Chapter 9
'Fair Play Please!': Recent Developments in the Application of EC Law to Sport

Contents

9.1 Introduction

In the Official Programme published for the 2002 Football World Cup a full page plea appears under the title 'Help us to ensure Fair Play at the 2002 FIFA World Cup Korea/Japan™!'[1] At first glance one might expect the exhortation to be designed to encourage respect for opponents, both on and off the field, or perhaps to appeal to all participants to play according to both the letter and the spirit of the laws of the game. Not so. The page in question is in fact devoted to the

First published in 40 *CML Rev.* (2003) p. 51–93.

[1] Korean/English edition, p. 122.

S. Weatherill, *European Sports Law*,
ASSER International Sports Law Series, DOI: 10.1007/978-90-6704-939-9_9,

phenomenon of 'ambush marketing'. It is explained that the 'Official Commercial Affiliates' of the tournament contribute greatly to its success, while other companies seek to promote their products by seeking to establish an association between them and the tournament without having paid FIFA for the privilege. Football spectators are encouraged to prevent such 'ambushes' by declining to bring commercially-branded material such as flags, banners, balloons and hats into the stadiums, even though they may commonly be cheerfully offered such free but unauthorized gifts on their journey to the match. Fair Play!

Sport has plainly become an industry of considerable commercial significance. Governing bodies are concerned with fair regulation of the game itself but also with effective exploitation of their commercial assets. No one would propose that the law has a valid role to play in dictating, for example, how many players there should be in a football team. Equally no one would deny that the law has a valid role to play in regulating, for example, price-fixing arrangements among suppliers of sports goods. But there is a more intriguing intermediate category of practices that may be peculiar to sport, but also carry direct commercial implications. Examples include the player transfer system and the sale of broadcasting rights for sports events. Typically the governing bodies of sport regard their proper sphere of autonomous decision-making competence as broader in scope than is admitted by public regulators. The style in which the argument is typically conducted is rather neatly captured by the anecdote at the beginning of this Introduction: sports bodies have a strong incentive to dress up a desire to maximize revenue streams in the clothes of 'Fair Play'. And sometimes they may be perfectly justified so to do. The broad issue that needs to be addressed is just how far it is proper to shelter arrangements in the sports sector from full or partial legal scrutiny and this inquiry demands as an essential preliminary a rigorous inquiry into what is really meant by the frequent claim that 'sport is special' – culturally, socially, economically. In Europe, this issue was catapulted on to the front pages of newspapers across the continent by the European Court's famous decision in 1995 in *Bosman*,[2] and since that time a cascade of opportunities has been presented to the Commission, in particular, and, less frequently, to the Court to clarify the treatment of sport under EC law. On 5 June 2002, a week after the World Cup began in Seoul, the Commission published a memorandum reporting on 'constructive discussions with sporting organizations' and listing a series of issues which the Commission considered to have been satisfactorily resolved after sports bodies had adjusted 'their sporting regulations to bring them into line with today's sporting, economic and legal requirements'.[3] The clear impression is that the Commission feels the time is right to call a halt to its vigorous enthusiasm of the last few years to employ the Treaty competition rules to scrutinize the professional sports sector. On the other hand, anxieties to show respect for the social and cultural benefits of sport may lately be identified in the practice of several institutions, including the

[2] Case C-415/93, *URBSFA* v. *Bosman*, [1995] *ECR* I-4921.

[3] MEMO/02/127, 'The application of the EU's competition rules to sport?', 5 June 2002.

Commission. This article surveys recent EC practice. It intends to take stock of how fair is the play in this field at present and it takes as a major theme the risk inherent in shaping a 'sports policy' that fails adequately to distinguish between professional sport and recreational/amateur sport.

9.2 'Sport is Special'

An insight into the peculiarities of economic power in professional sport may be derived from Scottish football. In April 2002, ten of the twelve clubs that compete in the Scottish Premier League announced their intention to resign. The 'breakaway ten' declared a plan to start a new League once the required notice period of two years had been served. The two clubs not involved were Glasgow Rangers and Glasgow Celtic, the so-called 'Old Firm', by far the most successful clubs in the history of Scottish football and also the clubs that attract by far the largest numbers of supporters. The 'breakaway ten' promptly informed Rangers and Celtic that the Glasgow duo would be welcome to join the new competition beginning in 2004, but only provided they accepted that major decisions would require the support of only 8 of the 12 participants in the League. The current arrangements dictate that 11 of the 12 must vote in favour. Plainly the ten smaller clubs plan to establish a structure that does not permit the two largest clubs to veto radical change and, in particular, they have in mind the adoption of systems of wealth distribution that will involve much more substantial transfers of revenue from the best supported clubs to the less well supported clubs than those which prevail today. Representatives of Celtic and Rangers reacted initially with dismay. Mr Ian McLeod, Celtic's chief executive, observed that the clubs that had announced their resignation 'appear to regard themselves as the oppressed ten when, because Celtic and Rangers generate 80 per cent of the revenue in Scottish football, they are actually being subsidized by the two biggest clubs'.[4] Presumably the figure of 80 per cent is a simple calculation based on size of gates at matches and it is indeed true that in the (not untypical) season 2001/02, Celtic and Rangers attracted an average League attendance to home matches of 58,505 and 48,257 respectively while Aberdeen, the third-best supported club in the Scottish Premier League, could boast an average figure of only 13,938.[5] Celtic and Rangers are correspondingly far better supported away from home than any other Scottish club and their travelling fans therefore swell the income of teams playing at home to the 'Old Firm'. But Mr McLeod's comments overlook one important feature. Plainly the 'oppressed ten' make money as a result of their entanglement with the commercially dominant Glasgow clubs, but Celtic and Rangers also make their money

[4] 'Celtic and Rangers to be kicked out as smaller clubs vote for new Scots league', *Financial Times*, 17 April 2002, p. 4.

[5] Source: Rollin and Rollin 2002.

because of the existence of their opponents. Rangers and Celtic far exceed the other football clubs in Scotland in the number of people who regard them as 'their team', but they depend on finding parties willing to supply that crucial extra element in the sporting bargain – opposition – to lend commercial and sporting purpose to their very existence. In this sense less popular teams in a professional league may have considerably more commercial leverage in their dealings with the 'bigger names' than one would suppose from a simple reading of turnover figures. In fact, one cannot carve up market shares in football the way one would in widget production. If smaller widget producers quit the market, the more powerful firms will typically simply cheerfully seize their market share.

In football, the 80 per cent market share claimed by Celtic and Rangers would not increase were their rivals to refuse to compete. Far from it. Exit by weaker parties ruins the game for the stronger. The two Glasgow clubs may seek new opponents by skipping the jurisdiction and playing in another League, most obviously in England, or they may feel obliged to strike a compromise deal in Scotland.[6] But for present purposes the tale reveals a key characteristic of professional sport which is not found elsewhere: there is an interdependence of interest between participants in sporting competition. In sport opponents are there to be beaten but the whole point of the endeavour is destroyed if opponents are, literally, beaten out of sight.

This understanding corresponds to the view adopted by the European Court in *Bosman*.[7] The Court famously stated that 'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results, must be accepted as legitimate'. This embrace of the notion of mutual interdependence in a sports league opens up the prospect of approval of rules that, for example, ensure the transfer of wealth from rich to poor clubs in pursuit of competitive equality and of rules that prevent multiple ownership of clubs in order to eliminate suspicions about fixed matches.

In mapping a future co-existence between EC law and sport, the vital feature of *Bosman*, too often neglected in the popular debate, is that the Court admitted that football in particular, and sport in general, possesses unusual characteristics that distinguishes it from 'normal' commercial sectors. The Court insisted only that in principle the economic significance of sport is apt to secure its subjection to EC law and that those unusual characteristics should then be taken into account in

[6] The latter currently seems the more probable medium-term outcome because the former appears to hold insufficient commercial appeal to the English clubs who would be asked to act as hosts. The former option itself raises intriguing questions in so far as attempts by governing bodies to maintain the traditional structure of national Leagues in Europe by refusing permission for such cross-border moves collides with EC rules governing free movement (albeit not in the case of Anglo-Scottish adjustments, which are internal to a single Member State).

[7] Case C-415/93, *supra* note 2.

shaping the application of the law.[8] The challenge for sport is to devise rules that serve these interests, which are peculiar to organized sport, without falling foul of EC law. In *Bosman* the European Court rejected attempts to demonstrate that two distinct existing practices in professional football were compatible with the Treaty provision governing the free movement of workers, Article 39 (ex 48) EC. Both the system governing the transfer of players between clubs and the rules requiring discrimination on the basis of nationality in European club football competitions were found to violate that provision. Adjustments have been made to the transfer system,[9] while the nationality rules have been abandoned in so far as they apply to EU nationals.

'Mutual interdependence' of participants is a feature that distinguishes sport from 'normal' industries. But key questions include: how much 'special' treatment does that feature justify? What other features are distinctive to sport, and how much special treatment do they justify? And how precisely is that 'special' treatment recognized within the framework of EC law? What is at stake here is an anxiety to connect the incentives at play in the sports industry, which generate unusual patterns of internal regulation designed to reflect *inter alia* the mutual interdependence of participants, with the application of orthodox legal rules to the chosen arrangements. Are 'legitimate' sporting practices outside EC competence entirely? Or are they merely capable of exemption from the basic prohibitions found in core provisions such as Articles 12, 39 or 81 EC? It is hem that the most awkward questions about the true character of the 'EC law of sport' arise, and the complexity of the inquiry is driven *first* by the eccentric cultural and economic nature of sport, *second* by the appreciation that sport is propelled by very different motivations in its professional context when contrasted to its recreational/amateur dimension and *third* by the constraints imposed on the relevant EC supervisory institutions by the fundamental constitutional point that the EC has no general Treaty-based competence to regulate sport.

Exposure of the intellectual challenge presented by the matter pre-dates *Bosman.* The European Court of Justice confirmed, in a pair of cases, decided in the 1970s that EC law is in principle capable of application to sport. In both *Walrave and Koch* v. *Union Cycliste Internationale*[10] and *Donà* v. *Mantero*,[11] the Court explained that insofar as sport constitutes an economic activity, it falls within the scope of application of Community law. Sport was not then and is not now a matter explicitly subject to supervision under the EC Treaty, but insofar as sport generates practices of economic significance it is affected incidentally by the principles of EC law. Sport offers an appealingly instructive case study of how the law of the EC may exercise a wider influence on the autonomy of public and

[8] For comment at the time of the judgment see annotation by Weatherill 1996, 991; O'Keeffe and Osborne 1996, III; Séché 1996, 355. For general overview see Dubey 2000, Ch. 2.

[9] See further below, Sect. 9.4.7.2.

[10] Case 36/74, [1974] *ECR* 1405.

[11] Case 13/76, [1976] *ECR* 1333.

private actors in the Member States than a formal inspection of the text of the Treaty may lead one to expect, primarily because of the extended reach of the rules governing the building of an integrated, competitive market.[12] However, the pair of cases from the 1970s also demonstrated the contortions forced on the Court as it struggled to accommodate sport's peculiarities within the orthodox framework of EC law. Faced with the alarming prospect that selection of players for national representative teams could be condemned as discrimination on grounds of nationality contrary to the rules of the Treaty, the Court in *Walrave and Koch* nervously concocted a category of practices which it described as of 'purely sporting interest' and having 'nothing to do with economic activity'[13] which lie beyond the scope of the EC Treaty. Nationality-based rules governing selection for national teams competing at international level fell conveniently into this category and could accordingly be applied without fear of challenge derived from EC law. Attempts to provide an intellectually satisfying explanation for this stance are awkward. Admittedly, the EC Treaty catches only 'economic' matters, but both the staging of international matches and the elevation of a player to the status of international have direct economic consequences, so it is unconvincing to argue that such rules escape the scope of the Treaty as in some way bereft of economic purpose or effect. Probably what is at stake is some elusive notion that the very structure of sport at the international level is founded on nationality discrimination and that this precludes disruption caused by the EC Treaty. In *Bosman* the Court, following the vigorous line pressed on it by Advocate-General Lenz, refused to extend this concession to nationality discrimination in *club* football, which it treated as incompatible with EC law, but it did nothing to rationalize the true jurisprudential basis of the so-called 'purely sporting interest' exception.[14] And probably there is no such clean-cut basis.[15] What is at stake here is sport as an oddity. The desirability of welding national markets into a wider more competitive European market may constitute the fundamental assumption of much of EC trade law and policy, but in sport national Leagues and national representative teams

[12] Cf. for comparable narratives in other sectors, Scott 1998; Weatherill 1997. Much food for thought about, and examples of, this spillover may be digested from the essays contained in Craig and de Burca 1999.

[13] Case 36/74 *supra* note 10, Para. 8. Cf. Case C-415/93 *supra* note 2, Para. 76.

[14] In fact, if anything it confused it, by referring to justification of such practices (Para. 76), which implies they in principle fall within the scope of EC law, whereas A-G Lenz took the more orthodox line of treating such practices as falling outwith the scope of EC law in the first place. See Weatherill 1999, p. 354.

