member States of the EU but also to the remainder of the UEFA territory.<sup>459</sup> The other parties in the committee did not wish to impose binding rules on their members. FIFPRO did not want to jeopardise the effect of the agreement by making the result a purely voluntary decision for the stakeholders to live up to the standards.<sup>460</sup> FIFPRO found that it was the only party that was putting pressure on the implementation of the agreement.<sup>461</sup>

The European Commission intervened in the impasse and used its task as a broker to facilitate the dialogue between the social partners.<sup>462</sup> With the consent of all parties concerned the European Commission drafted a compromise agreement.<sup>463</sup> The agreement was aimed at strengthening the implementation of the agreement through the voluntary route.<sup>464</sup> This intervention eased the antagonist attitude of the parties and the work towards the creation of a document that would lead to consensus went on. Despite this breakthrough it could not be prevented that the initial planning of the presentation of the Autonomous Agreement on 5 April 2011 needed to be postponed. The compromise document needed to receive the approval from the ECA, UEFA and the EPFL and FIFPRO needed to await its general assembly meeting outcome first.<sup>465</sup> UEFA and the representatives from the employers

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<sup>458</sup> Draft agenda of the Plenary meeting on 19 November 2008, Brussels. To be found at:

<https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>.

<sup>459</sup> Van Megen, W. (2008), *Minimum requirements: FIFPRO*, Presentation to the FSDC in Professional Football, 11 December 2008.

<sup>460</sup> Geeraert, A. and Colucci, M. (2012), *The Social Dialogue in European Professional Football*, Comparative Labor Law and Policy Journal, Vol. 33, Nr. 1.

<sup>461</sup> See FIFPRO Theo van Seggelen, secretary general of FIFPRO Division Europe ‘*Apparently they are not ready to sign a legal binding agreement on this very important issue. This is very frustrating for FIFPRO, since it is not about the contents of the agreement, but about the consequences and the will to commit to it.*’ On ‘Only FIFPRO ready to sign minimum requirements’, [http://www.fifpro.org/news/news\\_details/1469](http://www.fifpro.org/news/news_details/1469)

<sup>462</sup> As laid down in Treaty Article 152 TFEU.

<sup>463</sup> The compromise agreement was presented to the social partner and associate parties by Heinrich Wollny of DG Employment and Social Affairs and its effect on the negotiations was discussed in the plenary session of the FSDC of 28 February 2011, see the minutes of the meeting, EMPL/FSTD(2011). *Compromise proposal HW 24 January 2011 based on comparison of “employers November 2010 and FIFPRO January 2011”*. (Compromise Agreement).

<sup>464</sup> *Compromise Agreement*, p. 31.

<sup>465</sup> *Compromise Agreement*, “presentations and exchange of views”.

informed FIFPRO that they would come up with their amendment to the Commission compromise and present that to FIFPRO.<sup>466</sup> In the meantime the FSDC's further elaborated on the issue of stability of contracts and FIFPRO suggested the creation of a working group on this topic<sup>467</sup>, but the ECA was reluctant to agree to these initiatives in that stage.

This reluctance disappeared after April 2012, at which point FIFPRO agreed on the amended compromise it received from their counterparts. The Autonomous Agreement was presented in a plenary session on 19 April 2012. Mr. Michael van Praag, replacing the FSDC and UEFA chairman Michel Platini, highlighted in his opening speech that this was an historic moment and he stressed the importance of the Autonomous Agreement for the professional football sector after several years of negotiations.<sup>468</sup>

Below the content of the agreement will be discussed. After that, the implications as regards the implementation of the agreement will be presented, before embarking on an assessment of the effect of the agreement on EU professional football.

### **Agreement Regarding the Minimum Requirements for Standard Player Contracts in the Professional Football Sector in the European Union and in the Rest of the UEFA Territory**

The agreement establishes minimum requirements for professional football contracts in Europe.<sup>469</sup> The scope of the agreement is all professional football clubs<sup>470</sup> and professional football players who are bound to a club, the contract should do so on an employment contract.<sup>471</sup> The agreement attaches basic validation criteria to the employment contract such as the names of the parties, their ability to be legally bound to the contract and a co-signature

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<sup>466</sup> *Supra*, Geeraert, A., and Colucci, M. (2012).

<sup>467</sup> *Compromise Agreement*, "presentations and exchange of views".

<sup>468</sup> European Sectoral Social Dialogue committee for professional football, Plenary meeting followed by a signing ceremony, 19 April 2012, Minutes (approved by the steering committee), Brussels 24 April 2013. To be found at: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>.

<sup>469</sup> Article 1 Autonomous Agreement.

<sup>470</sup> In annex 6 of the agreement it is stipulated that the Agreement will in addition apply to all contracts in the clubs in football levels/leagues in the Territory with full-time professional players; with partially full-time and partially part-time professional players; or a majority of partially part-time professional players before amateur players.

<sup>471</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 2.

of the parents in the case that the player is a minor.<sup>472</sup> In the case of a club, it should be a direct member of the league and/or association. All the signed contracts need to be registered at the league and/or the national association concerned whereby all the parties to the contract receive a copy.<sup>473</sup> The contract stipulates the duration with a clear starting and an ending date. The right to terminate on the basis of just cause must be included in the contract, the club has the right to give a reasonable notice to the player in case of long or permanent injury. In that case a referral needs to be included in the contract to the FIFA Regulations on the Status and Transfer of Players. In case of a negotiation on the termination or extension of the contract the national implementation must ensure the equal balance of the parties. The contract also needs to mention if there are other parties involved in the negotiation such as the parent or guardian of the player or an agent if he has been involved in the negotiation of the agreement.<sup>474</sup> The contract contains a section of definitions, but if this sections is not included that a connection is made to the definitions as used in relevant regulations or statutes of UEFA and FIFA.<sup>475</sup>

The applicable legislation to the employment contract should be in accordance with the hierarchy of laws and of protecting the player against social dumping.<sup>476</sup> If there are annexes to the contract they should all be included and no other contract may cover the employment relationship between the player and the club.<sup>477</sup>

The agreement then goes into detail about the duty of the club to fulfil all its financial obligations: the payment of salaries and all other financial bonuses, reimbursable costs, other benefits such as car, housing, phone, etc. In the case that there exists a national pension fund scheme than these monthly payments are also specified in the contract. All methods of payment and the right currency are specified. A sport specific element as regards the financial obligations is the fact that the contract should contain a clause on major impacts on the budget or generation of revenue by the club: promotion or relegation.<sup>478</sup>

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<sup>472</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts , Article 3.1.

<sup>473</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts , Article 3.3.

<sup>474</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts , Article 3.7.

<sup>475</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts , Article 4.

<sup>476</sup> A situation whereby an employer in one country employs the player by means of a contract where other (labour) law, depriving the player of a more favourable legal framework, has been made applicable to the contract. An issue that is of concern to the professional cycling sector, see T.M.C. Asser Institute (2009), *Study into the identification of themes and issues which can be dealt with in a European Social Dialogue in the professional cycling sector*, Project under Budget Heading B3-4000, p. 102.

<sup>477</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 5.

<sup>478</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 6.

The agreement includes a clause on the applicability of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work.<sup>479</sup> The effect of this Directive in the context of the agreement is that the contract should ensure that every youth player involved in a youth development programme at a club should have the opportunity to also follow non-football related education in order to prepare for a post-football career.<sup>480</sup> A clear holiday scheme is also mandatory.

As regards health and safety, the player should have a medical insurance in place as well as for risk. These issues, including a programme for doping prevention, are brought under the general umbrella of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.<sup>481</sup> It is also an obligation of the club to protect the human rights of the player, such as the right to free expression and against discrimination of the player.<sup>482</sup>

The core obligations of the player are included in the contract. It is the essence of the profession of football to play matches to his best endeavour, to participate in training and match preparations in accordance with the instructions of the trainers / coaches, to maintain a healthy lifestyle and to comply with other instructions. These are the issues that establish the subordinate relationship and that are therefore the fundamental for the fact that the relationship between a club and a player is an employment contract. Other elements include the sport specific necessary adherence to relevant regulations of football governing bodies, not to gamble on activities within football and to participate in the club's commercial and social events. Standard employment clauses concern cooperation with necessary medical treatment and to return all club items at the end of the employment liaison with the club.<sup>483</sup>

Every contract should contain a statement on the method of commercialization of the player's image. The contract does not give a standard mandatory provision but it just gives a recommendation. The general principle is that the player may exploit his own image rights

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<sup>479</sup> Official Journal L 216 , 20/08/1994 P. 0012 – 0020.

<sup>480</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 6.5.

<sup>481</sup> Official Journal L 183 , 29/06/1989 P. 0001 – 0008.

<sup>482</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 6.8.

<sup>483</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 7.

when not in conflict with the rights of the club. The club may then exploit the player's image right when he is part of the whole squad.<sup>484</sup>

In the FIFA Regulations on the Status and Transfer of Players the issue of of player loans is explained and regulated.<sup>485</sup> The standard contract contains a provision that mandates the club and player to both agree to a loan spell at another club. This avoids a situation that a player is moved just for creating a basis for acquiring extra revenues from asking for loan fees.<sup>486</sup>

The standard contract must contain clear statements on penalties in case the player violates the club's rules. The player should be granted the right to appeal to the club in the company of the captain of the team and/or a union representative.<sup>487</sup> The contract should also contain rules on anti-doping.<sup>488</sup>

Players and clubs are bound to arbitration courts in case of disputes. The contract refers to these internal sport courts, keeping the general civil courts aside. An exception is made for certain countries where it is not allowed that labour issues are governed by dispute resolution in arbitration courts. The arbitration courts should guarantee fairness in the sense that the courts should be impartial and consists of equal and balanced representation from players as well as from employers. In countries where there is no final internal arbitration procedure available, for example when there is only one arbitration court, appeal to the Court of Arbitration for Sport should be made possible. Where the FIFA Regulations so describe, the issues between players and clubs that deal with employment may also be brought before the FIFA Dispute Resolution Chamber (FIFA DRC).<sup>489</sup>

The players and clubs must abide by rules and regulations of the association and the leagues that are of influence to the contract. The contract must contain a provision that this is

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<sup>484</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 8.

<sup>485</sup> Regulations on the Status and Transfers of Players, Article 10 and the Commentary on the Regulations on the Status and Transfer of Players. Loaning players to other teams is administratively similar to transferring a player, however the club that loans the player maintains in control over the player for as long as the initial contract with the player lasts. Reasons for loaning the player to another team may lie in the need for the player to gain extra experience or to fill a temporary vacancy due to illness or injury. However, more recently the loaning of players to other teams also has to do with valorising the player and creating favourable conditions for the sell-on of the player.

<sup>486</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 9.

<sup>487</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 10.

<sup>488</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 11.

<sup>489</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 12.

explicitly agreed upon.<sup>490</sup> The same is applicable to the impact that a collective bargaining agreement on the national level has on the contract.<sup>491</sup>

Every contract needs to contain further final provisions that underline the applicable law and jurisdiction, the authoritative version of the contract in case of translation of the contract, the fact that the contract is confidential, the validity of the complete contract in case of a nullity of a specific clause, number of copies and distribution of the contract to the parties, all annexes need to be specified and signed in order to be valid.<sup>492</sup>

The MRSPC explicitly refers to the role of UEFA as a party to the agreement and to UEFA's role in the Social Dialogue.<sup>493</sup> The MRSCP also requires that anti-racism is emphasized.<sup>494</sup> The practical issues as regards the agreement itself concern the fact that the agreement contains minimum requirements and that further protection of the player on the national level is allowed through more favourable conditions.<sup>495</sup> The agreement lasts from the date of signing for four years and the parties will do their best to have a new agreement in order three months before the expiry of the contract.<sup>496</sup>

### **Implementation and Enforcement of the Autonomous Agreement**

The initial deadlock in the negotiations between the social partners was attributable to the method, scope of implementation and enforcement of the agreement. Whereas FIFPRO wanted to bind the complete UEFA territory to the agreement, the other signatory parties did not wish to go beyond the EU to impose legislation or strict regulations on their members. UEFA and the employers' representatives promoted the 'voluntary' route of implementation. This voluntary route would consist of persuading the national members of the social partners and associate parties to implement the negotiation result into their own national systems but not to be legally bound to do so.

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<sup>490</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 13.

<sup>491</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 14.

<sup>492</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 15.

<sup>493</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 21.

<sup>494</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 16.

<sup>495</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 17.

<sup>496</sup> Agreement Regarding the Minimum Requirements for Standard Player Contracts, Article 19.



The compromise was presented by the European Commission and articulated in Article 18 of the Agreement. The parties to the agreement will use their best endeavours to ensure implementation of the agreement on the national level of the EU member states and of the UEFA territory. This method that was agreed upon is a 'mixed' approach, as it was practically impossible to create a Directive on the basis of a Council decision that would be implemented and enforced beyond the territory of the EU.

This mixed approach as a *specialis* of the voluntary route relying on national procedures and practices specific to management and labour and the Member States can be brought in line with the procedures within the context of Article 155 TFEU, as discussed in the previous chapter. Due to the fact that the Autonomous Agreement contains elements that strive to be minimum standards, it is a reality that in some countries the current standards are already in line with the level of regulation that the agreement promotes. Therefore, in the countries that already have a collective bargaining agreement (CBA) in force no actual implementation needs to take place. Where no CBA exists the social partners should seek to create the fundamentals for creating stronger industrial relations and eventually implement the agreement through a CBA. In the case that in some countries this method may not be the most appropriate one, alternative methods may be found by the social partners involved. As an example of such an alternative method the, standard contract used by the football governing bodies may already contain elements of social protection and standard clauses that are already in line with the Autonomous Agreement. If this is not the case, the regulations of the leagues and / or associations could impose a standard contract that incorporates the elements of the Autonomous Agreement.

The voluntary route thus entails a 'marriage' between (EU) employment law and the enforcement of the Autonomous Agreement through implementation in standard contracts of which the use is binding upon the members due to internal association regulations. Non-commitment could eventually lead to a system of (sporting) disciplinary sanctioning such as a deduction in points, financial implications or a ban from registering players during the registration periods.

The Commission compromise describes various levels of implementation and divides the countries that are intended to fall under the scope of the agreement into groups. The first group consists of countries where the social partners agreed to implement the agreement

within one year after signing. The countries that have been identified in this respect are Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, England, Northern Ireland, Wales, Scotland, Switzerland and Norway.<sup>497</sup> The second group, where the social partners have two or three years to implement the agreement, consists of Bulgaria, Greece / Cyprus, Hungary, Poland, Romania and Slovenia.<sup>498</sup> In the remaining countries the period of implementation could take three years.

The European Commission created a system that monitors the implementation of the agreement. This system is founded on the 'European Professional Football Social Dialogue Taskforce'.<sup>499</sup> This taskforce reports to the Steering Committee of the FSDC. The Steering Committee creates the agendas for the (plenary) meetings in the FSDC, and for UEFA's Professional Football Strategy Council. The taskforce will visit selected countries or selected regions in order to convince and to assist the parties at the national level to implement the agreement. The taskforce consists of representatives of each of the signatory parties and their national or regional affiliates.<sup>500</sup> The European Commission concludes by arranging a schedule for the visits.

The taskforce and its results will be frequently monitored by the FSDC working group on implementation of the Autonomous Agreement. This working group was created on the basis of the decisions that were taken on the plenary Social Dialogue meeting of 19 April 2012, when the Autonomous Agreement was launched. According to the mandate that has been given to this group the tasks are to make the MRSPC a reality throughout the whole UEFA territory while respecting the principle of solidarity. The working group will identify with help of the national associations and social partners at national level the issues that need to be resolved in order to implement the minimum requirements. To plan meetings to create awareness about the function and role of national affiliates in this process of implementation,

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<sup>497</sup> Annex 4, sub 1.1. to the Agreement Regarding the Minimum Requirements for Standard Player Contracts , *Compromise Agreement*.

<sup>498</sup> Annex 4, sub 1.2. Agreement Regarding the Minimum Requirements for Standard Player Contracts, *Compromise Agreement*.

<sup>499</sup> Annex 4, sub 2.1. to the Agreement Regarding the Minimum Requirements for Standard Player Contracts, *Compromise Agreement*.

<sup>500</sup> Annex 4, sub 2.1. to the Agreement Regarding the Minimum Requirements for Standard Player Contracts , *Compromise Agreement*. FIFA will be invited and is expected to join, further parties are the UEFA, the national association of the country concerned, EPFL, the national league of the country concerned, FIFPRO division Europe, the national players' union, ECA and local ECA members.

during the scheduled meetings agree on the best methods for implementation.<sup>501</sup> At the same plenary session two other working groups have been created.<sup>502</sup>

## Assessment of the FSDC

Prior to the start of the FSDC in 2008, academic debate concerning the European Social Dialogue not only focused on the fine-tuning and harmonisation of employment-related laws but more on the potential impact of collective bargaining on competition law, as shown below. In some cases, the connection is made to the history of concluding collective bargaining agreements in the closed leagues of the United States main sport disciplines. In the United States collective bargaining between union and management began to transform in the 1960s and early 1970s and it opened the door for a non-exhaustive exemption from the application of antitrust laws. This exemption was called the ‘labor exemption’ and helped the leagues to maintain a competitive balance within a closed competition.<sup>503</sup> The exemption was allowed if it primarily only affected the parties to the collective bargaining relationship, dealt with a matter that is the mandatory subject of collective bargaining and is the product of genuine collective bargaining.<sup>504</sup>

In 2003 Meier used this perspective when he described the emergence of the European Social Dialogue in professional football. Coming from the context of the discussions between FIFA, UEFA and FIFPRO as regards the change of the transfer system, in 2001, he approached the Social Dialogue as a potential framework for bringing the 2001 agreement in line with the commands of the European Commission.<sup>505</sup> He also discussed the potential gain for UEFA could have in implementing its intended club licensing system into a collective bargaining agreement and thus move away from the pressure it encountered from EU competition law.

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<sup>501</sup> Mandate (Terms of Reference) of working groups of the European Social Dialogue Committee in the professional football sector (Work Programme 2012/13) to be found at: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp?FormPrincipal: idcl=FormPrincipal: id5andFormPrincipal.SUBMIT=1andid=02154c14-115d-4a90-b27d-5393110f46c7andjavax.faces.ViewState=r00ABXVyABNbTGphdmEubGFuZy5PYmplY3Q7kM5YnxBzKWwCAAB4cAAAAAN0AAExcHOAKy9qc3AvZXh0ZW5zaW9uL3dhaS9uYXZpZ2F0aW9uL2NvbnRhaW51ci5qc3A=>

<sup>502</sup> The working group on career funds and working group on the respect of contracts and contractual stability.

<sup>503</sup> Kahn, L.M. (2009) *Sports, Antitrust enforcement and collective bargaining*, *The Antitrust Bulletin*, Vol. 54, fall/winter 2009, p. 857

<sup>504</sup> *Mackey v National Football League* 543, F.2d 606 (8<sup>th</sup> Cir, 1976)

<sup>505</sup> Meier, H.E. (2004), *From Bosman to Collective bargaining agreements, The regulation of the market for professional soccer players*, *International Sports Law Journal*, 2004, 3-4, The Hague: T.M.C. Asser Press

Especially concerning the imposition of a proposed ‘soft cap’ on the expenditure of no more than 70% of the club’s income on players’ wages, as proposed by the then G-14. Meier was of the opinion that there was not a lot of space for the social partners that were busy profiling and positioning themselves in those days to start a functioning Social Dialogue in the aftermath of the then recently concluded new, post-*Bosman*, transfer system. He said:

*“On the other hand doubts can be raised as to whether the new transfer regulations leave enough scope for a Social Dialogue. According to the clubs and the leagues the liberalisation of the player market has already proceeded so far that further concessions to the players’ unions are hardly imaginable. In addition, the new transfer regulations enable the clubs to continue the transfer system – including trade in players. Yet, the abolition of the transfer system has been the main goal of FIFPRO since its founding. On the first conference on sectoral dialogue the General Secretary of the French Professional League, Philippe Diallo, made quite clear that from the employers’ point of view the Social Dialogue should take into account the key elements of the transfer agreement since the employers in professional soccer were not interested in a “remake” of the transfer negotiations”*<sup>506</sup>

Meier is therefore sceptical about the prospects for a Social Dialogue in professional football. In his perspective the hindrance lies in the strong involvement of political stakeholders in the regulation of the players’ market.<sup>507</sup>

Parrish and Mietinen discussed this potential impact of the European Social Dialogue on the classical governance model of sport in the EU. They argued that:

*“its (European Commission) advocacy of structured Social Dialogue taking place within the Treaty framework has the potential for social partners to negotiate collectively thus partly removing the EU from some potential future sources of conflict. Yet this policy option is also contentious. Encouraging horizontal channels of*

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<sup>506</sup> Supra, Meier (2004), op.cit. p.12.

<sup>507</sup> Supra, Meier (2004), op.cit. p.6.

*stakeholder dialogue disturbs the vertical pattern of governing body authority which has traditionally been a feature of the European model.*”<sup>508</sup>

In the same book Parrish and Miettinen suggest that football might adopt a process “*making use of methods of Social Dialogue such as collective agreements*”, which would amount to a contractual way for football’s stakeholders to settle their differences and remain compatible with EU law<sup>509</sup>. They refer to the Brentjes case<sup>510</sup> in which all employees of a Dutch building company had to sign a compulsory contract with a pension scheme provider on the basis of the fact that all workers should be entitled to receive the same pension terms on an equal basis regardless of risks. The authors therefore also make an indirect connection to the potential exemption from the application of EU competition to sport in case of a Social Dialogue. Dixon is critical towards this approach, arguing that:

*“These are examples where dialogue can maximise the interests of all parties – at the time of the agreement, dialogue can provide more than even a victory in litigation. This has less application where the interests are strikingly different, and divisions between rich and poor clubs are such that they are not realistically social partners for each other let alone capable of entering into such partnerships with players and governing bodies. Given the state of football, dialogue is more about settling litigation or possible litigation – a dynamic very favourable to the richest clubs seeking to exercise their economic freedoms.” And: “The potency of such a threat obviously depends on whether the benefits of breakaway outweigh this dent in their earning power. Also the existence of a sectoral agreement will only be relevant to the application of competition law, it would not help FIFA or UEFA restrict a breakaway that invoked free-movement rights. In truth, almost by definition, EU law cannot oblige parties to compromise their legal rights. The greatest contribution it can make to dialogue is to leave sufficient uncertainty as to victory so as to blunt the confidence of the elite that, should it come to litigation, their economic rights will be trumps. Of course, the law can never aspire to spread doubt as to what the law is”*<sup>511</sup>

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<sup>508</sup> Parrish, R. and Miettinen, S. (2008), *The Sporting exception in European Union Law*, The Hague: T.M.C. Asser Press, 2008.

<sup>509</sup> Ibid.

<sup>510</sup> Brentjes B.V. v Stichting Bedrijfsfonds voor de handel in bouwmaterialen (Case C-115 - 117/97) [1991] ECR I-609.

<sup>511</sup> Dixon, D. (2008), *The Long Life of Bosman, A Triumph of Law over Experience*, Entertainment and Sports Law Journal, Vol. 6, Nr. 2, winter 2008.

Parrish attaches more value to the Social Dialogue. He positions the FSDC as a body with a long-term potential to transform industrial relations in European football based on the conclusion of binding agreements. In the short-term he attributes two functions to the FSDC: a source for potential governance standard change in European football and as a lobbying technique for the social partners in terms of their relationship with the EU, and as a venue for negotiated settlement between the rival interests operating within the EU's sports policy subsystem.<sup>512</sup> Parrish treats with caution the assessment that the creation of the FSDC has led to a new system of European industrial relations in professional football. He notes that the committee until then (2011) had only been established for three years and that it did not conclude any agreement. He also stressed the lack of the much desired legal certainty that the FSDC can bring in non-labour related issues or that it cannot be used as a mask for clubs to impose restrictions on players. Parrish also elaborates on the general criticism to the system of Social Dialogue as that it does not lead to binding agreements in the vast majority of the negotiations prior to the culmination into a result.<sup>513</sup> Especially employers would prefer soft measures over binding agreements.<sup>514</sup>

As regards governance change Parrish claims that both the players and the clubs view the Social Dialogue as a means of imparting pressure on FIFA and UEFA to allow for greater stakeholder participation within the structures of the sports governing bodies and enables them to influence the policy of control of FIFA and UEFA, where before the tools for such influence were limited.<sup>515</sup> The Social Dialogue implies a further shift towards a system of governance based on *co-regulation* where a wider range of stakeholders is involved in the decision making procedures.<sup>516</sup> Two other examples of the (potential) impact of the FSDC on governance are described by Parrish. The FSDC would be able to further define the specificity of sport as laid down in Article 165 TFEU. The 'vague' elements of Article 165, such as the

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<sup>512</sup> Parrish, R.(2011), *Social Dialogue in European Professional Football*, European Law Journal, Vol. 17, No.2, March 2011, p. 213-229, p. 213.

<sup>513</sup> According to Pochet fewer than 2% of the texts adopted at sectoral level are generally agreements with binding effect. See Pochet, P.(2007), *European Social Dialogue between Hard and Soft law*, European Union Studies Association (EUSA) Tenth Biennial International Conference, Montreal, Canada, 17-10 May 2007.

<sup>514</sup> Keller, B. (2005) *Europeanization at Sectoral Level. Empirical results and Missing perspectives*", 2005, Vol. 11 Nr. 3, Transfer 397, cited in E. Léonard (2008), *European Sectoral Social Dialogue: An analytical framework*, Vol. 14, Nr. 4, European Journal of Industrial Relations 403.

<sup>515</sup> Ibid, p. 225.

<sup>516</sup> See on co-regulation: Prosser, T.(2008), *Self-regulation, Co-regulation and the Audio-Visual Media Service Directive*, Journal of Consumer Policy, March 2008, Vol. 31, Nr.1, p. 99-113

promotion of “fairness and openness”,<sup>517</sup> and the “cooperation between bodies responsible for sport”, can be further defined in the context of labour relations when discussed by the social partners in the FSDC.<sup>518</sup> Finally, Parrish states that if FIFPro would not only use the FSDC as a tool to lever greater influence with the clubs and UEFA but also to conclude more far reaching and binding agreements then a comparison with the US model of sport would be easier to make.<sup>519</sup>

Meier and Garcia argue that “*those eager to contest the traditional power of the governing bodies might have expected too much too soon*”.<sup>520</sup> They claim that there have been no other venues that have empowered interest groups with the ability to influence the powers of the governing bodies than the threat of potential litigation. They conclude:

*“one (albeit not the exclusive) explanation for the relatively limited empowerment of clubs and players in football governance is that successful action in alternative political venues following a different institutional logic requires further investments in organisational capabilities since claimant status might not suffice...Nevertheless competition policy appears as a venue to be used by interest groups that support a liberalizing agenda and have only limited resources.”*<sup>521</sup>

In the context of the analysis of Parrish and Garcia and Meier, Anderson analyses an evolution in three steps as regards possible travel towards the US model. This evolution is that the US pattern of restrictive transfer related litigation have first been fought in a contract / private law arena. Consequently, that antitrust law was applied to sports cases, which lead to litigation. This ended when the labour exemption through collective bargaining agreements was introduced. By using the collective bargaining agreements and the labour exemption, the various stakeholders avoided that *Bosman* type accidents of litigation would determine the future of their sport.<sup>522</sup> They would take their own initiative and bargain collectively towards solutions. According to Anderson the EU sports sector has taken the first two steps and has

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<sup>517</sup> See also: Weatherill, S. (2012), *Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?*, in: Siekmann, R and Soek. J, (ed) (2012), *Lex Sportiva: What is Sports Law?*, The Hague: T.M.C. Asser Press.

<sup>518</sup> Supra Parrish (2011), p. 227.

<sup>519</sup> Supra, Parrish (2011), p.225.

<sup>520</sup> Garcia. B., and Meier. H.E. (2012), *Limits of Interest Empowerment in the European Union: the case of Football*, European Integration, Vol. 34, Nr. 4, p. 359-378.

<sup>521</sup> Ibid, p. 375.

<sup>522</sup> Anderson, J. (2010), *Modern Sports Law, A Textbook*, Hart Publishing, p.356-362.

now taken another half step forward. He attributes this half step to the structured dialogue principle as introduced in the White Paper on Sport.

Geeraert et al introduces a new approach in the academic debate on governance failures in professional football.<sup>523</sup> Geeraert claims that Social Dialogue is one of the elements that are part of a complex structure of interconnected layers of governance.<sup>524</sup> Leading in the approach is the governance of the sector through governance networks, cited by Geeraert from Sörensen:

*“A relatively stable horizontal articulation of interdependent, but operationally autonomous actors, who interact through negotiations, which take place within a regulative, normative, cognitive and imaginary framework and to a certain extent is self-regulating and which contributes to the production of public purpose within or across particular public areas”*<sup>525</sup>

He assumes that the intertwined political, legal and economic driving forces in professional football are enduring and that therefore an evolution from a pyramid to a more governance model network. In his conclusion Geeraert acknowledges that further research is needed to provide more concrete recommendations. As regards Social Dialogue, Geeraert claims that there are many problems before a solution between the parties can be reached, such as the lack of an agreement concerning FIFA’s transfer regulations due to the fact that UEFA would have no mandate to conclude an agreement in the FSDC that would concern these regulations. The latter brings him to state that the FSDC could not be compared to the North American models of collective bargaining because these agreements govern the employer-employee

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<sup>523</sup> Geeraert, A., Scheerder, J., Bruyninck, H, (2013), *The governance network of European football: introducing new governance approaches to steer football at the EU*, International Journal of Sport Policy and Politics, Vol. 5., Nr.1, p. 113-132.

<sup>524</sup> Ibid, p. 115: Governance according to Geeraert: *“Society is becoming increasingly complex, fragmented and layered. In order to govern efficiently, there is a need for negotiation and interaction between the different kinds of organisationorganisations and groups of state, market and civil society concept civil society refers to a multitude of organisationorganisations, ideally initiated and maintained by the Voluntary activities of citizens. However, this does not mean that central and local governments are being hollowed out. States still play a key role in local, national and transnational policy. Yet at the same time, their powers are steadily eroding, since they no longer monopolise the governing of the general well-being of the population. Governments increasingly control society by involving different groups of citizens, professionals, Voluntary organisationorganisations, unions and private actors in their decision-making. In other words, governments are gradually controlling society in a horizontal or networked way. This new horizontal form of governing is called ‘governance’. It can be viewed as the counterpart of the formal, classical and vertical or top-down ‘government’.*

<sup>525</sup> Sörensen, E. and Torfing, J. (2005), *The Democratic Anchorage of Governance Networks*, Scandinavian Political Studies, Vol. 28, Nr. 3.



relationships between the owners of the teams and the players. Colucci and Geeraert<sup>526</sup> state that the method of implementation of the MRSPC does not lead to impulses for stakeholders to enforce the agreement as it would only be a case of ‘endeavours’ and not of binding rules. Geeraert also claims that the bigger European leagues refused to ratify the agreement taking away the mandate of EPFL to continue the negotiations.<sup>527</sup> Finally, he states that on the basis of the ILO Convention 154 the social partners should be able to bargain freely and that governments would not be able to enforce the implementation of an agreement or put pressure on the social partners to implement an agreement.

## Conclusion

The overview above is centred around three themes. First, the lack of activity within the European Social Dialogue in general and in professional football in particular. Second, the obstacles related to the stakeholders’ participation in the FSDC. Third, the implementation and enforcement of the agreements in the FSDC. The impact of the FSDC on the governance structure of football was also discussed, linking it to collective bargaining models in the US sports.

The lack of activity in the European Sectoral Social Dialogue is an issue that has been discussed in the previous Chapter 4. Pochet described general reasons for the lack of outcome in the European Sectoral Social Dialogue. Employers favour a more consultative dialogue, limited in scope. Whereas the workers are more keen to exploit the venue of industrial relations to a further extent than the employers. In the football sector these obstacles have also been noticed. As the horizontal structure of collective bargaining might influence the pyramid model of EU sports governance, it is likely that UEFA has been reluctant to encourage or support the clubs to pursue a Social Dialogue. Those clubs hoping to participate in the UEFA competitions have felt the pressure of UEFA regarding their participation in the (creation of) the FSDC. However, taking the potential impact on the governance model in football into consideration, it has not taken an extremely long time before the Social Dialogue has been introduced in football. One has to take into consideration that only one year after the 2001

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<sup>526</sup> Geeraert, A., Colucci, M. (2012), *The ‘Social dialogue’ in European professional football*, Comparative Labor Law and Policy Journal, Vol. 33, Nr. 1.

