

# Global labour market for professional football players and contract law

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## CONTENTS

- I. Introduction
- II. The contractual chain linking transnational football federations and their members
- III. The effect of the CJEU on the interaction between freedom of movement for workers and contractual freedom
- IV. The effect of the Commission on the interaction between competition law and contractual freedom
- V. The effect of transnational football bodies on transnational mechanisms of dispute resolution
- VI. Conclusion  
Bibliography

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## I. Introduction

The creation of the International Olympic Committee (hereinafter IOC) by Pierre de Coubertin in 1894 was the milestone for the global promotion of sport activities. De Coubertin's objective was not only to re-establish the Olympic Games of ancient Greece but also to advocate for an idealistic concept of a transnational sport competition spirit that could help elevate the global human community to better moral values.<sup>1</sup> In his opinion, this would be possible through sport's organisational autonomy. In the matter of the Olympic Games, the Olympic Movement should have competence in creating transnational norms in sports without being bound to any specific substantive legislation or government intervention. Therefore, it should also be responsible for the self-governance of transnational sport organisation.<sup>2</sup> This concept is known as *lex sportiva*,<sup>3</sup> a term with no official legal description.

The establishment of the IOC laid down the foundations and principles of global sport organisation as we know it today in the present legal, institutional and economic context and communicated the global nature of sport to the wider public and national governments. Although the IOC attracted much of the spotlight, the humble sport activity of football begun its history quite earlier than the IOC and today football is the backbone of a multibillion global industry.<sup>4</sup> It was in 1863 that the first Football Association was established in Great Britain. Soon after, football associations appeared in France (1870)<sup>5</sup> the Netherlands and Denmark (1889) New Zealand (1891), Argentina (1893), Chile (1895), Switzerland, Belgium (1895), Italy (1898), Germany, Uruguay (both in 1900), Hungary (1901)

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1 MARTINKOVA (2016).

2 International Olympic Committee (2017), *Olympic Charter in force as from September 2017*, in [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#\\_ga=2.241435522.1063922124.1516281581-700252627.1515116261](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.241435522.1063922124.1516281581-700252627.1515116261) (15.01.2018). The Fifth Principle of Olympism in the latest Olympic Charter states that

Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.

3 Some authors are proposing a distinction between the *lex sportiva* as a transnational autonomous legal order created by the norms produced by international sporting federations which function under a formal contract basis combined with submission to the jurisdiction of sporting federations by athletes and others who come under its jurisdiction, with the Court of Arbitration for Sport as its unique forum, and the *lex iudica* which describes the formal rules and the equitable principles of sport which can be enforced by national courts, see LINDHOLM (2015); VALERO (2014); SIEKMANN (2011); FOSTER (2005).

4 MARKOVITS, RENSMANN (2010), p. 43.

5 TERRET (2016), p. 34.

and Finland (1907).<sup>6</sup> The International Federation of Football Associations (hereinafter FIFA) was created in 1904 by seven founder members and to this day it has 211 members worldwide. In Europe, the Union of European Football Associations (hereinafter UEFA) consists of 55 member associations. Both bodies are private entities that hold a monopoly on regulating competitive sports at an international level and they have their current head offices in Switzerland. The governance of such a global industry involving multi-stakeholder interests, pushes the limits of the division between private contractual liberty of the parties and public regulation as we know it so far in the European continental legal tradition. The transnational supply and demand in the football market makes the mobility and migration of players worldwide a significant condition to the football clubs success, as they are always looking to sign up the best talents that can offer them a competitive advantage compared to their opponents in the sports market with high levels of economic reward.<sup>7</sup>

The players' contracts are an expression of the autonomous choices of contracting parties. The freedom of contract is a fundamental tenet of contract law in all open market economies providing legal predictability and security in market transactions.<sup>8</sup> The asymmetry of information between the contracting parties may put some parties in a more disadvantaged position than the other. In order to restore the contractual balance between the parties, the State may, for public interest reasons, set the framework for specific contracts in order to protect the weaker party to the contract.<sup>9</sup> The courts may also be called by the parties to intervene in the interpretation of a contract during a civil law litigation or during arbitration. One category of contracts where the State may set the framework is employment contracts, negotiated individually by the parties or following a collective agreement negotiated by official social partners according to the national legislation.<sup>10</sup> In sports, the national legal framework that applies within the limits of that national jurisdiction allows sports federations and sports governing bodies to set-up their own internal statutes and regulations, as well as to enforce these regulations in relation to their members and other affiliated persons. However, some of these national status and regulations are enacted by transnational private sport bodies, such as FIFA, UEFA etc. and have a worldwide reach.<sup>11</sup> In

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6 La Fédération Internationale de Football Association-FIFA.com (2017), *History of the game*, in <http://www.fifa.com/about-fifa/who-we-are/the-game/index.html> (15.01.2018).

