

# Sport in the European Union

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Sport in the European Union:  
All sound and no fury?

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# **Sport in the European Constitution:**

## **All sound and no fury?**

*Stefaan Van den Bogaert & An Vermeersch \**

### **Abstract**

This contribution discusses the formal inclusion of sport in the Treaty establishing a Constitution for Europe. It shall assess whether Articles I-17 and III-282 can be legitimately expected to provide the necessary impetus to create a coherent and deliberate European sports policy. In order to come to a balanced judgement in this respect, the past and present dealings with sports issues of the European institutions, predominantly the European Commission and the Court of Justice, shall be analysed. It will become clear that the introduction of sport as an official Union policy in the Constitutional Treaty would not entail drastic changes in the EU approach to sport, but could nevertheless generate a number of positive effects.

### **Keywords**

Sport – EU – constitution – direct policy – indirect approach

### **Introduction**

Sport is a universal phenomenon with great social and economic relevance. The budget for the 2012 Olympics in London exceeds £2 billion. An increasing number of athletes play sports professionally. Millions of people watch their performances live at the stadium or on television. A fitting regulatory framework is required to steer sports practice in the right direction. Traditionally, this has been the prerogative of the sporting associations. Gradually, also local and national governments become involved in this. At European level, however,

sport is nowhere mentioned in the EC Treaty. In view of its international character par excellence, this absence is remarkable. All the more so, because the European institutions are actively engaged in sporting affairs. Currently, mere two Declarations, emphasising the specific characteristics of sport and its social, educational and cultural significance, have been adopted during the Intergovernmental Conferences of Amsterdam<sup>1</sup> and Nice<sup>2</sup>.

On the occasion of the revision of the existing European Community Treaties, the European Convention did insert two provisions relating to sport in the Treaty establishing a Constitution for Europe, hereby officially recognising sport for the first time as an area of Union policy.<sup>3</sup> This Constitutional Treaty was scheduled to enter into force on 1 November 2006. However, two referenda held in France and the Netherlands, two Founding Fathers of the European construct, resulted in a vigorous rejection of the Constitution. The outcome of these popular votes has plunged the EU into an unprecedented crisis. At the moment, it remains very much to be seen whether the 25 Member States will succeed in ratifying the Constitutional Treaty at all, and if they manage to do so, whether it will be in its current form, or rather in a more diluted version.<sup>4</sup> The future of sport in the Treaty is thus already in doubt, before it even really has had a present, let alone a past. This ongoing ratification crisis provides an excellent opportunity to evaluate Articles I-17 and III-282 upon their strengths and weaknesses. These provisions are unmistakably intended to give an impetus to a more coherent and deliberate European sports policy. It shall be analysed whether they can realistically be expected to achieve this goal. In order to come to a balanced judgement in this respect, the already developed – direct and indirect – European sports approach shall be

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<sup>1</sup> Declaration (N° 29) on Sport, annexed to the final act of the Treaty of Amsterdam [1997] OJ C340/136.

<sup>2</sup> Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, annexed to the Conclusions of the Nice European Council, Bulletin EU, 12-2000.

<sup>3</sup> Articles I-17 and III-282 Treaty establishing a Constitution for Europe (2004) OJ C 310.

<sup>4</sup> Declaration by the Heads of State or Government of the EU Member States on the ratification of the Treaty establishing a Constitution for Europe, annexed to the Conclusions of the Brussels European Council (16-17 June 2005), SN 117/05.

subjected to scrutiny.<sup>5</sup> The repercussions of an eventual failure to ratify the Constitutional Treaty for Europe's sports policy will also be considered.

### **Sport in the Treaty establishing a Constitution for Europe**

During the sessions of the European Convention, several options with regard to the future role of the EU in the field of sport passed the review.<sup>6</sup> Firstly, one considered whether sport could be granted an exemption from the application of the Community rules, a solution which many sporting federations favoured.<sup>7</sup> This would enable them to settle their affairs internally. And the European institutions would no longer be saddled with difficult, long and costly disputes relating to sport. However, it is highly uncertain whether such a solution would turn out to be an improvement for all clubs, athletes and federations concerned. Moreover, for such an exemption to be formalised in a Treaty amendment or a Protocol attached to the Treaty, the approval of all Member States is required to revise the Treaty in this respect.<sup>8</sup> It seemed improbable that such a consensus could ever be found.<sup>9</sup> Besides, the sporting world has failed to come up with convincing arguments which would justify taking such a drastic measure.<sup>10</sup> For these reasons, this option was firmly discarded. Secondly, one also contemplated a status quo, implying that the Community institutions are simply to proceed with their activities in the domain of sport, without any formal changes being made to the Treaty. Arguably, this option would not cause the Community's indirect approach to sport to undergo any radical changes, as the Treaty provisions on freedom of movement rules and competition law would continue constituting the regulatory framework against which the lawfulness of sporting rules and practices is scrutinised. It would

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<sup>5</sup> On the distinction between indirect and direct sports approach, Tokarski, Steinbach, Petry and Jesse, *Two Players – One goal? Sport in the European Union* (Meyer & Meyer, Oxford, 2004), p. 61. These two aspects reflect the dual mechanism that traditionally guides the European integration process: negative versus positive integration. Parrish, 'The Politics of Sports Regulation in the European Union' (2003) 10 *Journal of European Public Policy*, p. 250.

<sup>6</sup> Parrish, *Sports law and policy in the European Union* (Manchester, Manchester University Press, 2003), pp. 211-216.

<sup>7</sup> Foster, 'Can Sport Be Regulated by Europe?: An Analysis of Alternative Models', in Caiger & Gardiner (eds.), *Professional Sport in the European Union: Regulation and Re-regulation* (The Hague, TMC Asser Press, 2000), p. 43; Husting, 'Quelle reconnaissance pour l' "exception" ou pour la spécificité sportive dans la nouvelle constitution européenne?' (2004) 481 *Revue du Marché commun et de l'Union européenne* 515.

<sup>8</sup> Fernández Salas, 'De la possibilité de renverser l'arrêt 'Bosman' par une modification du Traité. Perspectives juridiques' (1996) 1 *RMUE*, p. 155.

<sup>9</sup> Van Nuffel, 'Case law: Bosman' (1996) 2 *Col JEL*, p. 345.

also mean a continuing lack of direct EC competence in sports. This was regarded as being not entirely satisfactory either. Therefore, finally, one envisaged including an explicit reference to sport in the new Treaty. The French ministry for sport launched the initiative.<sup>11</sup> After some modifications, especially during the Italian presidency,<sup>12</sup> the following text was ultimately adopted by the IGC:

#### Article I-17

*'The Union shall have competence to carry out supporting, co-ordinating or complementary action. Such action shall, at European level be: ... (d) Education, youth, sport and vocational training ...'.*

#### Article III-282

*'1. [...] 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.*

*Union action shall be aimed at:*

*[...] (g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and co-operation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.*

*2. The Union and the Member States shall foster co-operation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.*

*3. In order to contribute to the achievement of the objectives referred to in this Article:*

*(a) European laws or framework laws shall establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee;*

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<sup>10</sup> Weatherill, 'Do sporting associations make law or are they merely subject to it?' (1999) 13 *Journal of the Society for Advanced Legal Studies*, p. 24.

