Restraints of Trade in Sport:
An International and South African Perspective

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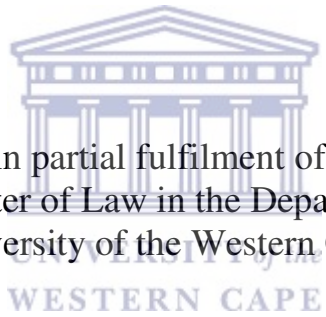

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Abstract

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LL.M. minithesis, Department of Law, University of the Western Cape

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The ongoing commercialisation of sport has generated new legal problems. One of eminent importance is the treatment of restraints of trade in the sport sector. Due to the increasing professionalism of sport and its growth into "big business" more athletes can afford to make a living from sport. Since sport has become their main source of income, they are no more willing to accept restrictions concerning the exercise of their professional activities, i.e. restraints of trade. As a consequence, they often decide to take legal action. The famous *Bosman* ruling of the European Court of Justice (ECJ), the judgment of the Cape High Court in the *Coetzee* case as well as the dispute about the reserve clause system in U.S. American sport exemplify this recent development.

The application of the restraints of trade rule to the sport sector is highly complicated and controversial. Sport has some unique peculiarities which distinguish it from "normal" business. For once, the market conditions under which sport operates differ from other industries, since athletes and clubs have a vested interest in the strength and survival of their rivals. Furthermore, some rules, as the actual rules of the game, are inherent to sport and must not become subject to the courts. Therefore, courts are confronted with the difficult task to consider the peculiarities of sport and to separate the sporting aspects from the economic aspects of sports.

Whereas U.S. courts already started to deal with the legal implications of restraints of trade in the sports sector about a century ago, the judging of restraints of trade in sport in Europe and South Africa is a rather recent development. Particularly in South Africa, the treatment of restraints of trade in sport is still little developed. Although some cases already dealt with restraints of trade in sport, South African courts in general do not have much experience with the issue. Hardly any guidelines have emerged that can already be seen as a South African sports policy. However, with South Africa's economy growing, sport is going to be more and more commercialized and new legal issues related to restraints of trade will appear.

The scope of the thesis is to develop guidelines and rules for the future dealing with restraints of trade in South African sport. These rules are developed from an analysis of the different legal approaches in Europe and the U.S.. The comparison of the legal situations against the background of the individual role of sports in Europe and the U.S. allows to demonstrate suitable ways of dealing with restraints of trade in the South African sport sector.

Declaration

I declare that "*Restraints of Trade in Sport: An International and South African Perspective*" is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Christoph Kolonko May 2006

Signed:

Introduction

With the ongoing commercialisation of sports new legal issues have appeared. One of eminent importance is the question of restraints of trade in the sports sector and its legal treatment.

Due to the increasing professionalism of sport and its growth into "big business" more athletes can afford to make a living from sport. Since sport has become their main source of income, they are no more willing to accept restrictions concerning the exercise of their professional activities. As a consequence, they often decide to take legal action. The famous *Bosman* ruling of the European Court of Justice (ECJ), the judgment of the Cape High Court in the *Coetzee* case as well as the dispute about the reserve clause system in U.S. American sport exemplify this recent development. But not only individual athletes, also professional sport clubs have an interest in the abolishment of certain long existing restraints of their business. Sport federations, in contrast, fear legal interferences with the way they organize sport and regard them as undesirable intrusions into their area of responsibility. While their only purpose in the early days of sport was to organise sport for leisure and recreational aspects on an amateur level, sport federations nowadays also set the rules for professional athletes and clubs that developed into business companies.

The abolition of restrictions in the area of sport through the application of restraint of trade rules is highly controversial and complicated. Sport has some unique peculiarities which distinguish it from "normal" business. For once, the market conditions under which sport operates differ from other industries, since athletes and clubs have a vested interest in the strength and survival of their rivals. Furthermore, some rules, as the actual rules of the game, are inherent to sport and must not become subject to the courts. Therefore, courts are confronted with the difficult task to consider the peculiarities of sport and to separate the sporting aspects from the economic aspects of sports.

As the comparison of the treatment of restraints of trade in the sports sector in Europe, USA and South Africa shows, the respective courts approach these difficulties in quite different ways. In Europe, sport is based on a grass-root approach. There is no clear line between amateur and professional sport which makes the legal assessment of restraints of trade quite difficult. The highly hierarchical structure of European sports federations additionally bears

the risk of abusing organisational power. Sport in the U.S., on the other hand, strictly distinguishes between its extremely professional associations and amateur sport that is mainly performed on college level. For the sake of professionalism and financial gain U.S. sports leagues created various restrictive measures. In order to accomplish this, professional sport in the U.S. is exempted from legal interferences to a considerable extent.

In South Africa, the treatment of restraints of trade in sport is a quite recent issue, but of increasing importance. Although some cases dealt with restraints of trade in South African sport, South African courts in general do not have much experience in dealing with this issue. The scope of the thesis is to develop guidelines and rules for the future dealing of restraints of trade in South African sport. These rules are developed from an analysis of the different legal approaches in Europe and the U.S.. The comparison of the legal situations against the background of the individual role of sports in Europe and the U.S. allows to demonstrate suitable ways of dealing with restraints of trade in the South African sport sector.

Chapter I of the thesis introduces a legal definition of restraints of trade and elaborates how the different legal systems in Europe, in the U.S. and South Africa deal with the issue of restraints of trade in general.

The second chapter focuses on restraints of trade in European sports. It gives a short outline of the European sports model and the difficulties that arise in connection with the application of law to sport. In order to demonstrate how the ECJ addresses these issues, I examine the different sports related cases and demonstrate the ECJ dealing of restraints in the area of labour law. The main focus of this analysis is on the well-known *Bosman* ruling and two very recent decisions, which extend the principles laid down in the *Bosman* ruling to non-EU players. I then examine some of the most relevant issues of sport in connection with competition law, such as the legality of the pyramid structure of European sports federations, the foundation of so called “break-away leagues”, broadcasting rights, the very recent issue regarding player release clauses, the player agents and the salary cap. Finally, I comment on the implementation of sport in the European Constitution and its consequences for European sports law.

The third chapter of the thesis starts with an outline of the U.S. sports system and of the federal laws which concern restraints of trade. I then discuss the most relevant exemptions of

U.S. professional sport, as the unique baseball-exemptions, the Sports Broadcasting Act or the single-entity defence. Finally I deal with the salary cap, which is already successfully established in U.S. professional sport.

The fourth chapter of the thesis draws conclusions from the European and U.S. American treatment of restraints of trade for the possible handling of the issue in South African Sport. In order do define the application of the restraint of trade doctrine in South Africa, I summarize South Africa's legal system. In a next step, the South African model of sport is explained and compared to the European and the American Model. The following case law analysis presents how South African courts have ruled on restraints of trades in sport so far. I then connect my findings to equivalent developments in European and U.S. American sport. In this context I especially refer to the *Coetzee* ruling, the *Cronjé Affair* and deal with question, whether a life-long ban can be considered as an unreasonable restraint of trade.

Finally, I present the result of the comparison and demonstrate probable future developments in the treatment of restraints of trade in sport. I summarize the legal issues South African sport will possibly face in the future and suggest some remedies, based on the experiences Europe and USA have already made.

Chapter I: Dealing with Restraints of Trade

Before examining the legal issues arising from the application of law to restraints of trade in sport, the general legal treatment of restraints of trade in the different legal systems will briefly be displayed in the following.

In the common law system, e.g. in South Africa, England or the United States[1], restrictive practices can be subject of the doctrine of restraint of trade that has been developed over the past few centuries. It is a general principle of the common law that a person is entitled to undertake a lawful trade when and where the person wishes to do so. Under European Community law, however, restraints of trade are not treated on basis of a certain doctrine.

1 The United States of America have a federal court system that is based on English common law. Each state has its own unique legal system, but all – except one (Louisiana's) – are based on English common law.

Instead there are several codified provisions in which the policy behind the doctrine of restraints of trade is laid down.

Restrictive practises in the common law system as well as in the European Union can also be subject of competition law. Both, the common law doctrine of restraint of trade and the competition law, are based on similar principles so that the scope of their applicability to restraints of trade might overlap.

1. The Restraint of Trade Doctrine of the Common Law System

1.1. Definition of a Restraint of Trade

A restraint of trade can generally be defined as

> "*…any contract which interferes with the free exercise of (a person's) trade, business or other economic activity, by restricting him in the work he may do for others, or the arrangements which he may make with others*."[2]

The doctrine of restraint of trade is not limited to certain types of contract. According to the definition contracts concerning labour law can be considered restraints of trade. Employment agreements often contain restraints, both within and outside of the employment relationship. That is, the employee might be restrained from engaging in any other paid work while his employment continues, or he might be restricted in the type of other work he can do. There might also be a restraint on what he can do after his employment ends.

Besides specific employment issues, restraints of trade do also occur in agreements between companies or combinations of businesses intended to eliminate competition, create a monopoly, artificially raise prices or otherwise affect the free market.[3]

1.2. Application of the Restraint of Trade Doctrine

A covenant in restraint of trade is, prima facie, unenforceable at common law and is enforceable only if it is reasonable having regard to the interests of the parties concerned and

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2 Dictionary of Law, L.B.Curzon, 6th Edition, 2002; similar in: Esso Petroleum Co.Ltd v Harper's Garage (Stourport) Ltd (1968) AC 269.

3 Black's Law Dictionary, Bryan A. Garner, Seventh Edition, 1999.

the public.[4] Quite often a restraint of trade can have some positive side-effects or be necessary for a certain purpose. As long as the conditions are reasonable, such restraints of trade are acceptable and are common practice in commercial and business activities. And as long as the parties enter into an agreement or contract freely, and the restrictions are reasonable, the courts will not intervene. A covenant in restraint of trade, if unreasonable, is void in the sense that the courts will not enforce it.

The current substantive test for determining the reasonableness of a restraint is the *Nordenfelt Test.* The key statement was made by Lord Macnaghten in Nordenfelt[5]:

> " *It is a sufficient justification and indeed it is the only justification if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and do guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."*

In essence the restraint must be reasonable *inter partes* and reasonable *in the interest of the public.*

2. Restraints of Trade in the European Union

In the law of the European Union, restraint of trade rules are laid down in different acts. A general rule covering the whole range of topics, like the restraint of trade doctrine does, never existed in the Community. Instead rules on restraints of trade law appear in various provisions of the European Treaty (EC).

Article 3 (c) EC requires *"the abolition, as between member states, of obstacles to the free movement of goods, persons, services and capital*". According to Article 12 EC, for this to be achieved, "*any discrimination on grounds of nationality shall be prohibited*". Three further Articles elaborate this goal in the specific fields of employment (Art. 39), establishment rights (Art. 43) and service provision (Art. 49).[6]

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4 In common law a restraint of trade usually is *per se* illegal, but can be exempted. On the way South African courts deal with the doctrine see chapter IV.

5 Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co, Ltd (1894) AC 565.

6 The full text of the provisions can be found in the Appendix to this thesis.

Art. 3 EC also defines that the activities of the Community should include the establishment of a system ensuring that competition in the Single Market is not distorted. The precise nature of this system is set out in Articles 81- 89 of the Treaty. The two Articles most relevant to the sports sector in Europe are Article 81 (dealing with restrictive practices by undertakings) and Article 82 (concerning the abuse of a dominant position by an undertaking).

Consequently, any action that comes into conflict with the principle of "non-discrimination" or the competition rules set out in the Articles mentioned above can be considered as a restraint of trade.

Similar to the common law system, restraints of trade can be exempted. So the EU free movement rules establish that directly discriminatory rules are permitted if they are justified on the grounds of public policy, public security or public health.[7] In order to determine whether a restraint of trade can be exempted, the EU uses the "*proportionality test"* as an equivalent to the *Nordenfelt Test*, whenever the principle of non-discrimination is affected. According to this the Court examines whether the negative effects caused by the restraint are in proportion with the positive effects the restraint might have Only if the positive effects outweigh the negative effects, the restraint can be justified. As will be shown below, the same idea of proportionality is applied to anticompetitive acts.