7 POLI (2010), p. 491; MAGEE, SUGDEN (2002), p. 421.

8 POUND (1909); HOOK (2016).

9 OMAN (2016).

10 GRUSIC (2015).

11 For a collection of national sports legislations worldwide see GUROVITS (2018).

the absence of an international public legal order for sport, controlling the validity of their normative autonomy becomes a complex matter with socio-economic implications.

## II. The contractual chain linking transnational football federations and their members

Just like corporations, international sport federations can have a legal personality after the adoption of their statutes and bylaws/regulations. The representatives of the national federations of the same sport discipline must be united in a Congress that will discuss and adopt the statutes of the international federation of that same sport discipline. The affiliation of national federations to their international sport body is also of a contractual nature. The membership agreement is a consensual contract and it is needed in order for the national federations to participate in international sport competitions. It also means that members adhere to all the regulations of the international body and may be sanctioned if they do not operate in total conformity with them. By a hierarchical chain of membership contracts, transnational regulations are binding to the clubs that are members of national federations and by consequence to the players registered to those clubs. The norms produced by transnational sporting bodies are accepted by their members under the principle *pacta sunt servanda* since there is no delegation of public international power to these bodies.<sup>12</sup>

The organisation of international competitions falls in the scope of competence of transnational sport bodies. The structure of the labour market of professional players in such competitions includes organisational rules on teams' composition, players' assignment to teams, for example rules to assign new players between clubs or geographic zones from which clubs are allowed to sign up new players. These rules may take the form of contractual clauses restricting the free mobility of players between clubs coupled with time restrictions or even establishing a specific fee payment system. It also includes the players payment and wage determination process – like salary cap arrangements, periodicity of wage-setting and the role of player agents and unions – and the formation of the players list by establishing justified restrictions on the criteria of players on the list and their maximum or minimum number.<sup>13</sup> In professional football, national contracts of employment between players and their club as well as between officials and their club usually incorporate in their terms the rules under which the

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12 RABU (2010), pp. 144-154.

13 BORLAND (2006).

club operates within the sporting body of which it is a member. Regulation of this type usually limits the freedom of the employing club and the player to negotiate their own terms on the contract. In some sports the rules require explicitly the contracts of players, coaches and managers to conform to a specific model prescribed by the organisational rules stemming from transnational sporting bodies that bound its members.<sup>14</sup>

Transnational sport bodies have to find a balance in their rules between the sometimes conflicting interests of the clubs that want to keep their best talents and the players that may want to explore better working opportunities in another club. Professional football players are usually contracted under a fixed-term contract with the club. If a player wants to change clubs before the expiration of his contract, he is considered in breach of his contractual agreement and he has to compensate his former club. This procedure is known as a transfer and if the player moves to another country's club, the procedure is known as an international transfer. In the absence of an international legislation on the matter, the void is filled by the norms stemming from transnational sport bodies;<sup>15</sup> in this case, the Regulations on the Status and Transfer of Players (hereinafter RSTP) of FIFA.<sup>16</sup> These regulations are compared to «a parallel transnational labour law applicable exclusively to professional football players and their employers»<sup>17</sup> and have three specificities: the compensation owned is much higher, even exaggerated, than the one due in case of a contractual breach by any other worker; if it is not paid, FIFA can issue temporary bans against the player and his future club and if the player moving is under 23 years old a training compensation may also be due to the clubs who contributed to his professional training.

In 1965 the French, Scottish, English, Italian and Dutch football players' associations established the Fédération Internationale des Associations de Footballeurs Professionnels (hereinafter FIFPro) as an international representative federation for professional players. Until the mid-nineties it had a marginal negotiation power over FIFA and UEFA and players who wanted to challenge their contracts had to act individually.<sup>18</sup> In fact, it is because of these individuals who challenged the validity of their contracts under European law provisions before the Court of Justice of the European Union (hereinafter CJEU) that FIFA and UEFA begun negotiating their regulations with FIFPro and the European

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14 BELOFF (2012).

15 ELIASSON (2009), p. 386.

16 La Fédération Internationale de Football Association-FIFA.com (2017), *Regulations on the Status and Transfer of Players 2018*, in [http://resources.fifa.com/mm/document/affederation/administration/02/92/54/37/regulationsonthestatusandtransferofplayersdez2017webeng\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/92/54/37/regulationsonthestatusandtransferofplayersdez2017webeng_neutral.pdf) (15.01.2018).