<sup>11</sup> CONV 478/03, 'The place of sport in the future Treaty', 10 January 2003. Also Commissioner Reding insisted on this: *Agence Europe*, N° 8400, 14 February 2003, 17.

<sup>12</sup> CIG 52/03 ADD1, 'IGC 2003, Naples Ministerial Conclave: Presidency proposal', 25 November 2003; CIG 60/03 ADD1, 'Intergovernmental Conference ADDENDUM 1 to the Presidency proposal', 9 December 2003.

*(b) the Council, on a proposal from the Commission, shall adopt recommendations.'*

The potential importance of these Treaty provisions lies principally in the fact that they would help to create clarity on the so-called 'legal environment of sport'.<sup>13</sup> This insertion of sport in the formal Treaty framework would turn it into an official Union policy. It has partially also a symbolic character, for it would 'legitimise' initiatives already taken in the domain of sport. For the first time, the EU would be granted an express, albeit limited, role to play in the field of sport. Moreover, these Articles would demarcate the level playing field of the EU in sport, stipulating that the Union can only engage in supporting, co-ordinating and complementary action. The competence in this context would thus rest primarily with the Member States and the sporting federations. The Union would only have a role of secondary importance to play. The sporting associations do not have to fear that their regulatory competences have been encroached upon.

Practically, Article III-282 would provide the necessary legal and financial basis for the further development of a coherent direct sports policy. This provision focuses mainly on the social and educational aspects of sport. It comprises general and high-profile goals such as the development of the European dimension in sport, the promotion of fairness and openness in sporting competitions and co-operation between sports bodies, and the protection of the physical and moral integrity of sportsmen and sportswomen. Simultaneously, the Union is given only a limited set of instruments 'to contribute to the achievement of these objectives', as European laws or framework laws can merely establish incentive measures. Besides these, the Council can adopt only recommendations. Furthermore, harmonisation of the Member States' laws and regulations is explicitly prohibited. These restrictions illustrate that the role of the Union in the field of sport is to remain limited. In this respect, it is nevertheless submitted to reconsider this exclusion of any harmonisation of the laws and regulations of the Member States. It seems possible to envisage areas of sport in which harmonisation at supranational level might actually be the solution to a particular problem. This does not automatically have to contradict with the limited competence of the Union in sporting affairs. In the fight against doping, for example, the Union

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<sup>13</sup> According to a survey, 62% of the European citizens support the enshrining of sport in the Constitution. However, only one out of two respondents (51%) supports an increased intervention of the EU in sport; 34% do not support this idea. Special Eurobarometer, The citizens of the European Union and Sport, November 2004.

could arguably fulfil a useful complementary role by providing a legal framework for the uniform implementation (in all Member States) of arrangements agreed upon at international level, e.g. within the World Anti-Doping Agency (WADA). However, since harmonisation in this domain is ruled out by Article III-282 Constitution, and cannot be realised on the basis of the provisions on public health either,<sup>14</sup> the Union's intervention in this field will continue to be limited to the subsidising of research and initiatives to raise public awareness and educate young sporting people.<sup>15</sup> At a meeting of the EU sports ministers at the end of 2004, it was decided to organise consultations at national and European level in order to define the future policy and to implement the new sports provisions.<sup>16</sup> Supposedly, the follow-up of the European Year of Education through Sport could also offer some input for the future sports policy.<sup>17</sup> One could think of extending measures that exist already, like promotional campaigns, exchange projects and other projects supporting European sporting activities, as core elements of the future policy.

Strictly legally speaking, the new Treaty provisions on sport would have no immediate bearing on the Union's indirect approach to sport. In this context, their importance seems to be of a mere symbolic nature. The recognition of sport as an official Union policy could very well constitute the decisive impetus for the Union institutions to firmly subject sporting activities in their economic dimensions to the Treaty's trade law rules and to keep the privileged treatment linked with the special status of sport within appropriate proportions, balancing the special features of sport evenly with the exigencies of free movement and competition law. In this respect, it is worth pointing out that Article III-282(1) merely mentions that the Union shall take 'account of the specific nature of sport, its structures based on voluntary activity and its social and educational function' while contributing to the promotion of European sporting issues. Contrary to what the federations may have wished for, this particular clause clearly is not going

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<sup>14</sup> Article III-278(4) Constitutional Treaty leaves the possibility of harmonisation open only for a set of strictly defined purposes of common safety concerns in public health matters. However, the Community legislature cannot be prevented from relying on Article 95 EC: Case-376/98 *Germany v European Parliament and Council of the EU* [2000] ECR I-8419, para. 88.

<sup>15</sup> Speech by Commissioner Figel at the public hearing on 'Drug-taking in Sport: Obstacle to the Ideal of Athleticism?', European Parliament, Brussels, 29 November 2004. However, the 2004 Eurobarometer survey shows a great level of public expectation (80%) in relation to EU action in the fight against doping. Special Eurobarometer, above n. 14.

<sup>16</sup> Presidency Conclusions, Informal EU sports ministers conference, The Hague, 1&2 December 2004.

<sup>17</sup> Joint Declaration by the Troika ministers for education and sport and the European Commission, 2 December 2004; Speech by Commissioner Reding at the meeting with European sport federations, 'Sport et Union européenne: ensemble pour relever de nouveaux challenges', Brussels, 6 October 2004.

to bring about a change in the current application of Community law to sport. The Union would only be obliged to take into account the specific nature of sport when it undertakes direct action in sport on the basis of Article III-282. On this particular issue, it could even be argued that the Constitutional Treaty retreats one step compared to the Declaration on Sport adopted in Nice. In the latter, it was stipulated in a more general way that '[...] 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, [...]'.<sup>18</sup> However that may be, it is submitted that the decision of the European Convention and the subsequent IGC not to reassert this phrase is unobjectionable. In any event, it would not have provided a general exemption status for sport. Such a clause would only give rise to a lot of controversy and would risk being invoked and interpreted inappropriately.

## **Direct Sports Policy**

Despite the absence of an express Treaty competence with regard to sport, the Community institutions have managed to develop some kind of direct sports policy over the years. The origins of this direct sports approach go back to the 1984 Fontainebleau European Council<sup>19</sup> and the Adonnino Report on 'A People's Europe'.<sup>20</sup> At that time, the Community's policy concentrated on the potential of sport to achieve 'European goals'. Sport was in the first place considered as a forum for communication among peoples, a tool to strengthen the image of the EU in the minds of its citizens.<sup>21</sup> Concretely, the Community's involvement in the field of sport remained for the most part limited to the funding of international sporting competitions like the European Sailing Regatta or the Tour de l'Avenir in cycling.<sup>22</sup> After the adoption of the Single European Act in 1986, Community interest in the field of sport moved onto a broader social, educational and cultural plane and the first pleas for the development of a European sports policy

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<sup>18</sup> Emphasis added.