3. The Relevance of Competition Law

Restraint of trade matters are also dealt with under competition law, as it is codified in Articles 81 and 82 of the European Treaty, in the US American Sherman Act or in the South African Competition Act. Due to the fact that the doctrine of restraint of trade is not limited in application to certain conventional types of contract, it is difficult to draw a clear distinction to competition law rules. Nevertheless, the policy behind the common law doctrine of restraint of trade slightly differs from the policy behind the competition rules. The common law doctrine of restraint of trade is primarily concerned with ensuring personal freedom to trade. Therefore, it is directed towards securing the *liberty of the subject and not the utmost economic advantage.*[8] Competition law, in contrast, is more generally focused on assuring the

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7 See Article 39 (3), Article 46 and Directive 64/221.

8 Texaco Ltd v. Mulberry Filling Station Ltd (1972) 1 WLR 814. Also see Bellamy Restraint of Trade: General Principles and Recent Developments (2004), para 36.

best competition possible on a certain market. However, in the most cases the restraint of trade doctrine does not pursue an objective different from the rules of competition law.

Chapter II: Restraints of Trade in European Sports

1. Outline of the European Sports Model

Before the end of the Cold War there were two models of sport in Europe: the communist model in Eastern Europe and the mixed Western European model, in which actions performed by governmental and non-governmental organisations existed side by side. After the fall of communism the Eastern countries also more or less adopted the Western European model. Its main characteristics are the following:

1.1. Pyramid structure

The central element of the current European Sport Model is the pyramid structure of sport organisations.[9] Sport is usually practiced within a club, which is a member of a regional association, which in turn forms part of a national association. The national association is itself a member of a European association.[10] Within the pyramid structure, only one national federation for each sport is allowed (so called *One-Association-Principle*). [11]

I. European Sport Federation
II. National Sport Federations
III. Regional Sport Federations
IV. Clubs

1.2. Amateur and Professional Sport

A very interesting fact about European Sport is that the same governing body regulates all sporting activities within a particular sport, from amateur and youth sports to the highest

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9 The European Model of Sport, Consultation Document of DG X, page 2. Available at: http://www.euractiv.com.

10 See on the pyramid system in European football and its negative effects: Chapter II, 4.4.1. of the thesis.

11 See on this principle, which is also known as "One-Federation-Per-Sport" principle: Hannamann, *Kartellverbot und Verhaltenskoordination im Sport*, (2002) p.5.

professional level. As a consequence, a clear distinction between amateur and professional sport cannot be made. The so-called "Grass-roots Approach"[12] is based on the assumption that the development of sport originates from the level of clubs, which organise sport on a local and non-commercial level.[13]

1.3. System of Promotion and Regulation

Another important characteristic of the European Sport Model is the "open" competition model, based on promotion and relegation. At the end of a season, champions promote to a higher level, while the teams with the worst records may move down one step.

1.4. The Dual Function of European Sport Organisations

Usually, the sport associations pursue a dual activity: on the one hand, they organise the specific sport for which they are in charge, for instance by issuing regulations and organizing competitions; on the other hand, they pursue a commercial activity, notably the sale of media rights. Priority is given to the sportive performance, with financial aspects serving as constraints for the ambition on the field. In other words, clubs focus on sportive achievements while trying to maintain an acceptable financial situation.

2. Applicability of European Law to Sport

2.1. Introduction

The question if and to what extend legal rules are applicable to sports is still a major point of discussion. When trying to answer it, the following issues have to be taken into consideration.

2.2. Sport is not mentioned in the European Treaty

As the EU is not an omni-competent organization, it must be established that sport falls within the scope of the Treaty Articles. According to Article 5 (I) of the Treaty the European Community can only "*act within competences and goals assigned to her by the EU Treaty*". [14] This principle of attribution or conferral insists that the EC may act only according to the

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[12] The European Model of Sport, Consultation Document of DG X, page 4.
[13] See on the different system in US sport chapter III.
[14] Art. 5 (I) EC states that the Community „shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein".

limited mandate crafted for it by the Member States under the Treaty. Article 3 EC does not cite sport as a competence of the EU meaning that no authority has been conferred to the EU to develop a sports policy. Nevertheless, Article 12 requires "*any discrimination on grounds of nationality shall be prohibited"* and further Articles in the specific fields of employment (Article 39), establishment rights (Article 43), service provision (Article 49) and competition law (Articles 81-87) similarly can have an indirect impact on sport. Additionally, the Member States chose to add Declarations on Sport to the Treaties of Amsterdam[15] and Nice[16]. Although those explanations are of no-binding character, they are at least suitable to serve as an assistance interpretation.[17]

2.3. No EU Competence for the Cultural Sector

Paragraph 151 EC defines that the cultural-sector falls into the responsibility of the member states. According to this the European Union should only support and protect the national cultures, but is not allowed to regulate them. Consequently the European Union was not allowed to intervene into sports matter, if sport could only been seen as a cultural activity.
The argument, that football is not an economic activity at all and sport should be seen in the same light as culture, has often been used by federations and clubs in order to prevent sport from an application of European Law.

2.4. Distinctive Features of Sport

Sport is unlike any other business. It presents some characteristics which are somehow special. On the one hand it performs educational, public health, social, cultural and recreational functions. On the other hand sport as business is capable of generating considerable revenues. Sport has rules, which are inherent to its existence, such as the original playing rules, which for that must not be touched by EC legislation interference. The same applies to sports federations and the way they are structured. Unlike any other business, sport also needs the competition. Therefore it is important to maintain a balance between clubs and to preserve a certain degree of equality. In a "normal" industry a company has no wish to see its rival prosper. In sport, however, each participant not only wants but needs credible rivals.

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[15] Treaty of Amterdam – Presidency Conclusions (2 October 1997) OJ C 340, 10/11/1999, No. 29: Declaration on sport. Published in the International Encyclopaedia of Laws, Doc.1: Sports Law (2004), Document I.C.2.23..

[16] "Declaration on the Specific Characteristics of Sport and its Social Function in Europe", Annex IV to the Presidency Conclusion, Nice, 7-9 December 2000. Published in the International Encyclopaedia of Laws, Doc.1: Sports Law (2004), Document I.C.2.153.

[17] Because of the non-binding character of these law initiatives it is also called "Soft-Law".

Take away the competition and there is nothing left.[18] For all these reasons sport deserves special and very sensitive acknowledgment under Community law.

2.5. The Economic Dimension of Sports

Over the last years professional sport has grown into big business**,** which is mainly build around gate receipts, transfer sums and broadcasting revenues. Sports merchandising and marketing has exploded into one of the largest industries in the modern world economy[19]. Sport has become a global industry representing more than 3 % of the world trade. The phenomenal growth in the value of the Sports Industry is largely due to the increase in the broadcast coverage of sports events and the exponential rise in the fees paid by broadcasters for the corresponding rights. A quarter of the world's population watched the television coverage of the 1998 World Cup Final in Paris and an audience of 3.7 billion watched the opening ceremony of the Millennium Olympic Games in Sydney on 15 September 2000. The broadcast rights to the Sydney Games were sold for a record 1.3 billion US-Dollar. With regard to the question of application of law to the scope of sport, one has to have in mind that professional sport in its economical effect can be compared to any other business.

2.6 Conclusion

Sport has some characteristics which are somehow unique and which therefore deserve special treatment under Community law. The following chapters will elaborate on how the European courts conceive this special treatment and how far the Community institutions are actually prepared to go in their recognition of this specificity of sport.

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[18] European Model of Sport: "In sport, however, the competing clubs need their competitors in order to make the championship interesting and exciting. Therefore a competitive balance between competitors has to be maintained. A championship comprising one major club that attracts all the financial resources and therefore dominates the tournament will not be as interesting as a championship with equal and economically solid competitors."

[19] See Steve Cornelius in The International Sports Law Journal 2003/2, p. 29

3. Restraints based on Infringements of the Basic Freedoms

3.1. The Birth of European Sports Law: The Walrave Case and the Donà Case

3.1.1. The Walrave Case

3.1.1.1. Introduction

As far back as 1974, the European Court of Justice (ECJ) handed down its first important judgment with regard to restraints of trade in the EU within the scope of sports: *the Walrave and Koch* case.[20] In this legal issue the ECJ was given the opportunity to show how the practice of sport coincided with Community law for the first time.

3.1.1.2. The Facts of the Case

Bruno Walrave and Noppie Koch were two Dutch professional pacemakers on motorcycles in medium distance cycle races with so-called "stayers", who cycle in the lee of the motorcycle. The function of the pacemaker (or pacer) is to create a moving vacuum for the stayer, who can thus achieve speeds – of up to 100 k.p.h.- that a "normal" cyclist could never attain. They provide these services under agreements with the stayers, the cycling associations or sponsors outside the sport. The competitions included the world championships, the rules of which, made by the Union Cycliste International (UCI)[21], include a provision that as from 1973 the pacemaker must be of the same nationality as the stayer. Plaintiffs argued that this provision is incompatible with Community law in so far as it prevents a pacemaker of one Member State from offering his services to a stayer of another Member State.

The Arrondissementsrechtbank[22] Utrecht referred under Article 177 (now Art. 234) of the EC Treaty various questions[23] relating to the interpretation of the first paragraph of Article 7, Article 48 (now 39) and the first paragraph of Article 59 (now 49) of the EC Treaty and of the Council Regulation No 1612/68 of 15 October 1968 on the freedom of movement for workers within the Community.[24]

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[20] B.N.O. Walrave and L.J.N. Koch v. Association Union Cycliste, (1974) European Court Reports (ECR) I-1405.

[21] The international association for cycling sport.

[22] The District Court of Utrecht.

[23] The basic question concerned whether the aforementioned text should be interpreted as being incompatible with the UCI regulations relating to medium-distance world cycling championships behind motorcycles according to which "*the pacemaker must be of the same nationality as his rider*".

[24] The Council Regulation No 1612/68 of 15 October 1968 is available at: http://www.logos-net.net/ilo/150_base/en/instr/eu_26.htm.

3.1.1.3. The Judgement

The ECJ began by examining whether Community law could apply to sport. It explained that the practice of sport was only subject to Community law insofar as it constituted an economic activity. To this effect, it gave the following reasons:

> *"Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*." [25]

The ECJ made the following important limitation in the scope of the prohibition on discrimination based on nationality:

> *"The Prohibition of discrimination based on nationality, set out in Articles 7, 48 and 59 of the EEC Treaty, did not affect the composition of sports teams, in particular national teams, the formation of which was a question of purely sporting interest and as such had nothing to do with economic activity."* [26]

The ECJ then explained that Community law, in this case the prohibition of discrimination based on nationality, applied not only to public authorities, but also to the rules of private sports associations. This principle applied to Art. 48 and 59 of the Treaty:

> *"Prohibition of discrimination based on nationality not only applied to the action of public authorities, but extended likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provisions of services."*

The ECJ referred the case back to the national court leaving it to determine whether EU law applied to the case and whether the pacemaker and the stayer were a team.[27]

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[25] *Walrave*, para 4.

[26] *Walrave*, para 8. The ECJ left it to the national judge to decide whether the discrimination of Mr. Walrave and Mr. Koch based on their nationality fell within the "composition of sports teams" of purely sporting interest.

[27] In the event, Walrave and Koch declined to press for a judgment by the Arrondissementsrechtbank because the UCI had allegedly threatened to withdraw paced cycle racing from the World Championships.

3.1.2. Donà v. Manteo

3.1.2.1 Introduction

Only two years after the Walrave decision, the ECJ once again dealt with a sports-related case concerning nationality rules in Italian football. In Donà vs. Mantero[28] Advocate General Trabucchi pointed out the dual significance of the judgement, that rightly stressed the value of sporting activity as such and the need to encourage it, and reaffirmed the general principle of the right to freedom of movement for those who, in the world of sport, want to take part in it as a preponderantly economic activity of a professional nature.