17 DUVAL (2016), p. 84.

18 GEERAERT (2016), pp. 72-74.

Commission. The importance of the European legislation and case law in creating a framework for an industry that has been always proclaiming its legal and institutional autonomy can be resumed in the phrase that «the European Union remains to this date the only international governmental organisation to have imposed to international sport organisations such profound modifications of their rules».<sup>19</sup>

### III. The effect of the CJEU on the interaction between freedom of movement for workers and contractual freedom

The composition of professional football clubs has been part of the regulatory/organisational aspect of sport falling in the competence of transnational football bodies. The early regulations provided a system of nationality-based quotas on the composition of football teams by national and foreigner players. The justification of that system was that the popularity of football was an important factor of shaping the national identity of supporters with wider social implications concerning social cohesion, education and job opportunities especially for the youth of the country where the club was registered. International federations were defending a vague notion of «purely sporting rules exception» that would allow them to adopt regulations including restrictions to the European provisions of free movement. In the Lisbon Treaty, the free movement of workers is protected under article 45 of the Treaty on the Functioning of the European Union (hereinafter TFEU).<sup>20</sup> The CJEU has ruled that the definition of «worker» protected under article 45 TFEU is a matter of European law and does not depend on the various definitions of the term by Member States' national legislations that could otherwise bypass the free movement objectives of the European Treaties.<sup>21</sup>

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19 MIEGE (2017), p. 278.

20 Art. 45 TFEU states that

1. Freedom of movement for workers shall be secured within the Union. 2. 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. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (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. 4. The provisions of this article shall not apply to employment in the public service.

21 CJ, 19.03.1964, Case 75/63, *Mrs M.K.H. Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, ECLI:EU:C:1964:19; TEYSSIE (2013), p. 108.

In the *Walrave* case the CJCE ruled that a prohibition based on nationality «does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity (...) this restriction on the scope of the provisions in question must however remain limited to its proper objective».<sup>22</sup> By this formulation the Court made clear that rules laid down by sporting federations, limiting or restricting the free movement of professional sportsmen based on nationality, could be found to be infringing the European provisions of free movement of workers within the internal market. According to the CJCE, the European Treaty would not apply to economic sporting activities only if the motive for the proportionate rule was a non-economic or a «purely sporting» one.<sup>23</sup>

Two years later in the *Donà* case, where a football agent challenged the nationality and residence preconditions imposed by the Italian Football Federation excluding players from another member of the European Union to participate in the national Italian Championship, the CJEU made clear that professional and semi-professional football players are encompassed by the definition of «workers» under article 45 TFEU. It also ruled the exclusion of foreign players «from participation in certain matches for the reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus, only, of sporting interest».<sup>24</sup> The notion of purely sporting rules was interpreted by the CJEU in a way that meant that sporting rules could be exempted from a compatibility control with European law if they produced an economic effect but were based on non-economic motives that relate to the particular nature and context of certain matches and are proportionate to this objective. It is argued that this purely sporting exception should not be applying to rules on team composition in a general manner but only to nationality rules in national team sports.<sup>25</sup>

It seems that the unfortunate wording of «purely sporting interest» formulated by the Court was used by the sporting industry as a suggestion of a clean separation between rules of purely sporting interest and rules with an economic impact. This separation would provide a legitimate justification for the international federations to keep avoiding a compatibility control of their regulations with the European legal order even when these rules have detrimental economic consequences for individuals. It is however more likely that by imposing the sporting exception to be proportionate to its non-economic objective the CJEU

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22 CJ, 12.12.1974, Case 36/74, *Walrave and Koch v. Union Cycliste Internationale*, ECLI:EU:C:1974:140, paras 8-9.

23 LATTY (2007), p. 698.

24 CJ, 14.07.1976, Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115, para 14.

25 PARRISH, MIETTINEN (2008), p. 100.

wanted to make clear that the evaluation of the limits of the autonomy granted to sports federations to set rules undisturbed by the demands of European legislation was a matter of judicial control.<sup>26</sup> After these two decisions of the CJEU, the European Commission was encouraged, in the late seventies, to engage the European sporting authorities in a dialogue in order to revisit the UEFA rules that were imposing quotas to the number of foreign players in professional football clubs. These efforts gave no result mostly because the football federations defended strongly their normative autonomy and independence from any national or supra-national substantive law.<sup>27</sup>

In the years following these two rulings the commercial value of football industry grew immensely<sup>28</sup> and it coincided with a swift of the political and economic focus of the European Commission and the CJEU to a more vigorous enforcement of internal market law coupled with the de-regulation of various economic sectors. Until the *Bosman*<sup>29</sup> case in 1993, professional players were unable to exercise their contractual freedom, like any other worker, to move between clubs-employers. For a professional football player to participate in official matches under his club, the player's registration which is held by the previous club had to be secured. That registration would be released only when the previous club was satisfied with the terms offered by the new club, including the payment of a fee. The Bosman case essentially placed under judicial scrutiny the discriminatory «3+2» regulation established by UEFA and had been drawn up in collaboration with the Commission. That regulation imposed nationality – based quotas in fielding foreign players and also imposed non-discriminatory transfer fee rules which restricted the professional – and therefore economic – activities of football players.