<sup>527</sup> See also the presentation, Geeraert, A. , *Social Dialogue in sport: theory and practice- the case of professional football*, presentation KU Leuven.

transfer regulations agreement, the aftermath of *Bosman*, the first Commission funded projects were started in order to create awareness about the Social Dialogue. The process then focused on the definition of the social partners, within 5 years representative organisations were created. The employers' side (EPFL and ECA) was undeveloped. Also, 4 years after the establishment of a FSDC the first Autonomous Agreement has been celebrated. This is a good result in comparison to the numbers in other Sectoral Social Dialogue Committees: until 2010 there had been only 4 Autonomous Agreements in all sectors together.

The general obstacles to stakeholder participation are also linked to the structure of the participating stakeholders. However, these general obstacles are, contrary to what has been argued in the review above, less present in the FSDC. Geeraert's argument that UEFA would not have a mandate to discuss and conclude an agreement concerning the FIFA regulations may be contested. Because, issues that would touch upon the relationship between employer and worker may all be part of a Social Dialogue discussion and be part of an agreement when falling within the scope of the TFEU Social Dialogue articles. Although UEFA has to agree on the agenda of the FSDC, the social partners, the EPFL and FIFPRO, are not obliged to include UEFA in the negotiations on the platform of the FSDC. Therefore, if these social partners decide that topics that fall under the scope of the FIFA regulations should be part of the FSDC, then this should be possible and under the Social Dialogue structures they cannot be prevented by a third 'non-industrial relations' party such as UEFA. As regards the lack of representativeness of the EPFL, Geeraert's claim about the refusal of some leagues to ratify the Autonomous Agreement should be seen from a different perspective. It has not been a refusal from these leagues to implement the agreement; these leagues already had a system in place that respected the minimum criteria. There is no relation to the issue of representativity from the side of the EPFL. In general, if the obstacles to start negotiations within the FSDC are related to the lack of willingness of the parties involved, then the ultimate motivation to pursue the route of a FSDC is to avoid legal challenges. Therefore, the claim of Garcia and Meier that competition policy remains the venue to influence an agenda, does not take into consideration that, next to litigation, an enforceable result by means of a negotiated settlement can also be reached within the FSDC.

## CHAPTER SIX

### FIFA Regulations on the Status and Transfer of Players

#### Introduction

The autonomous agreement of the FSDC regarding the minimum requirements for standard player contracts was a transformation and further elaboration on the agreement reached in 2006<sup>528</sup> by a working group comprising the EPFL, FIFPRO and UEFA. One of the differences between the two documents is<sup>529</sup> that the former explicitly states that in particular the FIFA Regulations on the Status and Transfer of Players (RSTP) needs to be taken into account before the finalization of each individual contract between a professional football player and the club on the UEFA territory takes place.

The autonomous agreement, on the contrary, refers in two of its articles to the RSTP and places emphasis on the application of EU fundamental rights and secondary EU law to football players' contracts.<sup>530</sup> The focus of the autonomous agreement lies on employment issues, and despite the fact that it refers to FIFA regulations, there has been no analysis of potential implications of the content of the RSTP with EU law.

Therefore, the question arises if in the regulations of these governing bodies there exist topics with relevance to the employment relation between footballers and their clubs that would deserve further analysis. Insofar as the parties to the autonomous agreement have committed themselves to further elaborate on provisions to regulate the employment contract while taking account of the specific nature of sport, it is to be investigated whether issues that are currently regulated by FIFA could, or should, fall within the scope of issues best covered by the Social Dialogue. It could be a better forum for the creation of legal certainty and stability and thus avoid legal challenges to the RSTP.

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<sup>528</sup> Sent to the Members of UEFA by Circular Letter no. 032 dated 18 May 2007.

<sup>529</sup> Annex 1 to the Memorandum of Understanding signed between FIFPRO and UEFA on 11 October 2007, "European Professional Football Player Contract Minimum requirements", Introduction sub C.

<sup>530</sup> Under the section "whereas" of the autonomous agreement point m states: "*the provisions of EU Treaties, the Charter of Fundamental rights of the European Union, and secondary EU law apply to professional football players' contracts without prejudice to more stringent and/or more specific provisions contained in this agreement. The parties commit to further elaborate provisions regulating the employment relationship in the professional football sector, taking into account its specific nature, in future agreements. Where appropriate, agreements on matters falling into the scope of Article 153 of the TFEU may be submitted to the Commission for adoption by Council decision in line with the procedure laid down in Article 155 of the TFEU.*"

This chapter analyses the RSTP and determines what topics could, or should, potentially be addressed in the forum of the Social Dialogue. First an overview will be given of the process that has led to the current RSTP. Consequently, the following issues will be described: status and registration of players, contractual stability, training compensation, minors, player release to national teams, duration of contracts, unilateral option clauses and dispute resolution. Finally, it will be concluded how these topics may be embedded within the Social Dialogue.

### **The FIFA Regulations on the Status and Transfer of Players: The 2001 Agreement**

The essential element of any transfer system is the creation of a situation whereby the movement of a player on the labour market is restricted. The restriction is grounded on three conditions that are common to a system of player restraints.<sup>531</sup> First, a temporary limitation of a transfer during a sporting season can be imposed on the athletes or a limitation on the registration of an athlete can be imposed on a club.<sup>532</sup> Second, there might exist national or international quota systems limiting the number of foreign players to participate in national team competitions.<sup>533</sup> Third, the federations concerned may create a further elaborated system of formal requirements that need to be fulfilled in order for an international movement of an athlete to be implemented.

The international transfer of football players has been regulated by a mixture of rules set by UEFA and FIFA since 1979.<sup>534</sup> After *Bosman* FIFA decided to be solely responsible for the implementation of the transfer system, including the implementation in the European Union.<sup>535</sup> FIFA was forced to change the transfer system in accordance with the prerequisites set by the judgment, related to safeguarding the free movement of football players within the territory of the European Union. As FIFA is an association of undertakings under EU law, and therefore the transfer regulations can be regarded as an agreement between undertakings, also EU competition law is applicable to FIFA and their regulations. Therefore, in addition to

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<sup>531</sup> J.-P. Dubey. (2000) *La libre circulation des sportifs en Europe*, Bruylant: Brussels, P. 274-277.

<sup>532</sup> See also *Lethonen v FRBSB* (Case 176/96) [2000] ECR I-2681.

<sup>533</sup> See *Doná v Mantero* (Case 13/76 ) and for the 3+2 rule in *Bosman*, (Case C-415/93).

<sup>534</sup> UEFA, (2005), *Vision Europe, the direction and development of European football over the next decade*. Nyon, Switzerland, UEFA. Dealing with transfers was not UEFA's original purposes because at the time of the creation of UEFA there were not many international transfers. Through the nineteen eighties UEFA dealt with international transfer disputes and had a well functioning arbitration system.

<sup>535</sup> *Ibid.*

adjust the transfer system in accordance with the free movement of workers, EU competition law grants the European Commission the authority to investigate if such agreements have as their object or effect the prevention, restriction or distortion of competition.<sup>536</sup> As such, the European Commission also needed to be satisfied that the transfer regulations did not restrict the clubs' ability to acquire football players due to unnecessary high transfer fees and that it did not affect interstate trade.

FIFA and UEFA attempted to bring the transfer regulations in line with EU law requirements by simply not applying them to transfers of EU nationals within the territory of the EU and by abolishing the 3+2 rule. This was not accepted by the Commission. In 1996 the Commission maintained certain objections to the transfer system on the basis of competition law due to the continuing imposition of the payment of fees for the movement of non-EU players within the territory of the EU after the end of their employment contract. FIFA and UEFA expressed their reluctance to adjust the transfer system in a manner that would go beyond the requirements set with *Bosman*. Instead of following the lines of the Commission FIFA and UEFA lobbied amongst the political leaders of the national member states to put pressure on the Commission.<sup>537</sup>

Although these lobbying activities might have influenced the eventual agreement and the position of sports governing bodies in general due to the subsequent mentioning of sport and its specific characters in the Amsterdam Treaty and Nice Declaration, it did not prevent the European Commission from launching a formal investigation, on the basis of an infringement of competition law without grounds for a justified exemption, into the operation of the international transfer system in 1998.<sup>538</sup> The Commission objected to provisions within the transfer system that had the effect of:

1. Prohibiting a player from transferring to another club following their unilateral termination of contract, even if the player has complied with national laws governing the penalties for breach of contract;
2. Allowing a club to receive payment for a player leaving a club if the contract has been terminated by mutual consent;

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<sup>536</sup> Article 101 (1) TFEU.

<sup>537</sup> Garcia, B. (2011) *The 2001 informal agreement on the international transfer system*, in: European Sports Law and Policy Bulletin, "Contractual Stability in Football" edited by Colucci, M., European Sports Law and Policy Centre, Rome, Italy, P. 20-22.

<sup>538</sup> Parrish, R. (2003), *Sports law and policy in the European Union*. Manchester, Manchester University Press, 2003, p.141.

3. Encouraging high transfer fees which bear no relation to the training costs incurred by the club selling the player, a practice condemned by the Court in *Bosman* and one which limits the ability of small clubs to hire top players;
4. Allowing for a transfer fee to be demanded for the transfer of players (both in and out of contract) from a non-EU country to a member state of the EU and *vice versa*.

After receiving the Commission's statement of objections, FIFA decided that it should continue negotiations on its own, without assistance from UEFA. FIFA approached FIFPRO and held talks with the players' union in 1999 and 2000 in order to find a solution with the players.<sup>539</sup> Despite the approximation of FIFA to FIFPRO no concrete solution to the objections raised by the Commission were presented. On the contrary, the relationship between FIFA and FIFPRO suffered from a severe infraction when FIFPRO decided to negotiate within their own ranks and claiming that FIFA had a hidden agenda. Since that moment FIFA excluded FIFPRO from the process towards new regulations.<sup>540</sup>

In total, a two year period of deadlock had followed the Commission's objections. This situation of inaction motivated the Commission to give FIFA a deadline of 31 October 2000 for the submission of an alternative transfer system, while a threat of a formal decision to impose sanctions and fines had to serve as a motivational tool for FIFA.<sup>541</sup> From that moment UEFA felt that it was necessary to reappear in the centre of the negotiations in order to avoid that FIFA would agree to an unacceptable liberalization of the players' market in Europe.<sup>542</sup> UEFA promoted the value of a constructive and positive dialogue with the Commission and that the dialogue, inevitably leading to change, would be acceptable if it would be a wider dialogue than the one that FIFA had conducted.<sup>543</sup> As a result of this approach a Transfer Task Force was established grouping the interests of FIFA, UEFA and a representation of some leagues. This group presented a set of proposals to the Commission on 27 October 2000. The Commission was positive but cautious about the recommendations that had been presented. It

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<sup>539</sup> According to an UEFA official, interviewed by Garcia, B. See: Garcia, B. (2007) *UEFA and the European Union: From Confrontation to Co-operation?*, Journal of Contemporary European Research, Vol. 3, Nr. 3, 2007, p. 210.

<sup>540</sup> M. Bose, 'Players' Rift with FIFA threatens transfer talks', The Daily Telegraph, 28 October 2000.

<sup>541</sup> *Supra*, Garcia (2011).

<sup>542</sup> As FIFA's main concern on the level of competitive football are the competitions of national teams, whereas UEFA is the organiser of the Champions League and the Europa League, yearly European club competitions. A liberalisation of the players' market would have a stronger effect on club football and as a consequence on the attraction of UEFA's club competitions.

<sup>543</sup> Garcia, B. (2007), *UEFA and the European Union: From Confrontation to Co-operation?*, Journal of Contemporary European Research, Vol. 3, Nr. 3, 2007, p. 210.

considered that the efforts of the ‘football family’ were a positive step forward and a good basis for discussion, but that on certain aspects the proposals presented needed to be clarified and completed through discussions with the different interested parties. According to the Commission a negotiated compromise should include mutual basic rights for players and clubs, therefore FIFPRO’s involvement should be sought by FIFA.<sup>544</sup>

Garcia stresses that the political developments that occurred simultaneously with the presentation of the work of the Transfer Task Force were of importance to an efficient conclusion of the negotiations towards a final agreement. The Declaration on Sport, a Presidency Conclusion, presented at the 2000 Nice EU summit, stressed the social importance of sport and the significant role of sports governing bodies in organizing their sport within a sphere of specificity and a with flexible application of EU law to sport. Around the Nice summit political leaders of the major football nations expressed their support, through formal and informal fora,<sup>545</sup> to UEFA and FIFA and pressured the Commission to find a solution while taking into consideration the special needs of professional football.<sup>546</sup>

After these develops it was clear that there were common grounds for reaching a solution. The Nice Declaration created fertile soil for a compromise between FIFA and UEFA. A compromise was found and the negotiations between the Commission and FIFA came to an end by means of an exchange of letters between the president of FIFA and commissioner Monti of DG Competition in March 2001. The new rules came into effect in September 2001, whereby FIFA and FIFPRO had agreed a month earlier that the latter would be involved in the implementation of the regulations and would be present in the newly to be established dispute resolution chamber. In a press release on 5 March the Commission revealed the principles for the new regulations:

- in the case of players aged under 23, a system of training compensation should be in place to encourage and reward the training effort of clubs, in particular small clubs;

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<sup>544</sup>European Commission (2000), *Football Transfers: Commission underlines the prospect of further progress*, European Commission Press Release, IP/00/1417, Brussels, 6 December 2000.

<sup>545</sup> See Garcia, B. (2011) , *op.cit.* p. 20-22.

<sup>546</sup> Prime Ministers’ Office, Joint Statement by the Prime Minister the Right Honourable Tony Blair MP and Chancellor Gerhard Schroeder, 9 September 2000.

- creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs;
- international transfer of players aged under 18 to be allowed subject to agreed conditions; the football authorities will establish and enforce a code of conduct to guarantee the sporting, training and academic education to be provided:
- creation of one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season;
- minimum and maximum duration of contracts of respectively 1 and 5 years;
- contracts to be protected for a period of 3 years up to 28; 2 years thereafter;
- the system of sanctions to be introduced should preserve the regularity and proper functioning of sporting competition so that unilateral breaches of contract are only possible at the end of a season;
- financial compensation can be paid if a contract is breached unilaterally whether by the player or the club;
- proportionate sporting sanctions to be applied to players, clubs or agents in the case of unilateral breaches of contract without just cause, in the protected period;
- creation of an effective, quick and objective arbitration body with members chosen in equal numbers by players and clubs and with an independent chairman; representatives of FIFPRO will sit on FIFA's Dispute Resolution Chamber, together with representatives of clubs. FIFPRO will also nominate representatives for the new Arbitration Tribunal for Football, to which decisions of the Dispute Resolution Chamber can be appealed.



- arbitration is voluntary and does not prevent recourse to national courts.<sup>547</sup>

On 5 June 2002 the Commission formally closed the investigation into the transfer rules. Commissioner Monti stated that:

*“The new rules find a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships. It is now accepted that EU and national law applies to football, and it is also now understood that EU law is able to take into account the specificity of sport, and in particular to recognise that sport performs a very important social, integrating and cultural function. Football now has the legal stability it needs to go forward.”*<sup>548</sup>

However, this statement does not have any influence on the legal status of the agreement. The exchange of letters that served as a conclusion is an informal settlement and not legally binding on the parties. The status of the agreement does not prevent the Commission from re-opening an investigation although it is unlikely to do so on its own, especially in the current context of Article 165 and the promotion of a structured dialogue.

However, this landscape that favours informal settlements leaves enough room for political manoeuvre for both the Commission and the stakeholders. A negative consequence is that the current system leaves a degree of legal uncertainty and scholars and practitioners have already speculated on the illegality of the system.<sup>549</sup>

In the following the current FIFA transfer regulations, the 2010 version which is based on the 2001 Agreement, will be analysed along the lines of the negotiation agreement principles.

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<sup>547</sup> European Commission (2002), *Commission Closes Investigations into FIFA Regulations on International transfers*, European Commission Press Release, IP/02/824, Brussels, 5 June 2002.

<sup>548</sup> Ibid.

<sup>549</sup> See Garcia (2011) p. 24. Also, Drolet, J. (2006), *Extra Time, : Are the New FIFA Transfer Rules Doomed?*, International Sports Law Journal, 2006 Vol. 1-2, p. 66-73, The Hague: T.M.C Asser press.

## **FIFA Regulations on the Status and Transfer of Players, 2008-2013**

The reformation of the transfer system intended to be the basis for a balance between players' rights and contract stability. However, there remain doubts about the legality of the transfer agreement. A clear example of this statement is the announcement of FIFPRO in December 2013 to challenge the 2010 RSTP.<sup>550</sup> FIFPRO indicated that it will address the issue of the free movement of workers within the EU, competition law and human rights.<sup>551</sup> However, no specificities about the content of the challenge were given.

The RSTP lay down global and binding rules concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different associations. Section 1 are the introductory provisions. Sections 2 deals with the status of the player, Section 3 regulates the registration of the player, Section 4 concerns the maintenance of contractual stability between professionals and clubs, Section 5 deals with third party influence on clubs, Section 6 is regulates the international transfer of minors, and Section 7 organizes the jurisdiction of FIFA over disputes. In the annexes to the regulations the release of players for national teams, the FIFA Transfer Matching System<sup>552</sup> and the methods for training compensation and solidarity payments can be found.<sup>553</sup>

The national associations are supposed to include the majority of the regulations into their national regulations. The remaining articles are only applicable when an international transfer takes place or when there is a dispute with an international dimension. These topics fall directly under the authority of FIFA, therefore there is no need for a national association to include those articles directly on the national level within their own regulations. The only deviation from the regulations that is allowed by FIFA is the deviation from Section 4 of the RSTP, these articles deal with maintenance of contractual stability and the national

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<sup>550</sup> [http://www.fifpro.org/news/news\\_details/2455](http://www.fifpro.org/news/news_details/2455)

<sup>551</sup> Ibid.

<sup>552</sup> FIFA TMS is a digitalized system for the administration of international transfers. In essence it controls the international transfers by demanding that both the selling club and the acquiring club fill in the details of the intended transfer into a FIFA database. At the moment that the details, such as details over the acquisition amount that the new club needs to pay and of the status of the player and the player passport, are in conformity with each other, when they 'match' the administration of the transfer can take place and the move is given the green light by FIFA.

<sup>553</sup> The Regulations on the Status and Transfer of Players can be found at:

[http://www.fifa.com/mm/document/affederation/administration/01/06/30/78/statusinhalt\\_en\\_122007.pdf](http://www.fifa.com/mm/document/affederation/administration/01/06/30/78/statusinhalt_en_122007.pdf)

associations are allowed to pay due respect to mandatory national laws and collective bargaining agreements.<sup>554</sup>

## **The Status and Registration of Players**

Sections 2 and 3 deal with the status of players and with the registration of players in case of participation in a national competition and/or registration after an international transfer. According to the RSTP the player is either a professional or an amateur. A professional is a player who has a written contract with a club and is paid more for the footballing activity than the expenses he affectively incurs.<sup>555</sup> The autonomous agreement contains elements that need to be included in the written contract and it specifies that the contract is an employment contract. It also states that national labour law may provide extra mandatory provisions that need to be taken into account by the signatory parties to the employment contract. It is to be assumed that the status description of the player as a professional can be understood to be in line with the concept of ‘worker’ within the context of Article 43 TFEU, as only the notion of ‘worker’ would trigger the application of the provisions of the free movement of workers.<sup>556</sup>

The transfer system in itself only functions properly due to the compulsory link of the football player to his club and, directly (individual membership) or indirectly (via his link to his club) to the association that governs football on the national level. In broad terms, this affiliation to the association, which is made concrete through the registration of his license to play at the national association of which his club is an affiliate, has a double objective. On the one hand it enables the football governing bodies to enforce their internal laws and regulations on the player as the registration of the player is conditional upon his acceptance of the rules of the football governing bodies. On the other, the football governing bodies are able to exercise control over the functioning and regularity of the competitions.

As they are able to assess which player is playing for what team they can prevent non-authorized players from participating in a competition. The international transfer of a player, the activity that falls within the scope of the RSTP, is in fact the international movement of

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<sup>554</sup> FIFA Regulations on the Status and Transfer of Players, Article 1 sub 3.

<sup>555</sup> FIFA Regulations on the Status and Transfer of Players, Article 2 sub 1 and 2.

<sup>556</sup> The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person for which he receives remuneration. So, before someone can be regarded as a worker there must be some kind of economic activity of some kind; remuneration and subordination. Case 66/85 Lawrie Blum v Land Baden –Württemberg [1986] ECR 2135, par. 17.

the registration of the player, or, the license of the player to enable him to participate in a competition. The player may be registered for 3 clubs during one sporting season while only be eligible to play for two clubs during that season.<sup>557</sup> The international movement of the registration of players is limited to two ‘registration windows’ per season: three months after the end of the season and one month mid-season window. Players whose contract has expired before the end of a registration period may also join a club after the closure of the ‘window’.<sup>558</sup>

National Associations are free to decide when they will have their registration windows in accordance with the duration of their competitions. Decisive for the movement of a player is the duration of the window of the receiving country. There has been a debate about the duration of the window, whereby clubs have argued that the transfer window should be closed at the beginning of the season in order for clubs to better prepare a consistent team.<sup>559</sup>

According to ECJ jurisprudence in *Lehtonen*<sup>560</sup> a restriction on free movement is permitted if objective justifications dealing with the integrity of the game are present. These justifications have to be connected to the fairness of competitions. However, this does not mean that any restrictive period in a season is automatically allowed under EU law. If a registration period is shortened, the freedom of movement of workers may be infringed. In essence, the means need to be in proportion to the methods used.

A player may be registered only after an International Transfer Certificate is issued. He may be registered on a temporary move whereby he continues to be affiliated to his club but plays for another club for a determined period of time that falls within the duration of his employment contract with his actual club.<sup>561</sup>

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<sup>557</sup> This statement may leave space for doubts in the case that a player is allowed to participate as a test player for another team in his national competition without acquiring the status of a registered player during the test period. It might occur that a player is under this test period and that the club, that would like to assess the qualities of the player in order to determine if it would move to a potential acquisition of the player, plays a match that can be regarded as an official match under the definition of FIFA. In the case that the player does not ‘earn’ a contract at this trial club he can be frustrated to move abroad due to the fact that a foreign club has doubts about the status of his temporary trial performance for another team without being registered in accordance to FIFA standards. Hence, a transfer to a foreign club could in that sense be the third club for which the player is registered, but the club could only use the player after the end of the current season.

<sup>558</sup> FIFA Regulations on the Status and Transfer of Players, Article 6 sub 1-2.

<sup>559</sup> See also <http://www.theguardian.com/football/2013/aug/30/michel-platini-uefa-fifa-transfer-window>

<sup>560</sup> *Lehtonen* (176/96).

<sup>561</sup> FIFA Regulations on the Status and Transfer of Players, Article 10.

## Contractual Stability

FIFA and UEFA stressed the importance of a balance between the players' rights to free movement within the territory and the stability of contracts, with the argument of the integrity of the sport and the stability of the competitions.<sup>562</sup> The post-*Bosman* 2001 agreement introduced Articles 13 to 17 on the maintenance of contractual stability, including the application of the protected period, as well as a FIFA Dispute Resolution Chamber<sup>563</sup> that could serve as the guardian of the concept of contractual stability within the scope of application of FIFA's regulations.

The protected period is a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the season of the player's 28<sup>th</sup> birthday or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such a contract is concluded after the 28<sup>th</sup> birthday of the professional.<sup>564</sup> The protected period starts running every time a contract is concluded and renewed between a professional and a club. If a contract is unilaterally breached without grounds, by either one of the parties during the protected period, the party that can be held liable for the preliminary breach, will face sporting sanctions. The sporting sanctions for the club will be a ban for registering players for a duration of two consecutive registration periods. The sporting sanctions for the player may amount to a period of ineligibility to play for four months and in aggravating circumstances, six months.

The basic article dealing with the maintenance of contractual stability is Article 13 in which the principle of *pacta sunt servanda* is laid down. A contract is to be respected and may only be terminated after the expiry of its duration or by mutual agreement between the parties. In professional football 'mutual agreement' is mostly reached in cases where club and player agree on the amount of damages that will have to be paid by the player, or in practice, his new club, to 'buy out' his contract. FIFA further acknowledges the situation in which a player and

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<sup>562</sup> European Commission (2002), *Commission closes investigations into FIFA regulations on international transfers*, European Commission Press Release, IP/02/824, Brussels, 5 June 2002.

<sup>563</sup> Ongaro, O. (2011), *Maintenance of contractual stability between professional football players and clubs - The FIFA Regulations on the Status and Transfer of Players*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011, ISSN 2039-0416.

<sup>564</sup> FIFA Regulations on the Status and Transfer of Players, Definitions.

a club may come to an end of their contractual relation if either one of them invokes the existence of a just cause for such preliminary termination.<sup>565</sup>

A termination for just cause can have two sources. First, FIFA defines the ‘sporting just cause’. Sporting just cause is a source for a premature ending of the contract with a fixed duration that only applies to an ‘established professional’. There is no jurisprudence on the exact meaning of this term. Therefore, it can be felt that the intention of FIFA is to give the possibility to the football player that has sufficient skills to play football on a competitive level but that is not fielded by his employer,<sup>566</sup> to seek opportunities to play for another potential employer.<sup>567</sup> In the case of sporting just cause the player will not be faced with sporting sanctions, nor will he be forced to pay compensation to his previous club. Ongaro gives a nuance to this approach when he states that a reasonably low fee may be imposed on the player due to the fact that the club did not neglect its contractual obligation in the case of the existence of a sporting just cause.<sup>568</sup>

The existence of a ‘regular’ just cause should be decided on a case by case basis. The party that decides to unilaterally terminate a contract should therefore take into consideration that the early termination is only justified if a certain level of severity has been reached. In general, just cause is considered as given when there are objective criteria which do not reasonably permit expectation of a continuation of the employment relationship between the parties.<sup>569</sup> A severe element is, amongst others, the non-fulfilment of the club of its financial obligations towards the player. In such a case, CAS jurisprudence has clarified that two conditions need to be met: the amount that has not been paid in time by the employer should be a substantial amount and the employee should have given a warning to the employer in advance.<sup>570</sup> In general, three months delay in payment of a salary gives a player the right to unilaterally terminate a contract without the risk of running sporting sanctions nor the payment of compensation. In aggravating circumstances the non-fulfilment of the financial obligation could be a source for unilateral termination with just cause after two months.

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<sup>566</sup> Better: appeared in less than 10% of the official matches in one sporting season. ‘Appeared’ means that the player was fielded and actually took part in the game.

<sup>567</sup> Supra *Ongaro* (2011), p. 41.

<sup>568</sup> Supra *Ongaro* (2011) p. 42.

<sup>569</sup> CAS 2008/A/1517 *Ionikos FC v C*.par. 56, with reference to CAS 2006/A/1180 *Galatasary SK v Ribéry and Olympique Marseille* par. 8.4.

<sup>570</sup> CAS 2006/A/1180 *Galatasary SK v Ribéry and Olympique Marseille*.

In all other cases of a premature ending of the contract on the initiative of one of the parties, which in any case may not occur during the course of a season,<sup>571</sup> the party that has been in breach is liable to pay compensation.

The contract between the player and the club may contain a clause in the case of a preliminary termination. If such a clause is included then the parties should, at the time of drafting the contract, be quite precise in the choice of the wording of such a clause. Commonly seen instruments are the 'buy-out' clause or the 'liquidated damages' clause. The former offers the party that invokes it the right to end the contract by paying the amount that is stipulated in the clause. The latter is a more abstract clause as it is difficult for a party to determine in advance what the damages will be that he incurs in case of a breach. If there is a disproportionality in, for example, the players' monthly remuneration and the height of the damages clause, then an adaptation of the abstract amount may be ordered by the body involved in the resolution of the dispute.

In the absence of a contractual clause establishing or giving guidelines for the calculation of the compensation sum in case of a termination of a contract without just cause, the parties need to fall back on Article 17 of the RSTP. Article 17(1) states that in all cases the party in breach shall pay compensation. The compensation payment is subject to any payment deriving from the obligation to pay training compensation. The FIFA regulations give the following guidelines for the calculation of the amount of compensation:

- due consideration for the law of the country concerned;
- the specificity of sport;
- any other objective criteria, in particular: the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

The professional football player is jointly and severally liable for the payment of the compensation together with his new club.<sup>572</sup> The new club shall be invited to establish that it has not been a party to prohibited inducement, but *a priori* the club will be deemed to have

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<sup>571</sup> FIFA Regulations on the Status and Transfer of Players, Article 16.

<sup>572</sup> FIFA Regulations on the Status and Transfer of Players, Article 17 sub 2 and sub 4.

induced the player. If the breach of contract takes place within the protected period, the player and his new club can face sporting sanctions. In the case that the protected period has passed then no sporting sanctions shall apply, however the player may be facing disciplinary sanctions if he fails to give notice of termination within 15 days after the last official match of the season. If another party is involved in the inducement of the breach of contract and this person is subject to the FIFA regulations, then he shall also be sanctioned.

The criteria laid down in Article 17 leave space for interpretation. Therefore, it is not surprising that the issue of the calculation of compensation for breach without just cause has been dealt with in a number of cases that ended up at the CAS in an appeal procedure. Below an overview will be given of the main article 17 cases. Consequently an analysis of the application of article 17 by the CAS arbitrators will be made.

### ***Webster***<sup>573</sup>

Just before his nineteenth birthday Scottish football club Heart of Midlothian (Hearts) signed Andrew Webster from the club Abroath. In 2001 the club agreed a contract with Webster after paying a transfer compensation of £75,000. The initial four year contract was set to expire in 2005, however Hearts and Webster agreed on a new-four year deal in the course of 2003. Webster was now bound to the club until June 2007. His career developed and Webster earned caps for Scotland while becoming a solid defender in Hearts' starting line-ups. In the course of 2005 Hearts wanted to extend their contractual relationship with Webster again, for a period up to 2009. However, Webster refused to sign as he felt pressured to do so and at the time there were rumours about other clubs' interests in employing the services of Webster.<sup>574</sup>

According to the facts presented in the underlying case in first instance at the FIFA Dispute Resolution Chamber,<sup>575</sup> Webster first intended to unilaterally terminate his contract claiming just cause, but then realized that he could use Article 17 as this would be a much speedier procedure. His agent informed interested clubs that the 'fee' that was supposed to be paid to Hearts would only amount to the residual value of his contract. Webster signed with FA Premier League side Wigan Athletic without payment of any sort of compensation. In the case

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<sup>573</sup> CAS 2007/A/1298, 1299 and 1300 *Webster and Wigan Athletic FC v. Heart of Midlothian*

<sup>574</sup> Gordon, P. (2006) *Webster on his way out at Tynecastle*, The Times, 27 April 2006.

<sup>575</sup> FIFA DRC 4 April 2007, 47936.



that was brought to the FIFA Dispute Resolution Chamber by Hearts, Hearts claimed an amount of £5,037,311. The DRC partly accepted the claim but it arrived at a total amount as compensation of £625,000. The argumentation for the Chamber to reach this amount was that there was no aggravating element on the basis of a unilateral breach within the protected period but the simple application of the amount of the residual value of the contract as damage would be in contrast with the principle of the maintenance of contractual stability. Therefore, the Chamber connected its decision to the justification offered by Article 17's criteria to calculate the amount of compensation, in addition to national law and the specificity of sport, any other objective criteria. The Chamber argued that Webster had raised his profile as a player at Hearts and that this was due to a contribution of the club. Although the reasoning was vague, Wigan was held jointly and severally liable for the payment of an amount of £625,000. After this decision all parties filed an appeal at CAS. CAS found that it could not be determined on what grounds the DRC had decided on the amount of the compensation. It decided that the decision of the DRC was invalid, it rejected the claim of Hearts and based its decision purely on the height of the compensation on the residual value of the contract: £150,000, as no other sums, such as unamortized transfer fees or agent commissions, were available to include in the calculation.