3.1.2.2. The facts of the Case

The player's agent Gaetano Donà was assigned by Mario Mantero, president of FC Rovigo to look for new football players overseas. When Donà had found such players, Mantero denied responding to his offers and also refused to pay the reasonable expenses (the latter consisting of the costs of an advert that he had posted in an Belgium sports newspaper). He referred to the statutes of the Italian football federation that only allowed Italians to participate in matches in the Italian football league. Donà held the opinion that this provision violates Art. 48 (now 39) and Art. 59 (now 49) EC. The case was referred to the ECJ. In particular, the national court asked the ECJ to decide whether the nationality requirement for playing in professional football matches in Italy was compatible with EU law.[29]

3.1.2.3. The Judgement

The ECJ confirmed the decision he had made in *Walrave* and made clear that he would only allow those regulations of sport federations that are made out of non-economic reasons and only concern the sport itself, such as, for example, the games of the national teams.

> *"…rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the State in question, are incompatible with Article 7 and, as*

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[28] Gaetano *Donà v. Mario Mantero*, (1976) ECR-I 1333.

[29] The Cour d'Appeal submitted the following questions to the ECJ: "*Are Articles 39, 81 and 82 of the Treaty of Rome in March 1957 to be interpreted as : 1 prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club; and (2) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organise?"*

the case may be, with Article 48 to 51 or 59 to 66 of the Treaty unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matters and are thus of sporting interest only."[30]

3.1.3. Conclusion to *Walrave* and *Donà*

The judgments on *Walrave* and *Donà* are of a general relevance in the field of professional sport. Most importantly, the ECJ has clearly established that sport is subject to the EU law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty. At the same time the Court has pointed out, that Community Law does not apply to issues that are of purely sporting interest. As a consequence, a French footballer, e.g., could not put his claim on grounds of Community law if he was rejected by the German National Team.

Secondly, the ECJ considers footballers to be workers as defined in Article 39 EC, since they provide services in return for remuneration. This applies at least to professional and semi-professional players.

Finally, the Court elaborated that Article 39 EC is not only vertically, but also horizontally directly effective. As a result, Article 39 EC covers not only the activities of public, but also of private sports associations. This symbolizes a divergence from the conventional doctrine, according to which Articles 39 and 49 EC are only applicable to acts of public authorities and are therefore not horizontally directly effective in disputes between private parties. This seems to be justified if one considers that a private sporting association can be as powerful as a public authority as far as relations with the players are concerned.

3.2. The Breakthrough of European Sports Law: The Bosman Case

3.2.1. Introduction

On 15 December 1995 the European Court of Justice delivered a ruling in the matter ASBL Union Royale de Belge des Sociétés de Football Association and Others v. Jean–Marc

[30] *Donà v. Mantero*, para 19.

Bosman, ever since referred to as the *Bosman* ruling.[31] The case concerned the legality of the *system of transfers* for football players and the existence of so-called *quota systems*, whereby only a limited number of foreign players were allowed to play in a club match. This case had by far the most significant and profound impact on European professional sport. [32]

3.2.2. The Situation Prior to Bosman

3.2.2.1. The System of Transfers

Prior to Bosman, a football player could only move to another club with the agreement of both clubs. Usually this agreement was only reached by the setting of a "*transfer fee*", whereby the buying club actually purchased the player from the selling club. This applied regardless of whether or not the player's contract with the selling club had ended. For this reason, out of contract players were not allowed to sign a contract with a new team until a transfer fee had been paid, or they had been granted a free transfer.[33]

It is argued that the purpose of those rules is to ensure the survival of smaller clubs and, moreover, the organisation of football as such. If no transfer fees were payable when a player moved, the wealthy clubs would easily secure themselves the best players, while the smaller clubs and amateur clubs would get into financial difficulties and possibly even have to cease their activities. There would thus be the danger that the rich clubs always become even richer and the less well off even poorer.[34] On the other hand the transfer fees are deemed a merely compensation for the costs incurred in the training and development of a player.

3.2.2.2. Nationality Rules: Quota System (3 plus 2)

Secondly, prior to Bosman case, *quota systems* existed in many national leagues and also in the UEFA club competitions. In 1991, UEFA adopted the so called "*3 + 2 rule*" permitting each national association to limit to three the number of foreign players whom a club may field in any first division match in their national championships, plus two players who have played in the country of the relevant national association for an uninterrupted period of five

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[31] Union Royale Belge des Sociétés de Football Association, Royal Club Liégeois, UEFA v. Bosman, (1996) ECR I-5040.

[32] *Bosman* not only mattered in sport, but also had a huge impact on the legal doctrine. See Stefaan van den Bogaert in "*Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman",* 2005. Also see Opinion of Advocate General Lenz in his preliminary observation of the ruling, *Bosman* para. 56 f..

[33] *Bosman*, para 6-24.

[34] See S.Gardiner, Sports Law, p. 365.

years, including three years as a junior (so-called "*assimilated*" foreign players). The same limitation also applied to UEFA matches in competitions for club teams.[35]

Various sports federations and Governments argued that the nationality clauses are justified on non-economic grounds, concerning only the sport as such. They would serve to maintain the traditional link between each club and its country and are necessary to create a sufficient pool of national players to provide the national teams with top players. Finally, those clauses would help to maintain a competitive balance between clubs from appropriating the services of the best players. [36]

3.2.3. The Facts of the Case

The Bosman case originated in a dispute between Jean-Marc Bosman, a Belgian professional footballer, and his club, the Royal Club Liège (RCL), which played in the Belgian first division. He claimed that the Belgian football federation, the Union des Associations Européennes de Football (Union of European Football Associations – UEFA) and the Federation Internationale de Football Association (International Federation of Association Football – FIFA) had prevented him from moving to a French club, US Dunkerque, in particular by demanding a so-called transfer fee.

Prior to expiry of his contract, Liège offered Bosman a new contract which included a massive reduction (almost 75 %) in his total pay which would have placed him on the minimum wage permitted by the URBSFA, the Belgian football governing body. Bosman, however, eventually attracted attention from the French club Dunkerque, and a transfer fee was agreed between Liège and Dunkerque. Unfortunately, the proposed transfer eventually fell through because Liège refused to request the Belgium Football Association to forward the release certificate to the French Football Association since there was doubt whether the French club could pay the transfer fee demanded by the Belgium club. Subsequently, Bosman was only able to enter into contract with a Belgian third division club.

On 8 August 1990, Mr. Bosman brought an action against RCL before the Liège Court of First Instance.

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[35] *Bosman*, para 27.
[36] *Bosman*, para 122-126.

Concurrently with that action, he applied for an interlocutory decision ordering RCL and URBSFA to pay him a monthly advance until he found a new employer, restraining the defendants from impeding his engagement and referring a question to the ECJ for a preliminary ruling. The judge hearing the interlocutory application granted Bosman's request and referred to the ECJ for a preliminary ruling a question on the interpretation of Article 48 (now 39) of the Treaty in relation to the rules governing transfers of professional players.

On 28 May 1991, the Liège Court of Appeal revoked the interlocutory decision of the Court of First Instance insofar as it referred a question to the ECJ for a preliminary ruling. However, it upheld the order against RCL to map monthly advances to Bosman.

In new pleadings lodged on 9 April 1992, Mr. Bosman amended his initial claim and sought a declaration that the transfer rules and nationality clauses were not applicable to him and an order against RCL, URBSFA and UEFA to pay him compensation in respect of the damage he had suffered and loss of earnings. He also applied for a question to be referred to the ECJ for a preliminary ruling.[37]

3.2.4. The Judgement

3.2.4.1. The Transfer System

As to the transfer rules, the Court held that they directly affect players' access to the employment market in other Member States and were thus capable of impeding freedom of movement of workers. They were therefore contrary to the Treaty provisions.

The Court held that

> *"Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid the former club a transfer, training or development fee."*

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[37] The Liège Court d'Appel referred the following questions to the ECJ: *Are Articles 48, 85 and 86 of the Treaty of Rome to be interpreted as: (1) prohibiting a football club from requiring payment of a sum of money upon the engagement of one of its players who had come to the end of his contract by a new employing club* (the validity of the transfer fee)? *(2) prohibiting the national and international sports associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organized* (the validity of the nationality clause)*?*

The reasons submitted by the federations for the existence of these transfer rules were not accepted by the ECJ. The need to maintain a financial and competitive balance between clubs and to train young players was rejected because these aims could be achieved by other means which did not affect the free movement of workers, such as the redistribution of a portion of clubs' gate receipts.

3.2.4.2. Quota System

With regard to the Quota-System the Court held:

> *"Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States."*[38]

3.2.5. Conclusion

From a legal point of view, *Bosman* may not really be particularly significant, certainly not with respect to the nationality clauses, as this issue was in fact already decided in *Donà* and no justification on sporting grounds could be presented to allow such an obvious infringement of the non-discrimination principle in Article 39 EC. Still, it was important as an expression of the European Court's persisting view that sport falls within the scope of the EC Treaty in so far as it constitutes an economic activity.

The judgment was also significant for the Court's concern to grapple with the peculiar characteristics of sport, which in some respects is not an industry like any other. The "uniqueness of sport" argument did in fact influence the ECJ, in as much as the Court acknowledged that a training compensation was acceptable "*in view of the considerable social importance of sporting activities and in particular football in the community*".[39] So there are (at least) two features which the view of the Court mark out sport as special: maintaining a balance between clubs and encouraging youth training.

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[38] *Bosman*, para. 137.
[39] *Bosman*, para. 106.

Most of all *Bosman* was a landmark in shaping EC law as a regime with capacity to force significant change in the sporting status quo. The transfer system was radically amended and the system of intra-EU nationality discrimination in club football was abandoned as the direct and unavoidable consequence of the judgment[40].

3.2.6. Consequences of the Decision

Even if the Bosman ruling did not surprise from a legal point of view, it had a huge impact with regard to its consequences, especially due to the its decision regarding the "*3 plus 2 rule*" to professional Sport in Europe. In short: *Walrave* and *Dona* mattered on paper. Bosman mattered on turf.

3.2.6.1. With Regard to the Transfer System

The *Bosman* ruling has generated clear financial attractions for both clubs and players.[41] For the former, there is the knowledge that transfer fees cannot be required for out of contract players as the principles of *Bosman* do not apply to players who are still under contract to their old club. For this reason the clubs are aiming to grant players long-term contracts and sell them before the contract expires. For the players, on the other hand, new contracts negotiated with new clubs are likely to involve significant signing-on fees alongside very attractive wage levels.

3.2.6.2. With Regard to the Quota System

After *Bosman*, it is quite obvious that migration patterns have changed dramatically resulting in an explosive increase in the number of foreign players in national leagues. To give some examples, it should be mentioned that in England during the 1995/96 season 102 non-British players appeared in the Premiership and nationwide leagues, but by 1999/2000 season that figure had increased to 185. In fact, the European football leagues are more international than ever with Germany topping the list with almost 50 % foreign players in the German Bundesliga. In the current teams of Arsenal London and Chelsea London not a single national player is fielded anymore. This increase of non-national players in national leagues has raised concern about the negative effects on the development of young talented players and German

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[40] The new Transfer System is portrayed at 3.2.6.3. of this chapter.

[41] See Simon Gardiner and Roger Welsh: „Show me the money – Regulation of the Migration of Professional Sportsmen in Post-Bosman Europe, (2000) at 114.

sports managers, such as Franz Beckenbauer and Uli Hoehness of Bayern München have suggested reintroducing quotas for young players.[42]

3.2.6.3. The New Transfer System

The following three issues characterize the new transfer system: the training compensation, the contracts between the players and the clubs, in particular their duration, and the sanctions in case of a unilateral breach of the contract.[43]

Training compensations seek to compensate the club that trained a player for the costs of such training. In an agreement the Commission and UEFA/FIFA introduced a sophisticated system of calculating these compensations. Accordingly, compensations are due to the clubs that trained the player on the occasion of every transfer of the player to a new club until the age of 23. The ultimate goal of this system is to redistribute income to all the clubs involved in the training of players. To the transfer of players under18 strict rules apply and a code of conduct must be established and enforced by the football authorities to guarantee that sporting, training and academic education is provided.