In this particular case, a professional footballer named Bosman, was not considered free to sign for any other club willing to employ him at the end of his contract of employment with his former club-employer, the Royal club liégeois. Any interested club would have to pay a fee to Royal club liégeois in order to obtain the transfer certificate. The CJEU ruled that this duty to buyout the right to contract with an out-of-contract player was considered an obstacle to freedom of movement for workers. Despite the formulation of the transfer rules by UEFA stipulating that the business relationship between the two clubs is to exert no

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26 WEATHERILL (2007), p. 49.

27 MIÈGE (2017), p. 51.

28 In a consultation document by the European Commission in 1999 on the European sporting model the most significant steps of sport industry are traced: the participation of professional athletes to the Olympic games in 1981, the commercialisation of Olympic symbols and trademarks in 1980, the deregulation of the public audio-visual sector and the high demand for tv sports rights at the late 1980s.

29 CJCE, 15.12.1995, Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI:EU:C:1995:463.



influence on the activity of the player, who is to be free to play for his new club, «the new club must still pay the fee in issue, under pain of penalties which may include its being struck off for debt, which prevents it just as effectively from signing up a player from a club in another Member State without paying that fee».<sup>30</sup> This means that restrictive measures which are non-discriminatory, like the transfer fee, are also subject to Article 45 TFEU if they are an «excessive obstacle to the freedom of movement».<sup>31</sup>

The importance of the judge's reasoning is that the significant impact of organisation rules on a club's willingness to recruit a player constitutes a restrictive practice opposing the free movement of workers that is transposable to in-contract players subjected to the compensation and sanctions of non-payment imposed by the FIFA RSTP as well.<sup>32</sup> The CJEU in its famous paragraph 106 recognized 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. The general notion of «social importance of sporting activities» is often promoted by both FIFA and UEFA to justify their regulatory choices. The CJEU abolished the quotas based on nationality discrimination and as far as the transfer fees for expired contracts are concerned they were found to be not proportionate to attain the legitimate objectives recognised as such under paragraph 106, which meant in practice that the rules on transfer system had to be amended. By basing its decision on free movement rules that were laid down in order to alleviate practices that impede cross-border trade, the CJEU had a specific vision of sport as part of European trade law.<sup>33</sup> Even though article 45 TFEU covers EU citizens, the CJEU confirmed in the *Kolpak*<sup>34</sup> and *Simutenkov*<sup>35</sup> cases that athletes from a third country which has an agreement with the EU containing non-discriminatory measures, are to be treated equally to EU citizens.<sup>36</sup>

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30 *Ibid*, para 100.

31 CRAIG, DE BÚRCA (2015), p. 761.

32 DUVAL (2016), p. 86.

33 WEATHERILL (2010), p. 485.

34 CJCE, 08.05.2003, Case C-438/00, *Deutscher Handballbund eV v. Maros Kolpak*, ECLI:EU:C:2003:255.

35 CJCE, 12.04.2005, Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, ECLI:EU:C:2005:213.

36 RABU (2010), p. 397.

## IV. The effect of the Commission on the interaction between competition law and contractual freedom

Until the Bosman ruling, the European Commission had chosen to follow a policy of persuasion of the clubs through dialogue instead of taking a more active stand in relation to the discriminatory rules of the national Leagues, enacted by the regulations of international football federations regarding foreign players, because of the political sensitivity of the issue.<sup>37</sup> The industry had still strong national identities while at the same time operating internationally on a business model basis. At the same time, discriminatory labour practices in the private sector could in theory be challenged both under the free movement provisions and the European competition law. However, depending on the legal basis of the demand, the private enforcement opportunities offered to individuals before national courts are different and so are the Commission's power in safeguarding the internal market law.