The football stakeholders, especially the clubs, were afraid of the potential impact of the Webster case. FIFA reacted that this decision would have far-reaching and damaging effects on football as a whole.<sup>576</sup> The fear of the clubs was that they would lose income on the potential transfer fees generated by the sale of players. With the decision in Webster a player could walk out of his contract without no other sanction than the payment of the residual value of the contract. If the player would have appreciated in the course of his current contract, the club would not be able to benefit from this more value.

### **Matuzalem**<sup>577</sup>

The Brazilian player Matuzalem was transferred in June 2004 from the Italian club Brescia for €8,000,000 by the Ukrainian club Shaktar Donetsk. The contract was concluded for the

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<sup>576</sup> [www.fifa.com/aboutfifa/federation/releases/newsid=682195.html](http://www.fifa.com/aboutfifa/federation/releases/newsid=682195.html). See also: De Weger (2008), F. *The Webster Case: Justified panic as there was after Bosman?*, The international sports law journal, 2008 Vol. 1-2, The Hague: T.M.C. Asser Press.

<sup>577</sup> CAS 2008/A/1519 and 1520 *FC Shaktar Donetsk v. Matuzalem Francelino da Silva and Real Zaragoza SAD and FIFA*.

length of five years ending on 30 June 2009. In the contract a 'transfer clause' was included. This clause offered an interested third club clarity as regards the fee it had to pay if it would be interested in acquiring the services of Matuzalem by means of a transfer. The clause was set at €25,000,000. Matuzalem became an important player in the team and gained interest from other clubs in Europe. Italian side Palermo offered Shaktar \$7,000,000 for the player but Shakter rejected this amount. Matuzalem decided to unilaterally terminate his contract with Shaktar on the basis of Article 17 of the FIFA Regulations within 15 days after the last game of the Ukrainian football season. Matuzalem signed a contract with Spanish Real Zaragoza, while Shaktar Donetsk denied that Matuzalem had grounds to claim the applicability of Article 17. Shaktar pointed towards the €25,000,000 transfer clause. It was this amount that Shaktar claimed in the procedure it initiated before the DRC, where it held Matuzalem and Real Zaragoza jointly and severally liable.<sup>578</sup> The counterclaim of Real Zaragoza and Matuzalem was an amount of €3,200,000.

The DRC decided that the transfer clause did not affect the unilateral breach of Matuzalem because it was directed towards a potential new club in case of that clubs acquisition of the services of Matuzalem through a settlement with mutual agreement after the payment of the sum that would enable such a transfer. The Chamber used three arguments to calculate the amount of the compensation: the residual value of the contract; the non-amortised value of the acquisition transfer fee paid by Shaktar to Brescia in 2004 and, as a consequence of the specificity of sport principle, the poor conduct of the player as he had left the club at a time when it was entering European club competitions. The DRC established that the amount of the compensation on these grounds should be €6,800,000.

The case was appealed to CAS which upheld the decision related to the transfer clause. However, it did adjust the amount of compensation to be paid by Matuzalem or Real Zaragoza. The argumentation was based on the calculation of the value of the lost services for Shaktar: the amount that Shaktar needed to pay to replace the player, added to the amount of remuneration that the player was still supposed to receive for the remaining two years of contract: €11,258,934. In addition to this amount the Court applied the argument of the specificity of sport. It reaffirmed that the player had become an important player (captain) for Shaktar and that it had left the club in a crucial phase of competition. Although the Court

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<sup>578</sup> FIFA DRC Decision, 2 November 2009, 117549.

acknowledged that the exact amount of damage could not be quantified, it did impose an extra amount of €600,000 to the established compensation, so a total amount of €11,858,934. Both Real Zaragoza and Matuzalem were held liable.

### ***El Hadary***<sup>579</sup>

The Egyptian goalkeeper El-Hadary played in his home country for Al-Ahly, where he signed a contract binding him to the club from January 2007 to the end of the 2010 football season. In 2008 Al-Ahly entered into talks with the Swiss club FC Sion about a potential transfer of the player to Switzerland. The clubs failed to reach an agreement, however the day after El-Hadary signed a contract with FC Sion and informed Al-Ahly that he had unilaterally terminated his contract with the latter. Al-Ahly brought the case before the FIFA DRC and was successful. The DRC calculated the compensation on the grounds of the remuneration that was still due to the player and on the loss of a potential transfer fee. This amount was set at €300,000. The DRC tripled the amount on the basis of the specificity of sport, apparently the player had caused the club so much damage that this addition to the basic amount was justified.

In appeal before the CAS another method of calculation was employed. The CAS determined that the amount reached by FIFA was too high. It took into consideration what the salary would be that El-Hadary would earn at FC Sion for the remaining duration of the contract he initially had with Al-Ahly. This amount would be added to the loss of the transfer fee by Al-Ahly and after that a deduction took place of the amount of salary that Al-Ahly did not have to pay because of the leave of the player. The final amount was established at €796,500. In addition to the jointly and severally liability of both player and club, El-Hadary also faced sporting sanctions. He was banned to play for four months.

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<sup>579</sup> CAS 2009/A/1880 FC Sion and El-Hadary v. Al-Ahly Sporting Club and FIFA.

## *De Sanctis*<sup>580</sup>

Goalkeeper Morgan de Sanctis signed a contract for Udinese Calcio in Italy after being transferred from Juventus, also from Italy. The contract was entered into in July 1999 and had a duration of five years initially, while it was extended in the years after with a final extension leading to a contract with a validity from 2005 to 2010. His salary at Udinese amounted to a total sum €630,000 gross with an addition of bonuses, a rent contribution of €9,700 and a yearly bonus of €350,878. In 2007 the protected period for De Sanctis had elapsed and he terminated his contract prematurely within 15 days before the end of the season. Not long after the termination of his contract De Sanctis signed a four year contract with the Spanish club Sevilla FC. Sevilla, in accordance with the Spanish customs, included a penalty clause in the contract that if the player would unilaterally breach the contract he would be liable to pay €15,000,000 to the club. In the case before the DRC<sup>581</sup> in 2008 Udinese calculated its losses and arrived at a compensation claim of €23,267,94. The DRC awarded Udinese a payment for their losses but substantially lowered the amount. Of the total amount, €3,547,134 resembled the compensation, but extra amounts would be added. The motivation was that this amount was the average of the salaries under the old and the existing contracts, a non-amortised agent fee of €36.000 and the value of the services attributed to De Sanctis by both clubs. In, addition, and bringing a further dimension to the extent of the notion of specificity of sport, was an amount of €350,000. In total the final amount was €3,933,134. On appeal, the CAS, not surprisingly, approached the case *de novo* and used another method of calculation. It lowered the total amount to €2,250,00 and it set the replacement costs on €4,510,00 for the remaining time of the contract (three years) and then deducted the amount that Udinese had saved on not having to pay the wages.

### **Article 17: Assessment**

Article 17 of the RSTP provides the methodology for the calculation of the training compensation. The outcome of the abovementioned cases serves as a source for analysis of the way in which the CAS has interpreted the individual elements of the methodology. Here it

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<sup>580</sup> CAS 2010/A/2145, 2146 and 2147 Sevilla FC SAD and Morgan De Sanctis v. Udinese Calcio S.P.A.

<sup>581</sup> FIFA DRC, 10 December 2009, 129641.

will be assessed how this approach promotes legal uncertainty. The pillars on which the amount of compensation is calculated on the basis of the Article 17 are:

- due consideration of the law of the country concerned
- statement in the contract
- the specificity of sport
- any other objective criteria, these *shall* include (in particular):
  - remuneration and other benefits due to the player under the existing contract and/or the new contract;
  - the time remaining on the existing contract up to a maximum of five years;
  - the (amortised) fees and expenses paid or incurred by the former club;
  - if the breach falls within a protected period.

### ***The Law of the Country Concerned***

An analysis of the key Article 17 cases reveals that none of the calculations have been based on the law of the country concerned. Ongaro<sup>582</sup> argues that the fact that the regulations include the reference to national laws, does not stipulate that these national laws needs to be applied. The consequence is that the national law should only be taken into consideration by the deciding authority. He states that the background of the regulations<sup>583</sup> is that the decisions of the DRC normally rest upon general legal principles rather than on specific provisions of contractual and civil law. When a case goes into appeal it already is ‘instructed’ on the basis of the FIFA statutes, where it is mentioned that CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.<sup>584</sup> The CAS has set aside clauses that include a choice of law in the contract.<sup>585</sup> In the key Article 17 cases the CAS has made such a movement. In *Webster* CAS did not apply Scottish law but Swiss law because the general Scottish laws on damages for contractual breach were ‘neither specific to the termination of employment contracts nor to sport or football’.<sup>586</sup> In *Matuzalem* there was no explicit choice

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<sup>582</sup> Supra Ongaro (2011), p. 45-46.

<sup>583</sup> Ibid., p. 53. Ongaro refers also to the composition of the DRC as the members of the chamber have different jurisdictional backgrounds. Also, he states that the members of the chamber do not have to have a legal education *per se*, but that they all should have a good knowledge of the regulations. This could imply that civil legal principles do not serve as a basis for the judgment but rather the mere interpretation of the regulations.

<sup>584</sup> FIFA statutes, Article 62 sub 2.

<sup>585</sup> De Weger, F. (2008), *The Jurisprudence of the FIFA Dispute Resolution Chamber*, The Hague: T.M.C. Asser Pres, p.23-24.

<sup>586</sup> Supra, *Webster*, par. 63.

of law, therefore the CAS applied FIFA regulations and Swiss law.<sup>587</sup> *El-Hadary and De Sanctis* the court used the approach that if a party would prefer the application of national law it should give enough reasons for the Court to do so.<sup>588</sup> Parrish concludes, in line with Ongaro's thoughts, that the approach of CAS seems to be to apply the regulations as they are tailored to football and would lead to more consistency than the application of national laws.<sup>589</sup>

### ***Statement in the Contract***

The existence of specific clauses on 'liquidated damages' or 'buy-out' clauses has been discussed. In the key case of *Matuzalem* the discussion concerning the legal consequence of the 'transfer clause' did not lead to clarity. Therefore the parties may include such a clause in the contract but they need to be careful about the exact wording in order not to leave too much space for interpretation. In some countries the use of such a clause might also be contrary to national law.<sup>590</sup>

### ***The Specificity of Sport***

There are no clear guidelines on how to approach the specificity of sport by the arbitrators of the CAS. Parrish argues that the specificity of sport should be seen as an approach by CAS as informing an analysis under 'any other objective criteria'<sup>591</sup> In general the CAS argued that:

*“the criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being a stakeholder in such world) and reaching therefore a decision*

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<sup>587</sup> *Supra, Matuzalem*, par. 52.

<sup>588</sup> Parrish, R. (2011) *Contract stability: the case law of the Court of Arbitration for sport*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011, p.79

<sup>589</sup> *Supra, Ongaro* (2011).

<sup>590</sup> De Dios de Crespo, J. *Maintenance of contractual stability in professional football, general considerations and recommendations*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011, ISSN 2039-0416 p 337.

<sup>591</sup> Parrish, R. (2011) *Contract stability: the case law of the Court of Arbitration for sport*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011 ,p. 82.

*which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football”.*<sup>592</sup>

This reasoning was also the guidance of the panel in *Matuzalem*. Also in *Matuzalem*, the panel referred to the specificity of sport in the sense that, unlike in ‘normal’ employment relations, the worker in football is not the weaker party per definition and that this could be taken into consideration in determining the amount of compensation.<sup>593</sup> In *Webster* the specificity of sport was described as:

*“the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory aspects of clubs and players.”*<sup>594</sup>

Ongaro adds in general that when embarking on the calculation of compensation, the DRC exclusively follows the other elements first, so not the specificity of sport, provided by the regulations. So strict adherence to the fundamental principles is maintained. After establishing the amount, the Chamber examines specific football matters that could justify an increase or decrease of the reached amount. Elements could be, amongst others, the behaviour of the party at fault, the timing of the premature termination (in relation to registration windows for example), and the status and commercial value of the player in the team.<sup>595</sup>

### ***Remuneration and Other Benefits due to the Player under the Existing Contract and/or the New Contract***

This aspect entails the remaining salaries to be paid to the player under a normal continuation of the terminated contract, and the salaries that the player should receive under the new agreement. However, the wording of the regulations (*and/or*) (again) leaves space for interpretation by the DRC and the CAS. In *Webster* the court argued that only the residual value of the contract should be taken into consideration, whereas since *Matuzalem* the ‘positive interest’ approach has been applied, taking also the future earnings of the player into

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<sup>592</sup> CAS 2007/A/1359 FC Pyunik Yerevan v. E, AFC Rapid Bucuresti and FIFA.

<sup>593</sup> Supra, *Matuzalem*, par. 156.

<sup>594</sup> Supra, *Webster*, par. 67.

<sup>595</sup> Supra, *Ongaro* (2011), p. 46 - 47.

consideration. Positive interest, or expectation interest, aims at determining an amount which places the injured party in the position as it would have had if the contract was performed properly, without the violation.<sup>596</sup>

### ***The (amortised) Fees and Expenses Paid or Incurred by the Former Club***

Under this heading the paid transfer fees and the potential replacement costs could be included. If the new club includes a ‘transfer clause’ in the contract, it could also create an element for the calculation. Again, the CAS has been ambiguous in its approach. In *Webster* it decided not to apply the potential replacement costs of the club in the final amount. In this respect it should be noted that where the player was bought by Hearts for an amount of £75,000, Hearts at the time of the dispute claimed that the value of the player had augmented to £4,000,000. The court judged that the rise in value of the player could not only be attributed to the club.<sup>597</sup> In *Matuzalem* the replacement costs were inserted in order to bring the club back into the position in which it was before the unilateral breach of the contract – the so called ‘positive interest’ principle. This approach served as a precedent.

The transfer fees paid to third parties in order for the club to acquire the player have also been a basis for debate. The key cases all include claims from the appealing party that the amortised transfer fee should be part of the compensation. However, for different reasons this request was not attributed. In *Webster* the paid transfer fee, like in *El-Hadary* and *De Sanctis*, had already been amortised. In the latter the payment of an outstanding agent fee was included. In *Matuzalem* the value of the fee was already incorporated in the total calculation and a separate approach should have been superfluous.<sup>598</sup>

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<sup>596</sup> Supra *Matuzalem*, par. 86.

<sup>597</sup> Parrish, R. (2011) *Contract stability: the case law of the Court of Arbitration for sport*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011, p.84.

<sup>598</sup> Parrish, R. (2011) *Contract stability: the case law of the Court of Arbitration for sport*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011, p. 86-87.



### ***The Time Remaining on the Contract and Breach within a Protected Period***

These criteria do not have an explicitly independent approach when calculating the compensation. The time of the contract is necessary to calculate the abovementioned compensations. The protected period is clearly based in the regulations and should be applied, however in *De Sanctis* the CAS decided not to apply the fact that the contract was terminated in a protected period due to the age (37) of the player. He was already sufficiently punished.<sup>599</sup>

### ***Conclusions on Contractual Stability***

The RSTP that were informally agreed between the European Commission and FIFA by means of an exchange of letters intended to foster contractual stability through Articles 13 to 17. However, a balance needs to be found between this intention and the free movement of workers, as required by the Commission. The stability needs to be clear and certain in order to prevent that stakeholders will seek recourse to ordinary Courts in search of desired clarity in an individual case.

One issue that puts extra pressure on players is the protected period. The informal agreement allowed for a protected period to be included in the contract. However, this period would consist of a maximum of three years for players under the age of 28 and two years for players over the age of 28. The informally agreed terms clearly focussed on the age and not on the contract. The FIFA definitions sections establish that the period starts to run again after the conclusion of a new contract. Therefore a player who is bound via consecutive contracts to the same club from his 18<sup>th</sup> to 27<sup>th</sup> could effectively never be relieved from a protected period if the contract is renewed after every second year. This is a regular procedure taking into consideration that it is practice to include unilateral extension options (see further) in the contract in favour of the club, under certain conditions. Therefore, the automatic extension of the protected period might lead to a too severe burden on the player as he will be faced not only for three years with a sporting sanction after a unilateral termination, but, if he remains with the same club, potentially longer..

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<sup>599</sup> Supra, *El-Hadary*, par. 231.

The methodology for the calculation of the compensation amount to be paid by the player after the protected period is not well defined. As an analysis of the key Article 17 cases reveals, neither the FIFA DRC, nor the CAS, have applied a similar calculation in any of the cases. A turn has been made from the ‘residual value’ perspective in *Webster* to the ‘positive interest’ perspective after *Matuzalem*, but no fixed methodology has been applied. Therefore the parties cannot know in advance what the compensation would be that will free them from each other. In addition, in the case that the parties have agreed on a contractual clause establishing an amount, the wording is also open for discussion and this could jeopardize the certainty as regards the agreed terms. The notion of ‘sport specificity’ appears to put too much of a burden on the players. They will not know what financial risk they run when unilaterally ending a contract. This uncertainty appears to be advocated by clubs in order to promote stability.<sup>600</sup> In fact, the ECA legal advisory panel chairman Ivan Gazidis stated that:

*“CAS continues to recognise that the financial consequences of a breach of contract must be analysed on a case by case basis. We welcome this approach, which means that a party in breach of a contract must take responsibility for the damages caused to the innocent party. Further, the uncertainty of outcome in any individual case encourages respect of contracts and stability in the game, which we support”*<sup>601</sup>

This notion of preaching uncertainty to promote predictability is not in line with basic legal principles such as the predictability of the law and the minimisation of litigation. It seems that litigation is the only way in which a player secure certainty about the amount of compensation after a breach. In addition, for clubs the damages in case of a unilateral termination are clear as they will not result in a higher payment than the residual value of the contract with a potential mitigation in the case that the player has found alternative employment in the time between an award and the termination.<sup>602</sup>

As regards the application of the law concerned, it turns out that, after the analysis, it is unnecessary to include a choice of law in the contract. Even an explicit clause will only be “taken into consideration” by the DRC and/or the CAS but will not be applied *per se*. On the

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<sup>600</sup> Parrish, R. (2011) *Contract stability: the case law of the Court of Arbitration for sport*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011, p. 93

<sup>601</sup> Ibid.

<sup>602</sup> Meigen, v. W. (2011), *Contractual stability from a player’s perspective*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, p. 121.

contrary, there are no cases where the national law has been applied. Before the CAS the regulations of FIFA are applicable and in cases of unclear principles or rules recourse is found to Swiss law. This is a serious undermining of the principles of the national legislation that are democratically established in line with labour law fundamentals, expressing a balanced equality between workers and employers in the sense that the worker is regarded, in general, as the weaker party. The specificity of sport has proven to be an instrument that treats worker and employer in football on the same grounds. This issue becomes even more problematic if the application of EU law is set aside by the football courts.

The compensation payment, when jointly and severally liable for club as well as player, can be too high in certain cases, burdening the player with an unrealistic amount. In the case of the player Matuzalem, he appealed before the Swiss federal supreme court<sup>603</sup> stating that neither he, nor his club Real Zaragoza, would be able to pay the amount of €11,858,934 as compensation to Shaktar Donetsk. The CAS award interfered with *Matuzalem's* economic activity: as neither he nor the club could pay the amounts he was sanctioned by FIFA and therefore he was unable to compete in any official competition, and, consequently he would be unable to earn any income to pay the fine. The Swiss Federal Supreme Court found that the effective lifetime ban of the player was disproportionate as regards the objectives pursued by the regulations that searched for contractual stability. The Swiss Supreme Court indicated that the disciplinary sanctions that serve as a 'u-turn' for enforcing CAS awards are not necessary as the New York Convention is the basis for recognition of arbitration awards under the signatory parties.

Lambrecht mentions two more issues that may jeopardize the creation of contractual stability. First, the fact that since August 2011 FIFA no longer enforces CAS awards of ordinary procedures, being procedures that have been brought to CAS in first instance. This is problematic for all the contracts that include a clause to deal with disputes under the CAS ordinary procedures, in first instance. The procedure to enforce the CAS award is lengthy and will eventually lead to an unenforceable sanction.<sup>604</sup> The fact that the DRC decisions concerning the payment of compensation take between two to four years is very problematic.

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<sup>603</sup> Case4A\_558/2011.

<sup>604</sup> Lambrecht, W.(2011) *Contractual stability from a club's point of view*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, p. 113.

An uncertain message is spread if one takes into consideration that the issuing of a provisional playing certificate is a relatively simple procedure.<sup>605</sup>

## Training Compensation

The principle of compensating clubs for the training of their players was one of the informally agreed principles in the 2001 transfer agreement. In *Bosman*<sup>606</sup> and later in *Bernard*<sup>607</sup> the Court of Justice judged on the legality of such a system for training compensation. In *Bernard* the judgment was targeted towards the French system of mandatory signing an employment contract with the club that trained the player. In *Bosman* the fact that compensation for training could serve as an incentive for clubs to train young players was defended. However, the conditions of such a training scheme need to be carefully construed, as they have to be in line with the general conclusion from the *Bernard* case:

*“Article 45 TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.”*

The scheme to remunerate the club for the training of a player restricts free movement. However, a certain restriction should be allowed in order to encourage clubs to continue to recruit and train players. The system to compensate clubs must, however, be proportionate and take only the realistic costs connected to the training of the players into consideration. If this is the case the compensation scheme could be justified.

According to Hendrickx<sup>608</sup> such a set of justifications should be in place in order to successfully exempt a system of training compensation from the application of EU free

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<sup>605</sup> Ibid.

<sup>606</sup> *Bosman* (C-415/93).

<sup>607</sup> *Bernard* (C-235/08).

<sup>608</sup> Hendrickx, F. (2010), *Justification of training compensation in European Football: Bosman and Bernard compared*, in Colucci M, *European Sports law and policy bulletin 1/2010*, p.30-33.

movement laws. First, the reimbursement should relate to the real and actual incurred costs of training.<sup>609</sup> Individual and global costs may also be included. This means that the training of a pool of players needs to be capitalized. All costs involved for training a group of players should be taken into consideration when a decision is made on the amount that the compensation for training of one single successful player should entail. Third, the payment of the compensation for training should be divided amongst the clubs that have actually participated in the training of the player. Fourth, the obligation to pay training must decrease over time. Hence, after a certain amount of time the training of the player is over. Finally, the payment of the compensation should be done by either the club or the player, and, most importantly, the free movement of the player should not be prevented. It will be assessed below if indeed the freedom of movement of the player is not, unjustifiably, restricted in the current RSTP.

After deciding to implement a system, FIFA asked their member associations to propose the elements that needed to be the source for the calculation of training compensation. Unfortunately FIFA received very few replies.<sup>610</sup> Therefore FIFA communicated a non-exhaustive list of factors<sup>611</sup> that lead to the implementation of a system of calculating the actual training costs. The system was incorporated in the FIFA RSTP.<sup>612</sup> Training compensation is generally paid when a player signs his first professional contract or whenever he signs a consecutive contract up until the end of the season of his 23<sup>rd</sup> birthday and up to his 21<sup>st</sup> year of age the compensation shall be calculated. His training period starts at his 12<sup>th</sup> birthday.<sup>613</sup> The average amount of training compensation for one player is determined every year. The basis is a non-exhaustive list of criteria. The clubs around the world are placed in different categories:

Africa:

2. Category: USD 30,000
3. Category: USD 10,000
4. Category: USD 2,000

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<sup>609</sup>See *Bosman*, par. 109 and *Bernard*, par. 50.

<sup>610</sup> Ongaro, O. (2010) *The system of training compensation according to the FIFA regulations on the status and transfers of players*, in Colucci M, *European Sports law and policy bulletin 1/2010*, p. 78.

<sup>611</sup> Ibid.

<sup>612</sup> Currently in Article 20 of the Regulations on the Status and Transfer of Players and more in detail in Annexe 4.

<sup>613</sup> FIFA Regulations on the Status and Transfer of Players, Article 20 and Annexe 4 Article 1.

Asia:

2. Category: USD 40,000
3. Category: USD 10,000
4. Category: USD 2,000

Europe:

1. Category: EURO 90,000
2. Category: EURO 60,000
3. Category: EURO 30,000
4. Category: EURO 10,000

North and Central America:

2. Category: USD 40,000
3. Category: USD 10,000
4. Category: USD 2,000

Oceania:

2. Category: USD 30,000
3. Category: USD 10,000
4. Category: USD 2,000

South America:

1. Category: USD 50,000
2. Category: USD 30,000
3. Category: USD 10,000
4. Category: USD 2,000

The top level clubs are category 1. These are only clubs of the big five leagues in Europe<sup>614</sup> and the Netherlands. The costs to be paid by the acquiring club are the costs it had to pay had it trained the player itself. The first time the player signs a contract the amount is calculated on the basis of the category of the acquiring club multiplied by the years that the player has trained at the selling club.<sup>615</sup> In a subsequent transfer only the subsequent club is entitled to receive training compensation when a player moves to a new club. Special provisions are created for the EU and EEA. In the case of a transfer within the EU and EEA the calculation is based on an average of the training compensation between the two clubs in the case that the new club is in a higher category. If the player moves to a lower category, then the lower

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<sup>614</sup> England, Germany, France, Italy and Spain.

<sup>615</sup> FIFA Regulations on the Status and Transfer of Players, Article 5 sub 1 and 2.

category club does apply. If it is clear that the player completed his training before his 21<sup>st</sup> birthday (which is difficult to be proven) then the final season of training may be placed earlier in time. If the player is not offered a contract by his former club, with at least the equivalent conditions, upon expiry of his contract than the club is not entitled to receive training compensation.<sup>616</sup> As an extra protection for the youth, the years of training of the player are normally set from age 12-15 on the last category, for every club, except in the circumstance that the player transfers to another club before the age of 18, then the full amount of the acquiring club needs to be paid.<sup>617</sup>

A simple calculation of a realistic case will show that this system can be extremely restrictive regarding the free movement of workers. Ajax Amsterdam is well known for its training facilities and practices. It scouts players throughout the Netherlands. A young player can be recruited to play for Ajax from, for example, 11 years. He will go through all the ranks of Ajax and then move, within the Netherlands, on his 19<sup>th</sup> birthday to another club at the bottom of the premier Dutch league table. This is no peculiarity as many players with an ‘Ajax history’ are active in the Dutch league. This player plays at this club for two years on a relatively low salary. When he is 21 he may wish to continue his career abroad. If this player wishes to move to, for example, the English Championship (second level of professional football, but a traditional club) then the amount of training compensation to be paid by the English club should be 12-15: 4x €10,000 + 16-20: 5x €90,000 = €590,000. This is an unrealistic fee and will prevent many clubs from signing a player of that sporting status. In such a case a player’s only possibility to move to another club is if his former club is ready to waive its right to the compensation. This situation applies to EU and EEA players, non-EU players do not have to receive an offer for a new contract to maintain the claim for training compensation of their previous club intact.

Another example of a potential restriction is the vagueness of the offer of a contract. In the case that a player is an amateur at a club, any offer for a professional contract from the club that has trained him, is to be considered as an offer if the offer is based on a compensation higher than his expenses. The situation might occur that the player is offered a contract by a bigger team than his current training team just before the end of his training period. If his training club then offers the player a professional contract for a very low amount it can secure

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<sup>616</sup> FIFA Regulations on the Status and Transfer of Players, Article 20 and Annexe 6.

<sup>617</sup> FIFA Regulations on the Status and Transfer of Players, Article 20 and Annexe 5.

the training compensation payment for the player. This seems logical, but if for example a Dutch club has understood that one player, who has been trained by the club, is of interest to a foreign club, it might just offer a very low wage in order to secure only the training compensation. Whereas if the player would have asked for a reasonable wage, he would not be able to negotiate that with a club. This practice leads in individual cases of uncertainty for the player, or for him to be forced to accept a lower contract than the one offered.

In addition to training compensation, clubs can also receive a solidarity payment.<sup>618</sup> This type of payment will be distributed amongst all the clubs that have trained a player during his training period. This is an amount of 5% of the transfer compensation to be paid by the new club of the player in the case that a player makes a transfer where ‘profit’ has been made. The clubs that have trained the player will get an even share of the 5% commission based on the number of years they have spent on the training of the player.

## Minors

As the acquisition costs for players and players’ wages have grown substantially, there are clubs that have changed their strategy in their search for talented football players.<sup>619</sup> The investment in talent is now more than a strategy targeted at purely sporting success, it is a significant source of income that allows for more economic competitiveness. *Grosso Modo*, two different types of investing in talent are able to be identified. First, (Western) European clubs scout and buy the local talent as this investment is cheaper than training a local player.<sup>620</sup> Second, clubs invest in the creation of academies. These academies are either connected to the professional team itself in the country of origin, or in football development countries where a relatively low investment can lead to an efficient recruitment of a relatively large number of players.<sup>621</sup> In England clubs such as Manchester United and Chelsea F.C. had

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<sup>618</sup> FIFA Regulations on the Status and Transfer of Players, Article 21.

<sup>619</sup> Celen, B., Lederman, L., Rigopoulos, A., J.A. Rodriguez., Sadowski, P. (2010), *International transfers of minors: Recommendations to improve the protection of Young Players in the current transfer system*, Research project FIFA CIES, July 2010, p. 19.

<sup>620</sup> Ibid.

<sup>621</sup> Supra. The authors mention in their report the example of Feyenoord Ghana Academy. The academy has collaborated in some projects with Unicef and has a good reputation. However, the migration of talent to “parent” club Feyenoord Rotterdam has not been very successful in the recent years. The academy was inspired by the ASEC Mimosas academy in Ghana that produced big talents such as Kolo Touré, Gervinho, Sekou Cissé, Emmanuel Kone, Romaric, Emmanuel Eboué and more. In Ghana also the Right to Dream academy has been active and Dutch team FC Utrecht opened an academy in the town of Tamale. Another type of investing in talent



in the squads of 20 an average of 6 to 8 non-national players.<sup>622</sup> There also exist academies not directly linked to a professional football club, this makes it difficult for the national associations to control what players are playing at the club because they do not participate in organised football.<sup>623</sup> The legal framework for the international transfers of minors is embedded in Article 19 of the FIFA RSTP. The article forbids the international transfer of players under 18 years.<sup>624</sup> This article is the basic framework and a further elaboration of the article deals with exceptions to the general rule. The following exceptions apply:

1. The player's parents move together with the player to the new country for non-footballing reasons.
2. The transfer takes place within the territory of the EU. Then the player is allowed to move to another EU country only and insofar as the new club provides the player with adequate football education, a school or vocational education that will allow the player to pursue a career outside football and make all the necessary arrangement to ensure that the player is looked after carefully.
3. The international transfer within EU takes place when the player lives no further than 50km of the border and/or the club is no more than 50km of the border. A maximum distance of 100km stands between the player's club and his domicile.<sup>625</sup>

Some disturbing issues have lead to a stricter application by FIFA of the regulations and to more strict regulations in itself, as evidenced below. Therefore, since October 2009 a specific sub-committee must decide on the international transfer of a minor.<sup>626</sup> Only if strict criteria are met will the transfer will be validated. A reason for this approach was the misuse and

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through academy is through a single owner owning multiple teams. For example Red Bull owns teams in New York, Salzburg, Leipzig and Sao Paulo. Red Bull recently opened an academy in Sogokope in Ghana, whereby it is the intention of Red Bull to place those players at their own team. In South America, especially in Brazil, there exists the phenomenon of "clube laranja", a club that has been especially set up to "transpose" the trained players into organised football in order to receive the return on investment deriving from the capitalisation of the economic rights on the players. One example is Desportivo Brazil, a club owned by investment group "Traffic", owner of other football clubs such as Estoril Praia from Portugal, Lisbon area.

<sup>622</sup> Celen, B., Lederman, L., Rigopoulos, A., J.A. Rodriguez., Sadowski, P. (2010), *International transfers of minors: Recommendations to improve the protection of Young Players in the current transfer system*, Research project FIFA CIES, July 2010,.