[15] For an extended discussion see Dubey 2000, Ch. 5, in which an ambitious case is made for the preservation of nationality discrimination at the higher levels of the club game (for comments, see Weatherill 2002, 901–4). See also McCutcheon 2000, pp. 127–140. Pending before the Court is Case C-438/00, *Deutscher Handballbund eV* v. *Maros Kolpak* on the compatibility of nationality-based eligibility rules in handball with the EC/Slovakia Association Agreement; A-G Stix-Hackl delivered her Opinion on 11 July 2002.

remain accepted building-blocks of the industry's structure. They are, in short, the 'rules of the game'.[16] EC law does not apply to sport in precisely the same way commonly accepted in other sectors, but this is not to say that satisfactory compromises cannot be found within which the 'objective character of the law', which in *Bosman* the Court ringingly insists must not be diminished,[17] can also recognize the objective character of sport. The question: is this being fairly and coherently achieved?

9.3 Recent Judgments of the Court

Two judgments of the Court in April 2000 stand together as the most significant explorations of the friction-laden interface between EC law and sport since the *Bosman* landmark of 1995. They are *Deliège* v. *Ligue de Judo*[18] and *Lehtonen* et al. v. *FRSB*.[19] Both rulings are significant in the enduring quest to identify a satisfactory basis for determining when a measure exerts a sufficient impact on trade patterns to impose an obligation on the rule-maker to show justification on terms recognized by EC law. This aspect escapes the scope of this paper.[20] In both rulings the Court repeated the familiar principle that sport is subject to Community law only in so far as it constitutes an economic activity and confirmed that rules of sporting interest imposed for reasons that are not of an economic nature escape the reach of the EC Treaty.[21] It supplemented this observation with the insistence, already clear in *Bosman* and, before that, in *Walrave and Koch*, that such a restriction on the scope of application of EC law must not exceed its proper objectives and that it cannot be relied on as a basis for excluding the whole of a sporting activity from the ambit of EC law.

In *Deliège* the Court was asked by the referring national court to deal with matters of EC law pertaining to the selection of judokas for international competition by national judo federations. The matter was distinguishable from the rules at stake in *Walrave and Koch* and in *Bosman*. The selection rules at issue in *Deliège* did not determine the conditions governing general access to the labour market not did they contain clauses limiting the number of participating nationals from other Member States. Moreover, the rules did not relate to a tournament involving competition between national teams, but rather to a tournament in

[16] This is explored in more depth and breadth in Sect. 9.5 below.

[17] Case C-415/93 *supra* note 2, Para. 77 of the judgment.

[18] Cases C-51/96 & C-191/97, [2000] *ECR* I-2549.

[19] Case C-176/96, [2000] *ECR* I-2681.

[20] On *Deliège* in particular see Van den Bogaert 2000, 554. For recent exploration, including a comprehensive collection of the cascade of comment, see Snell 2002.

[21] Paras. 41–43 of the judgment in *Deliège*, Paras. 32–34 of the judgment in *Lehtonen*.

which, once selected, the athletes then competed on their own account. The Court stated that although such selection rules

> 'inevitably have the effect of limiting the number of participants in a tournament, such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted.'[22]

It concluded that a rule requiring professional or semi-professional athletes aspiring to take part in competition to have been authorized or selected by their federations in order to participate in a high-level international sports competition, which does not involve national teams competing against each other, does not in itself constitute a restriction on the free movement of services prohibited by Article 49 (ex 59) EC, provided that it derives from a need inherent in the organization of such a competition. The final determination of whether the particular rule challenged by Ms Deliège fell foul of this test was left to the national court, which represents the orthodox division of function under the EC system of preliminary references found in Article 234 EC. The European Court in *Deliège* displayed a readiness to leave to sporting organizations considerable leeway in fixing rules governing participation in events.

Lehtonen concerned transfer rules in the sport of basketball. These rules are applied by national federations, under the supervision of the FIBA, the International Basketball Federation. In short, they provide for differential treatment of transferred players depending on the 'zone' in the world from which they are treated as having originated. The Court decided the case on the basis of Article 39 EC, the Treaty provisions that had formed the legal foundation of *Bosman*. The Court stated that the Treaty precludes the application of rules laid down by a sporting association which prohibit a basketball club from fielding players from other Member States in matches in the national championships where they have been transferred after a specific date, if that date is earlier than the date applicable to the transfers of players from certain non-member countries, unless objective reasons concerning only sport as such or relating to the position of players from a federation in the European zone and that of players from a federation outside the European zone justify such different treatment. The national court would be the ultimate judge of whether such justification was present. The Court in this way admits that EC law could be used as a basis for intervention in the conduct of sporting competitions. But the ruling in no way prohibits the possibility of devising acceptable even-handed transfer 'deadlines' during a season, after which no transfers are permitted. Such rules might restrict commercial freedom, but the Court in *Lehtonen* explicitly acknowledged the role of such deadlines in ensuring the regularity of competition. It shrewdly observed that transfers late in the season may upset competitive balance and damage the effective functioning of a championship, especially, where, as in the

[22] Para. 64 of the ruling.

case itself, the national league is won on the basis of late-season play-off matches.[23] As in *Bosman*, so in *Lehtonen*; the rules under scrutiny *in casu* appeared inapt to achieve the ends claimed to be pursued, but adjusted rules, designed more carefully to reflect the particular needs of organized sport, are by no means excluded by the Court in its interpretation of the application of EC trade law. This is not an exemption allowed to sport, but nor is it an insensitive subjection of sport to the 'normal' assumptions of EC law.

Both *Deliège* and *Lehtonen* assume that sports bodies are in principle permitted to set the parameters within which their sports shall be run and that the rules of the EC Treaty will not intervene, even if an incidental effect on the liberty of economic actors can be demonstrated. Insofar as the objective character of EC law is being developed with respect for the objective character of sport, then a judicial route towards Fair Play is being trodden.

9.4 Recent Decisions of the Commission

Bosman itself, like *Walrave and Koch* and *Donà* v. *Mantero* twenty years earlier, drew attention to the difficulties in reconciling the assumptions of the sports industry with the imperatives of EC law. The Court had confined itself to the law of free movement in *Bosman*, and did so again in *Deliège* and *Lehtonen*, but the Commission has lately been confronted by the need to apply the Treaty rules governing competition in order to resolve most of its outstanding cases. These cases are examined in this Part. The Commission has had an unenviably ill-defined task as it found itself faced with a need to shape a policy on sport and to dear the backing of individual complaints. A broader assessment of its handling of the competition rules is provided in Sect. 9.5, before Sect. 9.6 surveys sport in a social and cultural context.

The Commission's brief memorandum of 5 June 2002 reports that

> 'Commissioners Monti and Reding in particular have engaged in constructive discussions with sporting organizations over the last two years. […] As a result, the sporting organizations have put into effect very important changes to bring their rules into line with their legal obligations, bringing about better legal security to sport as a basis for future economic and sporting development, and a better deal for fans and consumers.'[24]

The memorandum records the Commission's satisfaction over the recent closure of a number of cases. In the sports sector, the Commission has been busier than the Court since *Bosman* and there is here a discernible feel that the Commission intends to draw a line under its adventures, and, moreover, with a sigh of relief. Neither Mr Monti nor Ms Reding, Commissioners for Competition and Culture respectively, have gathered much popular approval for their engagement

[23] See especially Paras. 53–56 of the judgment.

[24] MEMO/02/t27. 'The application of the EU's competition rules to sports', 5 June 2002.

with the sports sector and, at times of potentially radical institutional change within the Union s architecture, it would be unrealistic to suppose that such perceptions do not colour choice of priorities.

9.4.1 Football Players' Agents

Pursuant to its rules on football player agents, FIFA, the global governing body for football, had acted to prevent players employing agents not licensed by FIFA. This constitutes a classic anti-competitive barrier to entry to the market for supply of professional services. The Commission considered the matter worthy of investigation[25] but subsequently chose to recognize the need for FIFA to regulate the profession as long as access remains open and non-discriminatory. It accepted FIFA's adjusted requirements that an agent must pass a test and take out professional liability insurance, as well as agreeing to a Code of Professional conduct covering matters of transparency and honesty. In April 2002, the Commission expressed itself content that the contribution to raising standards and protecting consumers from unscrupulous operators allowed it to approve amended FIFA rules, albeit on an informal level.[26]

9.4.2 Formula One

A four-year Commission investigation into the Fédération Internationale d'Automobile (FIA) and the companies involved in Formula One motor racing as now been brought to an end. Notifications had been made in 1997,[27] and in 1999 the Commission had issued a statement of objections targeted in particular at the alleged over-mighty role of the FIA, which acted as regulator of the sport while also actively pursuing commercial exploitation. After long and occasionally public and acrimonious negotiations the FIA agreed to change its rules.[28] The agreed modifications ensure that the rule of FIA is limited to that of a sports regulator, and are designed to excise the risk of commercial conflicts of interest. Certain perniciously anti-competitive restrictions, designed to suppress the growth of new motor sports, have been abandoned, so that, for example, circuit owners hosting

[25] IP/99/782, 21 October 1999.

[26] IP/07/585, 18 April 2002.

[27] *OJ* 1997, C 361/7.

[28] Formula One, economically powerful and quick to threaten to move its operations beyond the EU's borders, has also been a tough nut for the legislature to crack; the Tobacco Advertising Directive, annulled by the Court in Case C-376/98 *Germany* v. *Council and Parliament* [2000] *ECR* I-8419, contained (now redundant) concessions to the industry. On the background see Khanna 2001, 113.

Formula One races will no longer be contractually restrained from staging other events that may compete with Formula One, nor will broadcasters be induced to commit exclusively to Formula One. FIA rules will not be used to prevent or impede new competitions unless justified on grounds related to the safe, fair or orderly conduct of motor sport. Appeal procedures against FIA have also been strengthened. The Commission announced its intention to take a favourable view of the new arrangements[29] and in October 2001 it did so, albeit at an informal level.[30]

9.4.3 The 'Mouscron Case'

A stadium owner in Lille, in France, had been refused permission by UEFA, football's governing body for Europe, to stage a UEFA Cup tie for which a Belgian side, Excelsior Mouscron, had been drawn as the home side. Presumably the prospect of increased revenue lay behind the desire to switch venues a short distance across a national border, but UEFA refused to depart from its rules requiring the match to be played in Belgium, the home side's country. The Commission rejected a complaint on the basis that this constituted a sporting rule that formed a necessary part of the organization of the competition. Home teams play at home. The rule was treated by the Commission as falling outside the scope of the Treaty's competition rules.[31]

9.4.4 Multiple Club Ownership

Rules forbidding a person owning more than one club participating in a particular tournament are directed at maintaining a sense of uncertainty of outcome and genuine competition that would be undermined by any whiff of collusion or match-fixing. UEFA's rules restricting multiple ownership of football clubs participating in European club competition were examined in 1999 by the Court for Arbitration in Sport (CAS), an arbitral body established by the industry and based in Lausanne. CAS decided such rules were lawful, examining the matter from the perspective of both EC and Swiss law.[32] Having regarded the *Walrave and Koch* 'sporting exception' as unworkable, the CAS proceeded to find the rules did not appreciably restrict competition within the meaning of Article 81(1). Moreover, it treated the

---

[29] *OJ* 2001, C 169/5.

[30] IP/01/1523, 30 October 2001.

[31] IP/99/956, 9 December 1999, IP 99/956, 9 June 1999.

[32] CAS 98/200, AEK *Athens and Slavia Prague* v. *UEFA*, 20 August 1999. See generally on the CAS, Beloff, Kerr and Demetriou 1999, Chs. 8.101–8.108.

rules as necessary in any event to achieve the legitimate objective of securing a properly functioning and credibly competitive league and proportionate to that end, for the CAS was unpersuaded that *ex post* control over match-fixing (for example, by the imposition of criminal penalties) was adequate. Subsequently the Commission issued a preliminary conclusion that the rule could fall outside the Treaty competition rules, citing both the CAS decision and the Court's recognition in *Bosman* of sport's legitimate objectives, although it required further information to satisfy itself of the absence of less restrictive means of preserving the integrity of competitions.[33] In June 2002 the Commission finally announced its termination of this investigation.[34] It recorded its view that the purpose of the rule was to guarantee the integrity of sporting competition and that the limitations on commercial freedom imposed by the rule did not extend beyond what was necessary to ensure the legitimate aim of preserving uncertainty about results. The Commission treated this as a case of a rule that undeniably interfered with commerce in the sector yet which, given its contribution to honesty in sports practice, fell outside the scope of the Treaty competition rules provided it was applied in a non-discriminatory manner.

9.4.5 Anti-doping Rules in Swimming

In August 2002 the Commission rejected a complaint brought by swimmers who had been banned from competitions for doping offences by the International Olympic Committee and FINA, swimming s governing body.[35] The Commission emphasized the autonomy allowed to sporting organizations to ensure the integrity of their events. The anti-doping rules facilitated the smooth functioning of sporting competition; they were necessary to combat doping effectively; and their restrictive effects did not exceed those necessary to achieve this objective. Viewed in their proper context, they did not fall within the prohibition contained in Articles 81 and 82 EC.