<sup>19</sup> Conclusions of the Fontainebleau European Council (25-26 June 1984), Bulletin European Communities, 6-1984.

<sup>20</sup> Adonnino Report, 'A People's Europe', Bulletin European Communities 6-1985, Suppl. 7/85.

<sup>21</sup> Ibidem, 5.9; European Parliament, Resolution on sport in the Community, 13 April 1984, [1984] OJ C 127/142.

<sup>22</sup> Tokarski, Steinbach, Petry and Jesse, above n. 5, pp. 62-63.

emerged.<sup>23</sup> This growing interest in sport resulted in official recognition of sport at institutional level in the EU. Nowadays, the Directorate General on Education, Training & Youth of the European Commission comprises a separate sports unit. Since the early 1990's, the Commission also organises an annual European Sports Forum, bringing together the sporting federations and representatives of the national and regional administrations, the so-called sports directors, to structure the dialogue with the sporting world.<sup>24</sup> In the European Parliament, the Committee on Culture and Education deals with sports issues. Furthermore, the ministers of sport of the Member States regularly meet on an informal basis.

Be that as it may, however, it has by no means proved to be a straightforward exercise to create a coherent and comprehensive direct sports policy. The lack of an express reference to sport in the EC Treaty has inevitably had repercussions. Firstly, the Community 'actions' relating to sport remained limited to the level of communications, resolutions, reports or declarations of intent, emphasising, in particular, the social and educational function of sport. As the Treaty contains no clear legal basis for action in the domain of sport, the Community institutions have to be careful not to overstep the limits of their competences. Besides, the sporting associations firmly hold on to their self-proclaimed regulatory autonomy and only reluctantly accept any interference into their affairs. After the decision of the Court of Justice in *Bosman*,<sup>25</sup> Community action in the field of sport nonetheless intensified. The Commission elaborated, *inter alia*, the 'Helsinki report on sport', in which the protection of young sportsmen and female athletes and the fight against doping were identified as the principal objectives, besides the fight against the excessive commercialisation and economic interpenetration of sport.<sup>26</sup> At the Intergovernmental

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<sup>23</sup> European Parliament, Resolution on sport in the European Community and a People's Europe, 17 February 1989, [1989] OJ C 69/234.

<sup>24</sup> In 2004 there was no European Sports Forum. However, the Commission organised a consultation conference with the European Sport movement on 14-15 June 2005. See 'Sports movement wants EU to take account of sport in other policy areas', 16 June 2005, <http://www.euractiv.com>.

<sup>25</sup> Case C-415/93 *URBSFA v Bosman* [1995] ECR I-4921.

<sup>26</sup> Communication from the Commission (COM (1999) 644 and /2), Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework ('The Helsinki report on Sport'). Consult <http://europe.eu.int/comm/sport/>. For detailed analysis, consult Weatherill, 'The Helsinki Report on sport' (2000) 25 *ELRev* 282. See also: Presidency Conclusions, Vienna European Council, (11 & 12 December 1998), Bulletin EU 12-1998; A-4-0197/97, 'Report on the role of the European Union in the field of sport', Rapporteur: Pack, 28 May 1997; European Parliament, Resolution on the role of the European Union in the field of sport, 13 June 1997, [1997] OJ C 200/252; A3-0326/94/PART A, 'Report on the European Community and Sport', Rapporteur: Larive, 27 April 1994; European Parliament, Resolution on the European Community and sport, 6 May 1994, [1994] OJ C 205/486.

Conferences in Amsterdam and Nice, the Heads of State and Government adopted the two aforementioned Declarations relating to sport.<sup>27</sup> These Declarations unmistakably have considerable political relevance, the Amsterdam Declaration being referred to by the Luxembourg courts in their rulings.<sup>28</sup> The fact remains that the European Council eschewed from integrating sport in the official Treaty framework and that the Declarations are essentially non-binding instruments.<sup>29</sup> Consequently, the Commission nowadays still often has to use its imagination to find an appropriate legal basis for any given action or measure in the area of sport. For example, after the initiative had been taken to conceive 2004 as the European Year of Sport,<sup>30</sup> a link with the Community's education policy was found, so as to endow the official Decision<sup>31</sup> with an appropriate legal basis.

Secondly, the absence of a Treaty provision on sport also has financial consequences. The Court of Justice has stated that each item in the budget requires a legal basis.<sup>32</sup> As a result, the European Commission was forced to suspend the Eurathlon programme,<sup>33</sup> through which the Union supported several sporting events between 1995 and 1998.<sup>34</sup> In spite of this, the Community nevertheless manages to be actively involved in the financing of various sports related activities.<sup>35</sup> The sums invested are, however, relatively modest. In 2003, the European Year of People with Disabilities, for example, EUR 6 million were donated for the organisation

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<sup>27</sup> See above, n. 1-2.

<sup>28</sup> Case T-313/02 *Meca-Medina & Majcen v Commission*, judgment of 30 September 2004, nyr., para. 38; Case C-176/96 *Lehtonen and Castors Canada Dry Namur-Braine v FRBSB* [2000] ECR I-2681, para. 33; Joined Cases C-51/96 and C-191/97 *Deliège v Ligue Francophone de Judo et Disciplines ASBL and others* [2000] ECR I-2549, para. 42.

<sup>29</sup> Weatherill defines the negotiations at the Amsterdam and Nice IGC as marked by 'the refusal to exempt sport, but the temptation to garland it with laurel': Weatherill, "'Fair Play Please'", *Recent Developments in the Application of EC Law to Sport* (2003) 40 *CMLRev.*, p. 89.

<sup>30</sup> Already in 1997 the European Parliament called for the organisation of a 'European Year of Sport'. A-4-0197/97, 'Report on the role of the European Union in the field of sport', Rapporteur: D. Pack, 28 May 1997; European Parliament, Resolution on the role of the European Union in the field of sport, 13 June 1997, [1997] OJ C 200/252.

<sup>31</sup> Decision 291/2003/EC of the European Parliament and the Council of 6 February 2003 establishing the European Year of Education through Sport 2004, [2003] OJ L 43/1.

<sup>32</sup> Case C-106/96 *UK v Commission of the European Communities* [1998] ECR I-2729. Hervey, 'Case C-106/96 UK v Commission of the European Communities' (1999) 36 *CMLRev.* 1079. On the 'abuse of budgetary powers', Dashwood, 'The Limits of European Community Powers' (1996) 21 *ELRev* 126.

<sup>33</sup> Consult <http://europa.eu.int/scadplus/leg/en/lvb/l35001.htm>.

<sup>34</sup> Tokarski, Steinbach, Petry and Jesse, above n. 5, p. 64; IP/94/980, 'Eurathlon', Brussels, 25 October 1994.