<sup>623</sup> Article 19bis imposes that any academy has a link with a professional club or has clubs that participate in organised football. In Belgium an academy that does not directly belong to a club is the Wadi Degla academy.

<sup>624</sup> FIFA Regulations on the Status and Transfer of Players, Article 19 sub 1.

<sup>625</sup> FIFA Regulations on the Status and Transfer of Players, Article 19 sub 2 and 3.

<sup>626</sup> FIFA Regulations on the Status and Transfer of Players, Article 19 sub 4 and Annexe 2.

circumvention of the FIFA regulations. One example was the case of the Paraguayan player Caballero<sup>627</sup> who moved from Olimpia Asuncion to Cadiz in Spain. His mother travelled with him to Spain. FIFA, after investigations, understood that the mother was not moving to Spain for reasons not linked to football. In appeal to CAS the Spanish club argued that the decision of FIFA was against Spanish, Swiss and international employment and human rights legislation. The panel stated that:

*“ the contented FIFA rules limiting the international transfer of players who are less than 18 years old, do not violate any mandatory principle of public policy under Swiss law or any other national or international law insofar as: 1) they pursue a legitimate objective, namely the protection of young players from international transfers which could disrupt their lives, particularly if, as often happens the football career eventually fails or, anyways, is not as successful as expected, 2) they are proportionate to the objective sought as they provide for some reasonable exceptions. ”*<sup>628</sup>

Another case that reached CAS was a situation whereby Nigerian youngsters came to play for Danish side FC Midtjylland<sup>629</sup> with a student visa and consequently were registered for the football club. An investigation learned that, according to CAS, the education was purely connected to the education schemes offered by the club and that there was no link to any other educational institution. An attempt to apply the *Cotonou* agreement<sup>630</sup> to non-working situations was not allowed by the CAS.

Alarming numbers of incidents of transfers of minors were presented by Gallavotti.<sup>631</sup> He raised the problems of minors arriving in Italy on tourist visas and then staying at a club for a long period of time until their eighteenth birthday. From that moment on, these players may be registered at an Italian club for the first time. In Italy in the season 2008-2009 409 non-

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<sup>627</sup> CAS A/2005/956, *Carlos Javier Acuña Caballero v. FIFA and Asociacion Paraguaya de Fútbol*.

<sup>628</sup> *Supra*, *Acuña*, par. 7.2.

<sup>629</sup> CAS A/2008/1485, *FC Midtjylland v. FIFA*.

<sup>630</sup> The Cotonou agreement is a Treaty between the European Union and countries from the African, Caribbean and Pacific (ACP). The treaty gives workers that are legally residing and working in a country of the EU the same rights as EU nationals. See also footnote 6 in Branco Martins, R.(2004), *Bosman times ten, football fears the arrival of Bosman, Bosmanovic and Osman*, in *International Sports Law Journal*, 2004, Vol. 1-2, The Hague:T.M.C. Asser Press.

<sup>631</sup> Gallavotti, M. (2009), *Protection of Minors, Article 19 FIFA Regulations on the Status and Transfer of Players*, Lecture at the congress on international football law, Madrid, March 14 2009.

Italian players were registered whereby 407 had never been registered abroad. A very alarming situation.

In the light of the perspective of the free movement rules of the EU it must, however, be taken into consideration that the restriction on the free movement may only be exempted from the application of EU law if in line with justifications on the basis of public policy, public security or public health.<sup>632</sup> These reasons are similar to the framework of reasons given in the *Acuña* case.<sup>633</sup> Therefore a balance needs to be found between the protection of minors and rules on free movement. What needs to be analysed in this respect is the ability for the relevant authorities to assess the entry of minors on the territory of a Member State of the EU. The football governing bodies are only capable of assessing a potential trafficking crime at the moment that a request for registration is made. The procedure leading to the registration, the *actual* trafficking, cannot be assessed.

Hence, it also needs to be taken into consideration that trafficking in football should fit the general definition of trafficking provided by the relevant EU legislation.<sup>634</sup> It is doubtful if in football the transfer of minors may qualify as child trafficking. In football this is in majority probably not the case. The players who arrive in Europe at a young age are normally determined to be successful as a footballer and sustain their families with their income. It cannot be said that they travel against their will. Their will is, in some cases such as the Italian example above, influenced on the wrong grounds. CAS has also confirmed that the issue of trafficking of minors needs to be addressed through employment and immigration law. There have been multiple suggestions that all stakeholders should be involved in finding a better

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<sup>632</sup> Article 45 (3) TFEU.

<sup>633</sup> See also: Minderhoud, P. and Oosterom-Staples, H. (2011), European Network on free movement of workers, *Obstacles to free movement of young workers*, January 2011.

<sup>634</sup> According to Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, the definition of trafficking is "*The recruitment, transportation, transfer, harbouring or receipt of persons, including exchange or transfer of control over that person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*"

*"A position of vulnerability occurs when the person has no real or acceptable alternative but to submit to the abuse involved."*

*"Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities or the removal of organs.?"*

working system.<sup>635</sup> UEFA proposed to carry out research to identify the problems of transfers of minors within the EU. It aims to provide figures and statistics with the negative consequences of those transfers.<sup>636</sup> However, the outcome of such research may not lead to an imbalance between the freedom of workers and to protection, as this may well turn out to be a quasi-protection.

### **Player Release to National Teams**

According to the FIFA statutes the FIFA's Executive Committee draws up a calendar for international matches.<sup>637</sup> The ultimate responsibility for organizing international football matches for national team lies with FIFA.<sup>638</sup> The organization of the FIFA competitions, such as the World Cup in different age categories and the Confederation Cup, can only be well organized as the composition of the national teams is as strong as possible. Therefore, in order to guarantee an interesting spectacle, FIFA has the complete freedom to call up players to participate in matches for their national teams. This authority is imposed on the national association member of FIFA through the annexe 1 of the FIFA RSTP. Clubs are obliged to release their players on the dates that were fixed on the international match calendar<sup>639</sup> and also for the preparation period, that is 14 days in case of final stages of a competition, compulsory five days for double-date matches in qualification stages, four days in the case that a match is played in another confederation than the home country, and the least is a period of 48 hours for single matches and/ or friendlies.<sup>640</sup> The clubs are not entitled to receive financial compensation for the time that the player is not able to work for his club. The club needs to insure the player for illness and accident. In the case that a player is bodily injured during and because of his activities for his national team, than the club will be indemnified by FIFA.<sup>641</sup>

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<sup>635</sup> *Supra Galavotti* (2009), *Supra Celen, B., Lederman, L., Rigopoulous, A., J.A. Rodriguez., Sadowski, P.* (2010), *International transfers of minors: Recommendations to improve the protection of Young Players in the current transfer system*, Research project FIFA CIES, July 2010.

<sup>636</sup> UEFA (2009), Media release N. 024, 09/03/2009.

<sup>637</sup> FIFA Statutes, Article 81.

<sup>638</sup> FIFA Statutes, Article 82.

<sup>639</sup> FIFA Regulations on the Status and Transfer of Players, annexe 1, Article 1.

<sup>640</sup> *Ibid.*

<sup>641</sup> FIFA Regulations on the Status and Transfer of Players, annexe 1, Article 2. The insurance for bodily injuries is included in the regulations after the threat of litigation in the Oulmers case.

The compulsory release of players, without the payment of their salaries<sup>642</sup> in the time that they are away, has a serious impact on the employment relation between the club and the player. The argumentation that FIFA should be allowed to demand that a player is released needs to be balanced against the freedom of the parties to conclude a contract in which they decide on their mutual relation without the involvement of third parties' interests in the workers.<sup>643</sup>

## The Duration of Contracts

Article 18 stipulates that the minimum duration of a contract is one year and the maximum duration of a contract is five years. This implies that all contracts that are used in the professional football industry have to be contracts for a fixed-term. As was discussed above in Chapter 5, in the European professional football sector European Union law applies. In that sense, Directive 1999/70 applies.<sup>644</sup> This directive protects, as discussed, the rights of employees with fixed-term contracts against discrimination *vis-à-vis* employees with contracts with an indefinite duration. Should a certain number of fixed-term contracts be used consecutively, then the contract shall be regarded as a contract of indefinite time. The duration of the contract is limited and *prima facie* a justification of the use of a fixed-term contract instead of a contract for indefinite time needs to be objectively justified. It is not to be expected that the mere mentioning of the fact that contracts have to be of a fixed-term in association regulations can be regarded as an objective justification as mentioned in the 1999/70 Directive's Article 5. In addition, even if the FIFA RSTP state that national law should prevail when it comes to mandatory labour legislation, in case of a dispute this national law only applies before a national (arbitration) court. In the case that a dispute has an international dimension and FIFA claims competence then it is ready to set aside national laws and apply Swiss law and/or the principles of the FIFA regulations. In appeal the CAS will do the same. An illustration of a case where Dutch national employment law was set

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<sup>642</sup> FIFA has issued a new structure for the remuneration of clubs during the FIFA World Cup in Brazil, in its circular letter nr. 1391 of 13 November 2013. Clubs that have players participating in the World Cup can receive per player a remuneration of 2800 US Dollars per day. This remuneration is only applicable to players participating in the final stages of the competition.

<sup>643</sup> See the discussion on the *Oulmers* case in Chapter 2.

<sup>644</sup> See also Hendrickx, F and De Groof, S. (2011), *Compensation in case of breach of contract in other civil law countries: Belgium*, in M. Colucci (ed) *European Sports Law and Policy Bulletin*, Contractual Stability in Football, Issue 1-2011. P. 163-177.

aside is the case concerning a contractual dispute between PSV Eindhoven and the player Leandro do Bomfim:

*“The principles outlined under Art....36 of...these regulations are also binding at national level”. As a result, the rule set forth in article 36 can be invoked “at national level” in the relation between clubs and players: national associations cannot depart from such rule; and domestic provisions inconsistent with the principles expressed by the mentioned Article 36 of the FIFA regulations 1997 cannot be invoked “at national level” to seek and to obtain a remedy, enforcing a contract having a duration of more than 3 years, expressly prohibited by FIFA rules”<sup>645</sup>*

### **The Use of Unilateral Option Clauses**

Players that have not reached the age of eighteen cannot be bound by contractual clauses that effectively determine a longer duration than three years. If the regulations mention these clauses it implies that the use of clauses that pretend to have such an impact are commonly used. This is indeed the case. Clubs wishing to have a certain freedom to decide if they continue with a player for a longer term often include unilateral option clauses, basically an irrevocable offer from the side of the player to enter into an agreement with the club for binding him longer, in their employment contracts. Although the autonomous agreement mentions that clubs and players should have equal rights as regards the prolongation of a contract, this does not entail the criteria for the use of these options in its scope. The practice of the use of unilateral option clauses is, internationally considered to be allowed if the unilateral option meets the following criteria:<sup>646</sup>

The potential maximum duration of the labour relationship should not be excessive. Secondly, the option needs to be exercised within an acceptable deadline before the expiry of the current contract. Thirdly, the salary derived from the option right has to be defined in the original contract. One party shall not be at the mercy of the other party with regard to the contents of the employment contract. Finally, the option shall be clearly established and emphasized in

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<sup>645</sup> CAS/2005/A/942 *PSV N.V. v. Leandro do Bomfim and FIFA*, 3 February 2006.

<sup>646</sup> CAS 2005/A/983and984, *Club Atlético Peñarol v. Carlos Heber Bueno Suarez, Christian Gabriel Rodriguez Barrotti and Paris Saint Germain*.

the original contract so that the player is conscious of it at the moment of signing the official contract.<sup>647</sup>

## **Dispute Resolution**

According to the RSTP, FIFA has two dispute resolution chambers.<sup>648</sup> These are the DRC and the Player's status committee. The jurisdiction of these chambers is defined in the RSTP.<sup>649</sup> These FIFA tribunals acknowledge an appeal procedure at CAS.<sup>650</sup> However, even if the parties make a choice of law in their individual contract, the football courts will only take this into consideration but will continue to apply the principles of the FIFA regulations and Swiss Law. A dispute between a player and a club dealing with, for example, a contractual disagreement will take between 2 to 4 years before a decision is taken.

## **Overall Assessment of the use of Social Dialogue as a Forum for the Creation of Legal Certainty**

FIFPRO's challenge to the FIFA RSTP illustrates the lack of legal certainty for the actors in the football sector. A system that seemed to be the fruit of a negotiation between football governing bodies and the European Commission is now under threat of legal scrutiny. The outcome of a legal challenge is uncertain. A challenge to the RSTP might lead to an overhaul of the system. In order to analyse if the European Social Dialogue could serve as a potential forum for a negotiated settlement and avoidance of legal challenges, it should be confirmed if the issues discussed above can be characterized as Social Dialogue issues.

The Social Dialogue deals with employment issues that are relevant and impact on the relation between the employer and the worker. Therefore, any issue that has an impact, in a specific sector, on an individual that can be qualified as a 'worker' under the characteristics of the jurisprudence of the European Court of Justice, may be included in the European Social Dialogue. Regards, the issues deriving from the Regulations on the Status and Transfer of

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<sup>647</sup> Portmann, W. (2007) *Unilateral option clauses in footballers' contracts of employment: an assessment from the perspective of international sports arbitration*, 7 Sweet and Maxwell International Sports Law Review, 2007, Nr.1, p 6-16.

<sup>648</sup> FIFA Regulations on the Status and Transfer of Players, Articles 23 and 24.

<sup>649</sup> FIFA Regulations on the Status and Transfer of Players, Article 22.

<sup>650</sup> FIFA Statutes Articles 10, 13 and 66.

Players, this impact is evident. Hence, in order for a professional football player to carry out his professional activity he needs to be registered. This is a prerequisite for determining his status as a ‘worker’.

The following issues from the RSTP have been identified and discussed and the connection between these topics and Social Dialogue will be explored in turn:

- Contractual stability
- Training compensation
- Transfers of minors
- Player release for national teams
- Contract duration and unilateral option clauses
- Dispute resolution

### **Contractual Stability**

One of the fundamental issues of the agreement of 2001 was the objective of the creation of contractual stability. However, the analysis above demonstrates that the current method in which this stability is reached is through the existence of uncertainty. The uncertainty relates to the calculation of the amount of damages that a player is due to his former club for breaking his contract prematurely. The fact that this amount can be a lot higher than the rest value of the contract, based on the ‘positive interest’ doctrine, makes that a burden which is placed on the player. The outcome of the *Matuzalem* appeal before the Swiss Federal tribunal illustrates that the system is too restrictive. This is for the reason that, if the player and/or his new club (for being severally liable) cannot pay the amount decided by the DRC / CAS, the disciplinary sanctions that are imposed on the player will prevent him to work.

At the moment that the contractual stability objective was introduced by FIFA as part of the compromise in 2001 there was no mentioning about the intention to promote the ‘positive interest’ principle. The agreement contained a protected period proposal, but this *de facto* consequence of the contractual stability articles goes beyond that what was proposed. Furthermore, the constant ‘renewal’ of the protected period was also introduced by FIFA after



the informal agreement had been made public. The social partners have already started a discussion on the issue of contractual stability in a FSDC working group, however the working group has not published any results as yet.<sup>651</sup>

According to the analysis, the topic is suitable for Social Dialogue. A renegotiation of the contractual stability issues within the FSDC would diminish the potential legal challenges to the rules and will create more clarity for all stakeholders involved. To achieve more certainty and stability, the FSDC could create a standard ‘preliminary breach’ clause that could be included in all employment contracts, thereby taking away the ambiguity that exists now in relation to contractual clauses defining an amount for damages in case of a preliminary breach. A maximum amount of years for a protected period could also be included in such talks.

## **Training Compensation**

In the *Bosman* aftermath the acknowledgment of a football club’s entitlement to a form of compensation for the training and education of players was elaborated by FIFA. In the 2001 informal agreement it was proposed that in the case of players aged under 23, a system should be in place to encourage and reward the training effort of clubs, in particular small clubs.

Training compensation is, according to *Bosman* and *Bernard*, a legitimate objective to restrict the free movement of a player. However, this restriction is only allowed in the case that there is a compensation for the actual costs incurred by the training of the player. In individual cases, as has been illustrated, a potential impediment goes beyond reason and leads to a *de facto* restriction on the player to join another team. The calculation of the compensation could not be in relation to the training and/or the offer of a new contract by the training club can be construed in the way that it is merely targeted to secure compensation whereby the player cannot leave his training club as a free player.

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<sup>651</sup> Only the agenda of the first meeting of the group on 19 September 2013 can be found on the EU Sectoral Social Dialogue website:  
<https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp?FormPrincipal: idcl=FormPrincipal: id5andFormPrincipal SUBMIT=1andid=0c6a1763-98fe-4f3d-91f5-258581169f4fandjavax.faces.ViewState=r00ABXVyABNbTGphdmEubGFuZy5PYmplY3Q7kM5YnxBzKWwCAAB4cAAAAAN0AAEzcHQAky9qc3AvZXh0ZW5zaW9uL3dhaS9uYXZpZ2F0aW9uL2NvbnRhaW5lci5qc3A=> .

The issue of training compensation leads to *de facto* restrictions in individual cases and it therefore is a basis for legal uncertainty and potential legal challenges by parties that are frustrated in their free movement. These parties are either workers or employers and therefore the topic seems appropriate for a discussion within the framework of the European Social Dialogue. With the consent of the workers a further acceptance of the rule can be established, however, all FSDC partners need to be involved in the creation of a more balanced set of rules for the calculation of training compensation. FIFA acknowledged that it did not receive much feedback from its members when it came to a suggestion of the parameters to determine the amount of training compensation. It seems appropriate to involve the clubs and players in this process as they are the ones offering the training and enjoying the training.

## **Minors**

The FIFA RSTP include a system for the protection of minors. Only under certain conditions is it possible to transfer players under 18, whereby there exists a difference between the conditions for the European Union and for the rest of the world. However, this system is connected to the scope of regulative authority of FIFA and will therefore only be initiated at the moment of a (request for) a registration of a minor. The actual problems relating to the illegal transfer of minors, the trafficking of children, by contrast, occurs in a stage before the registration.

The European Commission is of the opinion that sports federations are not adequately equipped to combat and punish offences against public order, particularly in the fields of human trafficking which falls within the province of financial supervision, fiscal control and crime prevention/law enforcement policies.<sup>652</sup> According to the Commission, Member States must play a complementary role by supervising the measures implemented by national federations and imposing criminal penalties for offences against public order.

The recognition of the problems related to the transfers of minors has already been confirmed officially by the European Commission and the European Parliament in 2007 in the White

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<sup>652</sup> Simons, R. (2010), *Protection of Minors vs. European law*, in Colucci, M. (Ed) *European Sports Law and Policy Bulletin* 1/2010, Chapter VI, P. 135. ISSN 2039-0416.

Paper on Sport and in the resolution on the future of professional football in Europe .<sup>653</sup> The two EU institutions emphasized on the existing EU directives<sup>654</sup> that were applicable to the protection of minors in the context of their transfers and to the application of immigration laws.

As the Member States have the ultimate responsibility to criminalize and prosecute the trafficking of children, it should be through the form of a formal set of rules that this activity is specifically targeted to football. The European Social Dialogue is a tool that can turn an agreement from the social partners into a directive if jointly requested to the European Council. By doing so, the football sector could not only influence the situation during and after the registration of the minor, but already in advance attach a formal framework of control and sanctioning to the scouting and trafficking of minors. The involvement of the social partners should and their initiatives shall also create a greater balance between protection and the right on free movement.

### **Duration of Contracts**

The directive on the use of fixed-term contracts is applicable to professional football in the European Union. It is restricted to use multiple contracts for a fixed-term consecutively if an objective justification allowing this use is available. A mere mentioning of the compulsory use of fixed-term contracts in the regulations of a football governing body might not be sufficient for a protection against the legal challenge of the system. Therefore, the explicit recognition of the fact that contracts in professional should be contracts of a fixed-term should be the source for an ‘umbrella objective justification’ for the use of such contracts. Therefore, the issue is clearly a topic that could be part of a Social Dialogue. The criteria established by Portmann regarding the requirements for the admissibility of unilateral extension options could be part of a Social Dialogue discussion.<sup>655</sup> The social partners may agree on a standard

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<sup>653</sup> European Commission, *White Paper on Sport*, 11 July 2007, par. 4.5 and the European Parliament Resolution on the future of professional football in Europe, 29 March 2007 (2006.2130 (INI), par. 37-38.

<sup>654</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been subject of any action to facilitate illegal immigration, who cooperate with the competent authorities; Council Framework decision 2002/629/JHA of July 2002 on combating trafficking in human beings; Council Directive 94/33/EC OF 22 June 1994 on the protection of young people at work.

<sup>655</sup> Portmann, W. (2007), *Unilateral Option Clauses in Footballers’ Contracts of Employment: an Assesment from the Perspective of International Sport Arbitration*, 7 Sweet and Maxwell International Sports Law Review, Nr. 1, p. 6-16. See also Chapter 6.

wording of a unilateral option clause that could survive legal scrutiny and create certainty for the parties that are willing to include this in their contracts.

### **Player Release for National Teams**

Clubs are forced to release their players for the national teams. This includes all official matches and for the time around those official matches. For international tournaments the players are forced to join their national team when called-up. In the case that a club does not collaborate to release the player it may risk a disciplinary sanction.

The clubs do not receive any compensation for the wage paid to the player for the time of his leave. Clubs have pressured FIFA and UEFA for a change in this system by threatening the governing bodies with a legal action. In the aftermath of an affair between FIFA and Bayern Munich, whose president is also ECA's president, concerning the player Arjen Robben who returned injured from an international game with the Netherlands, an agreement has been reached between FIFA and the clubs about a risk insurance in case that the player returns injured to his employer. This insurance is the club protection programme.<sup>656</sup> After a period of 28 days the insurance pays the salary of the player in the case of a temporary total disability (TTD) to play football. The total amount that the insurance will cover is €7,500,000. The total maximum daily compensation to be paid is €20,548 for a maximum of 365 days.<sup>657</sup>

In addition to this amount the clubs will share in the benefits of the World Cup tournaments. For the World Cup in Brazil in 2014 a gross amount of \$70,000,000 is made available for the distribution amongst all the clubs that have released their players for the national team competition.<sup>658</sup> This amount will be divided pro rata in relation to the players that have been released per team.

Although this compromise has taken away direct threat as regards legal challenges, it still is a fact that any national club competition in the world is depending on the planning of the FIFA world cup for the composition of the match calendar. This issue deals with working time and

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<sup>656</sup> Sent to FIFA's member associations in circular letter no. 1307 of 8 June 2012.

<sup>657</sup> FIFA Club Protection programme, Article 2 sub D.

<sup>658</sup> FIFA (2013), *Participation of Clubs in the Benefits of the 2014 World Cup in Brazil*, Circular Letter No. 1381 of 6 September 2013.

it therefore can be placed in the European Social Dialogue as a typical employment issue. It could lead to more stability if the international match calendar, together with the club protection programme could be confirmed by the social partners.

## **Dispute Resolution**

The FSDC could also be the platform for the establishment of an alternative dispute resolution chamber or for a specific branch of CAS. Hence, the cases that are now brought before these courts do not take into account other sources of law besides FIFA regulations or Swiss law. In this manner the parties in a dispute lose the protection of EU law, more notably the application of the freedoms offered by EU law.

The FSDC could establish an arbitration panel within its own structures, or within the UEFA structures. The social partners and associate partners in the FSDC could then appoint arbitrators to deal with disputes that take place within the territory of the EU. In such a case, the arbitrators would apply the basic standards of the Autonomous Agreement and also apply and refer to EU law in their awards.

## **Conclusion**

This chapter has presented the history of the RSTP leading to the conclusion of the informal agreement between FIFA, UEFA and the European Commission in 2001. It also illustrated that legal uncertainty is connected to the current RSTP and that the agreement with the European Commission is not legally solid enough to take this uncertainty away. This is evidenced by the announcement of FIFPRO that it will challenge the RSTP on the basis of infringements of the freedom of movement of players, of competition law and human rights.

Various elements of the RSTP have been analysed and it has been concluded that through the forum of the European Social Dialogue legal certainty can be attained. The topics in the RSTP are employment related issues and are therefore fit to be implemented in the negotiations taking place within the FSDC.

In the next chapter the regulations of UEFA will be assessed in a similar method.

## CHAPTER SEVEN

### UEFA Regulations

#### Introduction

UEFA has been appointed by means of a compromise with the social partners as the chairperson for the FSDC and as an associate party to that committee. The role of UEFA is to present the agenda for the FSDC meetings and to conduct the meetings. The agenda for the meetings is agreed upon by the parties in the FSDC outside of the FSDC structure in the UEFA governed PFSC. An associate party has, according to the rules of procedure, a similar status as a social partner, the voice of UEFA needs to be taken into consideration in order to reach the necessary consensus in decision making.<sup>659</sup>

UEFA also has a responsibility in the implementation of the Autonomous Agreement. UEFA is required to use its best endeavours to ensure implementation of the Autonomous Agreement.<sup>660</sup> Consequently, due to the implementation strategy that was agreed between the parties in the FSDC on the basis of the compromise brokered by the European Commission, an alternative source for implementation is added to the typical routes. In countries where no collective bargaining agreement (CBA) exists at national level, UEFA may force their member national associations to introduce the minimum requirements from the Autonomous Agreement in a standard contract.

A novelty to the European Social Dialogue is that this opens the door for implementing a Sectoral Social Dialogue Autonomous Agreement beyond the borders of the European Union.

Notwithstanding this role of UEFA in the FSDC, the current Autonomous Agreement goes no further than minimum requirements. Although legal certainty is created regarding these minimum requirements, this does not prevent other sources of regulation threatening the stability of the European football sector. These regulations may not primarily be linked to the employment relationship between a football player and his club, but they may influence that employment relationship.

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<sup>659</sup> Article 21 of the Autonomous Agreement in connection with the Rules of Procedure of the Autonomous Agreement and the FSDC.

<sup>660</sup> Article 18 of the Autonomous Agreement.

UEFA is the organiser of European club competitions and has specific regulations for the organization of the Champions League and the Europa League.<sup>661</sup> In order for clubs to be eligible to compete in these competitions they need to be licensed by UEFA on the basis of its club licensing regulations.<sup>662</sup> The adherence to the licensing criteria in these regulations are as decisive for participation in these competitions as is qualification through sportive merit achieved in national competitions.

The Champions League and Europa League regulations allow clubs to register a maximum of 25 players per season of the competition.<sup>663</sup> The 25 player squad must be construed along the lines of the 'Home Grown Player' requirement. The UEFA Club Licensing Regulations has introduced the Financial Fair Play system, putting a limit on clubs' expenditures.

Both regulations are currently under legal scrutiny. The practical functioning of the Home Grown Player Rule (HGPR) has been critically analysed and found to go beyond the necessary means to reach its objective.<sup>664</sup> The Financial Fair Play Rules (FFPR) are being legally challenged before a Brussels court<sup>665</sup> and a complaint concerning its legality has been presented to the European Commission.<sup>666</sup>

This chapter analyses both regulations and determines if they could, or should, be addressed in the FSDC. First an overview will be given of the FFPR. Consequently, the HGPR will be

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<sup>661</sup> UEFA Champions League Regulations, to be found at:

[http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/79/68/69/1796869\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/79/68/69/1796869_DOWNLOAD.pdf) and the UEFA Europa League Regulations, to be found at: [http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/94/62/40/1946240\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/94/62/40/1946240_DOWNLOAD.pdf).

<sup>662</sup> UEFA Club Licensing and Financial Fair Play Regulations, to be found at:

[http://www.uefa.com/MultimediaFiles/Download/uefaorg/Clublicensing/01/50/09/12/1500912\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefaorg/Clublicensing/01/50/09/12/1500912_DOWNLOAD.pdf).

<sup>663</sup> Due to the similarity of both regulations as regards the HGPR further reference shall only be made to the Champions League regulations. The HGPR is implemented in the section on conditions for registration, Article 18.08 onwards, p. 28-30.

<sup>664</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, Negotiated procedure EAC07/2012. This is a research project carried out by the University of Liverpool and Edge Hill University, funded by the European Commission, p. 8, to be found at: <http://ec.europa.eu/sport/library/documents/f-studies/final-rpt-april2013-homegrownplayer.pdf>

<sup>665</sup> Inside world football, 3 October 2013: *Striani and Dupont in court today to start financial fair play challenge*, to be found at: <http://www.insideworldfootball.com/world-football/europe/13366-striani-and-dupont-lawyer-in-court-today-to-start-financial-fair-play-challenge>.

<sup>666</sup> Inside world football, 7 May 2013: *Dupont files EU complaint over UEFA's financial fair play rules*, to be found at: <http://www.insideworldfootball.com/world-football/europe/12480-dupont-files-eu-complaint-over-uefa-s-financial-fair-play-rules>.

presented. Both regulations are then placed within the context of EU law. Finally, it will be concluded how these topics may be embedded within the FSDC.

### **UEFA Club Licensing and Financial Fair Play**

At the start of the 2004-2005 season UEFA introduced the Club Licensing system. The goal was to encourage European club football to look beyond the short-term and consider underlying longer-term objectives essential for the game's good health.<sup>667</sup> The licensing system is targeted at clubs that have qualified to participate in UEFA competitions. These teams need to fulfil the criteria laid down in the club licensing regulations in order to be eligible to play. The key principles that a club needs to consider in its club operation, since the entry into force of the licensing system, are connected to transparency, integrity, credibility and capability.<sup>668</sup>

Recent developments in the economic sense have changed the landscape in football. Despite the sport's growing popularity there has not been an equally levelled growth. Many clubs are in liquidity problems and have reported high debts and, as a consequence, were forced to open their doors for private investors and other equity participants to gain influence in the club's operations.<sup>669</sup> On the other hand, some other clubs have climbed up the competitive ladder and nestled themselves at the top of the European competitions through external investments. This development leads to an ever growing gap between the top clubs and mid-size or smaller clubs, and, consequently to an impact on financial stability and competitive balance.<sup>670</sup> Today's European football has a limited number of clubs that are responsible for the vast

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<sup>667</sup> UEFA, *Financial Fair Play*, media information, 25 January 2012.

<sup>668</sup> UEFA Club Licensing system and Financial Fair Play regulations, edition 2012, Article 2.1 states the general objectives of the Club Licensing system: 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; to ensure that clubs have an adequate level of management and organisation; to adapt clubs' sporting infrastructure to provide players, spectators and media representatives with suitable, well equipped and safe facilities; to protect the integrity and smooth running of the UEFA club competitions; to allow the development of benchmarking for clubs in financial, sporting, legal, personnel, administrative and infrastructure related criteria throughout Europe.

<sup>669</sup> An example of these takeovers and investments are Vitesse Arnhem, FC Utrecht and FC Twente in the Netherlands. In Portugal there are many clubs closely collaborating with investment funds, such as FC Porto, Benfica, Sporting Lisbon, Estoril, Vitória Guimarães. England has seen financial influx through foreign investments in clubs like Chelsea FC and Manchester City FC. These investments made that these Premier League clubs now compete at the highest level of international competitions.

<sup>670</sup> Vöpel, H. (2011), *Do we really need financial fair play in European football? An economic analysis*, Research report, CESifo DICE Report.



majority of the total revenue generated by European football,<sup>671</sup> while even between the top 20 revenue making clubs there are big discrepancies.<sup>672</sup>

Therefore, in addition to the rules based on the principles above, UEFA's executive committee unanimously approved a financial fair play (FFP) concept in September 2009 and this concept was transposed in the UEFA club licensing and financial fair play regulations in May 2010, while they entered into force on 1 June 2010. The objectives of the FFP regulations are<sup>673</sup>:

- To improve the economic and financial capability of the clubs, increasing their transparency and credibility;
- To place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually;
- To introduce more discipline and rationality in club football finances;
- To encourage clubs to operate on the basis of their own revenues;
- To encourage responsible spending for the long-term benefit of football;
- To protect the long-term viability and sustainability of European club football.

In summary: the FFP regulations seek to achieve long-term financial soundness and thereby ensure the long-term viability of European football.<sup>674</sup>

The core principal of the FFP regulations is the break-even requirement: clubs are not allowed to spend more than they earn: their expenses need to be in line with their income.<sup>675</sup> If these

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<sup>671</sup> Deloitte (2013), report: *Captains of Industry, Football Money League*, Sport Business reports, 2013. p. 2.