9.4.6 Ticket Distribution for the 1998 Football World Cup

This is a formal Decision which imposes a fine. The Commission condemned the CFO, the organizing committee for the 1998 World Cup football tournament, staged in and won by France, for violation of Article 82 of the EC Treaty and Article 54 of the EEA agreement.[36] Discrimination in the sale of tickets to the

[33] *OJ* 1999, C 363/2.

[34] IP/02/942, 27 June 2002.

[35] IP/02/1211, 9 August 2002.

[36] Decision 2000/12 1998 Football World Cup *OJ* 2000, L 5/55.

general public was at the heart of the abusive practices. The majority of tickets were distributed to recipients such as national football federations, official tour operators and sponsors, but 28.12 per cent of tickets, some 749,700, were distributed by the CFO direct to the general public. This bloc of tickets was first put on sale in 1996 but purchase was restricted to buyers able to provide a postal address in France. Only from 22 April 1998 did the CFO, under pressure from the Commission, alter its practice and sell tickets to members of the public able to provide an address within the EEA, but by then roughly three-quarters of the relevant bloc of tickets had been acquired by eager French buyers. Given the artificial structure of supply and demand imposed on this market, it is no surprise that in June 1998, during the tournament itself, games throughout France were typically preceded by heavy selling of match tickets by local residents to foreign visitors, often at prices far above those initially charged by the CFO.

The definition of the relevant product market in the Decision is notable for its explicit reliance on the 'SSNIP' test, which plays an important role in the Commission's 1997 Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law.[37] This provides that a relevant product market will normally be confined to a single product or service if a small but significant non-transitory increase in the price of that product or service (in the range of 5 to 10 per cent) does not lead to any measurable change in consumer demand in favour of substitutable products or services. The Commission concluded that an increase of at least 10 per cent in the price of match tickets would not have resulted in a significant switch in demand by the general public to competing products. It considered that from the consumer's perspective the market for match tickets for the Football World Cup stands alone; and, moreover, supply-side substitutability of tickets, via national federations and tour operators, was not treated as providing a realistic possibility of affecting the CFO's conduct The relevant geographic market was 'at least all countries within the EEA'.[38] Consumers readily travel considerable distances to attend an event of such magnitude. Given such a tight market definition, a finding that the CFO possessed a position of dominance was inevitable. Accordingly, the CFO held a 'special responsibility' not to conduct itself in manner that would impair undistorted competition.[39] As a dominant supplier, the CFO was required to offer tickets on a non-discriminatory basis to the general public throughout the EEA,[40] and, since it had failed to do so, it was condemned for abusive conduct constituting the imposition of unfair trading conditions on residents outside France which resulted in a limitation of the market to the prejudice of those consumers.

---

[37] *OJ* 1997, C 372, Paras. 15, 17, 40 of the Notice.

[38] Para. 77 of the Decision.

[39] Para. 85, citing Case T-83/91, *Tetra Pakt II*, [1994] *ECR* II-755, Case 7/82, *GVL*, [1983] *ECR* 483.

[40] The Commission cited Football World Cup in insisting on this principle in the (rather more important!) subsequent Decision 2001/892 *Deutsche Post OJ* 2001, L 331/40.

Security issues are, of course, notoriously relevant in the planning of major football tournaments and spectator segregation may be required. So circumstances will arise where blocks of tickets could properly be limited to fans of a particular team. But the blanket discrimination practised by the CFO could not be justified as a targeted response to threats of disorder.[41] The Commission is to be congratulated on a rigorous application of the proportionality principle which ensures that the peaceful majority do not have to suffer because of the excesses of the minority of supporters.[42]

This was a case of discrimination on the basis of residence which constituted indirect discrimination on the basis of nationality. As the Commission makes explicit, this type of abuse offends against 'fundamental Community principles'.[43] Nonetheless, the fine imposed, described as 'symbolic'[44] was just € 1000. The Commission observed that the ticketing arrangements were similar to those adopted for previous World Cup Finals and added rather opaquely that the issues raised 'are of such a specific nature as not to enable conclusions to be easily drawn from previous Commission decisions or case law of the Court of Justice'.[45] This is not a convincing explanation. Admittedly, an earlier Decision finding infringements of EC law in the ticket distribution system for the 1990 World Cup held in Italy did not address the matter of ticket sales to the public directly. It concerned impermissibly restrictive sales terms for tour packages.[46] No fine was imposed. But it is hard to argue that discrimination on the grounds of residence, an accepted violation of 'fundamental Community principles', is truly an issue of 'a specific nature' such as to merit such a small fine even if no Decision on the point in this particular sector has previously been recorded. It is hard to avoid the suspicion that the principal explanation for the mild sanction applied to such a blatant infraction rests in a degree of mishandling of the dossier by the Commission.[47] It is particularly perplexing that the Commission's intervention to press for elimination of discrimination came as late as February 1998, by which time the majority of the relevant tickets had long been sold in an abusive manner. The Commission had dealings with the CFO in June 1997, when it received a notification at a time when discriminatory practices were already being pursued. There was, it seems, more to the negotiation than was the subject of that notification, but it is left strikingly vague in the Decision whether the CFO misled the Commission or whether the Commission decided to turn a blind eye to what was happening.

---

[41] See especially Para. 109 of the Decision.

[42] Cf. the disproportionate but unchallenged response to incidents of violence involving English football supporters during the 1980s discussed in Evans 1986, 510.

[43] Para. 102; also Para. 122.

[44] Para. 125.

[45] Para. 123.

[46] Decision 92/521 *Distribution of Package Tours during the 1990 World Cup*, *OJ* 1992, L326/31.

[47] See Weatherill 2000, 275 for discussion *inter alia* of inconsistency in the handling of my complaint to the Commission.

The deterrent value of the Decision may be thought negligible in the light of the tiny fine imposed, notwithstanding the parting shot in the Decision to the effect that such a lenient policy cannot be expected in future, but it is reassuring that ticket sales to the general public of the EU for the 2000 European football championships, held in Belgium and the Netherlands, were approved by the Commission[48] and duly conducted without any discrimination rooted in nationality or residence.

9.4.7 The Player Transfer System

9.4.7.1 Bosman Remembered

The transfer system in football, damaged but not eliminated by the ruling in *Bosman*, has mutated over the last century and may be found in different guises in different jurisdictions at different times.[49] However its essence is simply described. Players were unable simply to move freely between clubs in the exercise of their contractual freedom. Under rules enforced by football authorities across the world, a club is permitted to field a player in an official match only once it has secured the player s registration, held by the previous employer. That registration will be released only when the previous club is satisfied with the terms offered by the new club, which has typically involved payment of a fee. *Bosman* had fallen foul of the transfer system when he had found himself prevented from joining a French club because the Belgian club which held his registration refused to release it, even though *Bosman's* contract of employment with the Belgian club had come to an end.

The Court, having acknowledged sport's 'considerable social importance' and embraced as legitimate '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',[50] nonetheless came to the conclusion that the transfer system in professional football constituted a violation of Article 39. The Court regarded the means employed in the football industry as inapt to achieve ends which might be capable of justification in principle. The Court did not consider that the transfer system acted as an effective method of maintaining balance between clubs. It did not preclude richer clubs buying the best players. Moreover, the Court observed that only a handful of young players repay clubs' investment in them by making the professional grade, so fees received are unpredictable and unrelated to the actual costs incurred. The

[48] IP/00/591, 8 June 2000.

[49] A-G Lenz's Opinion in *Bosman*, cited *supra* note 2, contains an overview. See also Blanpain and Inston 1996; Greenfield 2000, Ch. 8; Dubey 2000, pp. 272–317, 569–583.

[50] Case C-415/93 *supra* note 2, Para. 106.

system was hit-and-miss, rather than a carefully constructed distributive mechanism. The Court concluded that 'the same aims can be achieved at least as efficiently by other means which do not impede freedom of movement for workers'.[51]

9.4.7.2 Beyond Bosman: The Commission's Agreement with the Football Authorities

The judgment required alterations to be made to the transfer system as it applied to players in *Bosman's* position, whose contract of employment had expired and who wished to exercise their right to migrate between Member States of the EU. Clubs have reacted to the judgment by seeking to like star players on longer (and more lucrative) contracts. Patterns of expenditure on players have altered. Transfer fees are still paid, sometimes at very high levels,[52] but wage increases have been more striking. Money that had previously been allocated to inter-club payments for transfers has been more likely to find its way into players' wages.[53]

It is readily arguable that the transfer system rested on even shakier foundations than the *Bosman* ruling itself suggested. In particular, although the Court in *Bosman* declined to consider the matter from the perspective of the competition rules in the EC Treaty, it seems highly probable that, had it addressed that matter, it would have condemned the practices as unlawful restrictions on trade in players imposed 'horizontally' between employers, involving also governing authorities in sport. This was clearly the view expressed in the case by Advocate-General Lenz. It is important to appreciate that the competition rules are lurking in the background, for they could readily be employed to strike at persisting remnants of the transfer system that would not be imperilled by the invocation of Article 39 EC. In particular, EC law was predictably susceptible to more vigorous deployment to slice away at transfer systems operating within a single State, to assist even non-EU nationals and to attack restraints imposed by the football industry on the mobility of players whose contract has not expired.[54] So it has proved, at least in

---

[51] Para. 110 of the judgment; and see more fully (on this as on so many other things) the Opinion of A-G Lenz.

[52] And sometimes to the dismay of investors; the potential conflict of interest between economic and sporting motivation was illustrated by disquiet expressed over Manchester United's purchase of Rio Ferdinand, then under contract to Leeds United, in summer 2002 for £ 28 million; e.g., 'Unappreciative investors cry foul at depreciating asset', *Financial Times*, 23 July 2002, p. 21: analyst Stephen Ford is quoted as suggesting that Manchester United shareholders 'may have preferred to see less money risked in player trading and more returned through the certainty of dividends'.

[53] Cf. Dobson and Goddard 2001, pp. 90–101 & Ch. 4; O'Leary and Caiger 2000, Ch. 16; Antonioni and Cubbin 2000, 157.

[54] That, in any event, was the trio of prospects for future litigation that I identified in my Annotation of the ruling for this Review, Weatherill 1996, 1019–1031. See also Thill 1996, 89; Morris, Morrow and Spink 1996, 893; Hilf 1996, 1169; Spink 1999, 73.

part,[55] and some of the potential wider implications of *Bosman* have been instrumental in encouraging the shaping of a revised system.

The Court in *Bosman* ruled against the prevailing transfer system but, accepting the general argument that football is 'special', left space for the industry to choose how to re-arrange itself. And the transfer system lives on, albeit in modified and scaled-down fashion. In March 2001 it was announced that, after extended and sometimes acrimonious discussion, an agreement had been reached between the Commission and football's governing bodies for the world, FIFA, and for Europe, UEFA. The Commission went so far as to announce that the deal of March 2001 had been 'formalized' through an exchange of letters recorded in a Commission Press Release[56] between Mr Monti and the President of FIFA, Mr Sepp Blatter. In the aftermath of this legally ambiguous 'compromise' the International Federation of Professional Footballers' Associations, FIFPro, which had been heavily involved in the negotiation until at a late stage it walked away in dissatisfaction at what was being proposed and ultimately agreed in March 200l,[57] seemed a likely source of legal challenge to this deal. However, FIFPro's anxieties have been addressed[58] and in August 2001 FIFA and FIFPro were able to strike an agreement about FIFPro's participation in the implementation of the new rules, which entered into force on 1 September 2001.[59] Eventually, in June 2002, the Commission closed its investigation, declaring 'the end of the Commission's involvement in disputes between players, clubs and football organizations'.[60] Commissioner Monti stated: 'The new rules find a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships'.

The key features of this system that the Commission is prepared to treat as compatible with EC competition law and the law of free movement provide that in

---

[55] On litigation, potential and actual, see Gardiner and Welch 2000, pp. 107–126; McAuley 2002, 331.

[56] IP/01/3 14, 'Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers', 5 March 2001: 'formalisées' in French, 'formell besiegelt' in German, phrases which, like the English version, will perplex the EC lawyer. Cf. Egger and Stix-Hackl 2002, 81, 90–91.

[57] 'We don't accept this accord […] It creates a new category of workers at European level – footballers who will not benefit like others from the same social protection', Laurent Dennis, FIFPro spokesperson, quoted in *The Independent*, 'New transfer system threatens stability of the game', 7 March 2001, p. 28.

[58] On discontinued proceedings before the Belgian courts, see Bennett 2001, 180. At EC level, a players' union brought an application claiming illegal failure to act on a complaint about the transfer system in Case T-42/01, *SETCA-FGTB* v. *Commission*, but the case was removed from the Court's register on 24 Jan. 2002, and the complaint (COMP/36.583) was rejected on 30 May 2002 as part of the Commission's closure of the investigation. Relevant documentation is collected at http://europa.eu.int/comm/sport/key_files/circ/a_circ_en.html.

[59] See Dabscheck 2003.