With respect to the contracts concluded between players and clubs, their duration is limited to a maximum of 5 years and a minimum of one year. One transfer period per season was created with a further, limited mid-season window. The basic idea is to avoid as much as possible a transfer in the middle of the season, which distorts true competition between the clubs. In addition, there is a limit of one transfer per player per season. The player or club cannot unilaterally breach the contract for three years before the player has reached the age e.g. 28 and for 2 years thereafter.

Lastly, the deal also addressed the system of sanctions to be introduced for cases of unilateral breach of contract. While, under the prior system, FIFA required the agreement of the two clubs to enable the player to be transferred, the Commission promoted a balanced system of unilateral breach of contract. The applicable sanctions to a unilateral breach should be of a financial nature. Disproportionate demands of financial compensation can be subject to review by an arbitral body on a voluntary basis or by the national courts. Proportionate sporting sanctions, such as a suspension of up to four months can be imposed, but only if the

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42 See UEFA´s Rule on Home-Grown Players, 3.5 of this chapter.

43 See on the new Transfer Settlement Parrish "*Sports law and policy in the European Union*" (2003), p.147.

breach occurs during the first two years of the contract. To preserve the specificity of sporting competition, unilateral breaches of contract should only be possible at the end of the season. Recourse to an arbitration body set up under the auspices of FIFA and composed of representatives of players and of clubs in equal numbers, will be voluntary, and will not prevent recourse to national courts.

3.3. Post-Bosman Developments: *Lehtonen* and *Deliège*

In April 2000, in two cases the European Court of Justice awarded sport "specific characteristics" which justify a degree of restriction on the basic freedoms.

In the case of the Finnish basketball professional Jyri Lehtonen[44], the Court of Justice considered the arrangement of player transfers over certain periods as constituting interference in the free movement of workers, which, however, against the background of certain non-economic reasons concerning the sport as such could be justified.

In its second decision regarding the Belgian Judoka Christelle Deliège[45], the ECJ found that the selection criteria laid down by sports associations for participation in high-level international competitions fundamentally constitutes a restriction of the free movement of services. These criteria are, however, justified in so far as they prove to be necessary for organising and holding those competitions.

3.3.1. Lehtonen Case

3.3.1.1. Facts of the Case

Lehtonen was transferred from a Finnish to a Belgian Basketball team. It is a common practise in European sport that players are unable to be transferred outside the transfer seasons. The Belgian Basketball Federation refused to register him on the grounds that the transfer had not taken place within the specified "transfer window". Unregistered players are prevented from competing in Belgian competitions. To make matters worse for Castors Braine, the Belgian team which had acquired Lehtonen had already made him play in a winning team only to have the result overturned due to the breach of transfer rules. Lehtonen

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[44] Jyri Lehtonen v. Federation Royale Belge de Sociétés de Basketball (2000) ECR I-2681.
[45] Christelle Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL (2000) ECR I-2549.

and Castors Braine applied to the Court of First Instance in Brussels for an interim order on the overturned match and the sanctions imposed on Lehtonen. The court asked the ECJ to answer the question of whether certain rules of the national and international basketball associations were in violation of Article 39 (ex 49) of the European Treaty. [46]

3.3.1.2. The Reasoning of the Court

The ECJ relied on *Walrave*, *Donà* and *Bosman* in deciding that the activities of sport are subject to EU law and that employees of sports clubs are to be considered as workers. The ECJ acknowledged the *"considerable social importance of sport"* and made further mention of the Amsterdam Treaty's Declaration on the social significance of sport.[47]

The ECJ also found that the transfer deadlines constituted a restriction on free movement, since the transfer periods deprive players at certain times of any possibility of taking up employment.[48]

The Court then had to decide whether such restrictions were justifiable and proportionate. It agreed with the submissions of the Basketball Federation that rules on transfer deadlines were sporting rules which were necessary for the organisation of the game. Since late transfers could substantially weaken the strength of a team in the course of a championship thus calling into question the proper functioning of sporting competitions.

However, the ECJ argued that such rules must not go beyond what it necessary for achieving the desired aim. The differential treatment of players from inside and outside Europe, which the rules promoted, went beyond what was necessary and as such were prohibited by Article 39. [49]

Again, the ECJ did not address the question of competition law. Therefore in answer to the question referred by the Tribunal de Premiere Instance, Brussels, on 13 April 2000, it held:

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[46] The national court referred the following question to the ECJ: *"Are the rules of a sports federation which prohibit a club from playing a player in the competition for the first time if he has been engaged after a specific date contrary to the Treaty of Rome (in particular Articles 49, 81 and 82) in the case of a professional player who is a national of a member state of the European Union, notwithstanding the sporting reasons put forward by the federations to justify those rules, namely the need to prevent distortion of the competitions?"*.

[47] *Lehtonen*, para 32 and 33.

[48] *Lehtonen*, para 35.

[49] Players from a federation outside the European zone were subject to a transfer deadline of 31 March, whereas players inside the European zone were subject to a transfer deadline of February 28.

"Article 39 EC precludes the application of rules laid down in a member state by sporting associations which prohibit a basketball club from fielding players from other member states in matches in the national championship, where they have been transferred after a specific date, if that date is earlier than the date which applies to transfers of players from certain non member countries, unless objective reasons concerning only sport as such or relating to differences between the position of players from a federation in the European zone and that of players from a federation not in that zone justify such different treatment."

3.3.2. Christelle Deliège v. Asbl Ligue Francophone de Judo and Others

3.3.2.1. The Facts of the Case

In *Deliège*, the ECJ heard a case concerning a Belgian Judoka who claimed that her career had been impeded by the refusal of the Belgium Judo authority to allow her to participate in the 1992 Olympic Games held in Barcelona and the 1996 Games held in Atlanta. In order to participate in these events potential participants needed the authorisation from the relevant national federation. Although considered a very good judoka, Miss Deliège failed to make the Belgian Olympic team, having failed to achieve the necessary qualification criteria. Failure to gain selection would undoubtedly inhibit her career. Miss Deliège believed that, although judo is considered an amateur pursuit, she was carrying out an economic activity and as such had economic rights guaranteed by Articles 49, 81 and 82 of the EC Treaty. The case was referred to the ECJ by the Tribunal de Premiere de Namur.[50]

3.3.2.2. The Reasoning of the Court

As in *Bosman*, the ECJ did not address the question of competition law. On the question of the freedom to provide services, the ECJ confirmed that the activities of athletes (even amateur athletes) are capable of falling within the scope of Art. 49 EC. Organising the sporting contest allows the organisers to commercially exploit the secondary features of the contest such as broadcasting and sponsorship rights. Furthermore, Deliège received a grant to train and compete.

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[50] The Court was asked: *"Whether or not it is contrary to the Treaty of Rome, in particular Articles 49, 81 and 82 of the Treaty, to require professional or semi-professional athletes or persons aspiring to professional or semi-professional activity to be authorised by their federation in order to be able to compete in an international competition which does not involve national teams competing against each other."*

Despite giving clear guidance in this matter, the ECJ did however acknowledge the "considerable social importance of sport" and did refer to the Amsterdam Treaty's Declaration on the social significance of sport. In this connection, the ECJ decided that the selection ruled derived from a need inherent in the organisation of the sport and that they were not to be considered a restriction on the ability to provide services. Allowing anyone to compete in competitions is clearly not feasible. However, the ECJ held that sports organisations must be able to demonstrate that selection rules are based on objective justifiable principles. On 11 April 2000, the ECJ delivered its judgment. It held:

> *A rule requiring professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition, which does not involve national teams competing against each other, does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services prohibited by Article 49 of the EC Treaty.*

3.3.3. Conclusion: The First Step towards a Sport Exemption?

At first sight the rulings on *Deliège* and *Lehtonen* do not surprise as they confirm the principles of *Bosman* especially that sport is subject to EU law. However, the Court gave clearer guidelines for sporting justification arguments. The significance of these rulings lies in the way the Court acknowledged the special character of sport and dealt with the question on how to reconcile it with EU law. In the previous cases the ECJ had elaborated that law applies to sport as far as it constitutes an economic activity. With the two judgments at hand, the ECJ provided possible exemptions to this rule on the basis that they are inherent to the organisation of sports.

The significance of the *Deliège* ruling lies in the ECJ´s view that selection criteria do not necessarily constitute a restriction under Article 49 EC. This places a small limit on the application of the freedom to provide services to sporting contexts. In *Lehtonen*, the important finding is that, even though transfer windows do constitute a restriction on free movement,

they are able to be justified on sporting grounds and as such are capable of being exempt from the application of Article 39 EC.[51]

3.4. The Extension of *Bosman* to Non-EU/EEA Players

3.4.1. Introduction

In legal terms *Bosman* only provided free mobility within the members states for EU nationals and nationals from EEA countries (Liechtenstein, Norway and Iceland).[52] Non EU or non-EEA players were not directly affected by *Bosman*. In two recent cases the ECJ for the first time had to deal with the question whether sports federations or associations may limit the number of players originating from "third countries" with which the EU has concluded an Association Agreement as members of clubs participating in their competition.

3.4.2. The Kolpac Case

3.4.2.1. Facts of the Case

The Kolpak Case before the European Court of Justice involved a dispute between the German Handball Federation (Deutscher Handball Bund –DHB) and Maros Kolpak, the Slovak goalkeeper of the second division Handball Club TSV Ostringen in Germany. [53] The case concerned the legality of Article 15 of the German Handball Federation's regulation[54], which stated, at the time of the dispute, that the member clubs are only allowed to line up two players from "third countries", i.e. citizens from outside the EU or from countries of which the citizens do not enjoy complete equality of treatment opposite to Community nationals in respect of free movement of workers. [55]

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[51] *Lehtonen*, para 51-55.

[52] Agreement on the European Economic Area (EEA). The EEA Agreement is in force since 1.1.1994 and extends the Single Market legislation, with the exception of Agriculture and Fisheries, from the EU Member States to Norway, Iceland and Liechtenstein.

[53] Deutscher Handballbund e.V. v. Maros Kolpak (2003) ECR I-4135.

[54] The DHB regulations are available at www.dhb.de.

[55] See Frank Hendrickx "*The European Non-EU player and the Kolpak Case*", The International Sports Law Journal 2003/2, p.12. Also see Martins in "*The Kolpak Case: Bosman Times 10? Football Fears the Arrival of Bosman, Bosmaniovic and Osman*" in The International Sports Law Journal 2004/1-2, p. 26. and Blackshaw "*Bosman Principles Extended to Non-EU Citizens*" in The International Sports Law Journal 2003/3, p.33.

Rule 15 of the DHB *Spielordnung*[56] refers to the marking of the players' licence and provides:

1. *The letter A is to be inserted after the licence number of the licences of players*
   (a) who do not possess the nationality of a State of the European Union (EU State),
   (b) who do not possess the nationality of a non–member country associated with the EU whose nationals have equal rights as regards freedom of movement under Article 48 (I) (now Article 39) of the EC Treaty,
   …
2. *In teams in the federal and regional leagues, no more than two players whose licences are marked with the letter A may play in a league or cup match."*

The DHB, which organizes league and cup matches at federal level, issued him, under rule 15, a player's licence marked with the letter A on the ground of his Slovak nationality. However, Kolpak had requested that he be issued with a player's licence which did not feature the specific reference to nationals of non-member countries. He argued that he belonged to the group of third-country nationals who are entitled to the same freedoms as EU nationals by reason of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia[57].

Article 38 (first indent) of the Europe Agreement between Community and Slovakia provides:

> *Subject to the conditions and modalities applicable in each Member State: treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.*[58]

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[56] Sporting Rules of the German Handball Federation.

[57] The EU has concluded similar agreements with 22 other countries. These 22 countries are: Poland, Armenia, Azerbaijan, Byelorussia, Bulgaria, Estonia, the Czech Republic, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Russia, Slovenia, Ukraine, Uzbekistan, Tunisia, Algeria and Morocco.

[58] Article 38 (I) of the Association Agreement with Slovakia.