<sup>672</sup> Ibid., p. 5. The reason is that income streams differ. For example the Spanish clubs Real Madrid and FC Barcelona benefit from a broadcasting right arrangement that sees these two giant clubs being able to individually sell their broadcasting rights as opposed to the collective selling by other La Liga clubs.

<sup>673</sup> UEFA Club Licensing system and Financial Fair Play regulations, edition 2012, Article 2.2.

<sup>674</sup> Lindholm, J. (2011), *The problem with salary caps under European Union law: The Case against financial fair play*, Texas review of Entertainment and Sports law, Vol.12, Nr.2, P. 197.

<sup>675</sup> According to the UEFA Club Licensing system and Financial Fair Play regulations, edition 2012, Article 58, the relevant income should be in balance with the relevant expenses. Relevant income: revenue from gate receipts, broadcasting rights, sponsorship and advertising, commercial activities and other operating income, plus either profit on disposal of player registrations or income from disposal of player registrations, excess proceeds on disposal of tangible fixed assets and finance income. It does not include any non-monetary items or certain income from non-football operations. Relevant expenses: cost of sales, employee benefits expenses and other operating expenses, plus either amortisation or costs of acquiring player registrations, finance costs and dividends. It does not include depreciation/impairment of tangible fixed assets, amortisation/impairment of intangible fixed assets (others than players' registrations), expenditure on youth development activities,

two elements are in balance then there exists a ‘break-even’. The accounts of the club need to be in balance. The monitoring of the well-functioning of the system is carried out by the UEFA Club financial control body.<sup>676</sup> The monitoring period is a period of three years.<sup>677</sup> The clubs are allowed to have an acceptable deviation, this being the maximum amount of break-even deficit that a club may have over the aggregate monitoring period.<sup>678</sup> The allowed deviation is €5 million over the aggregated period or €45 million over the season 2013/2014 and 2014/2015 and €30 million over the next seasons if the deficit is covered by financial injections from equity participants and/or related parties.<sup>679</sup> In practice this means that (aspirant) owners or investors of/in football teams will no longer be able to contribute to the exploitation and composition of a team due to immense financial injections,<sup>680</sup> limiting such a contribution to €45 or €30million per three seasons.

Clubs that do not comply with the Club licensing and FFP regulations will be brought, via the Club Financial Control Panel, to UEFA’s independent disciplinary bodies. There already have been cases before CAS dealing with the regulations.<sup>681</sup> The sanctions on clubs can be financial and/or a (multiple year) ban for participating in UEFA competitions.

### ***The Club Licensing system and the Financial Fair Play regulations and EU Law***

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expenditure on community development activities, any other non-monetary items, finance costs directly attributable to the construction of tangible fixed assets, tax expenses or certain expenses from non-football operations.

<sup>676</sup> UEFA Club Licensing System and Financial Fair Play Regulations, edition 2012, Article 53.

<sup>677</sup> UEFA Club Licensing System and Financial Fair Play Regulations, edition 2012, Article 59.

<sup>678</sup> UEFA Club Licensing System and Financial Fair Play Regulations, edition 2012, Article 61 sub 1.

<sup>679</sup> UEFA Club Licensing System and Financial Fair Play Regulations, edition 2012, Article 61, sub 2 (a) and (b). However, in the case that the clubs present an aggregate break-even deficit are not sanctioned if they report a positive trend in the annual break-even results and/or the aggregate break-even deficit is only due to the annual break-even deficit of the reporting period ending in 2012,...to contracts with players undertaken prior to 1 June 2010.

<sup>680</sup> The examples of Chelsea FC owner R. Abramovich and Mansour bin Zayed Al Nahyan of Manchester City FC are commonly known.

<sup>681</sup> Such as CAS 2012/A/2702 Györi Fc vs. UEFA, dealing with the non-payment of a transfer fee between an Hungarian (Györi FC) and an Estonian (FC Flora) club; CAS 2012/A/2821 Bursaspor vs. UEFA, dealing with the non-payment of a transfer fee between a Turkish club (Bursaspor) and an English club (Portsmouth FC); CAS 2012/A/2824 Besiktas JK vs UEFA, dealing with the non-payment of a number of outstanding amounts by Turkish club Besiktas, 2013/A/3067 Málaga CF vs. UEFA, a case dealing with overdue payments to other clubs and the Spanish tax authorities.

The European Commission's competition head Joaquin Almunia was involved in talks with UEFA President Platini when creating and implementing the FFP regulations.<sup>682</sup> On 21 March 2012 the European Commission and UEFA issued a joint statement<sup>683</sup> in which the initiative by UEFA was welcomed and accepted by the European Commission as it believed that the break-even principle deriving from the FFP regulations is consistent with the aims and objectives of EU policy in the field of State Aid. However, despite the Commission's full support it only concretely referred to competition law.<sup>684</sup>

Therefore, a recourse to the European Court of Justice would place the validity of the FFP regulations under scrutiny of the Court. According to a number of authors<sup>685</sup> the FFP regulations would not pass the requirements of consistency with EU law. The FFP regulations, despite having praiseworthy aims, lead to a barrier for competition. As Dupont states:

*“But as an agreement (the FFP) whereby industry participants jointly decide to limit investments, FFP likely constitutes collusion and hence a violation of EU Competition law. FFP may also infringe other EU freedoms such as the free movement of workers and services.”*

The FFP is a joint agreement between clubs to limit their freedom to acquire players by restraining their ability to do invest in players' wages and registrations. The clubs, as undertakings gathered under UEFA and therefore fitting under the EU competition law

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<sup>682</sup>Letter of Joaquin Almunia, Vice President of the European Commission to Michel Platini, President of UEFA, 21 March 2012,

[http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/75/1772175\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/75/1772175_DOWNLOAD.pdf)

<sup>683</sup>Joint Statement of Michel Platini, President of UEFA and Joaquin Almunia, Vice President of the European Commission, 21 March 2012,

[http://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/58/1772158\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/58/1772158_DOWNLOAD.pdf)

<sup>684</sup> Ibid.

<sup>685</sup> For example Lon, C.R. (2012), *Promoting Competition or Preventing it? A Competition Law Analysis of UEFA's Financial Fair Play Rules*, Marquette Sports Law Review, Vol. 23, Nr. 1, Fall, article 8. And Dupont, J-L. (2013), *Football's Anticompetitive Streak*, Opinion Europe, 25 March 2013,

<http://online.wsj.com/news/Articles/SB10001424127887324077704578357992271428024>; Vöpel. H. (2011),

*Do we really need financial fair play in European football? An economic analysis*, Research report, CESifo DICE Report, 3/2011; Geey, D. (2012), *The UEFA Financial Fair Play Rules: a difficult balancing act*, Entertainment and sports law Journal, Volume 9 number 1; Lindholm, J. (2011)., *The problem with salary caps under European Union law: The Case against financial fair play*, Texas review of Entertainment and Sports law, Vol. 12, Nr. 2.

definition of an undertaking,<sup>686</sup> need football players to create their product: the football spectacle. Competition is, at first sight, distorted. Moreover, it is clear that the FFP regulations intend to influence the finances of the participants in EU team football competitions so the description as an economic activity is a logic consequence, making EU law applicable to the issue at stake.

In addition to a distortion of competition, Lindholm compares the introduction of the FFP regulations with the introduction of a *salary cap* in Europe.<sup>687</sup> A salary cap is a measure to limit how much money teams may spend on player salaries.<sup>688</sup> The use of salary caps is more common in North American professional sport leagues,<sup>689</sup> where they normally are part of collective bargaining agreements (CBA) between team owners and players.<sup>690</sup> Despite the fact that such a rule is anti-competitive it is exempted from antitrust laws as a ‘labor exemption’.<sup>691</sup> The conditions for such an exemption to be valid is that the CBA must primarily affect the signatory parties, concern a mandatory subject of collective bargaining and it should be the product of arm’s-length bargaining.<sup>692</sup> In the United States there are generally two types of salary caps.<sup>693</sup> A cap can be related to an individual, or to a team. In case that it is related to a team, the cap can be an absolute cap, connected to the total number of teams in a league, or a relative cap, connected to the turnover of the team that implements a cap on his roster. There may be a *hard cap*, the total amount a team can spend and applicable to all the athletes in a team without exemption possibilities, or a *soft cap*, a connection to a proportion of the revenue and that allows exemptions to the general applicability of the cap, for example in the case of exceptional talents or team icons.<sup>694</sup> According to Lindholm the FFP regulations have the same effect as a salary cap in the European Union, although at first

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<sup>686</sup> UEFA is a grouping of associations, structured similar to FIFA, FIFA has been determined to be a grouping of undertakings in Case T-193/02, Piau v. Commission of the European Communities, 2005 ECR II-209.

<sup>687</sup> Lindholm, J. (2011), The problem with salary caps under European Union law: The Case against financial fair play, Texas review of Entertainment and Sports law, Vol. 12, Nr.2.

<sup>688</sup> The definition that is used by the European Commission in its White Paper on sport (2007) will be used here. See note 210, COM (2007) 391 final report (July 11, 2007).

<sup>689</sup> Nafziger, J. (2009), *A Comparison of the North American and European model of sport organisation*, In Gardiner, S., Parrish, R. and Siekmann, R.C.R., (eds), *EU Sport law and policy*, The Hague: T.M.C.Asser Press.

<sup>690</sup> Kahn, L.M. (2009), *Sports, Antitrust enforcement and collective bargaining*, The Antitrust Bulletin, Vol. 54, Nr. 4.

<sup>691</sup> Mackey v. NFL, 543 F.2d 606.

<sup>692</sup> Ibid., Mackey v. NFL, 543 F.2d 606,614-15.

<sup>693</sup> For a discussion of the history of collective bargaining in sports and the role of antitrust law enforcement, see Staudohar, P.D. (2009) *The sports industry and collective bargaining*, (2d ed. 1989)

<sup>694</sup> This exception is officially known as a Veteran Free Agent exception. A player who qualifies for the exception is known as a qualifying veteran free agent. This exception allows teams to re-sign their own free agents without being penalized for going over the salary cap. See also:

<http://www.sportingcharts.com/dictionary/nba/larry-bird-exception.aspx>

sight this might seem different.<sup>695</sup> The break-even requirement entails a salary cap system that can be defined within the scope of a relative salary cap, teaming the total budget of the club to a limited amount that the club may spend on salaries. Therefore, the FFP regulations make it more difficult for a player to move to another club that participates in, or to a club that will qualify for, European competitions. Hence, a club cannot spend more than a certain amount, within the cap, on players' wages. The employment of a player is dependent on the space left in the cap. Although these rules do not directly discriminate on the basis of nationality, they do form an obstacle to the free movement. As stated in *Bosman*:

*“provisions 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...constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.”*<sup>696</sup>

The arguments used as an illustration need further analysis in order to examine if the rules drafted by UEFA are able to be exempt from the full application of the EU laws on competition and free movement of workers.

#### *The Financial Fair Play rules under EU competition law analysis*

European competition law and ECJ case law have introduced a method to analysing the application of article 101 TFEU, which is based on four questions.

1. Is UEFA, as the designer of the FFP rules, an undertaking?
2. Does the decision affect trade between Member States?
3. Is the effect on trade between Member States appreciable?<sup>697</sup>
4. Does the decision have as its object the restriction or distortion of competition?

It has been made clear above that UEFA can be seen as an undertaking according to an analysis along the lines of existing EU jurisprudence. The analysis of the effect on interstate trade has been dealt with as a precedence in the Court's judgment on *Société Technique Minière*.<sup>698</sup> This requirement has been met if it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law, or of fact, that the agreement in

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<sup>695</sup> Lindholm, J. (2011), *The Problem with Salary Caps Under European Union Law: The Case Against Financial Fair Play*, Texas Review of Entertainment and Sports Law, Vol. 12, Nr. 2, 2011, p. 191.

<sup>696</sup> C-415/93 *Bosman*, par. 96

<sup>697</sup> This is the *de minimis* rule, Case 5/69, *Völ v. Vervaecke*, 1969 ECR 295.

<sup>698</sup> Case 55/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 ECR I-5457.

question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.<sup>699</sup> If the approach to, and acquisition of, *raw materials* is affected then apparently at least a form of influence can be noticed. As regards the effect being “appreciable”, this requirement is easily met. This is a consequence of the European model of sport where UEFA is the sole organizer of the game, therefore any action or decision of UEFA is immediately noticed by the competitors in the market. The FFP regulations also distort competition, since the rules have as their main and explicit aim the reduction of the amount of money that the clubs spend on salaries of players. This is indeed likely to restrict competition, like price fixing arrangements in other sectors.<sup>700</sup>

It can therefore be concluded that the FFP regulations distort competition and are unlikely to be exempt from the full application of EU competition law, unless the rules prove to have a genuine and legitimate aim and the choice for the contested rule appears to be proportionate in relation to the objective that it intends to reach.

### ***Financial Fair Play Regulations: Legitimate Aim?***

In *Bosman* the ECJ suggested that maintaining a financial and competitive balance between sport teams amounted to a legitimate aim and that consequently a restriction on the free movement of workers could be allowed.<sup>701</sup> In the case of the FFP regulations, UEFA states that they pursue long-term financial stability.<sup>702</sup> Moreover, competition is likely to be negatively affected because the ‘break-even cap’ is connected to a club’s turnover and that a club in a smaller market continues to have less access to income generated through the sale of broadcasting rights, or to an enhancement of the income generated from sponsorships, merchandising and other exploitation methods of intellectual property rights due to the logical restrictions of a consumer base. The clubs with the larger markets and budgets will automatically remain on the top of their respective leagues, as well as in the European leagues, as their access to the most expensive players remains. However, the European Commission has recognized that in the specific market of sports the continuation of the

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<sup>699</sup> Ibid., par. 249.

<sup>700</sup> Although certain positive elements as a consequence of the the reduction of salaries are noticed, the fact that competition is distorted is sufficient to contrast Article 101 TFEU.

<sup>701</sup> *Bosman* (Case 415-93).

<sup>702</sup> Presentation of UEFA President Platini, to be found at: <http://www.uefa.org/video/vidoeid=1585436.html>

existence of competitors is also of relevance. Therefore, financial long-term stability is likely to receive the ECJ's approval as it has been recognized in the White paper on sport.<sup>703</sup>

### ***Financial Fair Play Regulations: Proportionate?***

Lindholm refers to the theory of Dietl, the overinvestment theory.<sup>704</sup> This theory deals with the fact that a club's success judged on the cohesion of the fan-base and the financial merit, derives from sporting success. In order to compete in this sporting success clubs will overinvest in players, endangering the existence of the club in case of no sporting results. This is an issue that the FFP rules try to abolish. However, there is not enough evidence to prove that the restrictive method chosen by UEFA to counter this potential threat is proportionate, especially if you take into consideration that the overinvestment theory is inconsistent with the experience in European football where salary overspending is not a problem for the average European football club.<sup>705</sup>

More importantly, are there alternatives that are less restrictive or that can better reach the objectives pursued? Lindholm lists four alternatives, which are shared in part by other authors.<sup>706</sup> Less restrictive alternatives could be a better method of sharing the revenues between clubs,<sup>707</sup> downgrading the financial gain of the Champions League and uplift the financial gain of the Europa League, limiting the mid-contract transfers of players, the introduction of an absolute cap or luxury tax on player's salaries.<sup>708</sup> The luxury tax could be introduced as an incentive for high-spending teams to share more revenues with the lower ranked teams as soon as they have surpassed a certain spending threshold.

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<sup>703</sup> White Paper on sport (2007) 210, COM (2007) 391 final report (July 11, 2007).

<sup>704</sup> Dietl, H. (2008), *Overinvestment in team sport leagues: a contest theory model*, Scottish Journal on Political Economy.

<sup>705</sup> *Supra Lindholm* (2011), p. 207.

<sup>706</sup> *Supra*, footnote 659.

<sup>707</sup> Dietl, H. (2008), *Overinvestment in Team Sport Leagues: A Contest Theory Model*, Scottish Journal on Political Economy, 2 June 2008. According to Dietl this should lead to less over investment. Downside is that the open character of the European leagues makes it less attractive to engage in revenue sharing.

<sup>708</sup> *Ibid.* Dietl argues that that this solution would not only treat the symptoms of the problem but also the roots. Although restrictive it would be a better solution than a relative caP.

## Financial Fair Play Regulations and the Free Movement of Workers

The free movement of workers is a different perspective, but nevertheless an important pillar of the foundation of the European Union. A similar ‘test’ as was carried out in relation to competition law, needs to be analysed for the acceptance of a restriction on the free movement of workers. This analysis comes forth from the ECJ *Gebhard* case.<sup>709</sup>

In order to assess an impediment to one of the four freedoms is allowed, it should be assessed if the measures at stake:

1. Are applied in a non-discriminatory manner;
2. Are justified by imperative requirements in the general interest;
3. Are suitable for securing the attainment of the objective which they pursue;
4. Not go beyond what is necessary in order to attain it.

A similar application as the test used above on the issue of competition law would lead to a similar result, but now from the perspective of free movement law. Less restrictive measures can be applied that do not restrict the freedom of movement.

### Conclusion

The Club Licensing and Financial Fair Play regulations may be incompatible with EU law if challenged before the courts. At the time of writing, there is a case pending before the national courts regarding the legality of the rule and a complaint before the European Commission. *Bosman* lawyer Jean-Louis Dupont represents a Belgian football agent, Mr. Striani, in his challenge of the FFP rules. As this procedure might take some time before the Court reaches a judgment, there might still be time for UEFA to prevent a negative outcome and search for another method in securing their objectives with less restrictive means by using the FSDC as a forum for negotiated settlement.

The club licensing and FFP regulations seek to achieve long-term financial soundness and thereby ensure the long-term viability of European football. The general objective is to use the

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<sup>709</sup> Case C-55/94 *Gebhard* [1991] ECR I-4165, par. 37.



regulations to avoid clubs becoming tempted to spend more than they earn. This requirement has been concretized in the “break-even” requirement.

Effectively the current system is fragile under EU law as a legal challenge could overhaul the complete system. The *de facto* salary cap that is introduced by the ‘break-even’ rule is fragile in the light of the EU rules on free movement and the restrictive effect on competition deriving from this rule goes against the principles of EU competition law. The regulations are not proportionate. It seems unlikely that, when considering the existence of less restrictive alternatives, the Court would judge the club licensing system and FFP regulations to be allowed under EU law. A challenge to the rules could be carried out by a player or by another party that is affected by the rule.

The European Social Dialogue could be the framework for a creation of control on the club’s expenditure on player’s wages. The European Social Dialogue is a form of collective bargaining and through the fact that the social partners in the European professional football sector have appointed UEFA to chair the Sectoral Social Dialogue committee, the issue of financial fair play could be placed on the agenda of negotiations in the field of football. In the United States salary caps could be introduced via a collective bargaining agreement, despite the restrictive effect, due to the ‘labor exemption’. In the European Court of Justice’s jurisprudence a similar type of labour exemption is introduced. After the cases *Brentjens*,<sup>710</sup> *Albany*,<sup>711</sup> *Drijvende bokken*,<sup>712</sup> *Pavlov*<sup>713</sup> it is possible to exempt the full application of EU competition law to certain restrictions. As the Court states in *Brentjens*:

*“It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to article 85 (1) (now 101) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of*

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<sup>710</sup> C-115/97 to C-117/97, *Brentjens Handelsonderneming B.V. v. Stichting Bedrijfsfonds voor de handel in bouwmaterialen*, 21 September 1997, ECR I-609.

<sup>711</sup> C-67/96, *Albany International B.V. v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

<sup>712</sup> C-219/97, *Maatschappij Drijvende Bokken B.V. v. Stichting Pensioenfonds voor de vervoer- en havenbedrijven*, 21 September 1999, ECR I-6125.

<sup>713</sup> C-180-184/98, *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

*collective negotiations between management and labour in pursuit of such objectives must by virtue of their nature and purpose, be regarded as falling outside the scope of article 85(1) of the Treaty.*<sup>714</sup>

More specifically, the Advocate General suggested in *Brentjens* that:

*“My conclusion on antitrust immunity for collective agreements is that collective agreements between management and labour concluded in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties are not caught by article 85(1) (now 101) of the Treaty.”*

The test that therefore needs to take place is if the restricting agreement has been agreed from a Social Dialogue between representative partners and if the agreement is structured as a collective bargaining agreement. In addition, does the agreement contribute to the working conditions of the workers?

In relation to the regulation, it might be suggested that the representative body of players, FIFPRO, would recognize the need for financial stability amongst club teams. It has to be proven that this system would eventually have a positive effect on the workers. Therefore, if the social partners agree that the issue may be placed on the agenda of the European Sectoral Social Dialogue Committee and an agreement on a financial fair play rule can be reached, then the risk of a legal challenge and overhaul of the regulations is no longer becomes realistic. Hence, the restrictive element on the free movement of workers has been acknowledged and accepted by the representative body of workers as positive for the workers' conditions and the UEFA proposal has been agreed upon by the social partners within the structure of a collective agreement. Therefore, it may be concluded that the only way to guarantee legal certainty for the financial fair play regulations is that UEFA requests the social partners to agree on its contents through the European Social Dialogue.

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<sup>714</sup> Ibid., par. 56-57.

## The UEFA Home Grown Player Rule

UEFA's Executive Committee adopted the HGPR on 21 April 2005 and UEFA's members accepted the rule at the congress in Tallinn. UEFA wished to introduce the rule in order to combat issues that, for them, had a negative impact on European football. UEFA detected at their member associations and their football clubs the following disturbances:

- A lack of incentive for clubs in training players;
- A lack of identity in local/regional teams;
- "Hoarding" of players;
- Problems for national teams as a result of the points above.
- Less competitive balance in UEFA club competitions and domestic leagues;
- An increased link between money and sporting success;
- Fewer opportunities for local-trained players to play.<sup>715</sup>

UEFA claimed that the training and development of talent at clubs was in danger. As the influx of income shifted more towards a select number of top clubs it appeared as if it was better for them to acquire talents from smaller clubs as soon as they were fit to make the (junior) ranks of the top teams, instead of a direct investment in training. As young players are more likely to join bigger teams on both sporting as financial grounds, and taking into consideration that for young players restrictions apply as regards contractual bonds,<sup>716</sup> the clubs that trained the players were not properly remunerated for the training time and efforts that they had invested in the player. UEFA sought to introduce a rule that would create incentives for clubs to keep investing in the training of players and that would be able to reintroduce a more balanced form of competition. Hence, if weaker clubs would be under less pressure from richer (stronger?) clubs in the sense that they would simply buy away their talents and hoard them in B-teams for irregular participation in the A-team, the competitive balance could be restored. The methodology was based on the HGPR in combination with the club licensing system.

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<sup>715</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, Negotiated procedure EAC07/2012, p. 9.

<sup>716</sup> See before in Chapter 6, on the basis of the RSTP under the age of 18 years may not conclude contracts for a duration longer than three years, any clause referring to a longer period is not recognized.

The HGPR would encourage the clubs to invest in training their own players, or “locally trained players”. The HGPR creates a distinction between locally trained players that are “club trained players” and “association trained players”. A club trained player is<sup>717</sup> a player who, between the age of 15 (or the start of the season during which he turns 15) and 21 (or during the season into which he turns 21) and irrespective of his nationality and age, has been registered with his current club for a period, continuous or not, of three entire seasons (i.e. a period starting with the first official match of the relevant national championship and ending with the last official match of that relevant national championship) or of 36 months. An association trained player is<sup>718</sup> a player who between the age of 15 (or the start of the season during which he turns 15) and 21 (or during the season into which he turns 21), and irrespective of his nationality or age, has been registered with a club or with other clubs affiliated to the same association as that of his current club for a period, continuous or not, of three entire seasons or of 36 months. The HGPR sets a minimum standard of locally trained players to be registered on the “A” list of a team, this is a list of 25 players that may be registered to participate in UEFA competitions and that needs to be delivered in accordance with the deadlines set by UEFA in their regulations governing UEFA club competitions.<sup>719</sup> In the first stages of this introduction, the clubs participating in UEFA competitions could gradually bring their squads in accordance with the new requirements. However, since the season 2008/09 onwards clubs must have at least 8 locally trained players in their squads. If they fail to meet this standard than the amount of 25 registered is also lowered. Of these eight players not more than four can be “association” trained.<sup>720</sup> Although not “aggressively” worded, this approach entails a quota for teams, limiting the amount of “non-locally trained” players to be fielded.

The European Commission published in its White Paper on Sport,<sup>721</sup> in the Pierre the Coubertin action plan, that:

*“Rules requiring that teams include a certain number of “home-grown players” could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination on the basis of nationality and*

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<sup>717</sup> UEFA Champions League Regulations, Article 18.10.

<sup>718</sup> UEFA Champions League Regulations, Article 18.11.

<sup>719</sup> UEFA Champions League Regulations, Article 18.13.

<sup>720</sup> UEFA Champions League Regulations Article, 18.08, 18.12, 18.08.

<sup>721</sup> European Commission (2007), *White Paper on Sport* of 11 July 2007 (COM) 2007(391).

*if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as enhancing and protecting the training and development of talented young players.”*

Therefore, the European Commission, at first sight, agreed to the rule but it committed itself to examine whether the potential indirect discrimination deriving from the rule would be allowed on the basis of the legitimate aim of the promotion of training of young players and the balance of the competition. An assessment of the impact would be carried out in 2012.

The admissibility of the UEFA HGPR under EU law has been a source for elaborate academic debate.<sup>722</sup> A reproduction of this debate is the start of the research project commissioned by the European Commission (DG Education and Culture (EAC)) and awarded to the University of Liverpool and Edge Hill University.<sup>723</sup> The study embarks on the objectives of the European Commission when, *prima facie*, agreeing to the rules. The main aims of the rule can be summarized as improving the training and opportunities for young players and the (re)introduction of competitive balance.<sup>724</sup> The analysis that is carried out deals with the following questions:

- Is EU law applicable to the rule?
- Does the rule restrict free movement?
- Does the rule restrict competition?
- If so: does the rule have a legitimate aim?
- If so: is the rule proportionate, e.g., are there less restrictive alternatives to reach a similar or better result?

### ***EU law applicable to the Home Grown Player Rule?***

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<sup>722</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, Negotiated procedure EAC07/2012. This is a research project carried out by the University of Liverpool and Edge Hill University, funded by the European Commission. In Chapter 2 a literature research has been carried out by the authors concerning legal literature in English on the *HGPR*.

<sup>723</sup> Ibid..

<sup>724</sup> According to the study, p. 13 and 14, the other objectives were the erosion of clubs and the decline of the standard of national teams of countries where the clubs consisted of clubs that fielded a large number of non-national players. These two objectives were not central in the discussion on the position of the *HGPR* under EU law, possibly due to their weak or uncertain standing in terms of objective justification under EU free movement law.

UEFA is the governing body for European Football and the rule applies to teams and players that are active in a cross border competition. Therefore, the rule does not apply only to an internal situation. Sport is not exempt from the Treaty either. According to the decision in *Walrave*<sup>725</sup> EU law is applicable to sport insofar as the case under analysis constitutes an economic activity. It cannot be denied that a rule that can influence the employment of a player touches upon the very core of an individual's economic activity: labour. Even if UEFA would argue that the rule should fall outside of the scope of the application of EU law, the jurisprudence of the Court has established a framework in *Meca-Medina*<sup>726</sup> that no rule of a sports governing body, when constituting an economic activity, would be by definition exempt from the application of EU law.

The *Meca-Medina* case dealt with the application of EU competition law, but the *test* can be compared to the *Gebhard*<sup>727</sup> test for labour issues, and no exception on the basis of purely sporting interest is applicable to it. This is because it deals with professional football and with the core activity of the participants in an economic sector: clubs, players, associations, leagues, etc. No comparison can be made, in the quest for an exemption, to rules such as the composition of national teams.<sup>728</sup> Therefore it can be concluded that EU law is applicable to the rule.

However, not all rules that fall under the scope of application of the Treaty are prohibited. In *Meca-Medina* the contested doping regulations fell under the scope of the Treaty but their purpose was of such a relationship to the essence of sport, being the maintenance of rivalry between participants, or the integrity of the competition, that an infringement of the EU's competition laws was not considered. In *Deliège* a similar outcome was reached. Rules of selection on the basis of nationality infringed the rules on the freedom of providing services, however a certain control and freedom for the governing bodies is needed in order to ensure a fair and organized selection mechanism for international competitions. Is the effect of the HGPR similarly inherent to the sport as such? According to the authors of the Home Grown Player Study, it is not.<sup>729</sup> The UEFA competitions have been a huge sporting and commercial

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<sup>725</sup> *Walrave and Koch* (C-36/74).

<sup>726</sup> *Meca-Medina* (Case C 519/04).

<sup>727</sup> Case C-55/94 *Gebhard* [1991] ECR I-4165 .

<sup>728</sup> For a detailed analysis of the sporting exception in EU law: Parrish, R. and Miettinen, S.(2008), *The Sporting Exception in European Union Law*, The Hague: T.M.C. Asser Press.

<sup>729</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, Negotiated procedure EAC07/2012, p. 86.

success long before the introduction of the rule, therefore the organisation of the competition does not depend on the application and enforcement of the HGPR. This conclusion is a start for a further analysis of the potential restrictive effect of the contested rule.

### ***The UEFA Home Grown Player Rule and its impact on Free Movement in the EU***

The European Commission has already stated its concern when, in principle, agreeing to the HGPR. It stressed the possibility that an indirect discrimination would come to the surface when the rule would be applied in practice.<sup>730</sup> The indirect discrimination has been confirmed in the study.<sup>731</sup> It is more likely that locally trained players are players that have the same nationality as the club in question. This conclusion is drawn despite the fact that a more intense migration of workers between the age of 15-18 has taken off after the introduction of the rule. Hence, if a player moves from one association to another association during his years of training he can still meet the criteria of becoming a locally trained player without occupying a “non home-grown” spot within the ranks of 25 on the A-list. One does need to be cautious with this conclusion as it would have an opposite effect on the competitive balance of European teams. Due to this rule it is likely that the training and education for traditional teams like Ajax Amsterdam is less interesting as their top talents will be transferred to the big five EU leagues before the talents sign a contract with their local teams. Moreover, besides this ‘muscle drain’, the rules on the transfer of players want to restrict transfers of minors whereas the HGPR could incentive the transfer of under eighteen players. Another negative consequence could be that clubs that have contracted young players to play for a number of years in their academies and, as such, reach the “locally trained player” status, are loaned out to satellite clubs. This is a phenomenon that is rising in the European competitions<sup>732</sup> and deserves further analysis outside of the scope of this thesis. Taking the above into consideration, a restriction on the freedom of a worker can be identified.

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<sup>730</sup> European Commission (2008) “*Although it is difficult at the moment to state with any certainty that the ‘home-grown players’ rule will lead to indirect discrimination on the basis of nationality, the potential risk of this cannot be discounted, as young players attending a training centre at a club in a Member State tend to be from that Member State rather than from other EU countries*” European Commission Press Release, IP/08/807, 28 May 2008.

<sup>731</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA’s ‘Home Grown Player Rule’*, Negotiated procedure EAC07/2012, Chapter 5.

<sup>732</sup> An example is Dutch side Vitesse Arnhem, playing in the Dutch Eredivisie with 7 players on loan from Chelsea FC in the 2013-2014 season.

## ***EU Competition Rules and the Home Grown Player Rule***

It is the consensus in academic debate, although the amount of work dedicated to competition law in this context is less than the rules on free movement, that the rule *prima facie* breaches EU competition law.<sup>733</sup> It is likely that the rule will eventually fail the proportionality test in light of the objectives that it pursues. In order to reach such a conclusion, a test along similar lines as the test on the FFP can be applied to the HGPR, is the aim of the rule legitimate, is it suitable and necessary and, if not, are there alternatives to the rule?

### ***The Aim of the Rule: Legitimate?***

In ECJ case law it has been identified that in sport there exists, due to the specific nature of sport, restrictions that serve a legitimate aim. A legitimate aim is the proper functioning of a competition<sup>734</sup> or the need to improve player training, education and development and the need to protect the competitive balance in a competition.<sup>735</sup> The latter two are the main objectives of the HGPR, therefore it can be determined that the objective of the rule is a legitimate one.