[60] IP/02/824, 'Commission closes investigations into FIFA regulations on international football transfers', 5 June 2002. The Commission does not propose to take the matter on to a formal plane.

the case of players aged under 23, a system of training compensation should be in place to encourage and reward the training effort of clubs, in particular small clubs; that there should be the creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs; that international transfer of players aged under 18 is to be allowed subject to agreed conditions; that there shall be created one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season; that there shall be minimum and maximum duration of contracts of respectively one and five years; that contracts are to be protected for a period of three years up to age 28 and for two years thereafter; that the system of sanctions to be introduced should preserve the regularity and proper functioning of sporting competition so that unilateral breaches of contract are only possible at the end of a season; that financial compensation can be paid if a contract is breached unilaterally whether by the player or the club; that proportionate sporting sanctions may be applied to players, clubs or agents in the case of unilateral breaches of contract without just cause, in the protected period; that there shall be created an effective, quick and objective arbitration body with members chosen in equal numbers by players and clubs and with an independent chairman; that arbitration is voluntary and does not prevent recourse to national courts.

9.4.7.3 Is the Matter Now Closed?

Under the new arrangements, collectively agreed and enforced restrictions en player mobility and associated sanctions imposed on contract-breakers are plainly to be reduced compared with past practice, but football will still be allowed to maintain arrangements that would not be tolerated in other industries. Is this lawful?

The Court has interpreted Article 81(1) to exclude agreements concluded in the context of collective negotiations between management and labour in pursuit of the improvement of conditions of work and employment.[61] Neither the method of its production nor its content brings the agreement en transfers within the sanctuary recognized by the Court. The level of collective involvement was inconsistent and fragmented; the effect is not to improve players' working conditions. It is submitted that there is no strong case in favour of an extended interpretation sufficient to confer such autonomy on the agreement, and that, in particular, residual restrictions and cross-border labour mobility within the ambit of Article 39 are inapt to benefit from the special treatment carved out by the Court for collective agreements between employers and employees.

---

[61] E.g., Case C-67/96, *Albany International* v. *Stichting Bedrijfspensioenfonds Textielindustrie*, [1991] *ECR* I-5751; Case C-219/97, *Maatschappij Drijvende Bokken BV* v. *Stichting Pensioenfonds*, [1999] *ECR* I-6121.

But the fact that the matter is in principle subject to the rules of the EC Treaty does not mean it is unlawful. Sport has special features that deserve respect. In accordance with *Bosman*, it should be regarded as legally permissible for football to devise an internal taxation system to transfer money into the hands of nursery clubs, as part of a scheme for sustaining a larger number of clubs than would survive in 'pure' market conditions and to diminish gaps in economic strength between clubs. This would connect with the need to preserve a credibly competitive League, the most persuasive general rationale for permitting the sports industry autonomy to regulate itself in a more interventionist manner than would be permitted in other sector.[62] Similarly it is submitted that one could readily accept the permissibility under EC law of 'transfer windows', which typically prevent players being acquired and immediately fielded by a new club in the later stages of a competition, or rules that forbid a player appearing for more than one club during a particular competition. Doubtless such rules dampen the market for player acquisition and exert an incidental effect en patterns of player mobility, but, by restricting the ability of rich clubs to poach their rivals' star players at the sharp end of the season, they serve the legitimate purpose of ensuring the competition remains credible. *Lehtonen* already suggests judicial receptivity to such a model.[63] Insofar such devices constitute features of the agreement en transfers brokered by the Commission, it is my submission that they are capable of being treated as compatible with EC law as contributions to fulfilment of the wider mission to maintain a degree of competitive equality and a form of organizational solidarity within the sport.

Collective attempts to impose restrictions on the ability of players to contract with their preferred employer, even where that involves a breach of an existing contract, also feature in the 'compromise'. For example, up until the age of 28 a player must abide by a contract for at least three years or else suffer a suspension imposed by the game's governing authorities. This goes beyond the generally applicable 'transfer window' and instead envisages collective action designed to encourage observance of an individual contract rather than simply leaving the matter to applicable national law. It is submitted that this contribution to stabilizing club squads goes beyond the space allowed by the Court's acceptance in *Bosman* that in view of the 'considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results […] must be accepted as legitimate'. This, however, cannot conclude the argument. In the same sentence of *Bosman* the Court added that in view of the importance of sport 'encouraging the recruitment and training of young players must be accepted as legitimate'.[64] This separate aim may be advanced in defence of the supplementary collective intervention into contractual negotiation and

[62] See generally Sect. 9.2 above.

[63] *Lehtonen*, *supra* note 19.

[64] Case C-415/93, *supra* note 2, Para. 106.

compliance envisaged by the newly agreed system. It is indeed explicitly stated by the Commission in its publications of March 2001 and June 2002 that it accepts the need to 'encourage and reward the training effort of clubs, in particular small clubs'. But it is arguable that on this point the Court, and therefore the Commission, exaggerates the special status of sport. It is simply assumed that sport has an unusually pressing need to offer inducements to employers to train young workers. But where is the reason for supposing that a football club is any less likely to train young employees because they might subsequently quit the company than a bank or a University would be – and no transfer fee system applies in those sectors! All employers need to train employees in order to take the benefit of their skills for as long as they are able to compete successfully in the labour market to attract them to stay with the company. A transfer system doubtless encourages a higher level of investment in training than would otherwise occur but what is missing from the ruling in *Bosman* and the Commission's subsequent approach to the matter is any supplementary explanation why sports clubs should be treated as a special case on this point. Economic rationales may conceivably exist.[65] The ability of football players is immediately visible on the pitch, so clubs that invest in training quickly lose the advantage they enjoy in having more information than predator employees about an employee's developed skills. Perhaps that generates an unusually strong unwillingness to invest in training, although a similar rationale would apply to musicians or actors who are not currently subjected to a transfer system. For current purposes the point is simply that no such analysis has been conducted in the context of EU policy-making and that therefore the EU institutions since *Bosman* have proceeded on the unexplained assumption that sport, and in particular football, is 'special' in its need to protect incentives to invest in youth training.

From this perspective it is accordingly far from clear that the Commission's 'compromise' agreement with football governing authorities is fully compatible with EC law.[66] It is submitted that the insistence on individual economic freedoms that is driven by Article 39 EC, supplemented by, and in some factual situations extended by, Articles 81 and 82 EC, fatally damages attempts to resuscitate a transfer system claimed to serve the collective interests of the game in so far as residual restrictions on labour mobility apply, over and above permissible devices for income distribution and other schemes such as the 'transfer window' designed to stabilize the credibility of a competition.[67] But, as mentioned above, FIFPro, the association of players unions, is apparently not now minded to fund litigation designed to destabilize the compromise arrangements, and a brave individual litigant may not be readily forthcoming. *Bosman*, after all, won his case, but his career was ruined by boycotts to which he was subject while his legal action was

[65] See, e.g., Feess and Muehleusser 2002, 221.

[66] It may also be vulnerable to attack under national law, though this will vary State by State. E.g., for comment on the impact of German law, see Engelbrecht 2001, 49.

[67] Cf. Foster 2001.

pending and fully eight years separated the initiation of litigation from an out-of-court payment made to him by the Belgian football authorities.

In closing the Commission's investigation in June 2002, Commissioner Monti, declaring 'the end of the Commission's involvement in disputes between players, clubs and football organizations', added that it 'is understood that EU law is able to take into account the specificity of sport, and in particular to recognize that sport performs a very important social, integrating and cultural function'.[68] Given the slender likelihood of litigation, combined with an admission that even the analysis above suggests that, at worst, the 'compromise' is only in limited respects vulnerable to a serious challenge based on EC law, one may be inclined to agree with this mood of all's well (more or less) that ends well (more or less). One may also readily appreciate Mr Monti's desire to trumpet the Commission's respect for sport's diverse strengths. There is little room for doubt that the background political mood played a rule in encouraging the Commission to find a way to terminate its dogged pursuit of this matter. Governing authorities in sport are often skilful in exploiting the fact that their games carry a value measured in newsworthiness that stands out of all proportion to their importance judged solely by turnover figures and balance sheets. Sport engages more than economics. In September 2000 Prime Minister Blair and Chancellor Schroeder were able to find time in their busy schedules to review the debate and, expressing the view that dismantling the current transfer system could imperil smaller clubs, they hoped that 'the Commission will take into account the special situation that exists in professional soccer [sic]'.[69] The slight to the Commission, by implication guilty of neglecting that special situation, is plain. It is doubtless appealing to politicians to grab cheap headlines by 'defending' football, especially where no financial commitment is involved. Subsequently, a letter written by UEFA to Prime Minister Goran Persson, at a time when Sweden held the Union Presidency, was conveniently leaked to journalists in early March 2001. It complained that Commission officials were almost impossible to deal with because of their unwillingness to accept the specific needs of the grass roots of the game' and 'out of sympathy with the expressed wishes of governments of their own member states and the recent [Nice] Declaration'.[70] In such an environment striving to close the file on the transfer system is not inconsistent with the formal independence guaranteed to and required of the Commission according to Article 213 of the Treaty but neither is it wholly disconnected from the practical politics of this sensitive matter.

---

[68] IP/02/824, *supra* note 60.

[69] Press Release No 425/00 of the German Government, 10 September 2000, currently available at www.eng.bundesregierung.de/top/dokumente/Pressemitteilung/ix_17866.htm.

[70] Quotes taken from 'UEFA fears for future as transfer talks reach impasse', *The Independent*, 3 March 2001, p. 26. See Sect. 9.6 below on the Nice Declaration.

9.4.8 Broadcasting

9.4.8.1 The Economic Context of Sport and Broadcasting

Bosman has been widely treated as a far more significant agent for change in sport in recent years than is realistic. Of course the judgment has brought to an end intra-EU/EEA nationality discrimination in club football, and, by generating curtailment of the scope of the transfer system, it has altered the nature of the relationship between player and club. But the dominating issue in professional sport over the last decade or so has been the transformation of the broadcasting sector. Sweeping deregulation and doses of privatization have combined with extraordinarily rapid technological change affecting the delivery of media services to convert broadcasting into a fiercely competitive and volatile sector. It is well known that broadcasting undertakings, and in particular new market entrants seeking to establish awareness of their presence among potential customers, have chased the acquisition of rights to transmit sports events with a zeal that reflects the intense appeal of sports coverage to viewers. Football and Formula One motor racing top the European tree. Media companies have vigorously pursued the acquisition of contractual rights and even in some cases have tried to secure a controlling interest in sports clubs themselves[71] or, at least, a lesser stake that increases their influence on decisions to sell rights.[72] Simple economics dictates that the explosion in the number of actors on the demand-side of the market combined with the relative difficulty in increasing the supply of truly attractive events leads to vast increases in the prices charged by the sports industry for broadcasting rights. Even if there are recent indications that the market is cooling down, at least in relation to demand for the sports events that, though not rated as top-level, were priced at frankly mysteriously elevated levels in this latest economic 'bubble',[73] it is nevertheless plain that rights to broadcast sports events, as a saleable commodity, have become sufficiently lucrative in recent years to

[71] E.g., in 1999 the UK competition authorities blocked a proposed merger between BskyB, a satellite broadcasting company, and Manchester United, a football club, on the basis that it would operate contrary to the public interest; cm 4305, 1999. Among other factors it was thought that competition in the market for acquisition of broadcasting rights would have been restricted by BskyB's more intimate involvement with the supply-side and that the gulf between rich and poor football clubs would be widened. For comment, see Tassano 1999, 395; Harbord and Binmore 2000, 142, and on the broader background, see Bose 1999.

[72] E.g., in the UK the consequence of the blocking of the BskyB/Manchester United merger, *supra* note 71, has been the acquisition by media companies of minority but not insignificant stakes in football clubs; see Brown 2000, Ch. 8.

[73] Notoriously in 2002 the 72 professional English Football League clubs operating below the top tier, the Premiership (comprising the leading 20 clubs), found expected substantial income from sale of broadcasting rights would not after all be forthcoming when the buyer, ITV Digital, which had attracted far fewer viewers than planned, was placed in administration. Despite dire predictions no club has (yet) been forced to close as a result. The collapse of the Kirch empire in Germany also featured broken agreements to pay large sums for rights to broadcast football. Cf. *The Economist*, 'Passion, pride and profit: A survey of football', 1 June 2002.

transform the whole structure of professional sport as a commercial enterprise. Opportunities to sell branded merchandise, such as club shirts, have provided another explosion of revenue. The fan who pays at the gate is no longer the main source of revenue for sports clubs. The alteration of the transfer system post-*Bosman* is small beer compared with these developments.

So the prominence of EC law's intervention in sport in recent years is above all the consequence of the 'commercialization' of the sector, in particular as a result of its close association with the helter-skelter development of the broadcasting industry. In fact, much of the most economically significant sports-related material that cascaded into the Commission's in-tray in the late 1990s was concerned directly or indirectly with broadcasting. In some respects the Commission's recent preoccupation with sport has been driven by its need to monitor the much more important broadcasting sector, in which it is profoundly anxious to forestall practices that will facilitate existing incumbents anxiety to impede new entrants.