3.4.2.2. Reasoning of the Court

3.4.2.2.1. Application of Art. 38 of the Association Agreement to a Rule laid down by a Sports Federation

After the Court had examined the direct effect of Article 38 (I) of the Association Agreement with Slovakia[59], it elaborated that it is also directly applicable to rules laid down by sports federations such as the DHB which determines the conditions under which professional sportsmen engage in gainful employment.[60] The Court questioned whether the interpretation of Art. 39 (2) EC (ex Art. 48 (2)) could be transposed to the provision under examination. The court found that the comparison of the aims and the context of the Association Agreement with Slovakia, on the one hand, with those of the EC Treaty, on the other hand, shows that there is no ground for giving to the first indent of Article 38 (1) of the Agreement a scope different from that which the Court has recognized Article 39 (2) EC as having.

3.4.2.2.2. The Scope of the Principle of Non-Discrimination set out in Article 38 (1)

The court then defined the scope of the principle of non-discrimination set out in the first indent of Article 38 (1) of the Association Agreement. It stated that the prohibition of discrimination on grounds of nationality applies only to workers of Slovak nationality who are already lawfully employed in the territory of a Member State and only with regard to conditions of work, remuneration or dismissal.[61] In contrast to Article 39 EC, Article 38 (1) of the Association Agreement does not extend the principle of non-discrimination to national rules concerning access to the labour market. Having made this legal distinction clear, the court repeated that Maros Kolpak was lawfully employed by his club in the territory of Germany. He already had lawful access to the labour market in an EU Member State and should therefore be treated like any other EU citizen working in Germany.[62]

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[59] *Kolpak* para 24-30. The Court referred to its judgment Pokrzeptowicz v. Meyer (2002) ECR I-1049. In this case the ECJ for the first time recognized the first indent of Article 37 (1) of the European Agreement establishing an association between the European Communities and their member states on the one hand, and the Republic of Poland on the other hand, as having *direct effect*. This premise was of significant importance in the in the Kolpak case. The court observed that the wording in the Polish and the Slovak Associations Agreements were identical and thus should have direct effect.

[60] *Kolpak*, para 37.

[61] *Kolpak*, para 39.

[62] *Kolpak*, para 43.

3.4.2.2.3. Discrimination

It thus remained for the Court to establish whether the application of Rule 15 of the DHB Spielordnung leads to a discrimination prohibited by Article 38 of the Agreement. Two reflections led to a positive response: firstly, the right to equal treatment under the first indent of Article 38 (1) is of the same scope as that in Article 39 (2) EC; secondly, the nationality clause at issue is similar to those in the *Bosman* case. From the moment the interpretation of Article 39 (2) EC in the Bosman case could be transposed to the first indent of Article 38 of the Agreement, only one conclusion could be drawn: this latter provision precludes any application to Maros Kolpak of a rule such as that laid down in Rule 15 of the DHB Spielordnung.[63]

3.4.2.2.4. No Justification on Sporting Grounds

The DHB had indeed attempted to argue that the provision laid down in Rule 15 of the DHB Spielordnung was justified on exclusively sporting grounds, as its purpose is to safeguard training opportunities for the benefit of young players of German nationality and to promote the German national team. It comes with no surprise that the Court rejected this justification on the grounds that the supposed aim of the rule could not be reached since the clubs are free to field an unlimited number of nationals of EEA Member States which would, just as certainly, hinder the raise of young German players.

With reference to *Bosman* and the Court's judgment to *Dona v Mantero*, the Court made clear that the Treaty provisions on the free movement of persons do not preclude rules or practices excluding foreign players from certain matches for reasons which are of non-economic nature, as long as they relate to the particular nature and context of such matches and are thus of sporting interest only. Such an exemption on the grounds of sporting interest is usually given in matches between national teams from different countries[64], but not in the case at hand.

3.4.2.3. Conclusion

The *Kolpak* Judgment is in line with the previous judgments of the ECJ concerning the freedom of movement in sports related cases. Once again, the Court confirmed and further developed the principle established in *Bosman* and in *Donà*, that a rule laid down by a federation and limiting the number of players who are nationals of a Member State of the EU

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[63] *Kolpak*, para 47-51.
[64] *Kolpak*, para 53.

and under contract with a club, or authorised to take part in competition, was contrary to EC Law. This has now been extended to these "third countries".

It is important to note that the judgment does not create rights concerning the cross-boarder movement of workers within the EU and thus does not directly concern the access to the labour market, since they need to be lawfully employed in a Member State. However, it threatens the intention of the clubs to support the national youth players by creating training facilities and to promote the respective national team. As the *Bosman* ruling *Kolpak* forces the clubs and federations to refrain from such discriminatory restrictions.

3.4.3. The Simutenkov Case

3.4.3.1. Introduction

With the *Kolpak* ruling, a great deal of speculation arose with regard to the impact of the judgment on other European Association Agreements, concluded with countries from outside the EU.[65] Would the court be willing to extent its case law to agreements with, for example, Russia, or even to those concluded between the EU and the ACP countries? In order to clarify the *Kolpak* ruling new case law of the ECJ had to be awaited. The Court's recent judgment in the Simutenkov Case[66], delivered on 12 April 2005, provides some answers.

3.4.3.2. The Partnership Agreement between the EU and Russia (PCA Agreement)

The legal basis for EU relations with Russia is based on the Partnership and Cooperation Agreement (PCA), which came into force in December 1997 for an initial period of ten years. It establishes the institutional framework for bilateral relations, sets the principal common objectives, and calls for activities and dialogue in a number of policy areas. It covers issues such as trade, economic cooperation, political dialogue, justice and home affairs.[67]

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65 See Frank Hendrickx „*The Simutenkov Case: Russian Players are Equal to European Union Players*", The International Sports Law Journal 2005/3-4, p. 13.

66 Igor Simutenkov v. Ministerio de Eucacion y Cultura and Real Federacion Espanola de Futbol (2005) 265/03, ECR I-2579.

67 The PCA Agreement is available at: http://www.eu.int/comm/external_relations/ceeca/pca/pca_russia.pdf..

3.4.3.3. The Facts of the Case

The Russian national Igor Simutenkov was, at the time of the dispute, employed as a professional football player by the Spanish football club Deportivo Tenerife and held a valid residence as well as a work permit. According to the player statutes he was issued a federation licence as a Non-Community player by the Spanish Football Federation Real Federación Espanola de Futbol (RFEF).[68] Under an Agreement concluded between the RFEF and the Spanish Professional Football League in 1999, the number of foreign non-EU players allowed to participate in the Spanish First Division was limited. [69] The relevant provisions of the RFEF, on which the Agreement was based on, are the following:

Art. 173 of the General Regulations provides:

> *"Without prejudice to the exceptions laid down herein, in order to register as a professional and obtain a professional licence, a footballer must meet the general requirement of holding Spanish nationality or the nationality of one of the countries of the European Union or the European Economic Area."*

Art. 179 (I) of the General Regulations provides:

> *"Clubs entered for official professional competitions at national level shall be entitled to register foreign non-Community players in the number stipulated in the relevant agreements concluded between the RFEF, the Liga Nacional de Futbol Profesional (National Professional Football League) and the Acociacion de Futbolistas Espanoles (Association of Spanish Footballers). Those agreements also govern the number of such footballers who may take part simultaneously in a game."*

In order to improve his chances to play, Simutenkov submitted an application to the RFEF for it to replace the federation licence which he held with a licence that was identical to that held by Community players. In support of that application, he relied on the Communities-Russia Partnership Agreement and its prohibition of discrimination contained in Art. 23 (I).

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[68] According to Art. 129 of the General Regulations of the RFEF, a professional football player's licence is a document issued by the RFEF which entitles a player to practise that sport as a member of that federation and to be fielded in matches and official competitions as a player belonging to a certain club.

[69] In the first Division it was limited to three non-EU players for the 2000/01 to 2004/05 seasons, and in the second division to three for the 2000/01 and 2001/02 seasons and two for the following seasons.

Article 23 (I) of the PCA (regarding labour conditions) provides:

> *"Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian national, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals."*

In the following the RFEF and the Spanish Central Court for Contentious Administrative Proceeding rejected his application for a new licence. Simutenkov appealed to the Spanish National High Court, which referred the case to the ECJ questioning, if a rule which provides that clubs may use in competitions at national level only a limited number of players from Non- EEA countries is contrary to Article 23 of the PCA.

3.4.3.4. The Reasoning of the Court

In its examination of the legal issue the ECJ answered the question given to him in two steps. First the Court considered whether Igor Simutenkov can refer to Article 23 (I) of the PCA at all. Secondly, it had to define the scope of the principle of non-discrimination contained in that provision.

3.4.3.4.1. Direct Effect of Article 23 (I) PCA

Regarding the issue of a provision having direct effect, the Court first attached special value to the wording of Article 23 (I) of the PCA Agreement. It found that the provision contains a clear and precise obligation precluding any Member State from discriminating which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[70] Such a rule of equal treatment, the Court continues, lays down a precise obligation as to results and, by its nature, can be relied on by an individual before a national court as a basis for requesting that court to disapply discriminatory provisions without any further implementing measures being required to that end.[71]

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[70] *Simutenkov*, para 23.
[71] *Simutenkov*, para 24 with reference to *Pokrzeptowicz*, para. 22 (see fn. 53).

Subsequently the ECJ rejected the following three counter-arguments that could have justified a different result:

● ***The wording of Article 23 PCA***

The words "*subject to the laws, conditions and procedures applicable in each Member State*", which feature at the beginning of Article 23 (I) of the PCA cannot be taken as an argument for a more restrictive interpretation. According to the Court this does not preclude the direct application of the provision. It merely allows the Member States to stipulate the scope of the enforcement of the rights granted by Article 23 (I), but not to subject the principle of non-discrimination to discretionary limitations. The latter would have the effect of rendering that provision meaningless and thus depriving it of any practical effect.[72]

● ***Paragraph 27 PCA***

Furthermore the Court determined whether Article 27 PCA is contrary to a direct application of the principle of discrimination. According to Article 27 PCA, Article 23 PCA is to be implemented on the basis of recommendations by the Cooperation Council. The role which Article 27 confers on that council is to facilitate compliance with the prohibition of discrimination but cannot be regarded as limiting the immediate application of that prohibition.[73]

● ***Purpose and Nature of Article 23 PCA***

Finally the Court held that neither the purpose of the Agreement nor its nature is a reason not to directly apply Article 23 (I).[74] The RFEF had pointed out that the Agreement was limited to establishing a partnership between the parties, without providing for an association or future accession of the Russian Federation to the Communities.[75] The Court rejected this argument and argued, that it does not in any way follow from the context or purpose of that Partnership Agreement that it intended to give to the prohibition of "discrimination based on nationality" as regards working condition any other meaning than that which follows from the ordinary sense of those words.[76]

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[72] *Simutenkov*, para 24 with reference to *Kolpak* para 29.
[73] *Simutenkov*, para 25.
[74] *Simutenkov*, para 27.
[75] *Simutenkov*, para 28.
[76] *Simutenkov*, para 29.

It thus has to be concluded that Article 23 (I) of the Communities-Russia Partnership Agreement has direct effect, with the result that individuals to whom that provision applies are entitled to rely on it before the courts of the Member States. [77]

3.4.3.4.2. The scope of Art. 23 (I) PCA

In a second step the Court went on to define the scope of the principle of non-discrimination laid down in the PCA. In doing this, the Court referred to the *Kolpak* ruling where the Court with reference to *Bosman* had ruled that Article 39 (2) EC must not be interpreted narrowly and could thus be transposed to the non-discrimination principle of an European Agreement.[78]

The Court then compared the wording of Article 23 (I) PCA to that of Article 38 (I) of the Communities-Slovakia Association Agreement. Since the differences in the wording are of no further significance[79], the Court held that they are not a bar to the transposition to Article 23 (I) of the PCA.