### ***Home Grown Player Rule: Suitable and Necessary?***

The final questions deal with the suitability and the necessity of the rule. First, does the rule attain its stated objectives: better training of youngsters and more competitive balance? The study concludes that it can only detect a modest impact on competitive balance.<sup>736</sup> This is partly due to the fact that there is not much data on competitive balance to make a more accurate calculation. On the second issue, the impact on youth training, the study concludes that there has been very little impact. The trend that the number of locally trained players made appearances in main teams has grown slightly but this trend started before the

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<sup>733</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, Negotiated procedure EAC07/2012, p. 21.

<sup>734</sup> Such as in *Lehtonen* (Case C-176/96): the use of transfer windows was legitimate as its objective was to allow a fair competition.

<sup>735</sup> As determined in Case 415/93 *Bosman* and Case C-325/08 *Bernard*.

<sup>736</sup> Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A. (2012), *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, Negotiated procedure EAC07/2012, p. 8



implementation of the rule. The study does not reveal evidence for a major change in investment in youth training if the rule continues to exist in its current form.

If the impact of the in meeting its objectives cannot be easily identified, or are rather limited, the question arises if there are alternatives. Alternatives that have a less restrictive impact on the free movement of workers and competition law. First, the rule could simply be amended to a more limited number of players that are locally trained and to be registered at the A-team. The amendment could also lie in targeting the rule only to club trained players. Both options lead to negative consequences, from the point of view of the authors.<sup>737</sup> The first would probably not pass the suitability test as the only positive outcome, being a small enhancement of the competitive balance, would be affected by limiting this number. The second, shifting the focus only to club team players and not allowing association team players, has a negative consequence that other teams of the same league will lose income from training and transfer fees if the player ‘moves up within a league. The use of association trained players is positive for competitive balance. Finally, this option could move bigger clubs to recruit players at an (even) earlier stage.<sup>738</sup> Another option would be to identify the restrictive effect of the rule, forcing the club to field more locally trained players, but that the outcome of the rule is more positive for youth training and competitive balance.

Besides changing the rule, alternatives can be considered. These could focus on methods affecting clubs and methods affecting players. The clubs could be forced, through licensing, to invest more in training youth; introduce salary caps; bonuses if national players are fielded; a higher part in the share of revenue, etc. The players could be forced to sign their first contract with the club that trained them; imposing squad size limits; allowing longer contract duration for minors, in essence: schemes to bind young players to a club.<sup>739</sup>

The final conclusion of the study proves that the legal landscape surrounding the HGPR is uncertain. It can be concluded that a legal challenge to the rule is likely to have some form of effect, if not the effect of a total abolition. According to the authors:

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<sup>737</sup> Ibid, p. 105.

<sup>738</sup> Ibid, p. 106.

<sup>739</sup> Ibid, p. 107.

*“UEFA’s Home Grown Player Rule has resulted in improvements to competitive balance in Champions League and Europa League competitions but these improvements are very modest. Despite the increase in the number of Home Grown Players”.*<sup>740</sup>

The European Social Dialogue could be a platform for negotiating the HGPR or a less restrictive alternatives.

The Social Dialogue deals with employment issues that are relevant and impact on the relation between the employer and the worker. Therefore, any issue that has an impact, in a specific sector, on an individual that can be qualified as a “worker” under the characteristics of the jurisprudence of the European Court of Justice, may be included in the European Social Dialogue.

The HGPR impacts on both the employer and the worker. The employer is restricted in employing the worker of his choice. In addition, he needs to invest in the human resource policy of his club by focusing on the training of talent instead of the acquisition of players. The EU worker is indirectly discriminated. The HGPR position in a team is likely to be filled in by a player that is of the nationality of the country of origin of the employer. The fact that the HGPR encourages the transfer of players between the age of 16 and 18 within the EU has an impact on players and clubs.

In the case that UEFA is able to convince the social partners that the HGPR is necessary to improve the European football sector and that it benefits players and clubs, it may place the issue on the FSDC agenda. UEFA is an associate party with a similar status and is able to organise the agenda itself, via the route of the PFSC.

When discussing the HGPR within the FSDC a balanced system needs to be presented. The research that was commissioned by the European Commission illustrated that the current system is too restrictive in relation to the results. The social partners can present their views and consent to a negotiated settlement.

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<sup>740</sup> Ibid, p. 8.

If the HGPR lacks consensus of the social partners it will remain purely an UEFA regulation. The threat of a legal challenge is then realistic. This can be diminished if it would have the status of a negotiated result, within the FSDC and if it would be implemented through national collective bargaining agreements or via the national associations in standard contracts. The enforceability of the agreement would be similar to the situation now, where a club needs to comply with the HGPR to participate in UEFA competitions. The only difference would be that a potential legal challenge would most likely fail due to the fact that the social partners have agreed to embed the HGPR in the FSDC, making the rule part of their negotiation within the marginal test by the European Commission as regards compatibility with EU law.

A potential challenge on the basis of competition law, the topic's restrictive effect should be justified under the *Brentjens*' test, like was described above on the FFPR.

## **Conclusion**

This chapter has included the UEFA regulations on Club Licensing and Financial Fair Play and the Champions League in the analysis of topics that could be part of a FSDC.

In relation to the FFP it has been concluded that UEFA indirectly introduces a system limiting the amount that clubs may spend on players' wages. This can be seen as the introduction of a salary cap. The competition law test has shown that UEFA might be under scrutiny if the FFP will be challenged. The latter is the case with pending litigation before a Brussels court and a complaint before the European Commission. UEFA could pursue the social partners to agree on using the FSDC as a platform for the introduction of the FFP and minimizing the threat of the outcome of a legal challenge. The FSDC could perform a similar role as the US CBA Labour Exemption.

According to the academic debate surrounding the topic of the HGPR it can be concluded that the restrictive elements of the rule on the free movement of workers are not proportionate to the very limited results as regards the objectives that the rule envisages. There exist alternatives that may lead to a similar or better result. Therefore, the level of legal certainty is

limited as a legal challenge could lead to an overhaul of the system. The fact that the HGPR leads to an impact on the free movement of workers, has a direct connection to the employment relationship between the football player and his club. Therefore, it is a topic that can be included in the European Social Dialogue. The following chapter analyses how Third Party Ownership and the activities of Players' Agents relate to the European Social Dialogue in football.



## CHAPTER EIGHT

### Third Party Influence and the Activities of Players' Agents

#### Introduction

Third Party Influence (TPI) is the ability for a third party to influence the policy of a club by means of owning a share in the future income generated by the transfer of a player before the expiry of his contract (economic rights). The current debate about the extent of admissibility of TPI was first fuelled by the controversy caused by the signing of Argentinean players Carlos Tevez and Javier Mascherano by English Premier League team West Ham United in the summer of 2006.<sup>741</sup> The economic rights of these players were held by a third party.

Players' Agents have been active in the international football industry since the development of modern organized football.<sup>742</sup> After *Bosman* the football players experienced more freedom in their choice of employer and the value of the contracts became more significant. As a consequence the negotiations became more complex and the activities of players' agents increased. This, in combination with the income generated by players' agents, made FIFA decide to regulate the profession. Since the mid-nineties FIFA Players' Agent Regulations (PAR) and licensing system have been in force.<sup>743</sup>

Both topics have been criticized by both FIFA and UEFA. That is the reason for examining them in a separate chapter. TPI is touched upon in the RSTP<sup>744</sup> but UEFA has proven to be a stronger advocate than FIFA against the use of TPI.<sup>745</sup> As regards the activities of Players' Agents, FIFA has decided to deregulate the profession.<sup>746</sup> UEFA has supported a stronger role for itself in the supervision of the activities of Players' Agents.<sup>747</sup>

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<sup>741</sup> BBC Sport, 31 August 2006: *West Ham Sign Tevez and Mascherano*, to be found at:

[http://news.bbc.co.uk/sport1/hi/football/teams/w/west\\_ham\\_utd/5301068.stm](http://news.bbc.co.uk/sport1/hi/football/teams/w/west_ham_utd/5301068.stm).

<sup>742</sup> KEA, CDES and EOSE (2009), *Study on sports agents in the European Union*, a study commissioned by the European Commission (Directorate-General for Education and Culture).

<sup>743</sup> A further discussion will follow in the course of this Chapter.

<sup>744</sup> FIFA Regulations on the Status and Transfer of Players, Article 18bis.

<sup>745</sup> UEFA website, 19 March 2013, *No place for third party ownership in football*,

<http://www.uefa.org/aboutuefa/organisation/generalsecretary/news/newsid=1931937.html>.

<sup>746</sup> FIFA website, 31 May 2013, *Congress endorses new approach on players' agents regulations*, to be found at: <http://www.fifa.com/aboutfifa/organisation/bodies/congress/news/newsid=2088917/>

<sup>747</sup> UEFA has integrally supported, and financed, the *Independent European Sport Review*, by J.L. Arnaut in 2006. On p. 47, par. 3.63 the role of UEFA is proposed.

A deregulation of the Players' Agent profession and a potential ban on TPI shall impact on every stakeholder in football. Therefore, any activity on these topics may encounter a reaction, including a potential legal challenge to the alternatives proposed by the football governing bodies.

This chapter shall first broadly describe both topics. Whether the FSDC is the right platform for providing alternatives to a deregulation (Players' Agents) or ban (TPI) that could be supported by the relevant stakeholders will be analyzed.

### **Third Party Influence**

The topic of third party influence on the policies of football clubs is part of a dynamic debate in European and international football.<sup>748</sup> The discussion centres on the acceptability of third party investment in the economic rights of players. The issue first became a topic of debate after the transfer of Carlos Tevez and Javier Mascherano from Brazilian club Corinthians to London side West Ham United. Corinthians had sold a majority share to football entrepreneur Kia Joorabchian. He was the owner of Media Sport Investments (MSI). MSI and another company, Just sports Inc. When the players were sold to West Ham United, MSI retained the right to receive a percentage of the future value of the player after a sale and, and this was the decisive factor for the £5,000,000 fine imposed on West Ham United as it had the decisive influence on the future of Tevez and Mascherano by being able to agree or disagree on a loan, or definitive transfer. This rigorous agreement between MSI and West Ham also underlined that the issue of influence in some cases can be regarded as 'ownership'.<sup>749</sup> After this affair the Premier League introduced articles in their (and the FA's) regulations<sup>750</sup> that would forbid the influence of third parties in club policies.

According to the definition of Geey, third party ownership, as it is currently been debated by the football stakeholders,

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<sup>748</sup> For an elaborate overview of literature concerning third party influence EPFL Sports Law Bulletin number 10, June-October 2012.

<sup>749</sup> De Dios de Crespo, J, and Whyte, A (2012). *A review of third party ownership, where do we go from here?* In Sports Law Bulletin number 10, June-October 2012, p.46

<sup>750</sup> Premier League Regulations Articles V.20 and consequently L.37 and L.38.

*“relates to the sale to a third party (e.g. a private investor, another club or a company) of a future transfer value. The entity buying the share (or the previous club keeping it for a subsequent transfer) believes the player has the potential to be transferred for a higher fee than it paid for the transfer share. For the club employing the player, the sale of portions of the economic rights helps it balance its books and find credit from alternative sources. While risks are high, so are the potential gains.”<sup>751</sup>*

The origins of third party influence<sup>752</sup> lie in South America. An example shall be given from the Brazilian perspective, based on experiences in the football sector. In the Brazilian ‘favelas’ many youngsters play unorganized football. In these favelas scouts are active that invite the boys to play in a team, unconnected to association football. After having selected the boys and recognized their talent, the scout introduces the talented boys to a club that participates in organized football. By doing this the player will be registered for the first time and his official training starts. In order for the player to be registered, a specific card (passe) was obligatory for entering the player in the association’s (federação) database. The original scout does not receive any financial remuneration for bringing the player to the club. Moreover, the club, normally the youth ranks of a lower level club, does not have the means to remunerate the scout. For that reason the club will have to invest itself on the acquisition of the player as well on his further training. Therefore, as an alternative, the club will offer the scout a percentage of the future income it may acquire from the consequent registration of the player at a new club.

This system applied in a time where also in Brazil the payment of fees was also still due after the player had ended his contract. The payment of fees was therefore not connected to the move of the player due to a premature rupture of the contract but through the ‘handing over’ or selling of the right to register the player. The registration of the pass generated income and by offering a share of the player’s pass to the scout that had brought him to the club, the scout was remunerated for his services. He would receive a share of future registration (the federative right) if the player would sign for a professional club with the funds to invest in the

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<sup>751</sup> Geey, D. and Reck, A. (2011) *Third party ownership and UEFA’s FFPR: A premier league handicap*, Sport and the EU review, Vol. 3, Nr.2.

<sup>752</sup> For reasons of personal conviction the term influence will be used instead of ownership, except in cases where the description of the issue so allows.



acquisition of his services.<sup>753</sup> After the introduction of the revised regulations on football contracts and transfer within Brazil, a generic law based on the Brazilian constitution, *Lei n.9615 de 24 de marco de 1998*, better known as the *Pelé law* the system was brought in conformity with the situation *Post Bosman* in Europe and the use of dividing shares of the player's passes was abolished.

The economic gain of investment in players shifted from the investment in the federative right of the player to the economic right of the player. As it could not be denied that this form of investment had created some stability as regards finances in Brazilian football.<sup>754</sup>

This economic right was the source for external investment along the lines of the definition above. The source for starting with the investment in economic rights by third parties lie in relation to the talent scout registering the player for the first time (the "classic" example), the fact that clubs in need of money assign part or their rights on players to third parties and acquisition of players by clubs with the help of third party investors due to the club's lack of financial resources.<sup>755</sup> This phenomenon first came to the surface in the *Tevez and Mascherano* case and has already been used extensively in countries like Spain, Portugal, Italy and Greece.<sup>756</sup> The CAS has also dealt with various cases in which third party influence or ownership was a subject.<sup>757</sup> According to its jurisprudence, CAS states that a club holding an employment contract with a player may assign with the player's consent, the contract rights to another club in exchange for given sum of money or other consideration, and those contract rights are the so-called economic rights to the performances of a player.<sup>758</sup>

After the *Tevez and Mascherano* case, FIFA introduced Article 18bis in its regulations (RSTP), not banning the ownership on the a share of the future gain of the player's career

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<sup>753</sup> See also for information and further reading: Rodrigues, F.X.F. (2007), *O fim do passe e a modernização no futebol Brasileiro* (2001-2006), 2007, tese (Doutorado em Sociologia) – PPFS/UFRGS, Porto Alegre 2007.

<sup>754</sup> See also Augusto Pera de Souza, F. and Felisoni de A. (2005), *O fim do passe e seu impacto sobre o desequilíbrio competitivo* Revista de Administração, São Paulo, Vol.40, Nr.3. jul/ago/set/ 2005, P.280-288.

<sup>755</sup> Reck, A. (2012), *Third party player ownership: current trends in South America and Europe*, in EPFL Sports Law Bulletin, Vol. 10, June-October 2012 p.52-53.

<sup>756</sup> *An overview of Third Party Ownership in European Professional Football*, EPFL Public Policy and Research Manager Ezechiél Abatan, takes up in its largest part the content of the *EPFL Report on Third Party Ownership in European Football*, in EPFL Sports Law Bulletin, Vol. 10, June-October 2012.

<sup>757</sup> CAS 2004/A/635: RCD Espanyol de Barcelona v. Atlético Veléz Sarsfield; CAS 2004/A/662: RCD Mallorca v. Club Atlético Lanús; CAS 2004/A/701: Sport Clube Internacional v. Galatasaray Spor Kulubu Dernegi; CAS 2004/A/781: Tacuary FBC v. Club Atlético Cerro and Jorge Cyterszpiller FIFA; 2008/A/1482: Genoa C.F.C. v. C.D. Maldonado.

<sup>758</sup> CAS 2004/A/635: RCD Espanyol de Barcelona v. Atlético Veléz Sarsfield.

move but restricting the potential influence that third parties might exercise over the club's freedom to determine its own policies:

*“No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams. The FIFA disciplinary committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.”*

The negative arguments regarding third party influence are summarized by Purdon thus:

*“A third party whose identity is not disclosed cannot be monitored to ensure that they have no interests in players of more than one club, possibly raising issues about influence over the affairs of more than one club. An owner or benefactor of a club might likewise have interests in the players of another club or clubs. The football authorities cannot be satisfied about the ultimate source of money coming into the game.”<sup>759</sup>*

In addition to these arguments related to the integrity and transparency of payments, are those related to human rights<sup>760</sup> This was especially the case if the notion of ‘ownership’ of players is used and if contracts regarding the third party investment are in force that effectively limit the freedom of the player to choose the club of his preference. Maybe even without the player's consent to the contract or knowledge about a third party to whom he is contractually liaised.

There are also advocates of the opposite approach; the benefits of third party investments. To the beneficiary clubs investments made by third parties is nothing more than a new form of financing and a method of competing with the financially stronger teams or leagues. For clubs in competitions not belonging to the Big five leagues, a collaboration with a third party offers them the possibility to reach a higher degree of competitiveness. In Portugal and Netherlands

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<sup>759</sup> Purdon, J. (2012) *Third Party Investment*, in EPFL Sports Law Bulletin, Vol. 10, June-October 2012, P. 39.

<sup>760</sup> Melero, V and Soiron, R. (2012), *The dilemma of third-party ownership of football players*, in EPFL Sports Law Bulletin, Vol. 10, June-October 2012, p. 43.

the links with clubs and investment funds are openly discussed.<sup>761</sup> Moreover, a grouping of Brazilian clubs have called to the football governing bodies not to ban a system of third party investments but to better regulate as the ban would have an impact on the continuation and financial capacity of the clubs.<sup>762</sup>

The issue of third party influence / investment / ownership may or may not be allowed. It does, in any case, have an impact on the individual employment relation between a club and a player. It depends on the contractual clauses of the investment contract between club and third party investor<sup>763</sup> and if the player is aware or not of the third party investor and the extent of his influence. The friction with the freedom to conduct a business in the EU also needs to be taken into consideration.<sup>764</sup> Restrictions on this freedom need to be evidence based and proportionate as regards the objectives that it envisages to attain.

### **The Activities of Players' Agents**

The role of agents has been present in the world of football since the first competitions were organized and transfers of players started. At the time of amateurism agents were more advisors that mediated between player and club in the case that a sensitive issue arose between the parties.<sup>765</sup> These activities turned into a profession when the players' commercial opportunities became more significant when the clubs experienced an increased turnover with the development of the broadcasting of sport events after the de-regulation of the media sector. The first serious increase in players' salaries became apparent and the labour market for players evolved with this commercial growth to a sector comparable to 'normal' industries.<sup>766</sup> After *Bosman* the use of agents continued to increase.<sup>767</sup> The limitation on the use of EU was abolished therefore the labour market for professional football became a truly

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<sup>761</sup> FC Twente has entered into a partnership with Doyen Sports Group, Portuguese clubs are known for their collaboration with funds, such as the Benfica Star Fund and the funds at FC Porto and Sporting Lisbon.

<sup>762</sup> Open letter of 21 professional Brazilian football clubs to Joseph Blatter, Jerome Valcke and Marco Villiger (president, secretary general and legal director of FIFA), claiming that a total ban should be avoided. The legal director of FC Porto and member of the ECA legal committee was present at the meeting where the letter was drafted, as a contributor. The letter is from 22 April 2013.

<sup>763</sup> Examples of third party investors: Doyen Sports Group [www.doyensports.com](http://www.doyensports.com) and the Royal football fund [www.royalfootballfund.com](http://www.royalfootballfund.com).

<sup>764</sup> Article 16 Charter of Fundamental Rights.

<sup>765</sup> KEA, CDES and EOSE (2009), *Study on sports agents in the European Union*, a study commissioned by the European Commission (Directorate-General for Education and Culture)

<sup>766</sup> Magee, J. (2002), *Shifting Balances of Power in the New Football Economy*, in Sugden, J. and Tomlinson, A. (ed), *Power Games*, London: Routledge.

<sup>767</sup> Shank, M. D.(1999) *Sports Marketing. A Strategic Approach*, Prentice Hall, New Jersey, 1999.

EU market. Also, due to the end of the payment of transfer fees and the greater freedom for players, the salaries of the players skyrocketed and employment contracts became more complex. The fact that the international football market is a complex sector, that the players are under the constant attention of the media and the workers are mostly young with no experience in negotiating contracts, makes that the use of agents is in constant evolution and growth.<sup>768</sup>

FIFA started to regulate the agents from the mid-nineties. The first licenses were given to applicants after an interview with employees from the national football associations. The applicants also needed to provide proof of good conduct and after a positive interview they signed a code of conduct and made a deposit of 200,000 Swiss francs as a bank guarantee. After that the agent was free to start his services as a FIFA licensed agent. Due the growth of the number of agents and the development of the football industry to a more cross-border market after *Bosman*, FIFA decided in 2001 that a more rigorous regulation of the activities of players' agents was necessary. From this moment on a player's agent needed to take a written examination and instead of a bank guarantee a players' agent is obliged to take out a liability insurance. Specific regulations for players' agents came into force and the principles of the transfer system in 2001 were also relevant for the reform of the PAR in 2008. A reform that came after the 2001 regulations became part of a procedure before the European Court of First Instance (CFI) in a case that was decided in 2005.<sup>769</sup> French citizen Laurent Piau filed a complaint against the PAR of 1995. Piau questioned the legality of the regulations and FIFA's authority to draft and implement these regulations.

Piau initiated his search for a judgment on the legality of the PAR in 1998. He claimed that FIFA infringed the free movement of services by blocking the access to the profession by means of a licensing system. Piau also argued that the ability of FIFA to sanction the profession without offering a possibility of an appeal should be changed.<sup>770</sup> After the European Commission objected to the PAR to FIFA, FIFA introduced the changes that became the basis for the 2008 system. FIFA abolished the necessity to make a deposit as a bank guarantee and introduced a compulsory liability insurance instead, it introduced a code

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<sup>768</sup> Branco Martins, R. and Reiter, G. (2010) *Players' Agents: past, present...future?*, The international sports law journal, 2010, Vol. 1-2, The Hague: T.M.C. Asser Press.

<sup>769</sup> Case T-193/02 Laurent Piau v European Commission supported by FIFA, Jur EG 2005, P.II-0029, no.8..

<sup>770</sup> See Branco Martins, R. (2005), *The Laurent Piau Case of the ECJ on the Status of Players' Agents*, The International Sports Law Journal, 2005, Vol. 3-4, The Hague: T.M.C. Asser Press, p.10

of conduct and detailed the methods for remuneration.<sup>771</sup> Piau was not satisfied and persisted in a claim and filed a complaint before the Commission. The Commission only approached the issue from the perspective of competition law and it did not detect an infringement.<sup>772</sup> Piau went on to litigate before the CFI. The CFI was of the opinion that

*“Thus the need to introduce professionalism and morality to the occupation of players’ agents in order to protect players whose careers are short; the fact that competition is not eliminated by the licence system; the almost general absence (except in France) of national rules and the lack of collective organisation of players’ agents are circumstances which justify the rule-making action on the part of the FIFA.”<sup>773</sup>*

The 2008 PAR determine that only licensed agents can carry out the profession. However, certain categories of individuals are exempt from the licensing requirement and may act as agents regardless: parents, siblings or spouses of players as well as legally authorized practicing lawyers are allowed to carry out the activities of an agent without falling under the jurisdiction of FIFA. Natural persons not falling under the exempted categories may only take the examination at their national association if they have an impeccable reputation and they may not, under any condition, hold a position as an official, employee, etc. at FIFA, a confederation, an association, a league, a club or any organization connected with such organisations or entities. After passing the examination<sup>774</sup> the agent further needs to take out liability insurance and sign a code of professional conduct before receiving his license.

The license is temporary and expires after five years. The agent then needs to take the exam again and if he fails the license is suspended until the exam is finally passed. Examinations take place once or twice a year on a date set by FIFA.<sup>775</sup> The agent is further obliged to conclude a written contract with the player he represents, meeting further formal requirements and for a maximum duration of two years.<sup>776</sup>

The agent is allowed to work for players as well as for clubs upon the request of either. In

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<sup>771</sup> Ibid.

<sup>772</sup> Ibid.

<sup>773</sup> Ibid.

<sup>774</sup> Passing the exam is very difficult. In the Netherlands, an average of 6% of the participants pass the exam. Information obtained via a telephone conversation with Mr. W. Boshuizen from the KNVB.

<sup>775</sup> Article 17 PAR. This requirement was then turned back by FIFA, also in the light of the reform of the agent regulation system.

<sup>776</sup> Article 19 PAR.

accepting such requests, agents need to avoid any (potential) conflicts of interest. In addition, the agent is *a priori* presumed to be guilty of inducing a player to breach his contract if the contract is breached prior to the contract's expiry and without just cause.<sup>777</sup> The burden of proof rests upon the player to establish that he is innocent in order to avoid a sanction. Sanctions that may be imposed upon agents for violating the regulations are a reprimand or warning, a fine of at least CHF 5000, suspension of the licence for up to 12 months, withdrawal of the licence or a ban on taking part in any football-related activity.

The regulations also include the rights and obligations of clubs and players. Clubs may only work with licensed agents and have to make reference to the agent in any contract that has been negotiated by the agent.<sup>778</sup> In the context of a player's transfer, clubs have to ensure that they pay agents by means of a lump sum only of which the amount has been agreed in advance.<sup>779</sup> If clubs violate these regulations they can expect to be warned or severely punished, with sanctions ranging from fines to deduction of points, transfer bans and even relegation to a lower division.<sup>780</sup>

Players that use the services of agents may choose to pay the agent by means of a lump sum or a fee on a yearly basis. The fee is based on a percentage of the annual income of the player. If no agreement is reached concerning the fee, the agent is entitled to receive 3% of the annual income of the player, including any sign-on fee.<sup>781</sup> Players' agents are not allowed to receive an amount, or a share of an amount, that is supposed to be paid between clubs.<sup>782</sup> These sums need to be administered by FIFA through the Transfer Matching System (TMS) and are connected to the compensation payments for the training of players, agents are not involved in the training of the player. If the player is responsible for a violation of the regulations he can be warned or punished by a fine of at least CHF 5000, a match suspension or a ban on taking part in any football-related activity.<sup>783</sup>

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<sup>777</sup> Article 22 PAR.

<sup>778</sup> Article 27 and 28 PAR.

<sup>779</sup> Article 20 PAR.

<sup>780</sup> Article 35 PAR.

<sup>781</sup> Article 20 PAR.

<sup>782</sup> Article 29 PAR

<sup>783</sup> Article 34 PAR.

In 2009 FIFA announced a reform of the licensing system.<sup>784</sup> The reasons for this reform was the fact that FIFA acknowledged that only 25% to 30% of the football transfers are carried out by licensed agents.<sup>785</sup> At the 59<sup>th</sup> FIFA congress, the members of FIFA agreed on the reform. After the congress FIFA established a working group that had as its task to consider a more pragmatic approach towards agent regulation. The group consisted of members of the FIFA legal department, representatives from FIFPRO and two club representatives.<sup>786</sup> The EPFL and the European Football Agents Association (EFAA) were consulted at a later stage, when the first set of regulations were already agreed in concept.

FIFA has changed the focus of their regulations, agents are no longer a part of the FIFA system and are therefore not under the control of FIFA. The parties that use the services of the agents, the clubs and players, will be responsible for and accountable for the actions of the party that they engage as an agent. The licenses will be withdrawn. The agent will disappear and the intermediary will be introduced. The regulations on working with intermediaries<sup>787</sup> deal with a natural or legal person who, for a fee or free of charge, represents players and/or clubs with a view to negotiating an employment contract or represents clubs in negotiations with a view to concluding a transfer agreement.<sup>788</sup>

The regulations are minimum standards the national associations have to implement at least the FIFA standards but are free to go beyond the minimum standards and come up with their own national regulations. Clubs and players must act with due diligence when engaging the services of agents and they will be responsible for assessing if the agent carries out his work in accordance with all relevant regulations of FIFA, national associations and every law that is applicable to the activity of the intermediary.<sup>789</sup> The intermediary will be registered in a database at the national association every time that he carries out an activity. All the contracts between the intermediary and his client need to be registered. However, there are no formal

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<sup>784</sup> A first public statement was made in a presentation by FIFA in-house lawyer Omar Ongaro at the 2009 Globe Soccer conference in Dubai on 28 December 2009.

<sup>785</sup> FIFA Media Release, *FIFA acts to protect core values*, 15 July 2009. The research on which this statement is based has not been disclosed, the media release cites FIFA legal director Marco Villiger: “*At the present time, we estimate only 25 to 30 per cent of all international transfers are conducted via licensed agents. FIFA finds this unsatisfactory.*”. The evidence to fund this argumentation is unknown, moreover, in this article FIFA states that it estimates and this implies that there is no evidence to fund such a statement.

<sup>786</sup> As presented by FIFA in-house lawyer Omar Ongaro in his speech at the Globe Soccer Dubai Conference, 28 December 2009.

<sup>787</sup> At the time of writing the final draft was presented to the stakeholders involved in the discussions and negotiation and consultation phase.

<sup>788</sup> FIFA Regulations on Working with Intermediaries, Definitions.

<sup>789</sup> FIFA Regulations on Working with Intermediaries, Article 2.

requirements regarding the content or duration of the contract between the intermediary and the player or club that he represents, besides the fact that the parties need to clarify the nature of the legal relationship, the way and amount of remuneration, the duration, the methods of termination, the signatures of the parties and of the guardian if the player is a minor.<sup>790</sup> The registration will take place at the time of the registration of the transfer of the player.<sup>791</sup>

There are no requirements for registration the association needs to be satisfied that the intermediary has an impeccable reputation. In particular, the association needs to assess whether the intermediary has been convicted of any criminal sentence or financial crime. The payments to intermediaries will be disclosed as well as, on request of the association of the country where the transfer or service of the intermediary is registered, all other relevant contracts, agreements and records between the parties. The associations will make the remunerations that are paid to agents publicly available. This openness will relate to a total amount spent on intermediary services per club.<sup>792</sup> FIFA recommends that the total amount of remuneration per transaction that act on the player's behalf should not exceed 3% of the player's basic gross income for the entire duration of the employment contract.<sup>793</sup> In the case that a club employs a player's agent, the recommendation is that the intermediary's fee does not exceed 3% of the transfer fee paid in connection to the relevant transfer.<sup>794</sup> In case of disputes about the remuneration of the intermediary the arbitration courts (in the case that the national association decides to set them up) only have jurisdiction to decide up to this 3%.<sup>795</sup>

An acknowledgement of the sometimes difficult situation in which the intermediary may find itself, operating for one party but also defending the interest of the other, is found in the articles relating to the conflicts of interest. If the parties concerned, player and club, prove that there is no conflict of interest, they may engage the same intermediary to negotiate their employment contract. They do have to make clear what party will remunerate the agent. The regulations contain sanctions on players and clubs that fall under the responsibility of the national associations. FIFA controls the implementation of the minimum standards with their national member associations.<sup>796</sup>

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<sup>790</sup> FIFA Regulations on Working with Intermediaries, Article 5.

<sup>791</sup> FIFA Regulations on Working with Intermediaries, Article 3.

<sup>792</sup> FIFA Regulations on Working with Intermediaries, Article 7.

<sup>793</sup> FIFA Regulations on Working with Intermediaries, Article 7 sub 3(a).

<sup>794</sup> FIFA Regulations on Working with Intermediaries, Article 7 sub 3(b).

<sup>795</sup> FIFA Regulations on Working with Intermediaries, Article 7 sub 4.

<sup>796</sup> FIFA Regulations on Working with Intermediaries, Article 10 and 11.