<sup>35</sup> Two provisions in the Community budget provided for the funding of sport related projects: European Year of Education through Sport; Preparatory measures for a Community policy in the field of sport. The latter is a preparatory action within the meaning of Article 49(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2002] OJ L 248. In addition, 'sport projects' can be funded indirectly under programmes relating to Community policies such as health, youth, education, environment, research, regional policy.

of the Dublin Special Olympics.<sup>36</sup> And during the 2004 European Year of Education through Sport, a total sum of EUR 6,5 million was divided amongst 200 sports projects, ranging from the creation of a European Academy for Sport Leaders over the organisation of a Coaches-on-Tour event to projects aimed at enhancing the participation in leisure sports programmes for children and young people.<sup>37</sup> Also a number of sports related studies<sup>38</sup> and campaigns<sup>39</sup> have been funded with Community budgets.

In view of all this, it is unsurprising that the Community's direct sports policy appears rather moderate, inconsistent, unstructured and lacking in effectiveness. The struggle to develop an anti-doping policy at Community level perfectly illustrates this point. After the infamous events in the 1998 Tour de France, in which a large quantity of prohibited substances was intercepted by the police in a bus belonging to the Festina team, the Vienna European Council, the European Parliament, the Committee of the Regions and the Member States' ministers of sport urged the Commission to issue proposals for a more harmonised public health policy with a view to combating doping.<sup>40</sup> The Commission responded with an ambitious support plan, identifying three main challenges in the fight against doping: (1) to assemble experts' opinions on the ethical, legal and scientific dimensions of doping; (2) to contribute to preparing the creation of a World Anti-Doping Agency; and (3) to mobilise relevant Community competences and instruments.<sup>41</sup> However, it has proved hard to concretise these ambitions. The Commission was effectively involved in the creation of WADA in 1999 and did act (together with a representative from the EU Presidency) for two years as EU representative in the WADA Foundation Board.<sup>42</sup> Nevertheless, due to the fact that the Board was 'not prepared to take decisions which are

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<sup>36</sup> IP/03/855, 'Special Olympics for people with learning disabilities open in Dublin with the support of the European Union', Brussels, 18 June 2003.

<sup>37</sup> IP/04/1433, 'European Year of Education through Sport: mutual learning and exchange of best practice to the fore as the Year draws to a close', Brussels, 2 December 2004.

<sup>38</sup> E.g. at the end of 2004, four sport related studies were finalised with support from the European Community (<http://www.europa.eu.int/comm/sport>).

<sup>39</sup> E.g. the joint anti-smoking campaign with UEFA, see IP/04/735, 'EURO 2004 feels free to say no to smoking', Brussels, 11 June 2004.

<sup>40</sup> Presidency Conclusions, Vienna European Council, (11 & 12 December 1998), Bulletin EU 12-1998; European Parliament, Resolution on urgent measures to be taken against doping in sport, 9 April 1999, [1999] OJ C 98/291; Committee of the Regions, Opinion on 'the European Model of Sport', 16 September 1999, [1999] OJ C 374/56.

<sup>41</sup> COM (1999) 643 Final: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, 'Community support plan to combat doping in sport', Brussels, 1 December 1999.

necessary to reconcile the WADA budgetary rules with Community financial rules', the Commission refused to present a proposal for a structural funding of the Agency.<sup>43</sup> Accordingly, Commissioner Reding withdrew from the Board and the Member States had to look for alternatives to arrange the 'European' contribution to WADA.<sup>44</sup> Moreover, the rivalry between three EU cities (Bonn, Stockholm and Vienna) to obtain the seat of the WADA headquarters illustrates the lack of solidarity and unity among the Member States in this field. Ultimately, Europe, that traditionally played a flagship role in the battle against doping,<sup>45</sup> lost the headquarters to Montreal. Despite the high sounding words in the aftermath of the Festina Tour, it must thus be acknowledged that the role of the Community is currently merely limited to ad-hoc co-operation with WADA, along with funding research projects and campaigns to raise public awareness,<sup>46</sup> whereas the hard-core decisions and the implementation of a world-wide anti-doping policy are left to other levels, like WADA, the Council of Europe, UNESCO<sup>47</sup> and the individual Member States.<sup>48</sup>

All in all, the conclusion seems to be that, despite the meritorious efforts to develop and streamline a direct sports policy, the 2004 EYES programme being a respectable attempt to this effect, these are almost bound to remain merely modest or marginal, until official legitimacy is given in the Treaty to pursue further action in the domain of sport.<sup>49</sup>

## **Indirect Sports Approach**

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<sup>42</sup> WADA was created on 10 November 1999, with Lausanne as the provisional headquarter. See constitutive instrument of foundation, Antoine RoCHAT, Notary Lausanne, 10 November 1999.

<sup>43</sup> IP/01/1727, 'Community funding of the operating budget of the World Anti-Doping Agency has been ruled out', Brussels, 3 December 2001.

<sup>44</sup> Today, the Member States of the European Union have three representatives in the Board. The Council of Europe has two representatives. See <http://www.wada-ama.org>. The EU Member States coordinate their (financial) commitments towards WADA within the framework of the Council of Europe. ([http://www.coe.int/T/E/cultural\\_co-operation/Sport/Doping](http://www.coe.int/T/E/cultural_co-operation/Sport/Doping)).

<sup>45</sup> See the adoption of the 1989 European Anti-Doping Convention by the Council of Europe ([http://www.coe.int/T/E/cultural\\_co-operation/Sport/Doping](http://www.coe.int/T/E/cultural_co-operation/Sport/Doping)).

<sup>46</sup> Evaluation report on 16 pilot projects in the area of the fight against doping in sport in Europe, Athens, April 2003; IP/01/1700, 'Fight against doping in sport: the EU takes the lead', Brussels, 30 November 2001.

<sup>47</sup> In October 2005, the UNESCO General Conference adopted an International Convention against Doping in Sport (<http://www.unesco.org> and <http://www.wada-ama.org>).

<sup>48</sup> European Parliament, Resolution on combating doping in sport, 14 April 2005 (<http://www.europarl.eu.int>).

Besides a direct sports policy, the Community institutions have also developed an indirect approach to sport, when assessing the compatibility of sporting rules with the Treaty provisions on freedom of movement or competition law. Practice has shown that the European Court of Justice, when the opportunity presents itself, invariably opts for settling a dispute on the basis of Articles 39 or 49 EC, and subsequently does not pronounce itself any longer on the lawfulness of the contested rule under Articles 81-82 EC. In fairness, so far only the European Commission and the Court of First Instance have dealt with a number of cases on grounds of competition law in sports related matters. In what follows, both strands of the Community's indirect sports approach shall be illustrated and analysed on the basis of a number of relevant cases.

### *Sport & freedom of movement*

Many problems have already arisen between sportsmen and their clubs or federations about the mobility of athletes in the EU.<sup>50</sup> In the first place, the Court of Justice has had to deal with sporting rules imposing nationality requirements. In the regulations of the sporting associations, nationality clauses usually take two different forms: either they exclude athletes from playing for a certain team or from taking part in a sporting competition on grounds of their (foreign) nationality; or they consist of quantitative restrictions for clubs to contractually engage and/or field players of a foreign nationality in official contests.