The Commission has no power to enforce the freedom of movement of workers against private parties. It can only initiate infringement proceedings against the Member States that have failed to fulfil a Treaty obligation, therefore requiring them to adjust their national legislation which is considered to be contrary to European law. In the case of football and the discriminatory clauses based on nationality laid down in national labour contracts, a Commission's intervention could be in theory possible but also politically and legally delicate. This was voiced by the AG Trabucchi in his Opinion in the *Donà* case who rejected «the principle that the State should be made liable for activities carried out on its territory by individuals exercising their contractual autonomy solely on the ground that they have adopted measures which conflict with directly applicable Community rules».<sup>38</sup> As far as football is concerned, the State's role was, according to the AG, to uphold the right of private parties, the sports clubs, to sign on foreign workers and to withhold legal recognition from a clause to the contrary contained in the rules applicable to them. The contractual autonomy of private parties and their liberty to insert clauses that may be contrary to European law belongs exclusively to the sphere of private law according to AG Trabucchi and therefore there is no legal liability for the public authorities of the Member States.

The liability of the State in case of infringement of Treaty provisions by private parties was mostly examined in cases evolving European competition law. According to the case law of the CJEU at the time, a Member State should not

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37 GRAYSON (2015), p. 213; VAN ROMPUY (2012), p. 300.

38 Opinion of the Advocate-General Trabucchi delivered on 6 July 1976, Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:104.

support infringement of European law by private parties by legislating purportedly to sanction or to encourage the illegality or by creating the legal conditions that would leave a Treaty infringement immune from any kind of control of legality.<sup>39</sup> If the national legislation was challenged as being contrary to European law before a national court of a Member State and that court refused to proceed to a conformity control, then that Member State would be liable and exposed to the infringement proceedings initiated by the Commission for failing to fulfil a Treaty obligation.

Regarding the enforcement of European competition law laid down in articles 101 TFEU<sup>40</sup> (ex article 81 TEC) and 102 TFEU<sup>41</sup> (ex article 82 TEC) against private parties, including the transnational and national football federations, the Commission had much more specific powers. According to the rules on procedure, powers of investigation and variety of decisions available to the Commission laid down by Regulation 17/62<sup>42</sup> the Commission had the unique authority

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39 CJCE, 01.10.1987, Case C-311/85, *ASBL Vereniging van Vlaamse Reisbureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, ECLI:EU:C:1987:418; CJCE, 30.04.1986, joints cases C-209-213/84, *Ministère Public v. Lucas Asjes et alii*, ECLI:EU:C:1986:188.

40 Article 101 TFEU states that

1. The following shall be prohibited as incompatible with the internal 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 internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make 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. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: – any agreement or category of agreements between undertakings, – any decision or category of decisions by associations of undertakings, – any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

41 Article 102 TFEU states that

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far 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; (d) 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.

42 Council Regulation 17/62/EEC, *First Regulation implementing Articles 85 and 86 of the Treaty*, 1962, O.J. L13, 21.2.1962, p. 204.

to exempt a restrictive agreement under article 101(3) TFEU (ex article 81(3) TEC) but only after notification of the agreement by the parties. In the case of football, the national clubs would have to notify their employment contract drafts with professional players and other rules to the Commission. If the Commission considered that they were in breach of the competition rules, it could demand the termination of the anticompetitive practice and/or impose a fine.

Despite the inactivity of the Commission in the early years of the football industry, both the Treaty's provisions on free movement and competition have a horizontal direct effect which means that player restrictions could be challenged before national courts following the procedures set on every Member State according to the principle of procedural autonomy of Member States.<sup>43</sup> However, an exemption of the anticompetitive practice under article 101(3) TFEU (ex article 81(3) TEC) is available in restrictive practices concerning the commercialisation of goods and services or, in other words, revenue-generating activities,<sup>44</sup> but may not include labour. In general, compensation and other employment conditions are often negotiated within the framework of collective or tariff agreements between the labour unions and employer organisations known as the social partners. Collective agreements can be excluded from the application of competition law only if they meet the conditions laid down in the *Albany* case.<sup>45</sup> The agreement must be the product of collective bargaining between the social partners in the form of a binding collective agreement, it must not include hidden restrictions of competition and it must incorporate only socio-political aims such as employment and working conditions. However, if the agreement incorporates conditions that go beyond the rights and obligations in the employer-employee relationship and affects third parties or markets, such as clients, suppliers, competing employers or consumers, it cannot be exempted and has to be assessed on the basis of article 101 TFEU.<sup>46</sup> Since the organisational rules of transnational football bodies were not qualified as collective agreements but were, however, imposing conditions in the employment contracts of their members effecting competing clubs and federations, the Commission would have to find a way to control them under competition provisions.

The question of compatibility of organisational rules with EU competition law was analysed in the *Bosman* case. Even though the CJEU declined to answer the national court's question on the compatibility of the transfer rules with articles

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43 SCHEPEL (2013).