In general it can be concluded that the agents will no longer be part of the FIFA organizational framework and that the first contours shape a system where the profession of agents will be a 'free for all'. The stakeholders, besides FIFA did fear the negative consequences and they sought the assistance of the European Commission. The Commission had already started to focus on the activities of agents after the White Paper on Sport had mentioned the reports of bad practices linked to agents' activities and the fact that there were, next to the 'umbrella' FIFA PAR, differing regulations (public and private) applicable to the profession of agents. As a result the European Commission carried out an impact assessment study to evaluate if Community action was necessary.<sup>797</sup>

According to the results of the study<sup>798</sup>, despite the fragmented legal framework<sup>798</sup> applicable to the activities of sports agents, there are no major obstacles to the free provision of the services of agents across the EU. The problems identified by the study are of an ethical nature, such as financial crime and exploitation of young players, thus threatening the fairness of sporting competitions and the integrity of sportspeople. Concerns also exist about the lack of transparency of the financial flows involved. At the same time, several issues related to the governance of agents in team sports, and in particular in football, need to be discussed in order to improve the existing system. In order to create a discussion with stakeholders about these issues and to allow FIFA to present its draft regulations, the European Commission appointed a working group consisting of representatives of FIFPRO, EFAA, FIFA, UEFA, ECA and EPFL to assist in the organization of a conference on sport agents that took place in Brussels in November 2011.

The general conclusion of the conference was that the European Commission:

*“recognised the right of self-regulation by the sports movement, an internal market directive could not be ruled out if serious problems regarding the free provision of services or of establishment came to light. A Recommendation on the basis of Article 165 TFEU was also a possibility as a way of bringing the different approaches in the Member States closer together. Referring to the substantive problems to be addressed with a view to some form of standardisation, approximation or harmonisation, he*

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<sup>797</sup>KEA, CDES and EOSE (2009), *Study on Sports Agents in the European Union*, Study Commissioned by the European Union, online publication: <http://ec.europa.eu/sport/library/studies/study-sports-agents-in-eu.pdf> .

<sup>798</sup> KEA, CDES and EOSE (2009), *Study on sports agents in the European Union*, a study commissioned by the European Commission (Directorate-General for Education and Culture), p. 172-177.

*mentioned the transparency of financial transactions, the level of fees, the protection of minors and dual agency issues among those on which the conference had provided valuable input. With regard to the CEN framework, he noted that this model could provide not just a useful platform for further consultation but also an opportunity for European and international standardisation in the field of sports agents. He concluded by saying that the conference organised by the Commission had marked a starting point for ongoing discussions on the important matters at stake, pointing out that an inclusive dialogue among all stakeholders was needed and mentioning the future work to be carried out by the Expert Group on Good Governance<sup>799</sup> reporting to the Council Working Party on Sport.”<sup>800</sup>*

The expert group on good governance agreed on seven recommendations after a year of assessment and interviews with stakeholders.<sup>801</sup> In general the expert group recommended that the current legal framework is appropriate and that the sport stakeholders are fit to best regulate their own activities and that the EU can assist. Methods for the supervision of sport agents should be aimed at transparency in transactions, protection of (young) players, create higher standards for agents, create clear and universal rules with appropriate sanctioning systems. The expert group suggests that a system of training of agents and/or certification of agents should be created with national and international control on the quality of the activities. The expert group promotes the creation of universal minimum standards that could be further adapted to the needs of every individual country or confederation.<sup>802</sup> In relation to the content of a regulation the expert group recommends rules relating to the following:<sup>803</sup>

*“Sports bodies are invited to consider the opportunity of establishing gradual and differentiating rules for sports agents taking into account the age of players involved in transactions managed by agents/intermediaries:*

*- Rules on ethics, transparency, conflict of interest, disclosure of information and*

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<sup>799</sup> The expert group on good governance that dealt with the transfer system in particular in the light of minors and the activities of players’ agents was one of six expert groups created by the Council as a consequence of the Work Plan for sport 2011-2014. See also: <http://ec.europa.eu/sport/library/documents/b1/eusf2013-06-eu-work-plan-bckgrnd.pdf> .

<sup>800</sup> Conclusions by Gregory Paulger from the European Commission Sport Unit, conference on Sport Agents, 17 November 2011, Brussels. The final report of the conference can be found at <http://ec.europa.eu/sport/library/documents/c10/final-report.pdf> .

<sup>801</sup> Deliverable 3, Expert group good governance, *Supervision of sport agents and transfers of players, notably young players*, October 2013.

<sup>802</sup> Ibid p. 2-6.

<sup>803</sup> Ibid, Recommendation 2.

*payment of intermediaries should be the strictest when the player signing a contract with the club is a minor (i.e. for under-18 players);*

*- For transactions involving minor players, it is proposed that particular scrutiny is exercised on the credentials of agents/intermediaries, e.g. by requesting proof of criminal records or other means of testing the aptitude of agents to work with underage players including their ability to provide specific careers advice that would be appropriate for the relevant sports discipline;*

*- Rules on ethics, transparency, conflict of interest, disclosure of information, the ability to dispense specific careers advice and payment of intermediaries should also be particularly strict when the young player is considered as being in the training phase of his/her career (this phase may vary according to the characteristics of each sport);*

*- Although high ethical standards must be maintained at all times, it may be possible for certain rules to be made more flexible for agents working with players who can be considered in the main stage of the careers (to be determined by each sport in accordance with its specificities).”*

### **Conclusion: Players' Agents Activities**

FIFA has opened up the market for the regulation of the activities of agents. The reasons for the regulations that have been applicable for almost twenty years are still, or maybe more than at the time of previous regulation, applicable to the sector. There is no evidence that the need for the protection of (young / minor) players, transparency in transactions and for a certain level of quality in relation to the services of the agent, has changed. The regulations of FIFA place responsibility for the activities of agents on the shoulders of the clubs and the players. Especially for the players this is now a double burden, where they initially needed more protection they now lose the protection offered by the PAR, but as a paradox will now be responsible for the activities of the agent / intermediary.

The move back from the PAR will make that in the case of a dispute, the agents are no longer a party to FIFA. Taking the international aspects of the activities of agents into consideration, problems might occur with dispute resolution and enforcement of decisions if disputes will solely be treated by civil courts. If the national associations fail to create harmonized system then there could be serious friction with the freedom to provide services in the EU. The European Commission has presented recommendations for the territory of the EU. The stakeholders now need to find the best framework for implementing enforceable rules that are in line with the wishes of the stakeholders and in accordance with EU law.

The search for a solution by means of a negotiated settlement is under pressure, as is proven by the activities of the Association of Football Agents (AFA). In England the AFA has declared that it is prepared to challenge the FIFA Regulations on intermediaries. It bases a potential challenge on a breach of European law.<sup>804</sup> AFA chairman Mel Stein has stated that *“Our members are not going to support a system which allows unqualified agents to operate. We will challenge the regulations in Europe unless the FA agree to make them user-friendly, by retaining some sort of qualification and giving currently licensed agents precedence over unlicensed intermediaries. The recommendation that agents’ fees should be capped at 3% breaches European law. If that is what FIFA recommends, then that is all that clubs will be prepared to pay. The whole concept of untrained intermediaries is ill-considered and would destroy the years of work we have put into the creation of the profession of licensed agents.”*<sup>805</sup>

### **Social Dialogue as a Forum for Negotiated Settlement**

In order to analyse whether the European Social Dialogue could serve as a potential forum for a negotiated settlement and avoidance of legal challenges, it should be confirmed if the issues concerned can be characterized as Social Dialogue issues. The Social Dialogue deals with employment issues that are relevant and impact on the relation between the employer and the worker. Therefore, any issue that has an impact, in a specific sector, on an individual that can be qualified as a “worker” under the characteristics of the jurisprudence of the European Court of Justice, may be included in the European Social Dialogue.

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<sup>804</sup> World Sports Law Report (2013), *Agents Prepare Challenge to FIFA’s Intermediary Rules, to be found at: [http://www.e-comlaw.com/world-sports-law-report/article\\_template.asp?Contents=Yes&from=wslr&ID=1621](http://www.e-comlaw.com/world-sports-law-report/article_template.asp?Contents=Yes&from=wslr&ID=1621).*

<sup>805</sup> Ibid.

### ***Third Party Influence***

It is clear that third party influence is under analysis of UEFA and FIFA. On the contrary, a number of clubs have indicated that they are in favour of third party investment in the economic rights attached to a player's transfer. The balance that needs to be found in a regulation is the one between preserving the game's integrity; safeguarding the rights of the worker regarding his freedom of movement and the freedom to freely choose the labour he wishes; and, finally, the rights of the club to attract the investment that it wishes taking the freedom to undertake into consideration.

The European Social Dialogue could be a platform to discuss the issues concerning third party investment. Hence, as illustrated, it touches upon the essential elements of a labour relation: working under the authority of a third party and salary. As these mixed approaches deal with UEFA, workers' and employers' issues, the FSDC offers the characteristics for compromise. On an EU level the sporting integrity of the game could be introduced by limiting the amount of the percentage of the economic right that can be acquired of one player by the third party thereby limiting its influence. An issue could also be a quota on a number of players acquired through co-investment. Since integrity is one of the direct consequences of transparency, an open register administered by the national football association could indicate what party is part owner of the economic rights of a player. To promote training of players, a certain percentage of a transfer of a player in which a determined threshold amount is owned by a third party should be deposited in a fund. The player could be protected by means of a compulsory clause in the third party contract revealing the third party, the method and amount of investment and a player consent clause.

### ***Players' agents***

The stakeholders in professional football have been confronted with the FIFA minimum standards concerning the regulations on intermediaries. These standards leave space for the national football associations to go beyond these regulations. National football associations have to be careful not to create rules that differ too much amongst the Member States in the European Union, as the difference in regulation of agents needs to take the free movement of

services into consideration. Consequently, such an impediment could additionally lead to a restriction of the free movement of workers, as a player may be represented by a malicious agent who refuses to place the player in a country where the regulations covering the activity of agents is less favourable to the intermediary.

From the perspective of the players, stronger protection is needed. Hence, the market situation is similar as was at the time of the *Piau* case: players need protection in the complex labour market of professional football. The regulations on intermediaries offer less protection to the players.

Clubs will deal with the negotiation of the employment contract between player and club, with the intermediary. Contracts with third party investors could also be introduced and negotiated through agents or intermediaries. There is no doubt that the activities of players' agents touch upon employment issues and that the main parties involved are the clubs and the players.

Instead of imposing rules on the relevant parties, the stakeholders could be involved in the regulation of agents. The European Social Dialogue could be the right forum to discuss issue players' agents and to seek for an enforceable framework for the regulation of the agent profession. The possibility of regulating agents through a "strengthened Social Dialogue" has already been presented by the Member of European Parliament, Mr. Mavrommatis:

*"[the committee considers that players' agents should have a role in a strengthened Social Dialogue in sports, which, in combination with a European licensing system for agents, would also prevent cases of improper action by agents.]"*

The clubs, via the ECA, have stressed that the agents could also regulate themselves such as lawyers and notaries in many (EU) countries do. The ECA has pointed to the European Football Agents Association (EFAA) to produce a form of self-regulation of agents.

EFAA is a not-for-profit association according to Dutch law founded in 2007.<sup>806</sup> Members of EFAA are national agent associations, including the AFA. Currently there are 11 European

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<sup>806</sup> More information: [www.eufootballagents.com](http://www.eufootballagents.com).

associations, including the “big 5 league” countries, represented in the EFAA. EFAA has accepted associated members in response to requests from Brazil, Japan, Australia and a cooperation of South American countries Argentina, Uruguay and Paraguay. EFAA’s objective is to try to improve the general image of agents. The other goals of EFAA are laid down in Article 2 of the organisations’ statutes and focus on creating common ground amongst agents in Europe and to support the creation of national agent associations. Article 2.2 goes on to state that:

*“The Association tries to achieve these objectives inter alia by: promoting the cooperation, amicable relations and unity of the Member Associations and their Members, the FIFA licensed players’ agents; aiding the exchange of information between the Member Associations and supplying information about developments that are important to the collective and individual position of the Member Associations in Europe; promoting the interests of the Member Associations while considering the collective affairs important for said Associations in the fields of economics, social economics and employment law; promoting and improving the interests of players’ agents in possession of a FIFA license in all respects while safeguarding the general interests of the Member Associations; promoting the co-operation, intermediary activities and relations among organisations, sports institutions, professional football clubs or any other entities and the individual Member Associations, in particular in the field of management, consultancy and all forms of employment in the professional sector of football; concluding collective agreements; all other lawful and permitted means that may be conducive to the objectives.”<sup>807</sup>*

EFAA has been recognized by the European Commission as an official sport stakeholder. The European Commission has recognized the work carried out by EFAA and has pushed the stakeholders in football to further strengthen the representativeness at agent side.<sup>808</sup>

As was established before, the European Commission has already applied a special regime to the European Social Dialogue in football, it was concluded that this special regime may be attributed to the specific characteristics of sport. In the case that EFAA would create a form of

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<sup>807</sup> Statutes of EFAA, Article 2.2.

<sup>808</sup> EC expert Group on Good Governance, *Report from the 7<sup>th</sup> meeting (7 November 2013), Subject: supervision of sport agents and transfers of players, notably young players*, to be found at <http://ec.europa.eu/sport/library/documents/b24/xg-gg-201311-final-rpt.pdf>

self-regulation and those principles would be agreed in collaboration with the social partners, then it would be possible to establish harmonized rules through the FSDC for a larger number of EU countries and avoid any discrepancies with EU law and serve transparency and protection of players.

On the basis of the specificity of sport EFAA could be included as an observer to discussions on the level of the Social Dialogue, thus allowing it to be part of the discussions and preliminary negotiations to create more certainty regarding the exemption of the final agreement on agent regulation. Regulating the players' agents via a collective bargaining agreement is in line with the status of players' agents in the professional sector of United States Basketball, where the agent activity has been recognised by both parties at the bargaining table and where the players' union is responsible for the governance of players' agents.<sup>809</sup>

Issues that need to be considered for a harmonized system of regulation of agent activity:

- *International minimum standards as regards quality and registration for agents*
- *FIFA recognizes national sanctions and imposes associations to cross-recognize sanctions*
- *Registration system with quality requirements*
- *Straightforward and simple regulation*
- *Permanent Education*
- *Certification as foundation for quality requirement*
- *Code of conduct (self-regulation)*
- *Financial transparency*
- *Strong enforcement and national control*
- *Realistic sanctions*
- *Agents fall under jurisdiction of 'receiving' country or 'receiving geographic area'*

## **Conclusion**

This chapter has focussed on TPI and the activities of Players' Agents. TPI is now common in European Football but both UEFA and FIFA have criticized the involvement of third parties

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<sup>809</sup> The regulations can be found at:

<http://www.nbpa.org/sites/default/files/users/sean.brandveen/Agent%20Regulations%20PDF.pdf>



in the internal policies of football clubs. UEFA goes further than FIFA as it seeks to completely ban TPI. TPI has a direct relation to employment law as it may affect the labour relation between a player and his club. TPI contracts may include clauses that impact on the way in which a contract may be terminated and it may have an impact on the player's income. Clubs have shown interest in TPI and continue to conclude collaboration with investment funds.

In the case of a total ban by UEFA, it is likely that potential legal challenge may arise. UEFA could invite the social partners to include the issue of TPI in the FSDC and create a solid basis for a regulation of TPI with the consent of the social partners. In that case, threat of legal attack from the side of players or clubs is diminished as they have been a party themselves to the agreement. A negotiated result could find a balance between the requirements deriving from EU labour law, the freedom of clubs to seek for investment and of the integrity of the game. Practical issues for regulation may include a maximum percentage of investment in economic rights by third parties and an open and accessible administration of TPI. National TPI structures would then need to be brought in accordance with the TPI guidelines negotiated in the FSDC.

The activities of Players' Agents are in the process of being deregulated by FIFA. The reasons that made FIFA regulate the activities starting from the mid-nineties are, however, still applicable in the current market. The deregulation has encountered criticism from football stakeholders. FIFA has left the possibility open for national football associations to go beyond the minimum requirements for the regulation of intermediaries. If the football associations fail to create a system that is harmonized in the EU then a challenge to the underlying system of FIFA is realistic as an infringement on the free movement of services seems likely.

The FSDC could be a solid basis for the conclusion of an agreement on the activities of players' agents. First, through the participation of EFAA in a strengthened Social Dialogue the consensus included the recognized body of agent representation. A challenge from EFAA or from an individual agent is less likely to succeed if EFAA agrees to a form of agent regulation. Second, through the negotiation in the FSDC the national associations and/or FIFA take away the potential threat of the abuse of a dominant position from a competition law perspective. A similar approach as the labour exemption in the US sports' collective bargaining agreements can be used.

The implementation could be guaranteed along the lines of an Annex of the agent regulations to the Autonomous Agreement. Implementation on the national level could be introduced via regulations of national associations. The stakeholders could introduce rules on the certification of agents, agent remuneration, representation contracts, compulsory liability insurance, permanent education and other issues that serve transparency and player protection.

## CHAPTER NINE

### Conclusions

#### Introduction

The final chapter of the thesis illustrates the impact of the introduction of the European Social Dialogue in European Professional Football. The approach of the conclusions originate from the perspectives of (I) the governance of sport and of football in particular (II), the necessity for the creation of legal certainty and from (III) the perspective of industrial relations and collective bargaining

The conclusions are charted chronologically.

1. The European Social Dialogue as a Form of Supervised Self-Governance (I);
2. The European Social Dialogue as a Forum for Negotiated Settlement (I);
3. The Social Dialogue as Part of the Structured Dialogue in Sport (I);
4. The FSDC as a Source for Legal Certainty (II);
5. The FSDC and the Definition of the Boundaries of Article 165 TFEU: ‘fairness’ and ‘openness’ (I), (II) and (III);
6. The Evolution of EU Labour Law by Promoting the Flexibility of Approach and Implementation and Enforcement of Negotiation Results through Association Regulations (I) and (III);
7. The Evolution of EU Labour Law by Enabling Influence on Labour Relations in Candidate and Third Countries (I) and (III);
8. Redefining the Separate Territories Framework (I), (II) and (III);

9. Restructuring the Pyramid – Introduction of the Horizontal Model of Governance or Co-Negotiation (I) and (III);
10. Connections with the US Model of Collective Bargaining (I) and (III);
11. Introducing the Labour Exemption in EU Sports Law (I), (II) and (III);
12. Enhancing the Debate on Lex Sportiva (II);
13. The European Social Dialogue as a Venue for the Settlement of Unsolved Issues (I), (II) and (III).

The individual conclusions are introduced and embedded in their descriptive context. This initial introduction is a summary of the previous chapters, therefore a reference to the chapters will be made and only where new issues are introduced a reference is made to the relevant sources.

### **The European Social Dialogue as a Form of Supervised Self Governance**

According to Foster, one can find at one side of the regulatory spectrum of sport, and football in particular, the pure market model.<sup>810</sup> Actors favour in this model a submission of sport to general laws applicable to every other economic sector. In contrast, the socio-cultural model takes the specificity of sport into consideration when lobbying for exemptions to EU law.<sup>811</sup>

Parrish has developed this approach and created a sports policy subsystem with two rival coalitions.<sup>812</sup> According to Foster these two competing interests may be reconciled in a form of supervised self-government.<sup>813</sup>

According to Foster the advantages of supervised self-government are:

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<sup>810</sup> Chapter 1.

<sup>811</sup> Chapter 2.

<sup>812</sup> Chapter 1.

<sup>813</sup> Chapter 1.

1. Sport governing bodies have acquired knowledge and experience in their specific sports and this should be respected;
2. Sport itself will bear the costs of regulation and not the consumer;
3. Self-regulation implies better compliance.

The European Social Dialogue brings Foster's model into practice. The FSDC is a form of supervised self-governance.<sup>814</sup> The stakeholders in football, and the participation of UEFA, are active in the negotiation about issues that they deem important for organizing their sector. These negotiations may lead to binding agreements.<sup>815</sup>

The supervision is guaranteed through the role of the European Commission. The Commission is on the one hand the facilitator for the debate. On the other hand, the marginal test that the Commission carries out and due to its role as the guardian of the Treaty, conformity with EU law is guaranteed.<sup>816</sup>

The FSDC is a practical example of supervised self-governance.

### **The European Social Dialogue as a Forum for Negotiated Settlement**

The European professional football sector is part of the football subsystem. In this subsystem the actors in professional football are divided into the sporting autonomy coalition and in the football business coalition. These coalitions try to overthrow the supremacy of the other in the subsystem in order to influence the policymaker's agenda with the content of its own belief system. The current status quo in the football has been characterized as a situation of hurting stalemate.<sup>817</sup>

In the football subsystem the stakeholders are suffering from a lack of legal certainty. This prevents them from organizing their business or from defining their policy objectives in an optimal way. The uncertainty of the legal framework that surrounds them goes along with potential legal challenges to their decisions. In this hurting stalemate situation both coalitions

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<sup>814</sup> Chapter 5.

<sup>815</sup> Chapter 4.

<sup>816</sup> Chapter 4 and Chapter 5.

<sup>817</sup> Chapter 1 and Chapter 3.

possess the ability to impose unacceptable costs on each other. A situation of progress is therefore disturbed. This is a situation where all the major coalitions share the view that a continuation of the current status quo is unacceptable.<sup>818</sup>

In such a case the coalitions favour a negotiated settlement. However, this negotiated settlement is only possible if negotiations take place in the proper forum. According to Sabatier a proper forum has as its characteristic that negotiations are conducted in private and last for a period of at least six months and that there is a facilitator (policy broker) that is respected by all parties and viewed as relatively neutral.<sup>819</sup> For the professional football sector the necessity of legal certainty has been added as a necessary characteristic of a forum for negotiated settlement. In the thesis the European Commission and the CAS have been presented as potential fora for negotiated settlement.<sup>820</sup>

The European Commission has introduced the Structured Dialogue with sports' actors and interested parties to encourage the debate on European sport. Within this dialogue four types of fora are defined for creating opportunities for sport stakeholders to present and promote their policy views. These are the European Sport Forum, specific conferences, thematic discussions and the commissioning of sport specific studies.<sup>821</sup> It was concluded that the European Commission is a facilitator for negotiations but it lacks the powers to force harmonisation by means of bringing legal certainty through the suggested fora.<sup>822</sup>

The CAS is an arbitration court. The onus of an arbitration court, even in the case of CAS as the ultimate appeal body in professional sport, is that it provides a solution to a dispute that exists between two individual parties. It does not create jurisprudence in the sense of the *stare decisis* principle. The CAS is the end of a route that is characterized by a negative approach, an undesirable alternative to an amicable settlement.<sup>823</sup>

The FSDC possesses the characteristics of a professional forum for negotiated settlement. It offers a venue for private negotiation and the structures may be used for as long as the social

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<sup>818</sup> Chapter 3.

<sup>819</sup> Chapter 1.

<sup>820</sup> Chapter 3.

<sup>821</sup> Chapter 3.

<sup>822</sup> Chapter 3.

<sup>823</sup> Chapter 3.

partners intend to use them, at least more than six months, while, the facilitator of the negotiations is the European Commission.<sup>824</sup>

The Commission is regarded by all stakeholders as (relatively) neutral. The reason for this is that the Commission has as the guardian of the Treaty a task to protect the freedoms of the Treaty, but also foster the specific characteristics of sport. It therefore relates to beliefs of both coalitions. The Commission can exercise its role as a policy broker. In the FSDC it has done this by presenting a compromise agreement to the social partners when a deadlock was reached in the negotiations.<sup>825</sup>

Finally, the FSDC may serve as the source for creating legal certainty as the agreements between the social partners may be enforced on the national level of the Member States after implementation.<sup>826</sup>

It can therefore be concluded that the FSDC has the characteristics to serve as a forum for negotiated settlement in the light of the definition provided by Sabatier.

### **The Social Dialogue as Part of the Structured Dialogue in Sport**

In the 2007 White Paper on sport the European Commission presented proposals for Community action in the field of sport. The overall objective of the White Paper is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy making and to raise public awareness of the needs and specificities of the sector.<sup>827</sup> The White Paper has as an important aim to illustrate the application of EU law to sport.<sup>828</sup>

The complex nature of sports governance on the EU level means that European sport structures are less developed than sport structures at the national and international level. The Commission and sport stakeholders agree that the Commission needs to contribute to the

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<sup>824</sup> Chapter 4.

<sup>825</sup> Chapter 5.

<sup>826</sup> Chapter 4.

<sup>827</sup> Chapter 3.

<sup>828</sup> Chapter 3.

European debate on sport by providing a platform for discussion.<sup>829</sup> The European Commission expressed that a structured dialogue with sport stakeholders and the promotion of Social Dialogue are a tool for establishing a follow-up on the objectives of the White Paper.<sup>830</sup>

The structured dialogue is such a platform. It is a consultation framework that involves interested parties in the field of sport such as sport governing bodies, social partners in the field of sport and political institutions dealing with sport. The European Commission intends to organize the structure dialogue by means of the EU Sport Forum and thematic discussions with a limited number of participants.<sup>831</sup>

According to the Commission the Social Dialogue can help address common concerns of employers and athletes. The Commission places these concerns in the light of the growing number of challenges to sport governance. The White Paper emphasizes the Social Dialogue as an instrument for shaping employment relations and working conditions.<sup>832</sup>

The thesis has analysed the outcome of the FSDC: the Autonomous Agreement. The Autonomous Agreement deals with minimum standards that need to be included in employment contracts between professional football players and their clubs. However, the thesis also illustrates that other issues that are connected to the employment relation but go beyond working conditions may be placed within the FSDC.<sup>833</sup>

The thesis shows that issues deriving from the FIFA RSTP and UEFA regulations could be discussed within the FSDC, while TPI and the regulation of the activities of Players' Agents fit within the FSDC structure. The result of negotiations within the FSDC on these issues is that, eventually, binding agreements may be concluded.<sup>834</sup> The FSDC includes other actors than only the Social Partners.<sup>835</sup>

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<sup>829</sup> Chapter 3.

<sup>830</sup> Chapter 3.

<sup>831</sup> Chapter 3.

<sup>832</sup> Chapter 3.

<sup>833</sup> Chapter 5.

<sup>834</sup> Chapter 4, Chapter 6, Chapter 7 and Chapter 8.

<sup>835</sup> Chapter 5.



By addressing these issues the FSDC may serve as an illustration of the application of EU law to sport. Hence, the issues that are discussed within the FSDC are negotiated in the presence of representatives of the European Commission.<sup>836</sup> The marginal test that the European Commission is allowed to carry out in relation to the negotiation result serves as a guideline on the application of EU law to sport. Similar issues in other sport sectors could follow the example set in the FSDC.

In addition, the FSDC may serve as a forum for negotiated settlement of differing views between the social partners, ECA, UEFA and it may include FIFA and players' agents.<sup>837</sup> Negotiations take place without much pressure between the stakeholders. This is due to the fact that the threat of legal challenge is diminished as a result of the potential to conclude binding agreements. This will consolidate and promote amicable relations.

Therefore, the FSDC deals not only with issues directly related to Social Dialogue but also to the objectives of the structured dialogue in the sense of the White Paper on Sport.

### **The FSDC as a Source for Legal Certainty**

The application of EU law to the sports sector has been analysed.<sup>838</sup> The focus of the thesis lies on the professional football sector. The actors in the football subsystem are divided into the sporting autonomy coalition and the football business coalition. Both coalitions seek to defend their interest based on their beliefs. The sporting autonomy coalition seeks less involvement of the EU into their sovereignty. The football business coalition pursues more influence in the regulation of the sector and a larger share of the financial benefits of the industry. The latter advocates influence of EU law to promote its beliefs. The coalitions have opposite beliefs.<sup>839</sup>

In professional football a deadlock has been reached. This deadlock has been described as a hurting stalemate situation: both coalitions have no more options to exploit, or their options are diminishing and becoming costly in terms of effort, resources and impact. No more

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<sup>836</sup> Chapter 4.

<sup>837</sup> Chapter 6 and Chapter 8.

<sup>838</sup> Chapter 2.

<sup>839</sup> Chapter 3.

venues are available for them to find a compromise. The threat of litigation remains because the actors persist in the search for an ultimate tool to establish their beliefs.<sup>840</sup>

In order to avoid litigation it should be made possible for the actors in the football subsystem to find compromise in an alternative setting. Compromise can be reached if both coalitions may rely on the law to enforce their mutual understandings. However, under the current setting of EU law the law does not bring certainty. The much desired legal certainty was not introduced by means of introducing an article, dealing specifically with sport, in the TFEU. Article 165 merely corroborates the existing doctrine and lacks a horizontal effect.<sup>841</sup>

The European Social Dialogue is a forum where balanced negotiations can take place. These can eventually lead to legal certainty. The FSDC groups the interests of the relevant stakeholders in the regulation of professional football: UEFA, ECA, EPFL and FIFPRO. \ Issues deriving from the FIFA regulations may be discussed within the FSDC. The stakeholders may negotiate about every topic they deem relevant to their sector. Legal certainty is reached if these negotiations are transposed into enforceable agreements.<sup>842</sup>

Agreements in the European Social Dialogue may be implemented in two ways. First, the Commission may request the Council to issue a Directive and force the Member States to implement the Directive within the laws of their legal system. Second, the agreements may also be implemented through procedures common to the Member States. In that case the agreements will be implemented in national collective bargaining agreements or similar types of agreements. In football it has been defended that the national football associations can assist in implementing the regulations in cases where no collective bargaining agreements or developed industrial relations exist.<sup>843</sup>

Issues that are part of the agreements reached in the FSDC are the fruit of a negotiated settlement.<sup>844</sup> Where in the case of litigation the court would have brought legal certainty by making a decision, the social partners have now reached a compromise with a similar status. The agreement as such shall, most likely, not be subject to legal challenges as it has already

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<sup>840</sup> Chapter 2 and Chapter 3.

<sup>841</sup> Chapter 3.

<sup>842</sup> Chapter 4, Chapter 5 and Chapter 6.

<sup>843</sup> Chapter 5 and Chapter 5.

<sup>844</sup> Chapter 4.

reached consensus between the initially rivalling coalitions. Legal threat could, however, be connected to a violation of the agreement.

The sanction on such a violation depends on the source of enforcement of the agreement. In the case that the agreement deriving from the FSDC is implemented via a Directive, then the civil courts may enforce the agreement and sanction a violation. If the collective bargaining agreement is used for implementation, the similar method of enforcement will apply. However, in the case that national collective bargaining agreements appoint a national (football) arbitration court for the settlement of disputes, these football courts could ensure the enforcement. The latter is also the case if the national football associations have implemented the FSDC agreement in their standard contracts.

Through this mechanism of negotiated settlement in a friendly and professional arena the threat of legal challenge diminishes to an extent that brings legal certainty to the European Professional Football Sector.

### **The FSDC and the Definition of the Boundaries of Article 165 TFEU: ‘Fairness’ and ‘Openness’**

The sport’s governing bodies, and most important from the perspective of this thesis, UEFA lobbied to include sports in the TFEU. It was perceived that a mentioning of sport in the Treaty would lead to greater autonomy for sports governing bodies.<sup>845</sup> However, Article 165 TFEU does not contain a general exemption for sport. On the contrary, the wording of the article leaves space for debate about the extent of the autonomy of sport governing bodies. The analysis in this thesis points out that the wording of Article 165 appears to be a codification of the existing status quo as regards the application of EU law to sport before the inclusion of the sports article in the TFEU.<sup>846</sup>

UEFA has presented its interpretation of Article 165 TFEU. It is of the opinion that the article does not prejudice the autonomy of the sport’s governing bodies’ decision making powers. UEFA invites the Commission to reaffirm, or confirm, the need for the centralized and

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<sup>845</sup> Chapter 2.

<sup>846</sup> Chapter 2.

territorial sale of audiovisual rights, the necessity for FFPR, compensation for the training of players, the limitation on the transfer of minors, to support measures taken by football authorities to deal with the activities of agents and to support measures to encourage the training of players.<sup>847</sup>

UEFA could support this view to exclude the application of EU laws on free movement and competition on these topics by claiming a connection to the fairness of the competitions. The argument would be that a certain restriction on competition or a compensation for the training of players is necessary to create a ‘fair’ competition. Although it remains a case-by-case analysis the future pushing away from EU law application will be brought under these vague terms of Article 165 TFEU.