The Court of Justice has consistently refused to interfere with instances of nationality discrimination concerning matches between national teams. According to an established line of case law, the free movement provisions 'do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.'<sup>51</sup> This hands-off approach of the Court in relation to national teams has not met with substantive criticism. In his opinion on *Bosman*, AG Lenz stated that it appears

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<sup>49</sup> Vermeersch, 'Europees sportbeleid in de startblokken' (2003) 11/12 *Nederlands Tijdschrift voor Europees Recht* 326.

<sup>50</sup> Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International, The Hague, 2005).

<sup>51</sup> Case 36/74 *Walrave and Koch v UCI* [1974] ECR 1405, para. 8; Case 13/76 *Donà v Mantero* [1976] ECR 1333, para. 14; *Bosman*, above n. 25, paras 76 and 127; *Delière*, above n. 28, para. 43.

‘obvious and convincing’.<sup>52</sup> That may very well be, but it must be acknowledged that in contemporary society, the Court’s explanation for this ‘restriction on the scope of Community law’ does no longer reflect reality. In general, matches between national teams are no longer of ‘purely sporting interest’. The Court’s position appears thus to be too generous towards the sporting world. It is submitted that an elegant solution to rectify this would be to adhere in this respect to the position adopted already in *Deliège*.<sup>53</sup> In that case the contested selection rules inevitably had the effect of limiting the number of participants in a tournament, but such a limitation was regarded as being ‘inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted.’<sup>54</sup> Such rules could not in themselves be regarded as constituting a restriction on the principle of freedom of movement. The Court also held that the adoption of one system for selecting participants rather than another must be based ‘on a large number of considerations unconnected with the personal situation of any athlete, such as the nature, the organization and the financing of the sport concerned.’<sup>55</sup> By analogy, it could be stipulated that a rule requiring athletes to have the nationality of the country of which they represent the national team in international sporting events does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the Treaty free movement provisions.<sup>56</sup> This solution appears to be entirely satisfactory: on the one hand, it reflects the assumption that in encounters between national teams, matters such as national pride and identity still play a decisive role and, in principle, outweigh the economic and financial interests at stake. As a result, these matches, in principle, deserve shelter from the application of Community law. On the other hand, it does not turn a blind eye to the reality that matches between national teams often have become huge commercial events. Therefore, when the restrictive effect of these particular nationality clauses goes beyond what is necessary and inherent to organise matches between national teams, Articles 39 and 49 EC will come into play. This conclusion fits squarely into the Court’s principled statement that the ‘restriction on the scope of the provisions in question must remain limited to its

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<sup>52</sup> Lenz AG in *Bosman*, above n. 25, para. 139.

<sup>53</sup> For more information about the case, see also Van den Bogaert, ‘The Court of Justice on the Tatami: Ippon, Wazari or Koka’, (2000) 25 *ELRev.* 554.

<sup>54</sup> *Deliège*, above n. 28, para. 64.

<sup>55</sup> *Deliège*, above n. 28, para. 65.

<sup>56</sup> *Deliège*, above n. 28, para. 69.

proper objective and cannot be relied upon to exclude the whole of a sporting activity' from the scope of the Treaty.<sup>57</sup>

The legal situation of naturalised athletes and sportsmen with a dual nationality could serve as a test-case for the proposed solution. Nowadays, several athletes are prepared to do just about everything to be able to compete in international competitions. Nationality changes are becoming increasingly frequent.<sup>58</sup> Federations do not adopt a uniform position in this respect. Some allow an athlete to compete for a country when he has acquired the nationality of this country, regardless of whether he has already competed for another country,<sup>59</sup> whereas others prohibit a sportsman to wear the shirt of two different countries during his career.<sup>60</sup> There are also federations which make the permission to compete for another country conditional upon fulfilment of a number of conditions, such as a waiting period.<sup>61</sup> It would be interesting to verify to what extent rules hindering naturalised athletes or sportsmen with a dual nationality to play for a given national team can be framed as inherent in the organisation of a sporting competition, and when they must be viewed as going beyond what is inherently necessary, and thus inevitably come under Community scrutiny.

Conversely, the Court of Justice has firmly brandished all discriminatory measures at club level as incompatible with Community law. Already in *Donà*, the Court held that a rule allowing only nationals to take part in matches organised by the responsible national federation, was contrary to Articles 12, 39 and 49 EC.<sup>62</sup> The Court's subsequent dismissal of the nationality clauses in *Bosman* appears to leave no longer room for sporting federations to treat domestic

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<sup>57</sup> *Donà*, above n. 51, paras 14-15; *Bosman*, above n. 25, paras 76 and 127.

<sup>58</sup> A famous example is that of Shaheen from Qatar, 2005 world champion 3000m steeple chase. Originally, he came from Kenya and was called Stephen Cheron. The federation of Qatar offered him lucrative conditions in return for his nationality change.

<sup>59</sup> In cycling, for example, Tchmil participated to the world championships for the former Soviet Union, Ukraine and Belgium (Part IX UCI Cycling Regulations). Originally, this situation also occurred in football. Di Stefano played for Spain, after he had already worn the shirt of Argentina, his country of origin. However, in 1964, FIFA ended this practice.

<sup>60</sup> Nowadays, in football, once a player has represented his country at the international scene, he is in principle not entitled to play for another national team any more (Article 15.2 FIFA 2005 Regulations governing the Application of the Statutes).

<sup>61</sup> For example, Rule 12.10.1 of the statutes of the International Association of Athletics Federations stipulates that in case an athlete acquires a new citizenship, he/she cannot compete for the new country for a period of at least three years after the date when the athlete last represented another member federation in an international championship such as the world championships or the Olympic Games. This period may be reduced to one year, if the two member associations concerned agree.

<sup>62</sup> *Donà*, above n. 51.

players more favourable than foreign players with the nationality of a country belonging to the EU or the European Economic Area (EEA).<sup>63</sup> The Court categorically held that the arguments relating to the maintenance of a traditional link between a club and its country, the creation of a sufficient pool of players for the national team and the preservation of a competitive balance between clubs were not such as to preserve the nationality clauses under the objective justification doctrine.<sup>64</sup> In the light of the discriminatory nature of these nationality clauses, this strict approach is rather unobjectionable.

However, the Court's ruling in *Bosman* did not signal the end of nationality clauses at club level. Many associations held on to quota with regard to third-country nationals. In 2003, the Court was invited to express its opinion on the legality of such nationality requirements. The case of *Kolpak* involved a professional handball goalkeeper of Slovak nationality who played in the German second division and who challenged the rule of the German handball federation, stipulating that clubs were entitled to field only two non-EU/EEA nationals in official matches.<sup>65</sup> The Court concluded that Kolpak, who was legally employed in Germany, could legitimately invoke Article 38(1) of the Association Agreement concluded between the European Communities and Slovakia, which confers the right to equal treatment to Slovak nationals as regards working conditions, remuneration and dismissal in the EU in relation to the host Member State's nationals.<sup>66</sup> Again, the Court showed no inclination to accept the arguments to justify the contested rule, which were grossly the same as in *Bosman*.<sup>67</sup> The potential impact of this decision is far-reaching: the European Communities have concluded international agreements containing a similar equal treatment clause with a large number of third-countries, and arguably, a lot of them seem to fulfil the criteria for direct effect.<sup>68</sup> Admittedly, the dispute in *Kolpak* concerned a national from a country which was, at the time of the proceedings, at the verge of becoming an EU Member State. The impression could therefore not entirely be discarded that the final

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<sup>63</sup> *Bosman*, above n. 25, paras 115-120.