44 PIJETLOVIC (2016).

45 CJCE, 21.09.1999, Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430.

46 DRIGUEZ (2006); SÄCKER (2008).

101 TFEU and 102 TFEU, the opinion of the AG Lenz in that ruling<sup>47</sup> offered the legal framework under which the European competition law could be specifically applicable to sport, at a time when the EU had no specific legal or institutional competence over the sport sector yet. In his legal analysis AG Lenz defined football clubs as undertakings<sup>48</sup> and the football federations as associations of undertakings (national federations) or associations of associations of undertakings (UEFA and FIFA). Therefore, the organisational rules that also effect the drafting of employment contracts for professional players, imposed by UEFA or the national federations, were interpreted by the AG as decisions of associations of undertakings or agreements between undertakings (the clubs). He concluded that the transfer rules could have an effect on trade between Member States. According to the AG «those rules replace the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and the clubs being deprived of the possibility of making use of the chances, with respect to the engagement of players, which would be available to them under normal competitive conditions».<sup>49</sup> As far as the transfer fees are concerned, the tendency to maintain the existing competition situation was according to AG Lenz inherent in the system that impedes fair competition between the football clubs. This opinion has reportedly «inspired the European Commission to pro-actively use EU competition law as a source of political and legal leverage to obtain a reform of the FIFA RSTP».<sup>50</sup>

The *Bosman* ruling qualified international sport bodies as undertakings and their organisational rules as agreements between undertakings, which meant that they were subject to the Commission's control under European competition law following the procedure laid down by Regulation no. 17/62. After this ruling, the Commission felt empowered to formally challenge FIFA's organisational rules under competition law. In 1997 FIFA notified its amended RSTP to the Commission for a compatibility evaluation with European competition law. FIFA had abolished the transfer fees for out-of-contract players but in the Commission's opinion the economic effect of maintaining the transfer fees for in-contract players would still restrict competition. Therefore, it issued a statement of objections addressed to FIFA stating this concern. A statement of objections is the official notification to the undertakings under competition proceedings that a prohibition

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47 Opinion of the Advocate General Lenz delivered on 20 September 1995, Case C-415/93, *Union Royale Belge des sociétés de Football Association et alii v. Bosman et alii*, ECLI:EU:C:1995:293.

48 The CJEU case law has established that «the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed» see CJCE, 23.04.1991, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, ECLI:EU:C:1991:161.

49 *Ibid*, para 262.

50 DUAL (2016), p. 89.

decision finding an infringement of EU competition law was about to be made, potentially accompanied by a high fine. Undertakings have the right to negotiate and offer remedies to the Commission in order to address its concerns as laid down to the statement of objection. This negotiation could lead either to informal settlements or commitment decisions under Regulation no. 17/62.

In the 1999 Commission's guidelines on the application of competition rules to sport<sup>51</sup> we find some of the reasons for the Commission to challenge FIFA's transfer rules. Amongst those reasons we find that the clubs (undertakings) had decided together how the system of fixing and paying the transfer fee will work. They had therefore given up the freedom of clubs to hire players by transfer without a fee or in return for a fee that is calculated objectively on the basis of real costs incurred by the old club for training and promoting the players. Clubs had also given up the possibility of hiring players who have unilaterally terminated their contract, therefore conserving the transfer system as it is. In the Commission's opinion the fact that these rules applied to all international transfers of players within the European Union, as well as the fact that the fees are fixed too high, or even at exorbitant levels for best players are «sufficient demonstration that their purpose and effect is significantly to restrict or to distort competition on the market in professional football matches staged by the first-division clubs in the Community and the EEA».<sup>52</sup> Also, the ban on transfers following a unilateral termination of a contract by a player in cases where the player has fulfilled all obligations under national employment law, as well as the standard employment contract between players and clubs represent a violation of the European provisions on free movement of workers because such measures can restrict the right of free movement of young athletes. Hence, FIFA should withdraw its ban on the transfer of players who have unilaterally terminated their contract, provided that they have fulfilled their contractual obligations under national law.

Following the statement of objections, negotiations between the football industry and the Commission started in order to find a common ground and in 2001 a joint FIFA/UEFA Task Force was created in order to work on devising a reform proposal that would be acceptable by all stakeholders and in conformity with European competition law.<sup>53</sup> The Commission and the football industry came to an agreement in 2001 that ended the competition proceedings and laid down the principles that influenced the current structure of the international transfer system of football players. Amongst those principles, the ones with special interest in regards to players employment contracts are those that provide

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51 European Commission, 1999, *Preliminary guidelines on the application of the competition rules to sport*, Internal Memo O/99/59, SEC (1999) 249.

52 *Ibid*, para 30.