9.4.8.2 UEFA's Rules on 'Blocking' Matches

In April 2001 the Commission issued a formal Decision concerning UEFA's 'blocking' rules.[74] These permit national football associations to prohibit the broadcasting of matches within their territory during a two-and-a-half hour period on a Saturday or Sunday corresponding to the normal time at which fixtures are scheduled in the relevant country. This, one would initially suppose, impedes the commercial freedom of broadcasters to conclude deals to show 'blocked' matches. On the other hand, it serves the rather differently calibrated value of encouraging spectators to attend matches 'live' and thereby to foster a vibrant atmosphere inside grounds. The Commission's market analysis led it to conclude that the rules do not appreciably restrict competition within the meaning of Article 81(1).[75] It explicitly states that it therefore need not assess the extent to which the televising of football exerts a negative impact on attendance at matches.[76]

Intriguingly, a different tune emerges from a reading of the Press Release concerning this matter. Mr Monti is quoted as observing that the decision 'reflects the Commission's respect of the specific characteristics of sport and of its cultural and social function'.[77] Admittedly the Decision is built on appreciation of the specific nature of the market for rights to broadcast football matches, just as all competition decisions take proper account of applicable market conditions, but Mr Monti's more ambitious claim that it reflects the Commission's respect for sport's 'cultural and social function' is disingenuous. It would be more accurate to state

---

[74] Comm. Dec. 2001/478, *OJ* 2001, L 171/12.

[75] Paras. 49–61 of the Decision. The Commission will monitor change in market structure, particularly in the wake of the 'Internet revolution', Para. 56.

[76] Para. 59.

[77] IP/01/583, 20 April 2001.

that market analysis conducted under Article 81 has led to a conclusion which preserves the autonomy of football governing bodies to choose to 'block' the broadcasting of matches. It is not the Commission's business to embark on an assessment of sport's cultural and social function, except in so far as it may be relevant under Article 81(3), and, even though the criteria governing exemption are not necessarily wholly incapable of influence by what may be loosely termed 'cultural factors',[78] such broader considerations are scrupulously excluded from the formal Decision, which is confined to Article 81(1) alone. The Commission may here be suspected of seeking to use its Press Release to build up credit for itself in the face of allegations that its application of EC trade law is liable to destroy the foundations of sport. Much as one may readily sympathize with the Commission for the more egregious attacks it has sustained from the sports industry and some prominent national politicians for its alleged meddling in matters that do not concern it, it is pertinent to wonder whether it may be storing up trouble for itself in making extravagant claims about its competence to cater for cultural and social matters in the application of orthodox EC trade law.

9.4.8.3 Collective Selling of Broadcasting Rights: The Competing Interests

The decision on UEFA's 'blocking' system is explicitly stated not to prejudice assessment of collective selling of broadcasting rights to football matches under Article 81(l).[79] This more general issue awaits authoritative Commission treatment. It is truly intriguing.

Sport without uncertainty of result would be like opera. You would know who is going to die in the end. It might be entertaining; but it would not be sport. So the establishment of a 'solidarity fund' within a sport, to which wealthier clubs are required to contribute from the proceeds of, *inter alia*, the sale of broadcasting rights and ticket income and on which poorer clubs may draw for financial support, would probably escape supervision under EC competition law. It would not restrict competition within the meaning of Article 81(1); rather, it is a form of equalizing arrangement that is essential to sustaining vibrant inter-club competition in a professional sports league.[80] Doubtless a shrewdly-devised balance has to be struck between rewarding the successful and strengthening the unsuccessful,[81] but

[78] For a summary of the unclear scope of 'non-economic' aspects to Art. 81(3), see Whish 2001, 125–128. Neither Commission nor Court has yet offered satisfactory explanation of the impact of Art. 151(4) EC on Art. 81 EC, and the issue, which also engages *inter alia* the impact of Arts. 6 and 153(2), escapes the scope of this paper. For a taste, see Monti 2002, 1057, esp. at 1069–78.

[79] *Supra* note 74, Para. 60 of the Decision.

[80] Cf. summary in Roth 2000, Para. 4–150. See also Sect. 9.5 of this paper, below.

[81] Much of the economic literature is North American in origin. For analysis, see Dobson and Goddard 2001, especially Ch. 3. Cf. Rosen and Sanderson 2001, F47, arguing US approaches to locating balance punish success while European approaches punish failure.

the key point for present purposes is that, by contrast, incentives to adopt such a strategy are completely absent from a typical manufacturing or service industry. The interesting questions in sport then surround the issue of how this peculiar economic status should be reflected in the legal regulation of practices that are presented as necessary to secure equality between clubs and uncertainty as to results. And this is the challenge presented by collective selling.

Collective selling arrangements typically offer prospective purchasers only the opportunity to compete for one package, comprising the league's entire output. Buyers are unable to conclude deals with individual clubs,[82] among whom there would otherwise be competition in selling.[83] As the Scottish excursion in Sect. 9.2 of this paper demonstrated, it is plain that clubs would have nothing to sell unless other clubs agreed to play against them. Fixtures cannot be arranged unilaterally – this is the nature of sport. But once clubs agree to play against each other, it is submitted the subsequent decision to sell rights to broadcast matches on a collective basis is capable of restricting competition within the meaning of Article 81(1). So collective selling of broadcasting rights should be carefully distinguished from arrangements internal to the game which reflect the peculiar economic interdependence of clubs because it exerts a direct external impact on third party broadcasters.[84] It restricts competition within the meaning of Article 81(1) EC, insofar as it has an appreciable effect on inter-State trade. It is unlawful unless it is exempted under Article 81(3). But here, at the stage of exemption, the peculiarities of organized sport may emerge. The fact that the collective system of selling has restricted supply will ensure that the price paid by buyers will be higher than the (aggregate) price that would have been paid for rights sold on an individual basis by clubs. So collective selling maximizes revenue which can then be shared between clubs in pursuit of the preservation of competitive equality and a more attractive spectacle. Moreover, raising revenue on a collective basis is a far more administratively convenient vehicle for the league to arrange for subsequent distribution between participant clubs than a model which insists on selling by individual clubs followed by some form of internal taxation. But how does the interest of sport in using collective selling to enlarge the pie and to make it easier to slice weigh against the interest of third party broadcasters, comprising both current incumbents and potential market entrants, in having a more competitive market for acquisition of rights?

---

[82] The precise nature of this 'right', typically comprising one of access to home matches, is dictated by national law cf. Beloff, Kerr and Demetriou 1999, pp. 134–6, 153–6; Nitsche 2000, 208; Van den Brink 2000, 359, at 360 and 420, at 422–23.

[83] The collectively sold package may be (and increasingly is) broken down into constituent units – live matches, recorded highlights, etc. – but this does not affect the basic issue, which is the suppression of sales by individual clubs. On the distinct question of exclusive sale see Fleming 1999, 143.

[84] Cf. Cave and Crandall 2001, F4, especially at F18.

9.4.8.4 Collective Selling of Broadcasting Rights: Legal Straws in the Wind

The Commission has not decided how to answer this question. It is interesting, though naturally not decisive as a matter of EC law, that the permissibility of collective selling of broadcasting rights has been addressed at national level. In the United Kingdom a decision of the Restrictive Practices Court in 1999 found in favour of the legality of collective selling arrangements practised within the English (football) Premier League.[85] However, although the judgment is lucid in its identification of the gains for football flowing from collective selling, it is much less convincing in its measurement of the losses incurred by (existing and potential) broadcasters. The deficiency was not the Court's but rather that of the now-repealed statute under which the decision was taken, the Restrictive Trade Practices Act. That Act confined the Court to choosing between the public interest in maintaining the current arrangements and in having no restrictions al all, and, statutorily unable to weigh up more nuanced intermediate alternatives,[86] it preferred the former. In Germany, by contrast, collective selling was condemned by the competition authorities but, in a tribute to the lobbying power of football, it was subsequently granted statutory approval.[87] Of course, a green light under national law cannot displace the application of Article 81 in the territory of a Member State, so neither of these two distinct Anglo-German routes to preservation of collective selling can be treated as inevitably durable in so far as inter-State aspects to the arrangements are involved.

But how will the Commission judge collective selling? In July 2001 it sent a statement of objections to UEFA, European football's governing body, complaining that its arrangements for the sale of broadcasting rights to the 'Champions League', the principal European club competition, infringe Article 81.[88] UEFA sells rights collectively on behalf of all participating clubs and has preferred to sell to broadcasters on an exclusive basis, typically under arrangements covering a period of several years. The Commission considers UEFA's scheme constitutes a substantial restriction on competition, not least because of the foreclosure of the market to potential entrants into a sector capable of dynamic evolution, and that, although it in principle recognizes the need for wealth distribution and solidarity within the sport, it believes the UEFA arrangements go beyond what is necessary to achieve these legitimate ends. It is notorious that the rise of the 'Champions League' has coincided with a diminution in the percentage of revenue raised that is shared among clubs

---

[85] *Re the supply of services facilitating the broadcasting on television of Premier League football matches*, [1999] UKCLR 258.

[86] E.g., in the form of a collectively-sold bloc of matches alongside which remaining matches could be made available on an individual basis. Cf. Szymanski 1986, Ch. 23; Spink and Morris 2000, p. 165.

[87] Para. 31 Gesetz gegen Wettbewerbsbeschränkungen, as amended with effect from 1 January 1999.

[88] IP/01/1043, 20 July 2001.

outside the game's elite. Moreover, the vast rewards on offer to the small pool of clubs able regularly to participate in the 'Champions League' may conceivably have made a significant contribution to weakening the competitive health of national league championships. One may accordingly suspect that the Commission, in seeking to apply Article 81 to break up collective selling of exclusive deals in the face of the sports industry's objection that such arrangements are essential to sustain internal organizational solidarity, has cunningly picked out the softest target. UEFA duly responded by proposing an amended system involving, in short, an 'unbundling' of the package of rights available for purchase. More operators, including internet content providers as well as more traditional public and private broadcasters, will be able to acquire a degree of involvement in the coverage of the Champions League. The Commission is favourably disposed to this plan for competitive diversification which, it considers, will benefit football fans while also assisting the growth of new technology in the media sector.[89]

In this case the Commission explicitly and scrupulously observes that it is not objecting to collective selling of sports rights as such.[90] But this case carries an echo of the Commission's intriguingly ambitious hint in its December 1999 'Helsinki Report on Sport',[91] that assessment of the compatibility of collective selling arrangements with Article 81 can legitimately involve analysis of the degree to which the revenues raised are shared throughout the sport. In the Helsinki Report, the Commission grouped features such as the notion of solidarity in sport, whereby the top of the professional game is connected to the humble 'grass roots', under the rubric of the 'European Sports Model'. The Commission commented that any possible exemption granted to collective selling arrangements would have to take account of the benefits for consumers and the proportionate nature of the restrictions in relation to the end in view. This is orthodox fare under Article 81(3) EC. It observed that it is therefore appropriate 'to examine the extent to which a link can be established between the joint sale of rights and financial solidarity between professional and amateur sport, the objectives of the training of young sportsmen and women and those of promoting sporting activities among the population'. In similar vein Commissioner Monti has cautiously suggested that 'financial solidarity between clubs or between professional and amateur sport' could be a relevant factor in assessing whether to grant an exemption to collective selling.[92] This is strikingly less orthodox as an articulation of the matters that are properly taken into account under Article 81(3). This line of thinking suggests use of the power to exempt restrictive selling practices as a method for insisting that sellers also take care to foster the social and educational function of sport by sharing proceeds throughout

[89] IP/02/806, 3 June 2002; *OJ* 2002, C 196/3. So, e.g., in the UK live Champions' League matches were available only on ITV in 2002/03, but a greater number of live matches, screened by both ITV and Sky, will be available from 2003/2004.

[90] 'Background Note', Memo 01/271, 20 July 2001.

[91] COM (1999) 644/1 and/2. See further below, Sects. 9.5 and 9.6.

[92] Speech delivered in Brussels at a conference on 'Governance in Sport', 26 February 2001, available as Speech/01/84 via http://europa.eu.int/comm/sport/key_files/comp/a_comp_en.html.

the sport.[93] So a 'breakaway' league of the type lately mooted in European football,[94] may, by ridding itself of its roots in the wider organization of the sport, thereby lose one commercially attractive opportunity, that of collective sale of broadcasting rights.[95] The Commission may here be floating an idea that would exceed the proper scope of Article 81(3). It is, in entertaining this temptation, running the risk of allowing its desire to hold the line on the features of the European Sports Model which it cherishes to propel it into the position of general sports regulator which it insists it does not wish to fulfil and for which its constitutional credentials are lacking. The Commission is competent to do more than supervise the choices made within the industry for their compliance with EC law.[96] For the time being, the compatibility of collective selling of rights to broadcast sports events with EC law remains an intriguing but unresolved issue.

9.5 The Structure of EC Trade Law Applied to Sport

The Commission issued 'The Helsinki Report on Sport' in December 1999.[97] In a section entitled 'Clarifying the Legal Environment of Sport' the Commission contents itself with a relatively brief summary, and it is the Treaty competition rules that are the centre of attention. In *Bosman* the Court notoriously avoided analysis of the matter from the perspective of the competition rules. *Balog*, which would have provided an opportunity to rule on the application of Article 81 to the pre-2001 version of the transfer system in litigation initiated by a non-EU (Hungarian) national, was withdrawn in the wake of a settlement of the dispute by the parties,[98] while in both *Deliège* and *Lehtonen* the Court concluded that the referral

[93] Support for this approach is expressed by the Committee of the Regions, Opinion on the European Model of Sport, *OJ* 1999, C 374/56, Para. 3.8.