<sup>64</sup> *Bosman*, above n. 25, paras 121-137. In view of the considerable social importance of sporting activities and in particular football in the Community, the Court did accept 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 as legitimate in principle (para. 106). Subsequently, however, it went on to rule that the contested nationality clauses did not comply with the principle of proportionality.

<sup>65</sup> Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135.

<sup>66</sup> *Kolpak*, above n. 65, para. 58.

<sup>67</sup> *Kolpak*, above n. 65, paras 53-57.

<sup>68</sup> Van den Bogaert, '...And another uppercut from the Court of Justice to nationality requirements in sports regulations' (2004) 29 *ELRev.* 267; Dubey, 'Case Note on *Kolpak*' (2005) 42 *CMLRev.* 499.

outcome, in particular the Court's stance on the justification issue, might have been different had the case involved a sportsman from a non-accession country.

After *Kolpak*, the situation was thus not completely clarified yet. An excellent occasion to settle the issue was not long in coming. In the case of *Simutenkov*, a Russian footballer playing for Tenerife complained about the fact that the Spanish football federation had issued a licence as a non-Community player, subjecting him to the quota for non-EU/EEA nationals.<sup>69</sup> In its judgment, the Court followed exactly the same line of reasoning as in *Kolpak*, enabling Simutenkov to base his claim for a Community licence directly on Article 23(1) of the Partnership Agreement concluded between the European Communities and Russia. The Court refrained from entering into an in-depth analysis of the justification issue, seemingly conveying the message that the hard line it had previously adopted with regard to nationality discrimination of EU/EEA nationals is to be extended to privileged third-country nationals. For these non-EU/EEA sportsmen to be able to challenge nationality clauses, it suffices that they are legally employed in a host EU Member State and can rely upon a directly effective equal treatment provision included in an international agreement establishing a partnership between the European Communities and their country of origin, regardless of whether accession to the EU is envisaged or not.<sup>70</sup> Strictly legally speaking, the lifeline of nationality clauses at club level in sport appears now thinner than ever.

In this particular context, one final observation is on its place: the last decade, enlargement and integration-prone developments have been the magic formula of the EU, the driving forces behind many a European policy. Now that the ratification process of the Constitutional Treaty turns out to be much more troublesome than expected, it cannot be excluded that this somehow might exert an influence on Europe's indirect sports approach in the near future. It is hard to predict with absolute certainty how the Court of Justice will react to the current crisis in the EU. Is it fair or even reasonable to state that the outcome of a case such as *Simutenkov* might just have been different had the defendants adduced appropriately chosen and carefully worded justification arguments, or simply if the case had been decided a couple of months later, in a changed political climate? In view of the central position the prohibition of

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<sup>69</sup> Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, judgment of 12 April 2005, nyr.

<sup>70</sup> Van den Bogaert, 'Free Movement for Workers & the Nationality Requirement', in Schneider (ed.), *Migration, Integration & Citizenship: A Challenge for Europe's Future, Vol. I* (Forum Maastricht, 2005), 55.

discrimination on grounds of nationality occupies in the Treaty framework, a radical reversal of the Court's approach with regard to nationality requirements seems unlikely. In any event, it is clear that, despite several unequivocal condemnations, many sporting federations still have not abandoned the idea of nationality clauses. Recently, UEFA adopted a new home-grown rule, providing that each club must have a certain number of domestically trained players under contract. According to the new '4+4' rule, by the start of the 2008/09 season, four players out of a squad of maximum 25 must have received their training at the club itself, while another four must be developed by other clubs from the same country.<sup>71</sup> It is advocated that UEFA's home-grown rule, which appears to be favouring local players and therefore inevitably runs the risk of being qualified as indirectly discriminatory, could provide the Court of Justice with another excellent opportunity to clarify the position of the EU on nationality clauses.

Conceptually, the Court of Justice has consistently adopted the same rigorous approach in all cases concerning the mobility of sportsmen within the EU, involving nationality clauses, transfer payments, selection procedures, transfer periods or the likes of it. The Court's search for a solution within the Community framework, which takes into account the claims of the sporting authorities and at the same time complies with the exigencies of Community law, is effectuated on a case-by-case basis, and is thus influenced by the circumstances of each case. The Court's record for its dealings with sports related cases is unquestionably rather good.<sup>72</sup> In sporting circles, the Court is often criticised for over-accentuating the importance of the migration rights of the individual athletes in this respect. It is alleged that on this ground, the Court has effectuated or allowed too many and too intrusive judicial inroads on the self-proclaimed spheres of autonomous competence of the sporting bodies, thereby infringing their freedom of association and failing to take sufficient account of the specific needs of sport. Arguably, this submission is unfounded. The Court has never interfered with sporting rules *sensu strictu*, the 'rules of the game', such as, the length of matches or the height of the net. On the contrary, it is advocated that the Community institutions have at times probably shown too much respect for the autonomy of the sporting authorities and have overrated the special status of sport, both from a factual and

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<sup>71</sup> See X, 'Homegrown plan wins approval', 21 April 2005 (consult <http://www.uefa.com>). This plan would apply to future UEFA club competitions, but UEFA has also asked its associations to consider applying the same rules to national competitions.

<sup>72</sup> Concurring, Weatherill, above n. 29, 51.

from a legal point of view. Sport does indeed possess certain special features, such as the mutual interdependence of sports teams, and at times, the special treatment accorded to sport under Community law appears therefore to be legitimate, whether it is to maintain a certain sporting and financial balance between sport clubs, to ensure the homogeneity and the regularity of competitions or to preserve the essential element of unpredictability of outcome. However, this should not go to the detriment of the rights of the sportsmen, or at least have only a minimal and proportionate impact.<sup>73</sup> Presumably, at the moment the perfect balance between all interests at stake has not been found yet. It can, in particular, rightly be questioned whether the training and development of young players really constitutes a legitimate aim which is sufficiently specific to the sports sector so as to justify restrictions to the freedom of movement of athletes?<sup>74</sup> This seems by no means evident.<sup>75</sup>

### *Sport & competition law*

Under the heading of the competition rules, the Community institutions, in the first place the European Commission, have proceeded largely along the same track in their dealings with sporting affairs. Some years ago, the Commission already revealed its intention to group the practices of sporting associations in four categories: 1) rules to which, in principle, Article 81(1) EC does not apply, given that such rules are inherent to sport and/or necessary for its organisation; (2) rules which are, in principle, prohibited if they have a significant effect on trade between Member States; (3) rules which are restrictive of competition but which in principle qualify for an exemption; and (4) rules which are abusive of a dominant position under Article 82 EC.<sup>76</sup> The Community's practices can be illustrated on the basis of a number of concrete examples.