53 PARRISH (2003), p. 142; VAN DEN BOGAERT (2005), p. 230.

for: the creation of one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season; the minimum and maximum duration of contracts of respectively 1 and 5 years; the contracts to be protected for a period of 3 years up to the age of 28 and 2 years thereafter; for the system of sanctions to be implemented in a way that preserves the regularity and proper functioning of sporting competition so that unilateral breaches of contract are only possible at the end of a season; for a financial compensation to be paid if a contract is breached unilaterally by the player or the club; and for proportionate sporting sanctions to be applied to players, clubs or agents in the case of unilateral breaches of contract without just cause during the protected period.<sup>54</sup> Under the new Regulation no. 1/2003<sup>55</sup> on European competition law procedures, undertakings have a larger operating framework to propose remedies and put an end to the competition proceedings by an official commitment decision.

## V. The effect of transnational football bodies on transnational mechanisms of dispute resolution

According to the European Commission, sport, in general, has a huge economic impact in the EU: €407 billion in 2004, representing 3.7% of the EU GDP and employing 15 million persons (5.4% of the labour force).<sup>56</sup> The financial transformation of the clubs over the years and the liberalisation of labour migration for footballers had as a consequence an extreme increase in players' wages creating a gap between the top clubs and the lower leagues.<sup>57</sup> This situation can create obstacles in the functioning of the football market due to the lack of an effective social dialogue for collective agreements in the industry and of truly representative social partners.<sup>58</sup> The Lisbon Treaty tried to fill this gap by establishing a supporting competence for the EU in the sport sector in articles 165 and 166 TFEU. These articles legitimated the EU's role in taking initiatives to promote sporting issues that are limited to incentive measures, excluding any legislative harmonisation. It also officialised the submission of international

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54 Commission Press Release (2001), *Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers*, IP/01/314, in [http://europa.eu/rapid/press-release\\_IP-01-314\\_en.htm](http://europa.eu/rapid/press-release_IP-01-314_en.htm) (15.01.2018).

55 Council Regulation (EC) 1/2003, *Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, 2003, O.J. L1, 04.01.2003, p. 1.

56 European Commission DG Competition (2017), *EU competition policy and the sports sector*, in [http://ec.europa.eu/competition/sectors/sports/overview\\_en.html](http://ec.europa.eu/competition/sectors/sports/overview_en.html) (15.1.2018).

57 ANDREFF (2016); COGNARD (2012).

58 PRIMAULT (2016); O'LEARY (2017), p. 157.

sporting bodies to the internal market law control and the proportionality principle. However, article 165 (1) TFEU stipulates that the EU must take account of the specific nature of sport, a notion that allows transnational bodies to pass rules and regulations that would be otherwise accepted with difficulty by the European institutions in other economic sectors.<sup>59</sup> These rules and regulations affect the contractual freedom of players and clubs. The lack of harmonisation of labour law and contract law in Member States could make the resolution of contractual disputes between players and clubs before national civil courts a very long and costly procedural battle.<sup>60</sup>

Employment contracts of professional players must be in conformity with the national legislation of the country where the club is registered and its courts have competence over breaches of contractual agreements. However, the organisational rules of FIFA create a parallel system of transnational labour and contract law norms. In the case of a contractual disagreement the FIFA RSTP designs three bodies for dispute resolution concerning its regulations. First, the Dispute Resolution Chamber (hereinafter DRC) that is composed by 24 members in total, half of them being players' representatives and the other half clubs representatives, appointed by the FIFA Executive Committee on the proposal of the players' associations and clubs or leagues. This body is competent for resolving disputes between clubs and players in relation to the maintenance of contractual stability where there has been a request for an International Transfer Certificate, employment-related disputes between a club and a player of an international dimension and disputes relating to training compensation and the solidarity mechanism. Second, the Players' Status Committee (hereinafter PSC) that is composed according to the procedure laid down on the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber<sup>61</sup> and its president and vice-president must be members of the Executive Committee. It is competent to deal with employment disputes involving a coach and an association and a club, disputes between clubs that don't fall in the scope of DRC's competence and disputes linked to the issuing of an International Transfer Certificate. The above – mentioned bodies are internal to FIFA's structure and they adjudicate in the presence of at least three members unless the case is considered of a simple nature and can be dealt by a single judge.

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59 WEATHERILL (2012).

60 CJCE, 16.03.2010, Case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC*, ECLI:EU:C:2010:143 ; Cass. Soc., 6 oct. 2010, *Olympique Lyonnais SASP v. Olivier Bernard, Newcastle UFC*, Bull. civ., V, n° 07-42023.

