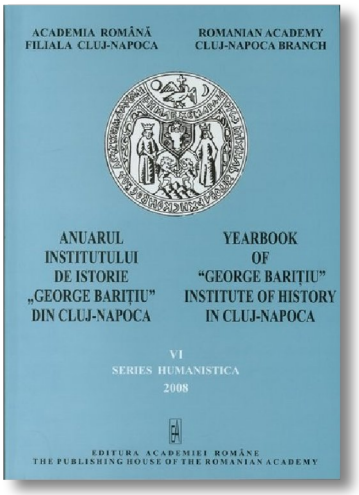


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## The European Union and Sport: Law and Policy

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# THE EUROPEAN UNION AND SPORT: LAW AND POLICY

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Not everybody knows that the European Union has a fairly extensive record in the field of sport. Last year, the Asser Centre published a book containing some 900 pages of selected legal and policy documents (resolutions of the European Parliament, decisions of the Commission, memoranda, jurisprudence of the European Court of Justice, etc.) and another 900 pages were put on the Centre's website. The EU has dealt with a wide range of subjects since the so-called Walrave case in 1974. These include doping and football hooliganism, themes which were initially the exclusive domain of the Council of Europe, the human rights organisation that today includes about 50 European countries. The European Union is a financially powerful organisation which funds research in the field of sport. In recent years, for example, Brussels commissioned the Centre to conduct research into the harmonisation of doping rules in national and international sports associations and federations and into tackling transnational football hooliganism. In 2003/2004, Roberto Branco Martins and his team travelled around Europe visiting all EU Member States, "old" and "new", in the framework of an EU project aimed at promoting Social Dialogue in Europe in the professional football sector. And last year, we produced a report on Professional Sport in the Internal Market for the European Parliament.

When we talk about EU and Sport, it should be emphasised that sport as such is not incorporated in the Treaties. The much debated Constitution for Europe contains a provision which also explicitly touches on sport. However as we know, the ratification process of this treaty – which is not a Constitution in the legal sense of the word – is now being suspended following last year's negative referenda results in France and the Netherlands. In my opinion, these results were down to a basic misunderstanding among the populations of both countries about what Europe is all about and the function of the treaty. This development is regrettable and in my view definitely detrimental to political progress in Europe! In this situation,

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the sports provision in the Constitution for Europe may only be used by advocates as an argument before court. The text confirms the importance attributed by the EU to the social and cultural function of sport and the respect for its special character and structures. These aspects were incorporated in the Declarations on Sport attached to the Treaties of Amsterdam (1997) and Nice (2000), which were stepping stones in the development of the fundamentals of the EU. The Treaty of Nice is still the law currently in force after the postponement of the ratification process of the Constitution for Europe. The Declarations of Amsterdam and Nice on Sport could be qualified as "soft law". They are political texts. However, they have been and are explicitly referred to in the sports jurisprudence of the European Court of Justice, supporting the Court's reasoning (Deliège, Lehtonen, Meca-Medina).

This brings us to the phenomenon of "sport specificity" which was developed by the Court.

In principle, the Court will apply European law to sport insofar as it concerns an economic activity (see Walrave, Bosman). There is no constitutional basis for sport in the European Treaties and therefore no general exception is made for sport under European Law.

The provisions relating to the freedom of movement for workers and fair competition must in principle be applied to professional sport to their full extent. However, the European Court of Justice has made exceptions in its jurisprudence for specific circumstances, where the rules of sports governing bodies or international sports federations have a purely sporting character. A clear example is the Lehtonen case. In ordinary society, workers and employees cannot be prevented from changing jobs at any time. In professional football, FIFA has stipulated that there are only two transfer windows, one before the start of the season and one during the winter break, when players are allowed to move from one club to the other. What is the reason for this farreaching restriction which as such contravenes European Law since it is contrary to the freedom of movement, one of the four basic freedoms on which the Community is based? The reasoning is that it would be unfair, a falsification of competition, if a club could be strengthened in the final stages of the season when decisions about championship and relegation are at stake. If the transfer window rule did not exist, a weak club could suddenly contract players financed by external money suppliers in order to avoid relegation. It could even try to get a key player transferred from another club fighting relegation from the League. So this rule is a functional one. It is a necessary and proportional rule. It is objectively justified and non-discriminatory. Perhaps not in its details, but in general the rule is accepted by the international football community, FAs, clubs and players' unions. The basis for the exception made by the European Court of Justice in cases like Lehtonen derives from the Nice Declaration. Another example is the Commission's decision in the ENIC/UEFA case. This case concerns the potential situation where one company simultaneously owns two clubs which are due to play each other. In the present