In February 2000, ENIC lodged a complaint against UEFA as regards its rule on 'Integrity of the UEFA Club competitions: Independence of clubs'. According to the UEFA rule, when two

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<sup>73</sup> Van den Bogaert, above n. 50, pp. 391-400.

<sup>74</sup> See also Weatherill, above n. 10, 24.

<sup>75</sup> Arguably, this objective, though laudable in itself, is pursued in all sectors of the industry and is therefore not sufficiently distinctive to sport so as to accept it as an overriding requirement in the general interest which justifies the erection or maintenance of regulations which are restrictive of the free movement of workers.

<sup>76</sup> IP/99/133, 'Commission debates application of its competition rules to sports', Brussels, 24 February 1999.

or more clubs which are under common control qualify for participation in the same UEFA club competition, only one is eligible to effectively take part. At the time of the proceedings, ENIC owned stakes in five clubs in five different countries. It claimed that it had been directly and materially affected by the operation of the rule and that it was likely to continue to suffer irreparable damage in the future, and challenged the compatibility of the UEFA rule with Articles 81-82 EC. The Commission rejected the complaint, asserting that the contested rule cannot be qualified as a restriction and therefore falls outside the scope of Article 81(1) EC.<sup>77</sup> In the opinion of the Commission, the possible effect of the UEFA rule on the freedom of action of clubs and investors is ‘inherent to the very existence of credible UEFA competitions’.<sup>78</sup> In any event, it decided that ‘it does not lead to a limitation on the freedom of action of clubs and investors that goes beyond what is necessary to ensure its legitimate aim of protecting the uncertainty of results and giving the public the right perception as to the integrity of the UEFA competitions with a view to ensure their proper functioning’.<sup>79</sup> Arguably, this decision is correct.

In July 2003, the Commission adopted a formal decision exempting the collective selling of the media rights of the UEFA Champions League.<sup>80</sup> Initially, it earmarked the joint selling of the television, internet and mobile telephone rights of an international sporting competition such as the Champions League as restrictive of competition, for it limits price competition and reduces output. However, after UEFA had undertaken to change its regulations, it held that an appropriate joint selling arrangement could benefit from an exemption under Article 81(3) EC, putting reliance also on the financial solidarity between clubs. The new arrangement contains a segmentation of the media rights in 14 different rights packages, which are to be sold separately on the basis of a public bidding procedure, and which concern not only TV rights, but also all other media rights, such as radio or internet. Having regard to several decisions of national courts and competition authorities in similar cases,<sup>81</sup> it appears that this decision might also have gone

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<sup>77</sup> Case COMP 37 806: *ENIC/UEFA*.

<sup>78</sup> *ENIC/UEFA*, above n. 77, para. 40.

<sup>79</sup> *ENIC/UEFA*, above n. 77, para. 41.

<sup>80</sup> Commission Decision of 23 July 2003 on the joint selling of the commercial rights of the UEFA Champions League (COMP/ C 2- 37.398) [2003] OJ L 291/25.

<sup>81</sup> For a discussion of the matter, including the relevant decisions of the courts in France, Germany, Spain, Italy, Germany and the UK, see Rumphorst, ‘Sports Broadcasting Rights and EC Competition Law’, paper presented at an international conference in London on 12 October 1999 (<http://www.ebu.ch>).

the other way, forcing the conclusion that the UEFA cannot complain about its treatment under EC competition law.

On 30 September 2004, the Court of First Instance rendered its judgment in the case of *Meca-Medina & Majcen*.<sup>82</sup> Surprisingly, this is only the first real ruling of a Luxembourg court on the applicability of Community competition law to sports rules. Meca-Medina and Majcen are professional sportsmen competing in long-distance swimming. In an anti-doping test carried out during a World Cup event in Brazil, they tested positive for nandrolone. Initially, the Doping Panel of FINA, the International swimming federation, suspended both athletes for a period of four years, a suspension which was first confirmed, but later reduced to two years by the Court of Arbitration for Sport, after certain scientific experiments had showed that nandrolone's metabolites could be produced endogenously by the human body at a level which can exceed the accepted limit. Hereupon, Meca-Medina and Majcen filed a complaint with the Commission, alleging a breach of Articles 81-82 EC of certain regulations adopted by the International Olympic Committee and implemented by FINA, as well as certain practices relating to doping control. After the Commission had rejected their complaint,<sup>83</sup> they brought an action before the Court of First Instance, seeking annulment of the Commission's decision. The Court of First Instance acknowledged that high-level sport has largely become an economic activity, but pointed out that the campaign against doping does not pursue any economic objective.<sup>84</sup> It stated that it is intended to preserve the spirit of fair play and to safeguard the health of athletes. In the opinion of the Court of First Instance, without fair play, 'sport, be it amateur or professional, is no longer sport. That purely social objective is sufficient to justify the campaign against doping.' The prohibition of doping must be regarded as a 'particular expression of the requirement of fair play', and constitutes a 'cardinal rule of sport'.<sup>85</sup> Moreover, the Court of First Instance stipulated that 'sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport. [...] The prohibition of doping and the anti-doping legislation concern exclusively, even when the sporting action is performed by a professional, a non-economic aspect of that sporting action, which constitutes its very essence'.<sup>86</sup> On these grounds,

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<sup>82</sup> *Meca-Medina*, above n. 28.

<sup>83</sup> *Meca-Medina*, above n. 28, para. 20.

<sup>84</sup> *Meca-Medina*, above n. 28, para. 44.

<sup>85</sup> *Ibidem*.

<sup>86</sup> *Meca-Medina*, above n. 28, para. 45.

the Court of First Instance finally dismissed the action, concluding that ‘the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration.’<sup>87</sup> Consequently, the rules to combat doping do not fall under the scope of Articles 49 EC, 81 EC and 82 EC. The anti-doping rules are conceived to be intimately linked to sport as such.<sup>88</sup> While the final outcome of this case may be acceptable, the reasoning of the Court of First Instance definitely is not. Arguably, by qualifying anti-doping rules as rules of ‘purely sporting interest’ which therefore fall outside the scope of Community law, the Court of First Instance has granted too much room for manoeuvre to the sporting associations. A much better solution, as also Weatherill advocates,<sup>89</sup> would have consisted of examining the contested rules on the basis of an analysis founded on *Wouters*.<sup>90</sup> Concretely, this would boil down to an investigation of whether the anti-doping rules at issue are intimately linked to the proper conduct of sporting competition, whether they are necessary to combat doping effectively and whether the limitation of athletes’ freedom of action does not go beyond what is necessary to attain that objective. In its decision, the Commission carried out precisely this analysis and reached the conclusion that the contest anti-doping rules did not fall foul of the prohibition under Article 81 EC.<sup>91</sup> The Court of First Instance subsequently departed from it. Yet, the case is currently on appeal to the Court of Justice.<sup>92</sup> Hopefully, the Court will adopt a more sound reasoning to come to its judgment.