On the contrary, opponents of UEFA’s view, and advocates of a further application of the free movement rules under the TFEU, could support their opposite beliefs by claiming more ‘openness’ to sport. For example, competitions should not restrict the participation of other EU nationals on the basis of more openness.<sup>848</sup>

These two elements of the specific nature of sport articulated in Article 165 TFEU are not likely to change the quest for autonomy of the sport governing bodies. The ambiguity with regards the scope of the Article remains. However, the FSDC can, at least for football, further specify what the meaning of Article 165 entails in practice, and as such be useful to sport stakeholders in general.

The social partners and UEFA can make binding agreements in the FSDC. When reaching these agreements the social partners may specify what the relation is of these agreements with the specificity of sport as articulated in Article 165 TFEU. A first test of the acceptability of a potential friction between the agreement and EU law should come to the surface if the European Commission, as the guardian of the Treaty but also as the administrative partner of the FSDC, agrees with the content of the agreement. In the case of a legal challenge to the FSDC it is likely that a Court would accept the interpretation of Article 165 as both sides of

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<sup>847</sup> UEFA document: *UEFA’s position on Article 165 of the Lisbon Treaty*, to be found at: [http://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167_DOWNLOAD.pdf)

<sup>848</sup> See also the argumentation of Weatherill: Weatherill, S. (2012) *Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?*, in Siekmann, R. and Soek, J., (eds.), *Lex Sportiva: What is Sports Law*, Asser International Sports Law Series, T.M.C. Asser Press, , P. 299-311.

the industry have agreed on the extent of the scope in a formal forum and in a binding agreement.

As such, the FSDC is important to the future of EU sports law as it further defines the scope of the specificity of sport.

### **Evolution of EU Labour Law by Promoting Flexibility of Approach and Implementation and Enforcement of Negotiation Results through Association Regulations**

The European Commission only allows the establishment of a sectoral Social Dialogue committee on the joint request of the social partners. Such a joint request shall only be successful in the case that both partners are representative with regards to the industrial sector they represent. In its 1993 communication the European Commission has presented the criteria that a social partner organization needs to possess before it can be recognized as an EU social partner and allowed into a sectoral Social Dialogue Committee:<sup>849</sup>

The organization needs to:

- be cross-industry, or relate to specific sectors or categories and be organised at European level;
- consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible;
- have adequate structures to ensure the effective participation in the consultation process.

The European Commission has previously shown some flexibility in its approach in other sectoral committees.<sup>850</sup> This flexibility has been expressed in allowing individual membership of undertakings of pan-European social partner organisations. When specific representation is

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<sup>849</sup> Chapter 4.

<sup>850</sup> See Siekmann, R., *Study into the possible participation of EPFL and the G-14 in the European Social Dialogue in Professional Football*, in the *International Sports Law Journal*, Vol, 3-4, 2006, Chapter 5.

required due to the nature of the topic of discussion, organisations with a relatively limited number of members may be allowed in a sectoral committee.<sup>851</sup>

The ECA does not meet the criteria for representative social partner organisations as defined by the European Commission. It consists of individual members and these members do not perform a role on the national level of the Member States in the structure of industrial relations. On the contrary, the individual members of the ECA are part of the leagues who are members of the EPFL.<sup>852</sup> Therefore, ECA members that are based in a European Union Member State where a collective bargaining agreement exists on that national level, are *de facto* double represented in the FSDC. Nevertheless, the European Commission has agreed to provide the ECA the status of associate party with the same rights as the social partners.

This is different for UEFA which acts as the chairperson for the FSDC. This has happened on the request of the social partners, giving UEFA the status of an associate party to the FSDC, with the similar rights as the social partners. Decision making, for example, is made through consensus voting. However, it has been mentioned that the social partners should be able to annul the appointment of UEFA as an associate party. It would go beyond the nature of the European Social Dialogue to make it impossible for social partners to reach collective agreements if an associate party that lacks the status of a social partner could frustrate negotiations in a sectoral committee.

Nevertheless, the participation of UEFA in the FSDC and the agreement of the European Commission to this participation can be seen from a different perspective than the participation of the ECA. UEFA does not directly represent employers or workers. UEFA represent all aspects of European football as a whole.<sup>853</sup> Therefore, it may be concluded that the European Commission has applied the doctrine now articulated in Article 165 TFEU in the appointment of UEFA as an associate party. Hence, it can be said that the European Commission has taken the specific characteristics of sport and its structures into consideration when allowing UEFA in the FSDC.

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<sup>851</sup> Idem, the example of the Audio-visual sector is given.

<sup>852</sup> Chapter 5.

<sup>853</sup> Chapter 3.

As a consequence another novelty is introduced in the European Sectoral Social Dialogue. The characteristic method of implementing the agreements reached in a sectoral committee is by the transposition of the autonomous agreement into a directive (*erga omnes* effect) or by means of implementing the EU umbrella agreement via procedures familiar to the social partners on the level of the Member States.

In the FSDC the European Commission compromise promoted a ‘mixed approach’. The implementation is not completely voluntary but the parties to the agreement (UEFA and the social partners, must ensure to use their ‘best endeavours’ to implement the agreement. This means that the parties should use the methods that are available to them to assist in the implementation. This is in line with the concept of the Open Method of Coordination.<sup>854</sup>

This means that in Member States of the EU where no collective bargaining in professional football is in place, UEFA could complement the implementation in those countries by offering its structures for implementation. As mentioned, UEFA must pursue its national member FA’s to implement the articles of the Autonomous Agreement in their regulations and the clauses and requirements of the Autonomous Agreement in FA standard employment contracts. The use of these standard employment contracts can be imposed on the member clubs of the FA or of the FA’s national league.

The effect of the implementation will be similar to implementation by means of the inclusion in a collective bargaining agreement. Enforceability of the clauses in the collective bargaining agreement may be achieved by means of challenges to violations before civil courts. However, it is more likely that the national collective bargaining agreement would include an arbitration clause and refer any potential dispute (exclusively) to the arbitration court of the national professional football sector. In the case that the Autonomous Agreement is implemented via the route of the association and laid down in a standard contract and/or association regulations, a violation would be sanctioned via the same arbitration court.

Therefore, a sport specific approach to the participation of UEFA in the FSDC has led to a novelty in the European Social Dialogue. Next to methods of implementation and enforcement that have been identified by the European Commission, the FSDC in football

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<sup>854</sup> Chapter 4.

adds enforcement through sport governing bodies. This method could be introduced in other sport sectors that would like to establish a sectoral Social Dialogue committee as well.

### **Evolution of EU Labour Law by Enabling Influence on Labour Relations in Candidate and Third Countries**

The role of UEFA as an associate party to the FSDC has been discussed.<sup>855</sup> The novelty that this role brings to the European Social Dialogue is the method of implementation via association regulations. The outcome and enforceability is similar to the traditional methods of implementation.

UEFA currently has 54 members. It is clear that the membership number of UEFA goes beyond the number of Member States of the EU. Therefore, taking into consideration that UEFA is a party to the Autonomous Agreement, the scope of the Autonomous Agreement can be broader than solely the EU.

In the case that non-EU countries wish to implement the Autonomous Agreement they will be free and able to do so on their own initiative or on the request of UEFA.<sup>856</sup> The latter is to be expected, especially in countries with more developed industrial relations. UEFA would promote a level playing field amongst their members and a similar approach to employment relations would be helpful in that respect.

If UEFA uses the FSDC to implement its FFPR and HGPR in accordance with the requirements of EU law, then it will definitely introduce a negotiation result from the FSDC beyond the borders of the EU. The FFPR and HGPR objectives of UEFA go beyond the territory of the EU.

The participation of UEFA in the FSDC brings EU harmonisation beyond the borders of the EU.

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<sup>855</sup> Chapter 5.

<sup>856</sup> Chapter 5.



## Redefining the Separate Territories Framework

Parrish has introduced the Separate Territories Approach in 2003.<sup>857</sup> The origin of the Separate Territories Framework lies in the tension between the EU's regulatory activities on the basis of Single Market objectives and the EU's perspective on the policy objectives for sport.<sup>858</sup> Chapter 2 has detailed the separate territories that have emerged due to the evolution of EU sports policy on the basis of judicial intervention by the European Commission and the European Court of Justice. The separate territories as introduced by Parrish in 2003 are sporting autonomy, supervised autonomy and judicial intervention.

With *Meca-Medina* the first adaptation of the separate territories emerged. With the introduction of the doctrine in *Meca-Medina* the territory of sporting autonomy changed into conditional autonomy. This is due to the fact that sports governing bodies now had to prove that the contested sport regulation serves a legitimate goal and that the means that are chosen to attain that goal are proportionate and understandable to the addressees. Before the judgement, the issues in the sporting autonomy territory were exempted of the application of EU law due to the specific sport characteristics of these rules. Now no sport rule is exempt from EU law *per se*.

The second impact on the Separate Territories Framework was introduced in 2009.<sup>859</sup> As an extra territory, the European Social Dialogue was introduced. This introduction was then depending on the establishment of the FSDC. As described, the official presentation of the FSDC occurred in 2008. Issues that were first part of one of the other territories were now shifted to the European Social Dialogue territory due to their connection with employment law.<sup>860</sup>

The thesis adds another element to the Separate Territories Framework. It introduces the HGPR and the FFPR to the ESD.<sup>861</sup> These two issues have been identified as having a

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<sup>857</sup> Chapter 1.

<sup>858</sup> Chapter 1.

<sup>859</sup> Branco Martins, R. (2009) *Regulation of Professional Football in the EU: The European Social Dialogue as a basis for the creation of Legal Certainty*, in Gardiner, S., Parrish, R., Siekmann, R., (Eds.), *EU, Sport, Law and Policy: regulation, re-regulation and representation*, T.M.C. Asser Press, p. 317-339. The actual writing of the Article was finished before the start of the FSDC.

<sup>860</sup> The transfer system and transfer windows, transfer fee payment, damages for breach of contract, match calendar, player release system, player recruitment regulations and nationality issues and third country nationals.

<sup>861</sup> Chapter 8.

connection with employment relations. In addition, the inclusion of these topics in the ESD may serve to reduce the potential friction with competition law that UEFA may encounter when the FFP are challenged. The adaptation of the FFP via the FSDC could lead to the introduction of a salary cap in European Professional Football.

The topics of contractual stability, TPI and the regulation of the activities of player's agents have been introduced to the FSDC. In the case that these issues will be regulated via the FSDC this would lead to a positioning within the framework of the European Social Dialogue in the Separate Territories Framework. This entails another adaption of this systems.

### **Restructuring the Pyramid – Introduction of the Horizontal Model of Governance or Co-Negotiation**

In 1999 the European Commission presented the characteristics of sport in the European Union. The European Model of Sport has ever since defined the approach to sport by the European Commission and the Court of Justice. According to the Commission, sport in Europe has the following characteristics.<sup>862</sup>

- European competitions are characterized by the model of promotion and relegation, enabling smaller teams to climb the hierarchy of competition and thus encouraging sporting competition and rewarding sporting success;
- Grassroot involvement in sport is fundamental for the European system. Sport depends on the participation of volunteers and this participation is key for bringing people together and strengthening communities;
- Sport has a cultural role in forging identity and national cultures. This is stressed by the organisation of international competitions. Within Europe competition helps to safeguard the cultural diversity between Member States;
- Sport in Europe is structured on interdependent levels. The structure has the form of a pyramid. On the basic layer the individual clubs are active. Above the clubs the

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<sup>862</sup> Chapter 2.

regional federations are active in organizing competition in a particular geographic area of a Member State. The regional federations are members of the national federations, who, on their turn, are members of a European federation. There is only one federation per sport and one national member of that European federation. It is argued that a primary function of this pyramid structure is to make it easier to fairly distribute the revenues on all levels of sport in order to encourage sport participation and competitive balance. Another element of the pyramid model is its impact on sport governance.

The top layer of the pyramid, the European Federation of the individual sports discipline, is for the most part member of a global federation. In European football UEFA is a member of FIFA. Due to the interdependent nature of EU sports, the rules and regulations of FIFA drip down to the level of the individual employment relation between the football player and his club.

The thesis gives a number of examples deriving from the FIFA and UEFA regulations that have an impact on these individual employment relations.<sup>863</sup> The transfer system contains requirements for contract duration and restrains the free movement of workers. Club licensing regulations and nationality quotas impact on the remuneration and working conditions of the workers and lead to discrimination on the labour market. At the moment of writing there are pending challenges to the legal viability of these regulations. These regulations might go beyond the tolerated deviance of EU law under the specificity of sport.

The thesis has placed these regulatory issues in the FSDC. The European Social Dialogue may serve as a platform for safeguarding the sports governing bodies from intervention of EU law by the European Commission or from an individual litigant before the ECJ. These issues are, due to their nature and connection to employment, fit to be placed in collective bargaining structures between employers and workers. This ‘double requirement’ dealing with admissibility of regulations and the nature of the regulations, impacts on the structure of the pyramid model of regulation for European Sport.

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<sup>863</sup> Chapter 6 and Chapter 7.

Where, until now, the model for regulation in EU football has been a top down approach, it now changes into a more horizontal form of regulation or co-regulation. This development changes the pyramid structure of EU sport governance.

The reason for the change is the empowerment of the clubs and players that previously formed the bottom of the pyramid. As a consequence the grip of the governing bodies in football, UEFA for the EU, will be undermined. Social Partners may use the FSDC to reach agreements outside the regulatory influence of UEFA.

### **Connections with the US Model of Collective Bargaining**

The introduction of the FSDC in professional football is a (further) shift towards the Americanization of the European Professional football sector. This is due to the fact that one of the characteristics of the US model of sports regulation, collective bargaining, impacts on the governance of the professional football industry.

The US model of sport is characterized by a sharp distinction between amateur sports and professional sports, the role of schools and colleges, a closed system of competition and an extensive system of player restraints regulated by means of a collective bargaining agreement.<sup>864</sup> The commercial merit of the leagues in the major US sport disciplines of American football, baseball, basketball and ice hockey derives from the fact that investments in these sports is better protected. The leagues are closed systems, they form of a single entity. There is no risk for a club to lose its status due to a relegation in a less commercially attractive competition.

In 1998 the richest football clubs threatened to organise a ‘breakaway league’. A competition outside of the scope of the UEFA regulations and with no threat of relegation. Although this can be seen as a shift towards the US model of closed leagues, it has never completely left the

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<sup>864</sup> Nafziger, J. (2009), *European and North American Models of Sport Organisation*, in Gardiner, S., Parrish, R., Siekmann, R., (eds.), *EU, Sport, Law and Policy. Regulation, Re-regulation and Representation*, The Hague: T.M.C. Asser Press.

drawing table. It served to exert a pressure on UEFA to allow more club involvement in their policies and organisation of competitions.<sup>865</sup>

Anderson introduces the viewpoint of the creation of a structure in professional football consisting of 32 clubs that are grouped in a European Super League (ESL) under the support of UEFA. This ESL could then, as a single entity, conclude collective bargaining agreements with the players and regulate issues such as the club licensing system, the FFPR, squad size limitation and quasi-salary caps.<sup>866</sup> This method of collective bargaining could be a potential shift to ‘Americanization’. However, the creation of such a ESL does not seem very likely, according to Anderson.<sup>867</sup>

Parrish<sup>868</sup> argues that the European Social Dialogue in football and its impact on governance structures may lead to a shift to a Americanization of the EU model of sport. He cites Halgreen<sup>869</sup> when stating that the first CBA’s in US sports in the sixties and seventies only concerned minor issues. Only after litigation the CBA’s contained more advanced issues in the field of labour such as player restraints.

The thesis has dealt with the introduction of the FSDC in football. In accordance with the US model, the first steps in the FSDC lead to the Autonomous Agreement. The Autonomous Agreement consists of minimum requirements that need to be included in the players’ standard contracts. However, the thesis explored other topics that could be included in the FSDC. Just like in the US, (threat of) litigation concerning these issues may motivate the governing bodies FIFA and UEFA to include issues that are now part of their regulatory authority in the FSDC in order to avoid potential challenges. At the time of writing, FIFPRO has just announced a new challenge to the transfer rules. It therefore seems that a shift towards the Americanization of the EU Sports Model seems less unlikely as a settlement of

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<sup>865</sup> Weatherill, S. (2000), *Resisting the Pressures of ‘Americanization’: The Influence of European Community Law on the European Model of Sport*, in Greenfield, S., Osborn, G., (eds.), *Law and Sport in Contemporary Society*, Frank Cass publishing, London, 2000, p. 155-181.

<sup>866</sup> Anderson, J.(2010), *Modern Sports Law, A Textbook*, Hart Publishing, Oregon, 2010, Chapter 8: *Brussels or Boston? The Future of Sports Law*, p 357 and further.

<sup>867</sup> *Supra idem*, p. 357.

<sup>868</sup> Parrish, R., (2011) *Social Dialogue in European Football*, *European Law Journal*, Vol. 17, No. 2, March 2011, p.21 3-229.

<sup>869</sup> Halgreen, L.(2004), *European Sports Law – A Comparative Analysis of the European and American Models of Sport*, Forlaget Thomson, 2004.

the dispute leading to the legal challenge is preferred in a forum for negotiated settlement such as the FSDC instead of a settlement in court.

A difference with the US is that the party that would give away its regulatory power is part of the FSDC (UEFA).<sup>870</sup> It could therefore be argued that the extension of the scope of regulation of the FSDC is a stronger step towards the preservation of the EU Model of Sport. As it has been argued above, the FSDC could be the venue to further specify the extent of application of Article 165 TFEU and with that the specificity of sport. The specificity of sport is founded on basic pillars of the European Sports Model.

It can be argued that the evolution of the FSDC has similarities with the US model of collective bargaining but that the end results takes the specific position of sport in the EU into consideration, including its intention to be defined by what it is not: the American model.<sup>871</sup>

### **The Labour Exemption in EU Sports Law**

The UEFA regulations have been analysed.<sup>872</sup> The FFPR have been assessed in the light of EU competition law. The competition law ‘test’ as defined by case law is useful in determining if a certain set of rules or an agreement falls under the TFEU competition law articles. In the case of UEFA the questions that needed to be answered were:<sup>873</sup>

1. Is UEFA, as the designer of the FFP rules, an undertaking?
2. Does the decision affect trade between Member States?
3. Is the effect on trade between Member States appreciable?
4. Does the decision have as its object the restriction or distortion of competition?

If the answers to these questions are positive, a rule from UEFA falls under the application of EU competition law. However, an exemption on the basis of the specific characteristics of sport is possible. After *Meca-Medina* such an exemption is no longer possible *per se*. It has to

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<sup>870</sup> Chapter 5.

<sup>871</sup> Weatherill, S. (2000), *Resisting the Pressures of ‘Americanization’: The Influence of European Community Law on the European Model of Sport*, in Greenfield, S., Osborn, G., (eds.), *Law and Sport in Contemporary Society*, Frank Cass publishing, London, p. 189.

<sup>872</sup> Chapter 7.

<sup>873</sup> Chapter 2.

be proven that the contested rule has no disproportionate effect and that it is not limited to what is necessary for the proper conduct of sport.<sup>874</sup>

The inclusion of UEFA regulations on FFPR and HGPR in the FSDC make that an exemption which is more likely to be acknowledged due to the connection to labour law and collective bargaining. The ECJ cases *Brentjens*, *Albany*, *Drijvende Bokken* and *Pavlov* can be regarded as a European Union equivalent to *Mackey*. This makes that certain restrictions are inherent to collective agreements. If the social partners both agree to these restrictions then this impacts the extent of the applicability EU competition law.

Therefore, if the 101 TFEU ‘test’ is answered positively, an addition to the *Meca Medina* principles is added. The question that needs to be asked before the *Meca-Medina* principles are applied, is if the contested rule is part of an Autonomous Agreement deriving from the FSDC.

### **Enhancing the Debate on Lex Sportiva**

A reflection has been made on the role of the CAS in creating *Lex Sportiva*.<sup>875</sup> In academic debate there exist differing views on the exact meaning of *Lex Sportiva*. On one side of the spectrum there is the view that a distinct body of law has been created, comparable to the *Lex Mercatoria*. The sources for this distinct body are not only the CAS awards but also the regulations and decisions of the sport governing bodies and rules of the game, the *Lex Ludica*. The amalgamation of these sources lead to the definition of a *Lex Sportiva in senso lato*.

On the other side there is the recognition that the notion of *Lex Sportiva* remains vague and that it should prevent the impact of state and international law on sport structures.

The thesis has posed the viewpoint that *Lex Sportiva* should be a uniform body of sports law that exists over the mosaic landscape of national sports law or general laws that are applied to sport. A set of rules regulating a certain sports activity may only be determined to be law if it

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<sup>874</sup> Chapter 2.

<sup>875</sup> Chapter 2.

may be sanctioned and enforced when violated. There exist countries in the European Union that have specific sport laws. *Lex Sportiva in senso stricto*. A few examples are given below.

In Spain there exists the *ley del deporte, Ley 10/1990, of 15 October*. This is a very elaborate sports act that serves as the basic legal ground for further legal regulation of the sports sector. The objectives of the state are defined and a Council for Sport is appointed to organise sporting issues and to serve as a guardian of the objectives of the act. The act regulates the role of the federations, the leagues that are active in organizing professional sports, the legal structure of clubs, disciplinary proceedings before arbitration tribunals and the role of the National Olympic Committee. Portugal has similar act.<sup>876</sup> In Italy the Constitution refers the role of sports governance and regulation to the State. A specific law for the creation of the Italian Olympic Committee (CONI) was first launched in 1942, giving CONI legal personality and bringing it under the authority of the Ministry of Tourism and Entertainment. CONI received the power to mandate its members to regulate competitions in their specific disciplines.<sup>877</sup> Italy has a specific act dealing with the employment contract for sportspeople, the *legge 23 marzo 1981, n. 91 sul professionismo sportive*.<sup>878</sup>

The countries that have a system of regulation of sports by means of generic laws based on a Constitution objective are defined as countries with an ‘interventionist system of sports regulation’.<sup>879</sup> These countries are opposite to countries that have a free regulatory system, where the associations and federation are not state controlled: ‘non-interventionist system of sports regulation’.

The European Social Dialogue has the potential to be the only source in the European Union to create an enforceable basic sport act: a *Lex Sportiva*. The EU has the potential to become an interventionist system of sports regulation. The method and process is as follows.

In the case that the social partners would come to an Autonomous Agreement and they would request the European Commission to submit a request for a Directive to the Council, then the

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<sup>876</sup> For Portugal: *Lei de Bases do Sistema Desportivo, Lei no. 1/90, 13 de Janeiro*.

<sup>877</sup> *Legge 16 Febbraio 1942, N. 426, Costituzione e Ordinamento Del Comitato Olimpico Nazionale Italiano (CONI), G.U. 11 Maggio 1942*.

<sup>878</sup> See for a further elaboration Geukes Foppen, T.(2010), *Italian Regulation of Sports Law and its Law n. 91 of 1981 – A solution for sport related problems in the Netherlands?*, in *International Sports Law Journal*, The Hague: T.M.C. Asser Press, Vol. 3-4, 2010.

<sup>879</sup> Chaker, A-N. (1999), *Study on national sport legislations in Europe*, Council of Europe Publication, 1 September 1999.



Autonomous Agreement will have to be implemented on the level of the Member States in their national laws. This makes that the Autonomous Agreement will have an *erga omnes* effect and that it may serve as a basis for further detailed regulation on the national level of the Member States. This would lead to a *Lex Sportiva in senso stricto*.

Taking into consideration that UEFA is allowed in the FSDC as an associate party, *de facto* it has access to create binding laws on the level of the EU. The social partners are able, as described above, to use the FSDC to further define the scope of the specificity of sport and of the vagueness caused by the reference to ‘openness’ and ‘fairness’ in Article 165 TFEU. It can be concluded that the European Social Dialogue, and, in particular, the FSDC, goes further in law making than Article 165. The latter misses the source for creating legislation and may only come up with incentive measures and support. One of these measures is, as has been illustrated, the promotion of the European Social Dialogue as a forum for debate and negotiation for sport stakeholders.

In the case that an Autonomous Agreement on the EU level is not transposed in an *erga omnes* Directive than it can be charted under the notion of *Lex Sportiva in senso lato*. The reason for this is that the relevant actors on the national level of the Member States are no addressees to the Autonomous Agreement. After a transposition into an enforceable agreement on the national level, via the route of implementation in a CBA or via the route of the association, it may become enforceable on the national level for the addressees. In that case, for that specific sector, *Lex Sportiva in senso stricto* is created.

### **The European Social Dialogue as a Venue for the Settlement of Unsolved Issues**

The thesis discusses issues that find their origin in the regulations of FIFA or in the regulations of UEFA. Two topics were added. The activity of players’ agents, currently regulated by FIFA but in the process of a deregulation procedure, was added. Third Party Influence (TPI) has been analysed. TPI is mentioned in the Regulations on the Status and Transfer of Players (RSTP) but it deserves a separate approach due to the statements of UEFA about the European governing body’s efforts to advocate a total ban of TPI on its territory.<sup>880</sup>

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<sup>880</sup> Chapter 6, Chapter 7 and Chapter 8.

In the conclusions below it will first be shortly described what the individual issues are. Then the potential or actual legal challenge to the issue will shortly be described. The conclusion per individual topic contributes to the overall conclusion: the FSDC as an instrument to introduce legal certainty in the European professional sector.

### *The Regulations on the Status and Transfer of Players*

The RSTP regulate the administrative procedure connected to the international movement of the registration of a professional football player. In addition, the RSTP dictates the method in which contracts need to be drafted, it introduced a system of training compensation, it promotes contractual stability, pays attention to the protection of minors and refers to arbitration tribunals for dispute resolution.

In December 2013 FIFPRO announced that it will challenge the RSTP. There was no specification on which elements of the RSTP the challenge would be directed, the general objective was to end the infringement of free movement and the implications on human rights. The legal threat is realistic as the status of the RSTP is no more than an informal agreement between FIFA and the European Commission and examples of EU law infringements would require justification on the basis of clear evidence. In Chapter 6 it has been illustrated that a number of issues under the RSTP have employment law links and are therefore suitable to be placed in the FSDC for negotiation. The issues are: contractual stability, training compensation, transfers of minors, contract duration and dispute resolution. Below some of these topics will be addressed in order to propose concrete measures in a FSDC agreement, in so far as this has not elaborately been discussed before.<sup>881</sup>

### *Contractual Stability*

It has been illustrated that the RSTP promote contractual stability through uncertainty. In the case that a player unilaterally breaches his contract before the end of its duration, there is no clarity on the amount of compensation that he is obliged to pay. In practice this may lead to a situation where a player (*Matuzalem*) is liable to pay such an unreasonably high amount that it

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<sup>881</sup> Chapter 6.

would prevent him from ever being able to pay that sum. In the case of non-payment the disciplinary system of FIFA may impose the sanction of banning the player from competitions.

The FSDC can be the platform for the re-negotiation of the contractual stability requirements. The social partners are apt to find a balance between stability and the rights of workers. The FSDC could agree on standard clauses for contract termination and on a calculation method for the amount of compensation to be paid in the case of a unilateral breach.

### *Training Compensation*

The system of training compensation has been introduced in the 2001 agreement on the RSTP. The motivation for the rule was to encourage clubs to train players. Due to the lack of feedback of their members, FIFA drafted a compensation system on the basis of its own findings.

Two examples have illustrated that in practice the current form of training compensation can go beyond the actual training costs that the club that trains the player, has incurred. This system may have impact on the free movement of the player. The FSDC may decide on a system of training compensation that is evidence based. As detailed in chapter 6, the method of renewing contracts with young players may be discussed as currently this method leads to uncertainty for the player who is involved in potential negotiations with new employers.

### *Minors*

In Chapter 6 it has been illustrated that in order to avoid child trafficking a symbiosis between association regulations and immigration laws is requested. This would allow the football sector to place the transfer of minors in a formal framework that enables better control and sanctioning. The FSDC operates on the level of professional football but is also under direct influence of EC control and participation and is directly connected to UEFA's regulations. The FSDC could therefore be the right platform to formalize the FIFA regulations on minors and include in that regulation clauses deriving from the relevant EU directives on human trafficking.

In conclusion, due to the weak legal status of the RSTP a legal challenge may lead to the overhaul of the system. FIFPRO's challenge of the system may be a method to force FIFA and UEFA to move the negotiation of these issues to the venue of the FSDC. Indeed, if the stakeholders of the FSDC will be invited to negotiate the RSTP in the FSDC the legal challenge would be solved before the Court will decide on the legality of the RSTP.

### *UEFA Regulations*

The UEFA Club Licensing Regulations and Financial Fair Play Regulations (FFPR) and the Home Grown Player Rule (HGPR) have been analysed. Both issues qualify as topics for negotiation within the FSDC.

Currently there is a legal challenge to the FFPR before a Brussels Court. Also, an official complaint has been notified to the European Commission. Both actions have been initiated by a Belgian football agent, who is advised by *Bosman's* lawyer Jean-Louis Dupont. According to Dupont the break-even requirement limit the freedom of a club to offer the players the salaries they would like to offer. It also limits the freedom of the provision of services.

According to a study that has been commissioned by the European Commission the restrictive elements of the HGPR go beyond the achievements of the rule. On the basis of the findings in the report, a legal challenge to the HGPR by a litigant could overhaul the HGPR.

If UEFA would bring both issues under the negotiation of the FSDC that it may profit from two advantages. First, a potential infringement of competition law based on the status of UEFA as a grouping of undertakings imposing salary cap regulations would be weakened. An exemption of competition law would be allowed under the EU labour exemption. Second, allowing the issue of the indirect discrimination of workers under the HGPR would be accepted more easily if the players themselves, via FIFPRO, would have been involved in the creation of the rule through negotiation in the FSDC.

### *Third Party Influence*

Stakeholders in European football are actively involved in the debate concerning TPI. UEFA is an advocate of a total ban, whereas the ECA and the EPFL from the side of the clubs are yet to present their definitive standpoint. FIFA is, at the time of writing, in the middle of an elaborate global research on the extent of the potential problems deriving from non-allowed influences in club's policies due to TPI. On the contrary, a number of Brazilian clubs have expressed their concern about the intentions to totally ban TPI. FC Porto was present in this group.

TPI affects players as well as clubs. It has an impact on employment relations and it may therefore be placed within the FSDC. A negotiated settlement would be favoured over legal challenges of a potential ban in court.

A system of transparent TPI regulation could involve a maximum on the percentage of third party entitlement to the future transfer compensation paid for a player's move to a new club. Also, a database could be made public showing the third party investments and the players that are financed through TPI. The FSDC could introduce standards of players' consent to third party investments, guaranteeing a freedom to enforce their rights as workers. The FSDC may bring legal certainty and is therefore the right platform to prevent potential legal challenges.

### *The Activities of Players' Agents*

FIFA have been regulating players' agents since the mid-nineties. Regulation became more fierce after *Bosman*. FIFA has overcome legal scrutiny over its ability to regulate the agents. In an ECJ case FIFA's powers to regulate this profession were confirmed due to the necessity for protecting the vulnerable players and for financial transparency.<sup>882</sup>

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<sup>882</sup>Piau v Commission of the European Communities and FIFA (Case C-171/050 [2006] ECR I-37.

According to FIFA the Player's Agent Regulations (PAR) have not been successful in reaching FIFA's objectives for regulation. FIFA has therefore decided to deregulate the profession, the licensed agent will disappear from the first of February 2015.

According to football stakeholders, and in particular the EFAA, this choice of FIFA may lead to potential chaos on the market. Since the entry into force of the PAR the situation with regards to player protection and need for financial transparency is still omnipresent. An overhaul of the system brings the players in a worse position as they are now. Players' agents may potentially be limited in their freedom to carry out their profession, as the new rules curtail their potential clients.

The new rules have not come into force yet. However, due to the fragile method of creation of the rules, with a limited amount of stakeholder consultation, a challenge to the new regulations is possible.

The FSDC has shown flexibility as regards the collaboration of stakeholders that are no direct social partners. In the case of Players' Agents it should be possible to involve EFAA in negotiations about the regulation of agents. In the case that this collective body, recognized by the European Commission, consents to the rules agreed in the FSDC, a potential threat of litigation diminishes.

Also, the connection to employment issues make that the FSDC could be fit to host negotiations about the issue.

The FSDC could be the forum to negotiate new Players' Agents Regulation and take away the threat of litigation.

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