Accordingly the Court concluded that Article 23 PCA establishes, for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty. That right precludes any limitation based on nationality, such as that in issue in the main proceedings, as the Court established in similar circumstances in the above judgments in *Bosman* and *Kolpak*.[80]

3.4.3.4.3 Discrimination

The Court found that in the given case the provision of RFEF which limits the number of foreign non-EU/EEA players allowed to participate at any time in the Spanish First Division prevents an equal treatment. This difference in treatment finally concerned the working conditions of Simutenkov as mentioned in Art. 23 (I) and therefore must be considered as a discrimination, which does not relate to specific matches between teams representing their respective countries but applies to official matches between clubs and thus to the essence of

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77 *Simutenkov*, para 30.
78 *Kolpak*, para 31-37 and 48-51.
79 Where the Russia Agreement reads that "the Community and its Member States shall ensure that the treatment accorded to Russian nationals…shall be free from any discrimination based on nationality", the Slovakia Agreement states that "treatment accorded to workers of Slovak Republic nationality…shall be free from any discrimination based on nationality."
80 *Simutenkov*, para 35.

the activity performed by professional players. As the Court also ruled in *Bosman* and *Kolpak*, such limitation cannot be justified on sporting grounds. [81]

Moreover, no other argument was brought forward to the Court that was capable of providing objective justification for the difference in treatment between, on the one hand, professional players who are nationals of a Member State or of a State which is a party to the EEA Agreement and, on the other hand, professional players who are Russian nationals.

Consequently, the Court held that Article 23 (I) PCA is to be construed as precluding the application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule drawn by a sports federation of that State which provides that clubs may field in competitions organised at national level only a limited number of players from countries which are not parties to the EEA Agreement.

3.4.4. Conclusion to *Kolpak* and *Simutenkov*

This case mirrors the *Kolpak* decision. Since *Kolpak* has already transposed the principles of *Bosman* into international agreements, the *Simutenkov* ruling is hardly surprising. Once again the European Court of Justice confirmed, that the scope of Article 39 EC has been extended to non-EU nationals through the existence of international agreements between the EU an third States. The *Simutenkov* Case concerned the PCA with Russia. However, it is likely that the principles put forward in *Simutenkov* can be extended to other countries in the same geographical and political area to the extent that their Agreements include a similar non-discrimination provision.[82]

The *Simutenkov* ruling created legal certainty with regard to the wording of the respective non-discrimination provision defining that Member States *shall ensure* a prohibition of discrimination.[83] It was not clear whether further implementing measures are required in order to "secure" the equal treatment.[84] The Court pointed out that it does not bar this provision

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[81] *Simutenkov,* para 37.

[82] See on the Agreement with ACP-States Chapter IV, 6.2.2.

[83] See with regard to the wording also Art. 20 of the PCA with Georgia that provides: "*Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Georgian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals."*

[84] Holtzke "*Die Gleichstellung drittstaatenangehöriger Berufssportler nach der "Kolpak" Entscheidung des Europäischen Gerichtshofe",* SpuRt, ed.11, p.1 f..

from having direct effect, even if the wording is less strongly formulated as compared to the wording at stake in *Kolpak*.

Nevertheless, it is important to stress that all those agreements generally do not provide for labour market access. The application of the non-discrimination clause is mostly conditional upon whether the person concerned is legally employed in the territory of the EU Member State concerned.

3.5. The new UEFA -Regulation on "home-grown" Players

3.5.1. Introduction

As a result of the *Bosman* ruling, the increasing number of non-national players in national leagues has raised concern about the negative effects on the development of young talented players. In order to counteract to this, clubs and federations suggested reintroducing quotas for young players. At the Spring 2005 UEFA Congress in Estonia, European football's governing body and its 52 national member associations agreed on a new rule setting a minimum quota of locally trained players on a sliding scale starting from the 2006-2007 season.[85]

3.5.2. The Content of the "home-grown" Player Rule

Consequently, clubs entering UEFA competitions now have to have four "locally" trained players, defined as players who have been registered for three seasons/years with the club between the ages of 15 and 21.[86] Until the season 2008-2009 the minimum number of "home-grown" players will be raised up to eight.[87] It is important to point out that the term "home-grown" does not refer to the player's nationality, but means all talents trained and educated between the ages mentioned.

3.5.3. Compatibility of the "home-grown" with EC Law

Although UEFA was careful to draft the new rule with no reference to the nationality of the players, it is unclear whether or not it will be interpreted as being a form of indirect

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[85] Michael Gerlinger, „*UEFA's Declaration on „Homegrown Players*", The International Sports Law Journal 2005/3-4, p. 51.

[86] Article "*UEFA Home Grown Player Rule may end up in court*", available at www.euraktiv.com.

[87] Michael Gerlinger, „*UEFA's Declaration on „Homegrown Players*", The International Sports Law Journal 2005/3-4, p. 51.

discrimination and therefore incompatible with the freedom of movement set out in Article 39 EC.

Article 39 EC does not only prohibit a "direct" discrimination on grounds of nationality, but also an "indirect" or "hidden" discrimination. This is the case when the discrimination is based on other criteria than nationality and indirectly leads to a discrimination of foreigners.[88] The ECJ holds that applying geographic criteria for a restriction, particularly, bears the risk of indirect or hidden discrimination.[89]

Although a regulation restricting the number of players in a squad that were not trained and educated in the club and/or association would not directly discriminate foreign players, it is quite obvious that most of the "home-grown" players would be nationals and not foreigners. Therefore, such regulation would discriminate foreigners indirectly, making it more difficult for foreign players to transfer to a country where they were not trained and educated.

3.5.4. Exemption on Grounds of Sporting Interests

The UEFA argues that this new rule is designed to counteract the recent development of clubs to go on "huge spending sprees" rather than invest in home grown talents. Jonathan Hill, Head of UEFA's EU office denies fears, that the home grown player rule will lead to discrimination based on nationality and added, that "*the idea is to encourage clubs to nurture their own talent and train at least some of their own players*."[90] UEFA believes that clubs have a responsibility to their communities, players and to the sport to provide training. If clubs rely increasingly on the market, this overly favours those with the biggest budget.

3.5.5. Conclusion

In the case at issue it is highly questionable, if the sporting interests of UEFA weigh enough to withstand European law. In *Bosman* the objectives of maintaining competitive balance and the encouragement of training programmes were considered legitimate although they are still subject to the proportionality test.[91] Even if the home grown rule is not directly linked to the nationality of the player, judges could still consider it as an infringement of the EC Treaty. *Bosman* and *Kolpak* have also showed that the ECJ would not exempt a restricting provision

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88 Standing jurisdiction since ECJ C-152/73 (1974) ECR I-153 "Sotgiu vs. Dt. Bundespost".
89 Martinez Sala", judgement of 12 May 1998 (1998) ECR I-2691.
90 Article "UEFA Home Grown Player Rule may end up in court", available at www.euraktiv.com.
91 *Bosman*, para. 106.

on the grounds of its sporting interest as a general justification. Moreover, the ECJ holds in standing jurisdiction that a restriction of Art. 39 EC can only be justified in case there are specific non-commercial needs, e.g. with respect to national team matches.

Besides the legal, there are also practical concerns regarding the rule. Since the rule stipulates that a club must have at least four players that were registered between the age of 15 to 21, a "hunt" for talents could break off in Europe as the clubs will try to secure enough talents at an early age. Especially the rich clubs will attract many young talents.[92] Furthermore, the rule implies that a Brazilian player who played in an Italian team for three years would make that player eligible as "home-grown", which is not in accordance with the idea of the rule.

4. Restraints based on Infringements of EC Competition Law

4.1. Introduction

Competition law issues are undoubtedly some of the most significant in shaping the legal structure of professional sport in Europe today. At the same time, this area of the law was and still is the one of the greatest legal challenges in European sports law. The competition taking place in the field of sport always has a character different from the one you can find between enterprises in the economy. Its focus is not, as already mentioned, to eliminate the others, but to preserve a well-balanced competition by conserving the other teams/athletes. Teams are not only interested in victories, but also in maintaining a good competitive level of the other teams in the league. To stress this point: Mercedes-Benz could still sell its cars and make profit, even if it was the only car building company in the world. Manchester United couldn't exist if there was no opponent left.

As shown above, the practice of sport is subject to Community law insofar as it constitutes an economic activity.[93] The distinction intends to target only those activities that are economic and therefore not eligible to be considered as "pure" sport. Often, however, it is difficult to

[92] See "*Professional Sport in the Internal Market*", T.M.C. Asser Institute, The Hague September 2005, p.35.
[93] "Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies", Annex IV to the Presidency Conclusion, Nice, 7-9 November 2000.

make this distinction. That is why the applicability of the antitrust law to sports is a demanding task.[94]

4.2. Outline of the Key Provisions of EC Competition Law

4.2.1. Art. 81 I EC

Art. 81 (1) EC provides that, "*The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market".*

Article 81 (3) EC provides that, *"The provisions of paragraph 1 may, however, be declared inapplicable in the case of, any agreements or category of agreements between undertakings; any decision or category of decisions by associated undertakings; any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerted restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."*

4.2.2. Abuse of Dominance, Art. 82 EC

Article 82 EC provides that: **"***Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and making the conclusion of contracts subject to acceptance by the other parties of*

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[94] See Parrish „*Sports law and policy in the European Union*" (2003) Chapter 5 (Sport and EU Competition Law), p. 109 f..

supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

4.3. Requirements of Art. 81 / 82 EC

When considering how EU competition rules apply to sport, the following issues have to be taken into consideration:

4.3.1. Are Sport Organisations/Clubs *Undertakings*?

Advocate General Lenz indicates in his opinion for the *Bosman* case that an undertaking has been defined as *"every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*."[95] According to the Commission and the ECJ, the term "economic activity" has to be viewed in the broadest sense as "*any activity consisting in offering goods and services on a given market."* [96]

On first appearance, sports organisations are primarily concerned with regulating sport conduct. However, sports organisations have a wider responsibility to ensure the commercial success of their sport. They are centrally involved in a range of economic activities including exploiting broadcasting and sponsorship rights. Similarly, clubs are to be considered commercial undertakings. Such commercial activity ranges from ticket sales to transfer dealings. In some cases clubs are even quoted on the stock exchange in the form of public limited companies.[97]

4.3.2. Do Sport Rules constitute *Agreements*?

Agreements can be reached between undertakings (such as clubs) or by an association of undertakings (such as governing bodies). The answer to this question depends on the concrete agreement in question. Due to the fact that the governing bodies of sport play an important non economic regularity function, it has to be distinguished between agreements that constitute rules of *purely sporting interest* and those of an *economic* nature. The first

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[95] *Bosman*, para 253-286. The definition was first stated in: Höfner (Klaus) and Elsner (Fritz) v Macrotron GmbH (1991) ECR I-1979, para. 21.

[96] See *EEC Competition Rules – Guide for Small and Medium-Sized Enterprises* (1983) European Documentation, at p. 17 and Commission v. Italy, (1987) ECR I-2599, para 7.

[97] Even individuals can be classified as undertakings, provided they are independent economic actors (See Hydrotherm v Andreoli, ECR I-2999 (1984)). Consequently, one could even possibly argue that they are independent economic units, operating to improve their value on the market, thus qualifying as undertakings.

mentioned are covered by the sporting exemption, and are thus incapable of being defined as a restriction. However, if the sporting body primarily acts in order to ensure the commercial success of the sport, it is engaged in an economic activity and thus can be considered as an undertaking as defined in Articles 81 and 82 EC.

4.3.3 Restraint of Trade

Agreements whose object or effect is to prevent, restrict or distort competition and therefore constitute a restraint of trade will be prohibited by Article 81 (1) EC. Even if an agreement does not have the *object* of restricting competition, it is nevertheless necessary to ascertain whether it has the *effect* of restricting competition.[98] However, even restrictive rules are capable of falling outside the scope of competition rules.