On 26 January 2005, the Court of First Instance already rendered a second decision concerning sport and competition law. It dismissed the application of Laurent Piau for annulment of the Commission’s decision rejecting his complaint concerning the validity of the FIFA Players’ Agents Regulations under Articles 81-82 EC, on grounds that the Commission did not commit a manifest error of assessment.<sup>93</sup> Again, the Court’s reasoning leading up to the final decision does not appear to be entirely satisfactory.<sup>94</sup> Arguably, the significance of the ruling lies primarily in a number of principled statements the Court of First Instance made with regard to the

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<sup>87</sup> *Meca-Medina*, above n. 28, para. 47.

<sup>88</sup> *Ibidem*.

<sup>89</sup> Weatherill, ‘Anti-Doping Rules and EC Law’ (2005) 7 *ECLR* 416.

<sup>90</sup> Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653.

<sup>91</sup> Case COMP 38.158: *Meca-Medina & Majcen/ IOC*, para. 55.

<sup>92</sup> Case C-519/04 P, still pending.

<sup>93</sup> Case T-193/02 *Piau v Commission*, judgment of 26 January 2005, nyr.

<sup>94</sup> In particular, the Court’s finding that there are no other (national) rules and that there is no collective organisation of players’ agents seems to be inaccurate. See X, ‘Legal challenge to FIFA regulations on football players’ agents

role and powers of the sporting associations. It signalled that FIFA adopted the contested regulations of its own authority and not ‘on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity.’<sup>95</sup> Moreover, it held that those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations either. Therefore the Court of First Instance ruled that the legitimacy of a private organisation like FIFA to enact rules ‘which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms’ is questionable and that such rules cannot be automatically regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.<sup>96</sup> Concretely, the Court stipulated that the Players’ Agents Regulations are a reflection of FIFA’s resolve to coordinate the conduct of its members with regard to the activity of players’ agents and constitute a decision by an association of undertakings within the meaning of Article 81(1) EC.<sup>97</sup> It also decided that FIFA holds a collective dominant position on the market for players’ agents’ services.<sup>98</sup>

These pronouncements of the Court of First Instance may not have been relevant for the outcome of this particular case, it is nevertheless immediately apparent that they are likely to greatly influence the future case law of the Luxembourg courts in sports-related issues. The Court has clearly hinted at its willingness to review the practical monopoly power of the sports federations in organisational and regulatory matters under the competition law provisions. Litigation is already under way. In Belgium, Charleroi has instituted legal proceedings against FIFA. According to FIFA regulations, football clubs must release their players for international representative matches.<sup>99</sup> In 2004, one of Charleroi’s most influential players, Oulmers, returned injured from international duty with Morocco and remained sidelined for more than six months. Charleroi was not entitled to compensation. It regards this mandatory players release system as an abuse of FIFA’s dominant position within the meaning of Article 82 EC. The hearings in this case are eagerly awaited. Ultimately, if the parties fail to reach a settlement, the Court of Justice

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rejected’, 3 February 2005, (consult <http://www.euractiv.com>); Vermeersch, ‘Piau t. Commissie: Sportieve competitie eindigt op 0-1’ (2005) 11 *Nederlands Tijdschrift voor Europees Recht* 101.

<sup>95</sup> Piau, above n. 93, para. 74

<sup>96</sup> Piau, above n. 93, para. 77.

<sup>97</sup> Piau, above n. 93, para. 75.

<sup>98</sup> Piau, above n. 93, para. 114.

<sup>99</sup> Annex 1 Release of players for Association teams, FIFA 2005 Regulations for the Status and Transfer of Players.

could be forced to adjudicate whether these rules fall under the organisational and regulatory autonomy of the sporting bodies or rather go beyond it.<sup>100</sup>

In the same vein, the debate about the current transfer rules in football could – again - be reopened. In December 1998, the European Commission sent a statement of objections to FIFA, announcing that it viewed certain provisions of the FIFA Regulations for the Status and Transfer of Players which were applicable at the time as incompatible with Article 81 EC. In March 2003, the Commission was found willing to terminate the infringement procedure, after FIFA had undertaken to change its existing regulations. However, it is open to question whether the current FIFA Regulations, in particular the chapters on maintenance of contractual stability and training compensation, are fully in line with the requirements of Community law. Only in December 2005, the Court of Arbitration for Sport had to decide the dispute between AS Roma and Auxerre relating to the unilateral breach of contract by Philippe Mexès.<sup>101</sup> If a case involving transfers were to reach the stage of the Courts in Luxembourg again, some aspects of the current FIFA transfer system may not withstand the test of compatibility with EC competition law.<sup>102</sup>

From the practice of the Community institutions under the competition law provisions in relation to sport, even though it is not all that extensive yet, by and large the same picture emerges as from the Court's jurisprudence relating to freedom of movement. Sport has been firmly subjected to Community competition law and has not been granted an outright exemption from its scope. Also in this context, the particular features of sport have been regarded rather generously. In view of the statements of the Court of First Instance in *Piau*, interesting new developments are furthermore to be expected.

## Conclusion

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<sup>100</sup> See also Weatherill, 'Is the pyramid compatible with EC law?', (2005) 3-4 *International Sports Law Journal* 3.

<sup>101</sup> CAS 2005/A/902 & 903 *Mexès and AS Roma v AJ Auxerre*.

<sup>102</sup> For instance, it does not seem inconceivable that a rule imposing a sports sanction on a club which is considered to have induced a player to unilaterally breach his contract with another club, consisting of a prohibition to acquire new players during a certain period, might be qualified as unjustifiably restricting competition between clubs. If the period is too long, especially the principle of proportionality might not be respected. See Van den Bogaert, above n. 50, pp. 213-320.

In general, the relation between the European institutions and the sporting world can best be qualified as uncomfortable. The introduction of sport in the European Constitution might add an interesting new dimension to the 'sport and European law' saga. At first sight, there is not much spectacular about Articles I-17 and III-282. In the near future no major changes would have to be expected in the EU approach to sport. The application of the free movement provisions and the competition law rules to sports rules and practices would in all likelihood simply proceed, paying due regard to the specific characteristics of sport. The importance of this Treaty reference to sport would be largely symbolical, legitimising Community action already taken in the field of sport. Be that as it may, attention should be paid not to overlook its intrinsic strengths: the official recognition of sports as a Union policy could be instructive to the European institutions to find a more appropriate balance between the wishes of the sporting world and the exigencies of European law. Moreover, it would neatly delineate the room for manoeuvring of the European institutions in the field of sport, establishing that they can only carry out supporting, co-ordinating or complementary action, thereby thus implicitly respecting and confirming the primary role of the sporting associations. All in all, therefore, the inclusion of sport in the Treaty must be welcomed, although the exclusion of any harmonising measures can be deplored.

In the event that it were to turn out impossible or unworkable to implement the European Constitution and this were to mean the demise of sport in the Treaty, the consequences for the European sports policy would not be too far-reaching. It would be especially hard to intensify and streamline the European direct sports policy, but this was bound to remain limited in scope after all. Nevertheless, the Treaty provisions concerning sport do seem to create the opportunity for the European institutions and the sporting federations to be no longer uneasy bedfellows. It would be a pity not to seize the occasion.

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