[94] 'Project Gandalf', the European Football League, was notified to the Commission, *OJ* 1999, C 70/5, and though the breakaway has not (yet) been executed, the threat was enough to generate changes by UEFA that benefited larger clubs. See, e.g., van den Brink 2000, especially 364–65. The 'G-14' group of leading clubs met Commissioner Reding on 16 April 2002; see Commission 'Key Files', *supra* note 92.

[95] On the very permissibility of such a League, if 'closed', under EC competition law, see van den Brink 2000, especially 364–8, 426; Hellenthal 2000.

[96] Cf., however, note 78 *supra* and the admittedly thoroughly ambiguous role of the *Querschnittsklausel* Art. 151(4) EC in shaping the ambit of Art. 81(3).

[97] Cited *supra* note 91. See Weatherill 2000, 282.

[98] Case C-264/98, *Tibor Balog* v. *Royal Charleroi Sporting Club*, referred by the Tribunal de première instance de Charleroi under an order of 2 July 1998, removed from the Court's register on 2 April 2001. An Opinion by A-G Stix-Hackl, dated 29 March 2001, has not been made officially available (its hearing was 'cancelled', according to Court Press Release No 11/2001, 29 March 2001), but favours a finding of incompatibility with Art. 81; sustainable development has been secured by the re-cycling of the analysis in the unpublished Opinion in Egger and Stix-Hackl 2002, 81.

did not provide it with sufficient detail to allow it to provide an informed ruling on the interpretation of the Treaty competition rules.[99] Perhaps it is sound judicial technique to decide only matters that need to be decided for the purposes of disposal of the case at hand, but such judicial reticence has left plenty of space for debate, nurtured by the vigorous Opinion of Advocate-General Lenz in *Bosman*, about the proper role of competition law in this field.[100]

In the Helsinki Report the Commission offers only a framework for analysis. It considers that, from the perspective of the Treaty competition rules, there are three categories into which rules of sporting bodies might fall:

(i) practices which do not come under the competition rules. These are rules to which Article 81(1) does not in principle apply because they are inherent to a sport's identity and/or necessary for its organization. The Commission states that, 'first and foremost', this would cover 'The rules of the game';

(ii) practices that are, in principle, prohibited by the competition rules. This category comprises practices that are motivated by economic interests, unassociated with the preservation of the special characteristics of sport. Orthodox Community law applies to forbid nationality-based discrimination outside the special case of representative teams and anti-competitive practices in, for example, distribution of sports goods;

(iii) practices likely to be exempted from the competition rules. The Commission draws on *Bosman* to express a favourable view in principle of agreements genuinely designed to achieve the objectives of maintaining 'a balance between clubs, while preserving a degree of equality of opportunity and the uncertainty of the result, and to encourage the recruitment and training of young players'. It is also ready to exempt 'an exclusive right, limited in duration and scope, to broadcast sporting events' and short-term sponsoring agreements based on clear and non-discriminatory selection criteria. Presumably such schemes that lack the beneficial features mentioned by the Commission are unlikely to enjoy exemption and, assuming the presence of an appreciable effect on inter-State trade, will be condemned as violations of Article 81(1).

It is certainly helpful to have this tripartite framework set out as a starting point. It is possible for those in the sports industry seeking to shelter their arrangements from intervention under EC law to adapt their arguments to the approach sketched by the Commission. But there is plenty of room for controversy about the proper location of particular practices on this ladder, not least because traditional sporting practices, viewed from within as, in short, 'rules of the game', carry inescapable economic

[99] Deliège, *supra* note 18, Paras. 36–38 of the judgment; *Lehtonen*, *supra* note 19, Paras. 28–19 of the judgment.

[100] Cf. Hannamann 2001; Van den Brink 2000. See also sources, *supra* notes 54, 80.

implications which, moreover, may resonate more loudly as sport's commercial clout increases.[101] Disagreements at the borderline between categories (i) and (iii) and categories (ii) and (iii) seem especially likely to proliferate. And the Commission itself appears to waver on the matter of classification. Whereas the Helsinki Report locates arrangements designed to maintain a balance between clubs in category (iii), exemptable practices, it is at least arguable that such practices are necessary for the very organization of sporting competition, and that they accordingly belong in category (i), rules lying beyond the reach of Article 81(1). In a Press Release issued almost contemporaneously with the Helsinki Report the Commission, addressing this issue, appeared to slide on to the other side of the line in asserting that rules of sports bodies that are necessary to ensure equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions are not in principle caught by the Treaty's competition rules.[102] On this view, keeping a balance between clubs that prevents results being a foregone conclusion is an intrinsic feature of sport and systems for shaming out income that are indispensable to the maintenance of this balance would be capable of eluding Article 81 altogether even though hard currency is very obviously involved.

Locating margins between the Commission's three categories is evidently a delicate art, but it is important to assert that although this taxonomy is designed to supply a coherent framework for understanding how EC competition law applies to sport, it is not in itself divorced from the fundamental approach of EC competition law to any sector. Rules inherent to a sport's identity and/or necessary for its organization escape Article 81 altogether. This allows recognition of sport's particular characteristics. But the application of Article 81 is always conditioned by the particular context in which arrangements are struck. There must never be a lazy or mechanical assumption that a rule restricts competition within the meaning of Article 81(1). So an apparent constraint on competition that is in fact unavoidably required to sustain the functioning of an unobjectionable commercial arrangement is itself compatible with Article 81.[103] Not every agreement which restricts the freedom of action of one or both of the parties fails within the scope of the Article 81(1) prohibition.

> '[A]ccount must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account

[101] Pons, Deputy Director General of (what was then) Directorate-General IV, confesses the difficulties involved in Pons 1999, Ch. 6, plus discussion in Ch. 9. For recent statements of practice by officials (including Pons), consult http://europa.eu.int/comm/sport/key_files/comp/a_comp_en.html; and see also Pons 2002, 241.

[102] IP/99/965, 9 December 1999.

[103] E.g., Case C-250/92, *Gottrup Klim* v. *DLB*, [1994] *ECR* I-5641. See also A-G Lenz in *Bosman*, *supra* note 2, Paras. 262–276.

[104] Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, judgment of 19 February 2002, nyr, Para. 97.

> must be taken of its objectives […] It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.[104]

This observation was delivered in the context of rules prohibiting multi-disciplinary partnerships between members of the Bar and accountants[105] but can readily be transplanted to underpin an argument that the overall context in which sports regulation occurs, built around pursuit of a broad objective of healthy equality of competitive opportunity, produces effects which though restrictive of competition are nonetheless inherent in the pursuit of those objectives. So restrictions indispensable to the proper functioning of a sports League lie in an arena of autonomous sporting regulation unaffected by the hot breath of Article 81. But the general jurisprudential point is that although sport receives 'special' treatment insofar as there is room for its economic peculiarities to be used as a reason for sheltering rules that may initially appear restrictive of competition from the Treaty, in fact all sectors are in principle permitted to invoke their peculiarities in this context. The issue is only that sport is unusually peculiar.

The cases set out and discussed in Sect. 9.4, above, can be slotted into the three categories to show how the Commission's practice has evolved. So, for example, the 'Mouscron case', concerning UEFA's 'home and away' rule)[106] illustrates an exercise of autonomous sporting regulation that does not in principle fall within Article 81 or 82 at all. This is category (i); so too anti-doping rules in swimming[107]; and the UEFA rules forbidding multiple ownership of clubs – correctly treated by the Commission as essential to preserving sporting competition as a real not a sham struggle for supremacy.[108] It is submitted that rules imposing a 'transfer window', which appear in the new transfer system[109] would be similarly treated. Such a restriction on buying and selling players amounts to a contribution to limiting the occasions on which money can talk and to focusing primary attention on clubs' abilities to succeed by astute deployment of existing playing resources.

Football World Cup fits comfortably into category (ii). These were ticketing practices of purely economic interest that contradicted the fundamental principle of EC law forbidding indirect nationality-based discrimination unless objectively justified.[110]

Other cases lately brought to an informal conclusion are not blessed by precise explanations of the Commission's position. Nor does the memorandum of 5 June 2002, though presented under the sweeping title 'The application of the EU's

---

[105] And is controversial in its application by the Court in that particular context; see annotation by Vossestein 2002, 841.

[106] Section 9.4.2.

[107] Section 9.4.5.

[108] Section 9.4.4.

[109] Section 9.4.7.2.

[110] Section 9.4.6.

[111] Memo/02/127, 5 June 2002.

competition rules to sports', offer any more than a quick summary of recent practice.[111] What is really necessary for the organization of sport, and therefore beyond the reach of Article 81, is an invitation to debate rather than a clean-edged category. The two issues on which most attention is lavished in Sect. 9.4 above, the transfer system and collective selling of broadcasting rights, are particularly intriguing. The arguments do not bear repetition here; suffice to say that both practices can be regarded as elements in promoting wealth distribution that contributes to competitive balance in a league, but both are vulnerable to the powerful criticism that other devices for achieving this objective can be found that do not inflict damage directly on third parties, players and purchasing broadcasters respectively. It is therefore much harder to place them beyond the reach of the Treaty rules altogether, and, moreover, it is far from dear that the grant of exemption pursuant to Article 81(3) can be justified. A cautious Commission has declined to rule formally on the application of Article 81 to the transfer system, although it has informally suggested the conditions for exemption may be met by the system of collective sanctions against unilateral contract-breakers,[112] while it has explicitly avoided delivering any ruling on the general phenomenon of collective selling of broadcasting rights.'[113]

It matters, of course, whether a practice is placed outside Article 81 altogether or in need of exemption pursuant to Article 81(3), most prominently because exemption currently remains the exclusive preserve of the Commission.[114] So, tactically, sporting autonomy is best protected by a regime that takes a narrow approach to Article 81(1)'s net; conversely, Commission control is enhanced by a wide interpretation of that prohibition. This is standard fare for competition lawyers. But, in practice, the difference may be less profound than it may initially appear. The exclusion of practices from the reach of Article 81 is in any event conditional on those practices being shown to be necessary and proportionate, and accordingly in practice a degree of co-operation with the Commission is likely to be required of sports bodies, whatever theoretical preference one may entertain for the scope of Article 81(1).

Aficionados of *Bosman* may well inquire, in wounded tone: Whatever happened to Article 39? In fact, built into recent Commission practice is an assumption of convergence between the basic thrust of Articles 39 and 81/82, when applied to sport. Under the EC Treaty as interpreted by the Court, provisions governing persons cross over with the competition rules in away that the provisions on goods, which do not bind private parties directly, do not.[115] *Bosman* was directed at building into Article 39 an openness to sport's special characteristics and, seeking to avoid incoherence in the application of the Treaty rules, the Commission now

---

[112] Rejection of COMP/36.583 *supra* note 58.

[113] Section 9.4.8.4.

[114] This will change if the 'modernization' of competition policy initially proposed in a developed fashion in the Commission's 1999 White Paper, *OJ* 1999, C 132/1, comes to fruition.

[115] See Snell 2002, especially Ch. 3; Van den Bogaert 2002, Ch. 5.

appears ready routinely to build in the same formula in its treatment of sporting practices under Article 81. For example, in its communication dealing with UEFA rules on multiple ownership, the Commission invokes 'Article 39 reasoning' directly in the application of Article 81.[116] The Court in *Wouters* adopts a comparable assumption of convergence between Articles 39 and 81,[117] and both *Deliège* and *Lehtonen* contain material that is persuasive in this direction.[118] Rules intrinsic to the organization of sport are untouched by the Treaty rules despite their apparent restrictive effect on trade, and, at least at this level of analysis, Articles 39 and 81 run in parallel. Admittedly, it will frequently be tricky in individual cases to determine precisely which sporting rules meet this test.[119] And, of course, in contrast to its central role in the administration of competition policy the Commission has no powers to bring proceedings directly against private parties for violation of Article 39. But as a general proposition it seems correct that rules necessary for the basic organization of sport should be treated as equally immune from challenge whether reliance is placed on the Treaty provisions on free movement or those on competition. The Commission appears to have increased the probability in practice of parallel outcomes by informally treating aspects of the amended transfer system[120] and the amended FIFA rules on agents[121] as compatible with the Treaty rules governing free movement and, by analogous reasoning, also acceptable under Article 81(3) though not excluded from Article 81(1).

The Commission concludes its Helsinki Report on Sport by insisting that 'the basic freedoms guaranteed by the Treaty do not generally conflict with the regulatory measures of sports associations, provided that these measures are objectively justified, non-discriminatory, necessary and proportional'. This is very much the message which the Commission has sought to convey in its recent practice in dealing with individual cases. And, as a general claim, it is convincing. Sport has room to move under EC law. Fair Play!

---

[116] *Supra* note 33. This feature of the Commission's approach provides Mortelmans with the springboard for a much wider exploration in Mortelmans 2001, 613. See also Stuyck 1999, p. 1477.

[117] Wouters, *supra* note 104, Para. 122.