4.3.3.1. De Minimis Rule

Although the wording of Article 81 (1) suggests that any restriction of competition is sufficient to bring an agreement or practice within the scope of the provision, they will not be caught by the prohibition of Article 81 (1) if they do not have an *appreciable* effect on competition (so-called *de minimis* doctrine).[99] Its purpose is to determine, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 (1) EC. The Commission holds the opinion, that where the market shares of the parties to an agreement do not exceed certain thresholds, the agreement in principle does not appreciably restrict competition. [100]

4.3.3.2. Ancillary Restraints

The European Court of Justice[101] and the European Commission[102] already recognized that the scope of application of Art. 81 EC is quite wide and accordingly requires a restrictive interpretation. In different judgments the ECJ essentially held that an agreement which affects

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98 Delimitis v. Henninger Bräu, (1991) ECR I-935 (para. 13).
99 Völk v. Vervaecke, (1969) ECR I-295 (para 5-7).
100 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community (De Minimis Notice), OJ 2001 C 368/13.
101 LTM v. Maschinenbau ULM, (1966) ECR I-304. Metro SB-Grossmaerkte GmbH & Co. KG v. Commission, (1977) ECR I-1875. Lancome v. Eros (1980), ECR I-2511. L`Oréal v. De Niewe (1980) ECR I-3375.
102 European Commission, Official Gazette, 1968, NR. L 201, p.1 “Machines-outils”.

the trade between Member States does not violate Art. 81 of the EC Treaty, if it is *objectively necessary* and *essential* for the pursuit of a legitimate purpose. [103]

4.3.3.3. Rule of Reason

The question has been raised, whether there is a "rule of reason" under Article 81 (1) EC, which makes it necessary to weigh the pro- and anti-competitive effects of an agreement in order to determine whether the agreement is caught by the prohibition laid down in that Article. [104] However, the Commission has rejected the rule of reason and explained, that such balancing is reserved for Article 81 (3) EC.[105]

4.3.4. The Relevant Market: Do Sporting Rules affect *Trade between Member States*?

Articles 81 / 82 EC are only applicable if the Trade between Member States is affected. Therefore, the market has to be defined. Market definition plays a fundamental role in competition analysis under EC law, whether under Art. 81 or Art. 82. It is a basic tool to identify and define the boundaries of competition between firms and to analyse the practical effects of their behaviour on the competitive environment.[106] The definition of the relevant market calls for a two-stage analysis of each market. First, it is necessary to determine the material scope of the market (the relevant product market). Secondly, it is necessary to determine the geographical scope of the market (the relevant geographic market). The geographic relevant market has been defined as an area within the Community, affected by the measure.[107] It covers the total area of the Common Market, if products in all member states are regularly demanded and supplied.

Due to the pyramid structure of sports federations in Europe, sport has a strong international dimension and there are international implications of almost all sporting rules and practices which accordingly affect the European Market.

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[103] Gøttrup v. DanskLandbrugs Grovvareselskab AmbA (1992), ECR I-5641. Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis, (1986), ECR I-383.

[104] On the application of the „Rule of Reason" in US-American law see Chapter III of the thesis.

[105] Guidelines on Article 81 (3) at para 30. Also see the opinion of Advocate Lenz on a possible application of the *rule of reason* to EC competition law in *Bosman*, para. 266.

[106] See, e.g., Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C 372/5 (the "Notice on Market Definition").

[107] United Brands v. Commission (1978), ECR I-207.

4.3.5. Exemption under Article 81 (3) EC

Rules that are restrictive under Article 81 (1) are still capable of legal protection. A restrictive rule considered appropriate for an Article 81 (3) exemption will contain economic consequences but will satisfy the criteria outlined in Article 81 (3). Still the negative effects have to be in proportion to the positive effects of the restraint (so-called proportionality test).

4.3.6. Article 82 EC: Abuse of a Dominant Position

4.3.6.1. Dominant Position

Art. 82 EC does not define the term "dominant position", but the concept has been clarified by the practice of the Commission[108] and the case law of the European Courts. [109] It is defined as *"…a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the common market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers."*

4.3.6.2. Abuse of a Dominant Position

The finding of dominance is not in itself illegal and as such, the Commission must establish whether an abuse of this dominance has taken place. Article 82 does not define the concept of "abuse" either. Instead, it only provides the following non-exhaustive list of four examples identified above. The Court of Justice provides the following definition:

The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[110]

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[108] European Commission, OJ 1985, Nr. L 374, p.1, "ECS / AKZO II".
[109] Michelin v. Commission (1983) ECR I-3461.
[110] Hoffmann-La Roche v. Commission, (1979) ECR I-461 (para 91).

4.4. Crucial Issues in the Application of Competition Law to Sport

4.4.1. The Conformity of the Pyramid Structure with EC Competition Law

The pyramid structure which confers substantial power to the federations on top, such as FIFA or UEFA, results in legal concerns as far as potential abuse of their powerful position is considered.[111] In 1999 the Helsinki Report asserted that "*the pyramid structure of the organisation of sport in Europe gives sporting federations a practical monopoly. The existence of several federations in one discipline would cause major conflicts…".*

4.4.1.1. The Pyramid System in European Football

As already mentioned, sport in Europe is structured in a hierarchal way, the so-called pyramid structure. In football the pyramid places FIFA, the world governing body, at the peak. Beneath FIFA lies the UEFA, an association of 51 national associations in Europe. According to the *One-Association-Principle*, there is only one national association in every country, as, for example, in Germany the Deutscher Fussball Bund (DFB).[112] On the next level, the national associations are found. Then follow the professional clubs, along with other bodies as the regional associations and amateur bodies.[113]

4.4.1.2. The Aim of the One-Association-Principle

The FIFA argues that the pyramid is necessary for the proper organisation of the sport of football in Europe. Accordingly, the *One-Association-Principle* has the specific aim to guarantee the uniformity of the sporting activity at all levels. At the core is the standardization of regulations, especially the rules of the sport, game etc., and the avoidance of jurisdictional conflict between competing associations.[114]

4.4.1.3. The Monopolistic Character of the Pyramid

The *One-Association-Principle* is by nature a monopolistic structure which is strongly self supporting, and which makes it, e.g., extremely hard for new leagues to penetrate the market. Only very few European sports today experience real competition between rival federations,

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[111] See Stephen Weatherill "Is the Pyramid Compatible with EC Law?" in The International Sports Law Journal 2005/3-4, p.3-7.
[112] The German Football Association.
[113] See Ducrey/Ferreira/Huerta/Marston in „*UEFA and Football Governance: A New Model*", The International Sports Law Journal 2004/1-2, p. 81-83.
[114] See Hannamann, *Kartellverbot und Verhaltenskoordination im Sport*, (2002) p.5.

with boxing as the most outspoken exception to this rule.[115] All associations – international, national and regional associations - settle on their rules through statutes. These statutes bind each of the association's members to the standards and decisions of the association. Furthermore, each member association is obliged to include the principal regulations of the higher ranked association into its own statutes. Therefore, in the example of UEFA, its statutes are compulsory for each national association and thus for each national team which participates in the international events run by UEFA.

4.4.1.4. Conclusion

Due to the pyramid structure the federations on top, such as FIFA or UEFA, hold an immense amount of organisational power. As long as they do not abuse this power, this is as such not problematical. There can be no doubt that sporting organisations have the authority to set genuine sporting rules - that is, they may fix "the rules of the game" or rules necessary for its organisation - and these escape control under EC law. Equally there can be no doubt that it is difficult to identify what really are such rules that belong to the autonomy of sports federations and what are instead rules of a sufficiently commercial character to fall for inspection under the rules of the EC Treaty. This is what the Court in *Bosman* described as *"the difficulty of severing the economic aspects from the sporting aspects of football"*.[116]

4.4.2. The Foundation of a "Supra-League"

4.4.2.1. Introduction

The Commission has received the notification of a number of agreements concerning the establishment and administration of a new European Football League ("Superleague"), which challenges UEFA's monopolistic structure and its *One-Association-Principle*. Some top European football clubs think that their sports and particularly their economic interests are

[115] For many years, there have been several international competing boxing federations (e.g. WBF, WBO, WBA, WBC and IBF). However, these federations do allow boxers to compete for titles across the boundaries of the various federations. Thus, a boxer may hold championship titles from several federations at a time, without being excluded from one federation.

[116] *Bosman*, para 76.

insufficiently represented by UEFA[117]. In the following will be examined if the formation of such "break-away" leagues is in accordance with EC competition law.

4.4.2.2. Article 49 (3) of the UEFA Statues

According to Article 49 (3) of the UEFA Statutes *"International competitions and international tournaments which are not organised by UEFA shall require the approval of the latter*". [118] In other words, the member associations of UEFA and its affiliated football clubs are not allowed to establish international football competitions besides the official UEFA competitions (e.g. UEFA Champions League, UEFA Cup etc.) without UEFA's permission.

4.4.2.3. Compatibility with EC Competition Law

4.4.2.3.1. Infringement of Article 81 (1) EC

UEFA and its member associations are both undertakings and associations of undertakings as defined by Article 81 (1). Further, the object and purpose of the licensing requirement of Article 49 (3) of the UEFA Statutes is to restrict competition within the common market for European competitions for club teams as between the member associations of UEFA. The provisions of the articles of UEFA regulate the market access for initiators of a European Football League. As this also affects trade between the EU Member States, an infringement of Article 81 (1) EC is basically given.

4.4.2.3.2. Application of the Ancillary Restraints Theory to Article 49 of the UEFA Statutes

Due to the *Ancillary Restraints* doctrine an agreement falls outside the scope of Article 81 (1) EC if it is *objectively necessary* and *essential* for the pursuit of a legitimate purpose.

Applied to the case in question this means that agreements preventing the formation of new leagues are *necessary* to ensure the existence and efficiency of league sport in football.[119] It is difficult to argue that the restriction of the establishment of new leagues is necessary to ensure the existence of European League Football. The possible devaluation of UEFA and the

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[117] See Project Gandalf, OJ 1999 C 70/5. A number of agreements concerning the establishment and administration of a new European Football League (EFL) were notified to the Commission. Pursuant to these agreements, the eighteen founder clubs would commit themselves to participate in the EFL exclusively for a period of three years. Other participating clubs would qualify for one season only, based on their performance in their domestic league or cup competitions. The notification included a draft marketing agreement, pursuant to which the participating clubs would exploit jointly all the intellectual property rights linked to the EFL on an exclusive basis for a period of three years.

[118] The UEFA Statutes are available at http://www.uefa.com.

[119] Hannamann, op. cit., p. 371

negative effects that the foundation of such leagues might cause do not justify the application of the *Ancillary Restraints Theory*. Consequently, Article 81 (1) is applicable.[120]

4.4.2.3.3. Exemption of Article 81 (3) EC

Since the above assessment confirms that Article 81 EC is engaged, the crucial question is whether UEFA qualifies for an exemption under Article 81 (3) EC. According to the proportionality test the positive effects of the prohibition laid down in Article 49 (3) of the UEFA statutes have to outweigh the negative effects caused by the restraint.

On the one hand, the establishment of new leagues is in accordance with the general purpose of EC competition law, which is to ensure market access to a variety of market players. It is even likely for new leagues to have positive effects on the sports market as far as the organization of sports events is concerned. The resulting increased competition could lead to more efficiency in allocating resources.

The European sport model, on the other hand, is based on solidarity between the clubs and between the amateur and the professional level. The creation of new competition systems which do not respect this principle may threaten the internal balance of the European sport sector.[121] The essential feature of the actual "market" of the organization of sport events is that the participation of athletes and clubs is based on their performance. The creation of another league which does not respect this principle may threaten the possibility of smaller clubs participating in the competitions.[122]

4.4.2.3.4. Conclusion

Although there are good arguments in favour of the prohibition set out in Article 49 (3) of the UEFA Statutes, the resulting restriction of competition is unlikely to be justified on grounds of competition law. The creation of new leagues might have some negative effects as far as the functioning and organisation of sports competitions is concerned. However, this will not endanger the existence of league sport since the formation of "break away leagues" would not

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[120] Of the same Opinion: Hellenthal Zulässigkeit einer supranationalen Fußball-Europaliga nach den Bestimmungen des europäischen Wettbewerbsrechts, (2000), p. 141.

[121] Written Question E.2790-98 by Graham Watson, 17 September 1998, OJ 1999 C 135/116.