61 La Fédération Internationale de Football Association-FIFA.com (2017), *Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber*, in [http://resources.fifa.com/mm/document/affederation/administration/02/92/54/28/rulesgoverningtheproceduresoftheplayersstatus-committeeandthedisputeresolutionchamberdezember2017\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/92/54/28/rulesgoverningtheproceduresoftheplayersstatus-committeeandthedisputeresolutionchamberdezember2017_neutral.pdf) (15.01.2018).



The members of the DRC designate amongst themselves one single judge for the players and one for the clubs. If the single judge of the DRC considers that the case involves «fundamental issues» the case can be referred to the chamber. The single judge of the PSC is its Chairman or a person appointed by him or her.

The decisions of these two bodies may be appealed within specific delays before the third dispute resolution mechanism which is the Court of Arbitration for Sport (hereinafter CAS). FIFA introduced an arbitration clause in favour of the CAS in its statutes in 2002. Each club or player that participates in DRC or PSC proceedings, without raising any direct objection regarding the CAS arbitration clause or the jurisdiction of the DRC and the PSC, is bound by a CAS arbitration clause, according to the jurisprudence of the Swiss Federal Tribunal. Awards of CAS can be challenged by the parties before the Swiss Federal Tribunal under very strict conditions, which makes the CAS a de facto ultimate arbiter of matters involving the FIFA RSTP.<sup>62</sup> The voluntary character of arbitration does not prevent the parties from recourse to national courts. This was also part of the Agreement between the Commission and the football industry that followed Bosman and aimed at safeguarding the due process rights of the persons affected by the RSTP.

FIFA's RSTP article 22 stipulates that FIFA is competent to hear claims based on the RSTP without prejudice to the right of any player or club to seek redress before a civil court for employment related disputes. Despite the option offered to parties to bring their case before a national court, the majority of transnational labour disputes arising from the professional football employment field are dealt by FIFA's dispute resolution bodies. Some of the reasons for this concentration is that these bodies follow fast procedures at a very low cost when compared to traditional labour disputes before national courts. Also, a possible bias of a national court in favour of one of the two parties is, at least in theory, less plausible in a transnational environment.<sup>63</sup> Most important, players and clubs use FIFA's dispute resolution bodies as a way to claim exorbitant salaries or damages that would otherwise be difficult to prove and justify before national labour proceedings. Especially in cases of international transfers, if there is a pending contractual dispute between the player and his former club, the former football association must refuse to provide the ITC and the player and/or his new club will have to turn to the PSC to obtain a provisory registration with the new club. If there are no pending national proceedings, the DRC will automatically have the

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62 Rigozzi (2010), p. 263.

63 Duval (2016), p. 99.

competence to adjudicate the contractual dispute. If the player or the club have turned to the national courts the DRC will refuse to adjudicate the case to avoid parallel process and forum shopping.<sup>64</sup>

## VI. Conclusion

The liberalisation of an economic sector such as sports without its submission to a conformity control under substantive law can have negative economic and social impacts in a free market economy. In order to avoid distortion of competition, the raise of burden of debt for clubs, social dumping and forum shopping, the EU has been engaging in a long and difficult dialogue with the stakeholders of the football industry in order to create the framework to control transnational sporting norms under EU internal market law.<sup>65</sup> The funding of players' wages and transfer fees varies considerably between countries within the EU and outside. In the absence of a transnational labour law or contract law most of the contractual disputes are often resolved via arbitration.<sup>66</sup>

The European Commission tries to engage the transnational bodies in a social dialogue that can offer some minimum protection for players. After a joint request by FIFPro and the representatives of the European Professional Leagues, a social dialogue committee was established in 2008 that resulted in an agreement in 2012 on minimum requirements in standard players' contracts and further discussions are planned.<sup>67</sup> The Commission also promoted the Financial Fair Play in 2010 within UEFA that does not allow for the clubs which participate in European competitions to spend more money than they earn, in a way to establish a monetary cap that should provide balance to the football market. The UEFA Executive Committee approved the formation of the two-chamber Club Financial Control Body (CFCB) in June 2012 to oversee the application of the UEFA Club Licensing and Financial Fair Play Regulations.<sup>68</sup> In these initiatives the Commission sees an alternative source of global regulation in the absence of a global state but also a legitimization of its actions and initiatives to promote the players interests in an industry dominated by the interests of the club owners.

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64 BELOFF (2012).

65 TENREIRO (2015).

66 LOQUIN (2003).

67 PARRISH (2016); MIÈGE (2017), p. 275.

68 The Union of European Football Associations-UEFA.com (2017), *Protecting the game: Financial Fair Play*, in <https://www.uefa.com/insideuefa/protecting-the-game/club-licensing-and-financial-fair-play/index.html> (15.01.2018).

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