instance, the investment firm ENIC was co-owner of AEK Athens and Slavia Prague which were competing in UEFA Cup "knock-out" matches. According to UEFA policy aimed at preventing the manipulation of match results, this was not allowed and this ban was approved by the European Commission in its practice. The Commission did not consider the ban to be an infringement of fair competition under European Law. On the contrary, the ban actually promoted fair competition in sport.

So, here were two clear examples of the acceptance and recognition of sporting rules, although they have important economic implications and consequences. It seems that, in its role of supreme decisionmaker on dispute settlement in the EU, the European Court of Justice is steadily restricting the freedom of international federations in their law and policymaking. This was illustrated recently by the MecaMedina case in appeal. The European Court of First Instance fully respected the world swimming federation's doping rules as being purely sporting in character, but at the same time ignored their economic impact. Of course, the purpose of anti-doping rules is to defend fair sporting competition and protect the health of sportsmen and women. However if a sportsperson is banned for two years, this will undoubtedly have far-reaching financial consequences for the person concerned. Banned from competition, he or she may be unable to earn any money during this period and lose sponsors. The doping rules will therefore have to be scrutinised as to their necessity and proportionality. The outcome of the Meca-Medina case, whose verdict was initially rejected, in appeal shows that the concept of sport specificity should not be interpreted too broadly. So sports federations are advised to perform the sport specificity criteria test before adopting and implementing any new rules and regulations. European Law is supranational, superior law as demonstrated in the European Court of Justice's jurisprudence since Walrave, and as made abundantly clear in the famous Bosman case in 1995 which questioned the legality of the transfer system and the existence of 'quota systems' in professional football. Bosman was a landmark case with regard to the freedom of movement of sportspersons. A new case is currently pending at the European Court of Justice which can already be considered a land mark case on competition law in sports. The Bosman case addressed the relationship between player and club. In the new case, the relationship between the club and the sports governing body is at stake. This case was brought before the European Court of Justice for a prejudiciary ruling in the summer. It concerns FIFA rules governing the release of players for international games. The Moroccan player Oulmers from the Belgian club Sporting Charleroi was injured playing for his country. Nobody in the international football world contests the necessity of the release rule. Without this rule it would be impossible to organise national team football, European Football Championships or World Cup competitions. However, in ordinary society it is totally unheard of that company A may force company B to release its employees to A for short periods of time or even one or two months as is

the case when a national team is preparing for and participating in the World Cup! In professional football, A (clubs) and B (national teams) are similar types of companies competing for similar sponsorship and broadcasting rights markets. The players' release rule amounts to unfair competition. But national team football is impossible without this rule. So, the conditions for release should be improved for the clubs, not only because they continue to pay the players' salaries and insurance fees, but also because they receive no financial compensation from the national FA, UEFA and/or FIFA. Obviously there should be much more even-handedness between clubs and governing bodies. If this is the final outcome of the Oulmers case, this will mean a huge step forward in normalising the monopoly of the governing bodies. With regard to the Oulmers case, the European economic interest grouping G-14, which now consists of 18 top elite clubs of the Real Madrid category, supports Sporting Charleroi in its plea for change.

It is clear that much needs to be done in other respects too before European professional football fully complies with the demands of European Law and the Community. For example, the consequences of the Bosman verdict have not yet been fully realised everywhere. Two weeks ago I visited one of the new EU Member States, Malta, where players are still not free to move wherever they wish at the end of their contractual term. A transfer fee still has to be paid by the player's new club and if not, his FA registration remains unchanged, thus with the former club. So, the transfer system still has to be abolished in Malta. Moreover, Maltese professional football clubs are obliged to field at least eight nationals which is contrary to the abolition of nationality clauses according to Bosman.