[118] *Deliège*, *supra* note 18, *Lehtonen*, *supra* note 19, in particular the Opinions of A-G Cosmas and A-G Alber respectively; and similarly the 'lost' Opinion of A-G. Stix-Hackl in *Balog*, *supra* note 98. See Mortelmans 2001, especially 625–9.

[119] The new transfer rules, which potentially attract the attention of both Arts. 39 and 81, would not meet it, in my view, see Sect. 9.4.7.2 above.

[120] Rejection of COMP/36.583, *supra* note 58.

[121] Section 9.4.1; Rejection of COMP/37.124, 16 April 2002.

9.6 The Wider Terrain of a Policy on Sport

Sport possesses unusual economic features. It is also culturally and socially significant. Attention has already been drawn above to instances of the Commission weaving together these distinct strands in its handling of eases, and it has been suggested that this regulatory ambition may be susceptible to criticism for its constitutionally unstable foundations.[122] The question of just how extensive should be an EC policy on sport now deserves more focused treatment.

9.6.1 The Commission's Approach: a 'European Model of Sport'

The authorship of a Press Release issued in February 1999 draws attention to the Commission's broad horizons.[123] The document, which set out in brief the Commission's planned work agenda, appeared under the name of three of the fifteen Commissioners, representing competition policy (Van Miert), culture (Oreja) and social affairs (Flynn). As a general observation, sport doubtless deserves attention from all these perspectives. But the scope of the EC's competence in each is quite distinct and, in different ways, limited. Already such a complex web of involvement within the Commission itself hints at inevitable tension in the quest to achieve coherent policy development.

The Commission organized a 'European Union Conference on Sport' at Olympia, Greece, in May 1999. This gathering attracted representatives from, *inter alia*, governing bodies in sport, the media and interested public authorities. It generated a set of conclusions,[124] which included proclaimed adherence to a 'European Sports Model'. This core notion duly re-appeared in the Commission's first major post-*Bosman* policy document, the 'Helsinki Report on Sport', considered above in connection with the application of the Treaty competition rules to sport.[125] The Helsinki Report begins with the ambitious assertion that it 'gives pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions'. The Commission identifies 'a European approach to sport based on common concepts and principles', which includes sport's role as 'an instrument of social cohesion and education'. Tensions have emerged between this function and the increasingly prominent economic

[122] See in particular Sects. 9.4.7.3, 9.4.8.2 and 9.4.8.4.

[123] IP/99/133, 24 February 1999.

[124] The conclusions are available via http://europa.eu.int/comm/sport/index.html.

[125] *Supra* note 91.

[126] Cf. 'Project Gandalf' and the 'G-14 group', *supra* note 94.

[127] COM (95) 590.

motivations for sport. The Commission mentions the threat of a 'breakaway' European Football League which may 'jeopardize the principle of financial solidarity between professional and amateur sport and the system of promotion and relegation common to most federations'.[126]

The breadth of the Commission's horizon is emphasized by further connections made to the Commission's 1995 White Paper on teaching and learning[127] in search of methods for enhancing the educational role of sport; to the Council of Europe's view that sport is an ideal platform for social democracy; and it is asserted that 'existing Community programmes should make use of sport in combatting exclusion, inequalities, racism and xenophobia'.

It is striking that whereas the Court's recognition in *Bosman* that sport is, in short, 'special' referred to its 'social importance',[128] it was in fact largely reasoned on the basis of economic differences from normal industries, particularly clubs' need for credible rivals. By contrast, the Commission's agenda is more wide-ranging. The Helsinki Report can persuasively be taken as a demonstration of the Commission's sensitivity to the charge that it is liable to under-estimate the wider social and educational functions of sport in its application of EC law. But it leaves the reader anxious lest too much is being asked of sport as an instrument for social progress and, moreover, lest too much is being asked of the EC, and of the Commission in particular, against a constitutional background of limited available competence and policymaking instruments in many of these fields of endeavour. The Commission may be in danger of raising inflated expectations of its regulatory competence. This is especially pertinent with regard to the Commission's stated anxiety to protect a 'European Sports Model'. That model, dedicated to cohesion between the top flight and the grass roots, is plainly here constructed as a deliberate alternative to the 'closed league' system preferred in American professional sport.[129] But there is a tension between the Commission's preferred European vision and growing trends at the summit of European professional sport, especially football, enticed to look inquisitively at how money is made in North America. It was discussed above that the Commission is tempted to withhold exemption under Article 81(3) as a means of preventing the collective selling of broadcasting rights unconnected to adequate distribution of revenue to sporting grass-roots;[130] and it may be able to use Articles 81 and 82 to block the creation of 'closed' Leagues.[131] But the Commission will be ill-advised to offer any over-estimate of its ability to impede trends towards wealth maximization in professional sport. It is not a general sports regulator and it is not competent to impose a 'European Sports Model'.

---

[128] Case C-415/93, *supra* note 2, Para. 106 of the judgment. Cf. Sect. 9.2 above.

[129] See Weatherill 2000.

[130] Section 9.4.8.4.

[131] *Supra* note 95.

9.6.2 The Treaties of Amsterdam and Nice: Declarations on Sport and Their Consequences

It is not only the Commission that has expressed high-minded sentiments about the value of sport in society. Pressure has been periodically exerted by the sports industry to exempt sport from the scope of EC law. This, as a Treaty revision, would require the unanimous support of the Member States. Sports bodies are modestly skilful at exploiting the media to broadcast their (usually unsubstantiated) allegation that they are better left to their own regulatory devices and an unusual combination of circumstances might deliver the unanimity required to rid the EC of this turbulent pest. But the assembly of unanimous support would represent an arduous task and frankly the sports sector has failed to present an intellectually convincing case as to why it deserves such unique treatment. The Declaration on Sport attached to the Amsterdam Treaty provides an illuminating insight into the failure of the sports sector to win the argument for exemption, but also displays the accompanying anxiety of the Heads of State and Government to be seen to be doing 'something' about sport – even if, in practice, that is not very much at all.

The Amsterdam Declaration provides that:

> 'The Conference emphasizes the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.'

The Commission can claim to have abided by the instruction to consult, not least through the Forum it organized in Olympia in 1999 as it undertook preparation of what was to become the Helsinki Report on Sport. But otherwise this is an anodyne Declaration, far more important for what it does not do than for what it does. Most of all, it does not in any way challenge the basic point, made so vividly in *Bosman*, that the Treaty applies to sport insofar as it constitutes an economic activity. This was expressly acknowledged by the European Court in its treatment of the Amsterdam Declaration in *Deliège* and *Lehtonen*.[132]

The refusal to exempt sport, but the temptation to garland it with laurel, also marks the negotiations at Nice. A Declaration on 'the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies' was annexed to the Conclusions of the Nice European Council held in December 2000. This concedes the absence of any direct Community powers in the area, but asserts that the institutions of the Community must 'take account of the social, educational and cultural functions inherent in

---

[132] Deliège, *supra* note 18, Paras. 41–42 of the judgment; *Lehtonen*, *supra* note 19, Paras. 32–33 of the judgment.

[133] This is duly quoted in the Commission's memorandum of 5 June 2002, *supra* note 3.

sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured.[133] The Declaration calls for the preservation of 'the cohesion and ties of solidarity binding the practice of sports at every level', and, under a sub-title 'Amateur sport and sport for all', heralds sport as 'a factor making for integration, involvement in social life, tolerance, acceptance of differences and playing by the rules'. Sports federations are declared to carry 'special responsibilities' in the light of sport's social functions.

A process of dialogue endures. In October 2001 the 'European Sports Forum' was convened in Brussels in collaboration with the Belgian EU Presidency. The Forum included a working group on the follow-up to the Nice Declaration.[134] In its conclusions, the insistence on the value of a partnership between interested actors is sustained, alongside assertion of the social and educational function of sport, though the working group's most striking conclusion is its immodest claim that 'In the light of current international events, it is more than ever before essential to spread the message of peace and respect for others conveyed by sport'. A separate working group, dealing with 'sport and the social economy', concluded that sport should remain faithful to the values of the social economy, which 'is composed of people-centred organizations and enterprises based on democracy, solidarity and valorization of social, cultural and environmental resources'. It identified these as 'civic values [that] transcend the logic of profit-seeking interest'. In similar vein, a working group of the European Sports Forum held in Copenhagen in November 2002,[135] called for promotion of 'ethical and social values' and lauded recent Commission decisions for reconciling 'respect for Community law and the unique nature of sport' in accordance with the spirit of the Nice Declaration. The text of a Portuguese proposal to confer competence on the Community to develop a European sports policy is appended to the group's conclusions, although absence of unanimous support for this step is conceded. The Nice Declaration is also cited in the proposal for a Decision of the Parliament and Council establishing the 'European Year of Education through Sport' published by the Commission in October 2001.[136] This asserts sport's contribution to, *inter alia*, 'the all-round development of the person', 'counter[ing] school failure and head[ing] off social exclusion', 'fighting against racism' and serving as 'an excellent platform for social democracy'. This seems of itself vainglorious, but, mindful of the EU's limited constitutional and practical competence in these realms, such rhetoric is

[134] Documentation is available via http://europa.eu.int/comm/sport/info/events/forum200_en.html.

[135] Working Group on 'Taking account of sport in Community policies and measures'. Documentation is available via http://europa.eu.int/comm/sport/info/events/forum2002_en.html.

[136] COM (2001) 584, 16 October 2001.

[137] The Economic and Social Committee, endorsing the Proposal, gravely explains that 'The Olympic spirit is an unwritten law. A spirit cannot be codified or written down, and it eludes description. It must be experienced', SOC/092, 24 April 2002, Para. 1.6, citing a Greek Government website.

plain silly. The proposal concludes by describing professional sport as 'excessively commercialized' and its image 'tarnished', and declares it is time to 'restore the true Olympic ideals so that they can help to bring personal fulfilment'.[137] The Commission is on the wrong track by assuming there is 'bad' sport – which is professional – and 'good' sport – which is uncommercialized and educationally valuable. In truth, these are quite distinct phenomena, with different structures and objectives that call for more thoughtful discrete treatment. Nonetheless the Council reached a common position on adoption of a lightly amended version of the Commission's proposal in October 2002.[138]

9.6.3 The Several Faces of 'Sport'

The thread linking Helsinki, Amsterdam, Nice and the Proposal for a European Year of Education through Sport is eager assertion of the EU institutions' awareness of sport's impact outside the purely economic sphere. I am anxious that this tends to over-state the EC's legal competence to act across the spectrum. And I am anxious too that this tends to over-state the proper scope of sport's claim to contribute to European society and culture. In particular, I am sceptical about use of the label 'sport' to describe a huge variety of practices and motivations. 'sport' is simply not a single social phenomenon and it is becoming increasingly apparent that it is fruitless, or perhaps worse, to attempt to develop a policy that will comfortably fit all the ambitions of those involved in sporting activity.[139] It is particularly pertinent to separate sport as an instrument of social cohesion from sport as a money-making enterprise. In fact, the vision of European sport as a pyramid, with the professional game at the apex, below which are nurtured semi-professional sport, amateur sport and, located at the base, purely recreational sport, offers a model glowing with instinctive normative attraction, yet increasingly hard to detect in reality. Professional sport has little to do with the social and educational function of sport mentioned in the Helsinki Report. Conversely recreational sport has no economic motivation. The notion of 'vertical solidarity', whereby revenue raised in the higher echelons of the professional game is used in part to sustain the grass roots, has not been abandoned entirely in Europe, but the

[138] *OJ* 2002, C 275E/70. A budget of € 11.5 million is envisaged.

[139] Cf. Parrish 2000, p. 21; and more generally Greenfield and Osborn 2001.

[140] Admittedly this is not a one-way street. In Weatherill 2004, Ch. 4, p. 113 et seq., I argue that sport does not only invoke the cloak of culture to shelter itself from normal commercial assumptions (taking collective broadcasting and the transfer system as examples) but also, and under equally contestable assumptions, it may find itself required to make commercial sacrifices as a consequence of its cultural status, the example being the 'protected events' provisions found in Directive 89/552, as amended by Directive 97/36, as well as under some national laws, which limit its ability to sell rights to broadcast some events to the highest bidder. See also on recent practice Craufurd Smith and Boettcher 2002, 107.

commercial preferences of corporate sport, in particular football, are steadily loosening traditional vertical ties. In these circumstances parties engaged in top-level professional sport would be only too delighted to wrap their profit margins in the cloak of social and educational progress, the better to negotiate favourable legal treatment for their commercial practices.[140] But this is to concede too much to professional sport, which has frankly limited connection with high-minded values such as the promotion of a healthy lifestyle, tolerance and respect for others. In other manifestations, sport is socially and educationally beneficial. But, constitutionally, that is, in short, not the EC's business – or only peripherally is it so. There is much to be said for encouraging the drawing of more careful distinctions when the over-inclusive label 'sport' is used in association with social, cultural and educational virtues. One might conclude that if the structure of the EC Treaty causes its institutions to be primarily concerned with the economic aspects of sport, then that brings them neatly and appropriately into alignment with the dominant interests of those playing and governing professional sport.

9.7 Conclusion

Absence of an explicit Treaty-based competence in the field of sport has not prevented the EC institutions from crafting a brand of sports policy, primarily driven by the need to cope with the extended reach of the legal rules concerning the free movement of persons across national borders and the competition rules. But, against this constrained constitutional background, can there really be a suitably comprehensive EC policy on sport? Sports administrators would allege a bias rooted in an application of EC trade law to sport which reflects the market-making imperatives of the Treaty while failing to pay adequate respect to the economic peculiarities of sport and, in particular, they would object that EC law neglects sport's distinctive contribution to the realization of social and cultural objectives that are broader than economic gain alone.

I do not accept these allegations, though one can readily identify the motivation of sporting interests, thirsty for enhanced autonomy, in making them. EC law has been shaped by the Court and the Commission in a way that permits the invocation of sport's peculiar economic characteristics, particularly that pertaining to the interdependence of clubs in a sports league. In fact, I have made a case that, if anything, the EC is *too* generous to sport. The Court's willingness to treat sport as peculiarly likely to suffer disincentives to invest in training in the absence of a transfer system has been criticized as inadequately explained.[141]

I also reject the allegation that EC law demeans sport's social, cultural and educational function. In fact, Commission policy documents are littered with

[141] Section 9.4.7.3.

[142] See in particular Sects. 9.4.7.3, 9.4.8.2 and 9.4.8.4; and more generally Sect. 9.6.

references to respect for such issues. My anxiety is more that the Commission makes *too much* play of this dimension. This tends to obscure the constitutional limitations which apply to EC adventures in these realms, which, if neglected, may lead to the Commission exposing itself to legal rebuke for mistaking its competence in applying relevant EC rules.[142] Moreover, policy documents that sweep education and social inclusion into the Commission's sports bag tend to concede too much to *professional* sport. In fact, it is a theme of this paper that much professional sport is rapidly distancing itself from the social and educational context of recreational sport. I do not yearn for a golden age of sporting chivalry, but I do argue that essentially commercial practices be judged as such, and not enjoy protection provided by spurious claims to promotion of social inclusion.

In the cases that have been tidied up in the last few months I do not find instances of misapprehension by the Commission of sport's wider virtues. In fact, I would credit the Commission with having found largely sensible solutions against a legal background which is far from precise, both because the Treaty itself was not designed to cater for sport and because the Court has preferred to avoid giving guidance on the application of the competition rules to the sector. So the Commission's memorandum of 5 June 2002[143] carries a valedictory tone which gives a strong impression that the Commission, burdened by the task of supervising many economically more significant sectors while also seeking to engage in grand debates about the re-shaping of governance for an enlarged and, perhaps, constitutionally re-conceived European Union, feels it has devoted enough of its scarce resources to sport. But it is signing off on a relatively successful note. Fair Play!

And yet even though sport is increasingly anxious to improve the likelihood of resolution of disputes through mechanisms established within the industry[144] it is hard to believe the commercialization of sport will permit the EC institutions much peace. A case might arrive that the Commission deems irresistible; and there is plenty of scope for troubling the Court with individual litigation. Those involved in the sector periodically tantalize lawyers with their disingenuous assumptions about the special character of sport. For example, in May 2002 a spokesperson for the 'G-14' group of leading European football clubs,[145] referring to a commitment to agree a maximum ratio of turnover to player salaries and transfer costs, was reported to have identified as the first aim to reduce the competition between G-14 clubs as buyers: 'It is important to avoid auctions on a player because it has art effect of raising the prices'.[146] Restricting competition on the demand-side will presumably prove brightly effective in holding down prices, but this is the very

---

[143] Memo/02/127, *supra* note 3.

[144] Cf. reference to the Court for Arbitration in Sport, *supra* note 32; also, e.g., Kaufmann-Kohler 2001; Beloff et al. 1999, Chs. 7 and 8.

[145] Cf. *supra* note 94.

[146] 'Europe's football clubs hoping to curb costs', *Financial Times*, 16 May 2002, p. 8. The report adds to the reader's mirth by declaring this is 'the first time leading football clubs have unilaterally [sic] committed themselves to avoiding overspending'.

[147] *Albany*, *supra* note 61.

heartland of the prohibition contained in Article 81 EC. Although true collective bargains escape the reach of Article 81,[147] horizontal arrangements between employers of this type do not, and one may anticipate that arrangements such as salary caps or other devices designed to foreclose clubs' opportunity to overspend, introduced by groupings of clubs or imposed by governing bodies, will offer rich pickings for lawyers in future.

References

Antonioni P and Cubbin J (2000) The Bosman ruling and the emergence of a Single Market in soccer talent. Euro Int. Law and Econ 9:157–173.

Beloff M, Kerr T and Demetriou M (1999) Sports law. Oxford: Hart, 134–6, 153–6, Chs. 7 & 8, Chs. 8.101–8.108.

Bennett A (2001) They think it's all over, […] it is now! – How extra time was required to finally settle football's transfer saga. Sport and the Law Journal 9:180 et seq.

Blanpain R and Inston R (1996) The Bosman case: The end of the transfer system? Leuven: Peeters.

Bose M (1999) Manchester unlimited, London, Texere.

Brown A (2000) Sneaking in through the back door? Media company interests and dual ownership of clubs, in Hamil S, Michie J, Oughton Cand Warby S, eds, Football in the digital age: whose game is it anyway?, Edinburgh, Mainstream Publishing, Ch. 8.

Cave M and Crandall RW (2001) Sports rights and the broadcast industry. The Economic Journal 111:4–26.

Craig P and de Burca G (1999) The evolution of EU law, Oxford University Press.

Craufurd Smith R and Boettcher B (2002) Football and fundamental rights: regulating access to major sporting events on television. EPL 8:107–133.

Dabscheck B (2003) The globe al their feet: FIFA's new employment rules. (as yet) unpublished paper on file with the author.

Dobson Sand Goddard J (2001) The economics of football, Cambridge University Press, 90–101, Ch. 3, Ch. 4.

Dubey JP (2000) La libre circulation des sportifs en Europe, Berne, Staempfli, Ch. 2, Ch. 5, 272–317, 569–583.

Egger A and Stix-Hackl C (2002) Sports and competition law: a never-ending story? ECLR 81–91 90–91.

Engelbrecht G (2001) New legislation on fixed-term work: impacts on the discussion about a new FIFA-Transfer-Regulation. International Sports Law Journal 2001:49 et seq.

Evans A (1986) Freedom of trade under the common law and EC law: the case of the football bans. Law Quarterly Review 102:51 et seq.

Feess E and Muehleusser G (2002) Economic consequences of transfer fee regulations in European football. European Journal of Law and Economics 13:221 et seq.

Fleming H (1999) Exclusive rights to broadcast sporting events in Europe. ECLR 20(3):143–148.

Foster K (2001) Transfer Fees: still (il)legal after all these years?, Singer & Friedlander Football Review, www.le.ac.uk/crss/sf-review/00-01/contents01.html.

Gardiner S and Welch R (2000) Show me the money: regulation of the migration of professional sportsmen. In Post-Bosman Europe. In Caiger A and Gardiner S, eds, Professional Sport in the EU Regulation and Re-Regulation. The Hague: TMC Asser Press, 107–126.

Greenfield S (2000) The ties that bind: Charting contemporary sporting contractual relations. In Greenfield S and Osborn G, eds, Law and sport in contemporary society. London: Frank Cass, Ch. 8.

Greenfield S and Osborn G, eds, (2001) Regulating football: commodification, consumption and the law. London: Pluto Press.
Hannamann I (2001) Kartellverbot und Verhaltenskoordinationen in Sport. Berlin: Duncker and Humblot, V.
Harbord D and Binmore K (2000) Toeholds, takeovers and football. ECLR 21:142–144.
Hellenthal C (2000) Zulässigkeit einer supranazionalen Fussball-Europaliga nach den Bestimmungen des europäischen Wettbewerbrechts, Frankfurt, Peter Lang.
Hilf M (1996) Das Bosman-Urteil des EuGH. NJW 18:1169–1232.
Kaufmann-Kohler G (2001) Arbitration at the Olympics – issues of fast-track dispute resolution and sports law, The Hague, Kluwer.
Khanna D (2001) The defeat of the European Tobacco Advertising Directive: a blow for health. YEL 20:113–138.
McAuley D (2002) They think it is all over […] It might just be now: unravelling the ramnifications for the European Football Transfer System post-Bosman. ECLR 331–340.
McCutcheon JP (2000) Nationality eligibility rules after Bosman. In Caiger A and Gardiner S, eds, Professional sport in the EU: regulation and re-regulation. The Hague: TMC Asser Press, 127–140.
Monti G (2002) Article 81 EC and public policy. CML Rev 39:1057–1099, 1069–1078.
Morris E, Morrow S and Spink PM (1996) EC Law and professional football: Bosman and its implications. MLR 59:893–902.
Mortelmans K (2001) Towards convergence in the application of the Rules on Free Movement and on Competition? CML Rev 38:613–649.
Nitsche I (2000) Collective marketing of broadcasting rights in Europe. ECLR 21:208–214.
O'Keeffe D and Osborne P (1996) The European Court scores a goal. International Journal of Comparative Labour Law and Industrial Relations 12:111–130.
O'Leary J and Caiger A (2000) The re-regulation of football and its impact on employment contracts. In Collins H, Davies P and Rideout R, eds, Legal Regulation of the Employment Relation. London: Kluwer, Ch. 16.
Parrish R (2000) Reconciling conflicting approaches to sport in the European Union. In Caiger A and Gardiner S, eds, Professional sport in the EU: regulation and re-regulation. The Hague: TMC Asser Press, 21–42.
Pons JF (1999) Sport and European competition policy. In Hawk B, ed, Fordham Corp. L. Inst., Ch. 6, Ch. 9.
Pons JF (2002) La politique européenne de concurrence et le sport (1995–2002). Revue du Droit de l'Union Européenne 2 :241 et seq.
Rollin J and Rollin G (2002) eds., Rothmans football yearbook 2002–2003. London: Headline Book Publishing.
Rosen S and Sanderson A (2001) Labour markets in professional sports. The Economic Journal 111: 47–68.
Roth P, ed (2000) Bellamy and Child: European community law of competition. London: Sweet and Maxwell, Para. 4–150.
Scott (1998) Environmental Law, Harlow, Longman.
Séché JC (1996) Quand les juges tirent au but, 32 CDE, 355.
Snell J (2002) Goods and services in EC law: A study of the relationship between the freedoms. Oxford: Oxford University Press, Ch. 3.
Spink PM (1999) Blowing the whistle on football's domestic transfer fee. Juridical Review 1999:73–86.
Spink PM and Morris P (2000) The battle for TV rights in professional football, in Caiger A and Gardiner S, eds, Professional sport in the EU: regulation and re-regulation. The Hague: TMC Asser Press, 165–196.
Stuyck J (1999) Libre circulation et concurrence: Les deux piliers du Marché Commun. In Dony M, ed, Melanges en hommage à Michel Waelbroeck. Brussels: Bruylant, 1477–1498.

Szymanski S (2000) Hearts, minds and the Restrictive Practices Court case In Hamil S, Michie J, Oughton C and Warby S, eds, Football in the digital age: whose game is it anyway?, Edinburgh, Mainstream Publishing, Ch. 23.
Tassano F (1999) Are vertical mergers harmful? ECLR 20:395–397.
Thill (1996) L'arrêt Bosman et ses implications pour la libre circulation des sportifs a l'interieur de l'UE dans des contextes factuels differents de ceux de l'affaire Bosman. Revue du Marché Unique Européen 1996:89–117.
Van den Bogaert S (2000) The Court of Justice on the Tatami: Ippon, Waza-Ari or Koka? EL Rev 25:554–563.
Van den Bogaert S (2002) Horizontality. In Barnard and Scott, eds, The law of the Single European Market: Unpacking the premises. Oxford: Hart, Ch. 5.
Van den Brink JP (2000) EC Competition law and the regulation of football. ECLR 21:359, 360, 364–5, 364–8, 420, 422–3, 426.
Vossestein AJ (2002), Annotation [*Wouters*]. CML Rev 39:841–863, 853.
Weatherill S (1996) Annotation [*Bosman*]. CML Rev 33:991, 1019–1031.
Weatherill S (1997) EC consumer law and policy. Harlow: Longman.
Weatherill S (1999) European football law, in Collected courses of the 7th session of the Academy of European Law. The Hague: Kluwer, 354.
Weatherill S (2000) 0033149875354: Fining the organisers of the 1998 Football World Cup, ECLR 275–282.
Weatherill S (2000) Resisting the pressures of "Americanization": The influence of EC law on the European sport model. In Greenfield S and Osborn G, eds, Sport and the Law. London: Frank Cass.
Weatherill S (2000) The Helsinki Report on Sport. EL Rev 25:282–292.
Weatherill S (2002) Book review [Dubey]. CML Rev 39:901–904.
Weatherill S (2004) Sport as culture in EC Law. in Craufurd Smith R. ed, Culture in European Union Law, Oxford University Press, Ch. 4, p. 113–152.
Whish R (2001) Competition Law. 125–128.