[122] See comment of Dr. Mario Krogmann on C. Hellenthals *"Zulässigkeit einer supranationalen Fussball-Europaliga nach den Bestimmungen des europäischen Wettbewerbsrechts*", The International Sports Law Journal 2003/1, p. 47.

prevent UEFA from organising league football. As a result, the establishment of new leagues cannot be prevented on grounds of competition law.[123]

4.4.2.3.5. Abuse of a dominant position, Article 82 EC

UEFA has a dominant position in the market with regard to European football club competitions as it is the only one organising them in the European market and therefore even holds a monopoly. With regard to the question, whether UEFA abuses this powerful position the same arguments apply as elaborated under Article 81 (3) EC. The prevention set out in Article 49 (3) of the UEFA Statutes has the effect of hindering the maintenance of the degree of competition and cannot be justified.

4.4.3. Broadcasting Rights

4.4.3.1. Introduction

TV-rights have become the major source of income for most sports disciplines. In football, for example, they bring in more than the gate money, so most clubs are more interested in selling TV-rights to the highest bidder than selling all tickets. For TV-networks, on the other hand, broadcasting major sports events, especially football matches, has always been a way of obtaining the best viewing figures. The broadcasting sector has undergone profound changes in recent years: from a purely public service provided by state-owned channels, a large part of the broadcasting activity has turned into a commercial activity, financed by advertising fees and/or fees paid by the customers (i.e. in the case of pay TV). The ongoing process of media digitalisation has contributed to a dramatic expansion of the market for television and media in the recent years. As a result, competition is high when it comes to acquiring "premium content". This will attract the greatest number of viewers and thus generate the largest profit. Sport events, given their social and cultural importance, are of potential interest to many viewers and are a prime example of "premium content".

4.4.3.2. Special Features of Broadcasting

Sports' broadcasting is a category with very particular features. First, sport coverage is distinct from other programming due to its "temporary" nature.[124] Second, broadcasting must

[123] See Hellental, p. 183.
[124] Mario Monti: „*Sport and Competition*", speech delivered in Brussels, 17 April 2000.

be live in order to satisfy viewers, and the rights are not substitutable, either with deferred coverage or with coverage of another sport. Third, the supply of sport rights is restricted due to the limited number of sport events that take place, the concentration of broadcasting rights in the hand of federations, and increasingly longer contracts.

4.4.3.3. Relevant Market

The relevant market for broadcasting rights has been changing in the past years, as its geographic scope becomes increasingly international in nature. Furthermore, product market definitions have become more specific. For instance, where the market may have originally been a single "sport broadcasting market", there are now, instead, markets for "football broadcasting rights" or "Formula One broadcasting rights".

In addition, a time factor needs to be taken into consideration. Indeed, the anti-competitive effects of an agreement are assessed over given time periods that may vary depending on the nature of the product. There can be single events of such major importance, such as Formula One Races, which, by their nature, determine the relevant time window. Similarly, the Commission considered that there was a separate market for the acquisition of TV broadcasting rights of football events played regularly throughout every year. For football, this definition would in practice mainly include national first and second division and cup events as well as the UEFA Champions League.[125]

4.4.3.4. Collective Selling (81 I EC)

4.4.3.4.1. Introduction

Collective selling (also described as "joint selling") usually describes a situation in which sport clubs assign their media rights to their association, which sells the rights on behalf of the clubs. Traditionally, the association would sell all media rights in one exclusive contract to a single exclusive broadcaster in each territory.[126]

4.4.3.4.2. Implications under Competition Law

[125] "Joint selling of the commercial rights of the UEFA Champions League", OJ 2003 L 291/25.
[126] Torben Toft „*TV Rights of Sport Events*", speech delivered in Brussels, 15 January 2003. Available at: http://www.europa.eu.int/comm/competition/speeches/text/sp2003_002_en.pdf

4.4.3.4.2.1 Restraint of Trade according to Art. 81 (1) EC

4.4.3.4.2.1.1. The Organizer of Broadcasting Events

Since the television rights are normally held by the organiser of a sporting event it has to be cleared who indeed organises sporting events.[127] According to by now fixed case law, the organiser is the entity responsible for the event with respect to its organisation and financing.[128] In football on an European level, participating clubs and the respective league share the ownership of the TV Rights and may claim certain rights in respect of that match. They are therefore co-organisers of the sport event.[129]

4.4.3.4.2.1.2. Restriction of Competition

Such a joint selling agreement involves a form of horizontal restriction of competition which prevents the clubs from competing in the sale of any rights, even club related rights. The Commission's basic position is that collective selling agreements restrict competition by serving as a price-fixing mechanism and by reducing those individual rights that remain available in the broadcasting market.[130] This may limit competition between broadcasters and strengthen the market position of those broadcasters already in power, thereby reducing consumer choice.

4.4.3.4.2.2. Exemption under Art. 81 (3) EC

4.4.3.4.2.2.1. The Benefits of Joint Selling

Nevertheless, a joint selling agreement may still be exempted under Article 81 (3) EC if there is a fair balance between the restrictions created by the agreement and the benefits for the consumer. As noted in the UEFA Champions League decision, a joint selling agreement can potentially improve broadcasting and its distribution for the benefit of sport clubs, broadcasters and viewers, for instance when it leads to the creation of a single point of sale for the acquisition of a packaged "league media product". [131] A "league media product" is a broadcasting product focusing on a competition as a whole, such as the entire UEFA Cup, and

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[127] See Antje Weihs: „*Die zentrale Vermarktung von Fußballübertragungsrechten aus kartellrechtlicher Sicht*", Beiträge zum Sportrecht, Band 19 (2005), p.155.
[128] BGH (German Federal Court), decision of 29.April 1970, published in GRUR 1971, p. 46-47.
[129] Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, at para 143-153.
[130] See Torben Toft "*Sport and Competition Law*", speech delivered in London, 23 February 2005. Available at: http://www.europa.eu.int.
[131] Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, at para 139,140, 143-153.

not on the individual clubs participating in it.[132] The creation of "league media products" allows viewers to follow the competition more easily as it unfolds.[133] Although such a product could arguably be established with clubs selling their rights individually, the Commission considers a certain level of joint selling to be a more efficient way to achieve this. [134]

The UEFA Champions League decision of 2003 illustrates how the Commission applies this principle.

4.4.3.4.2.2.2. The UEFA Champions League Decision

In the UEFA Champions League decision, the Commission considered that UEFA's initial joint selling agreement infringed EC competition law because UEFA was selling all TV rights on an exclusive basis in a bundle to a single broadcaster per territory for a period of several years.[135] This agreement prevented individual football clubs participating in the UEFA Champions League from taking individual commercial action in respect of the TV rights.[136] UEFA's sub-licensed policy did not remedy the foreclosing effects on this agreement since it was rather exclusive, allowing only one broadcaster to show the UEFA Champions League matches that the main broadcaster itself was not showing. Therefore, a maximum of only two broadcasters per Member State could broadcast the UEFA Champions League, to the exclusion of all other broadcasters that were not even allowed to show highlights of the match.[137]

4.4.3.4.3. Conclusion

Although the Commission recognizes the benefits of collective selling, this arrangement must not unduly restrict football clubs in exploiting club related rights nor must it lead to a situation where restrictions in the collective selling arrangement create unused rights. So if there is consumer demand for rights, the rights owners should be at liberty to satisfy this demand. Only then an exemption under Article 81 (3) EC can be granted.

4.4.3.4.4. The New UEFA-Draft

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[132] Torben Toft „*TV Rights of Sport Events*", speech delivered in Brussels, 15 January 2003.
[133] *Joint selling of the commercial rights of the UEFA Champions League,* OJ 2003 L 291/25, at para 148-151.
[134] Ibid.
[135] Ibid.
[136] *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25, at para. 19.
[137] Commission memorandum MEMO(01)271, „*The UEFA Champions League Background Note*", 20 July 2001

In response, UEFA submitted to the Commission a new draft agreement which received an exemption under Article 81 (3).[138] The main characteristics of the agreement are as follows:

- rights are split up into several individual packages (limitation of the scope of exclusivity)
- these rights packages are sold separately by means of a public bidding procedure
- contracts are concluded for a maximum duration of 3 years (limitation of exclusivity in time)
- clubs can sell their rights individually under certain circumstances so that rights will not remain unused ("Fall back" guarantee[139])
- collective selling may not hold back new media rights (internet and UMTS), which are also included in packages sold by UEFA., but can to some extent be sold by the individual clubs. Under the new system, a number of different media operators will have the opportunity to bid and to acquire different packages.

4.4.3.5. Exclusive Selling

4.4.3.5.1. Introduction

The granting of exclusive broadcasting rights, often in addition to joint sales packages, is an essential commercial practice for the sport broadcasting industry to ensure larger audiences and thus justify significantly higher advertising fees.

4.4.3.5.2. Implications under Competition Law

Exclusive broadcasting rights are not inherently anti-competitive. Rather, they are necessary to guarantee the value of the programme, and provided that the duration of exclusivity is short and its scope limited, the Commission is unlikely to find that exclusive broadcasting agreements are restrictive of competition.[140] In most cases, exclusive contracts for single sport events or for one season in a given championship would not been seen as a restraint of trade according to Article 81 (1) EC or be exempted under Article 81 (3) EC respectively. [141]

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[138] Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25.
[139] See Herbert Ungerer, „*Commercializing sport – Understanding the TV Rights debate*", speech delivered in Barcelona, 2 October 2003.
[140] Mario Monti: *„Competition and Sport – The Rules of the Game*", speech delivered in Brussels, 26 February 2001.
[141] Torben Toft: „*TV Rights of Sport Events*", speech delivered in Brussels, 15 January 2003.

In contrast, a long period of exclusivity could be considered restrictive of competition under Article 81 (1), as the concept of exclusivity inherently results in market foreclosure, meaning that all other broadcasters are denied access to the market for an extended period of time.[142] In the Champions League decision the Commission accepted contracts of 3 years duration in a context where the rights have been unbundled and sold to different owners. In another case, the Commission considered a limitation of the maximum duration of contracts with football right owners of two years was appropriate.[143] In this context, attention will also be paid to the range of rights that are subject to the exclusive agreement, as well as the market position of the broadcaster.

4.4.3.5.3. Alternative Remedy for Exclusivity: The Television without Frontiers Directive

When exclusivity limits access to broadcasting rights, the application of competition law is not the sole remedy. In June 1997, the EU adopted an amendment to the *Television without Frontiers Directive* permitting Member States to guarantee a right of access for certain sporting events to its citizens by mandating the event's broadcast on free-access television.[144] The rationale underlying of this amendment arose out of the concern that certain sporting events are of such high public interest, and reflect such national importance, as to confer upon the public a "right" to view these events free of charge.

4.4.3.6. Conclusion

The importance of broadcasting rights in the sport sector will probably still increase in the future, given the fact that the scope of broadcasting rights are expanding under the impulse of the developments in audio-visual technology as, for example, Internet, 3G mobile technology or UMTS.

Due to the increasing importance not only of Television, but other progressive media the implications in that scope are not solved yet. Whereas the issue of joint-selling mostly concerns the horizontal level between the Club and the Federation, the question of exclusivity also affects the consumer of sports broadcasting. Competition law ensures a balanced cooperation of clubs and federations and furthermore ensures consumers' access to the

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[142] Ibid.
[143] Case no COMP/M. 2867, Newscorp/Telepiu', Commission Decision of 2 April 2003.
[144] Directive 97/36 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1997 L202/60. The TWF Directive is available at: http//www.euractiv.com.

broadcasting of major sports events. Furthermore, the *Television without Frontiers Directive* is one measure to deal with the problems outlined above.

4.4.4. Restrictions in the Labour Market

Due to the increasing commercialisation of sport, the application of competition law to restraints of trade relating labour law is of increasing importance. It is among the debated issues whether restrictions in the labour market should be dealt with by applying competition law or labour law to sport.[145]

4.4.4.1. Bosman and the Competition Law

In its *Bosman* judgement, the ECJ held that the transfer rules and nationality clauses maintained by the two main European football governing bodies, FIFA and UEFA, violated the EC rules on free movement of workers under Article 39 EC. But the question referred to the Court of Justice not only made reference to the lawfulness under the Community free movement provisions, but also included a request concerning the interpretation of the Treaty competition rules in this respect. However, after having reached the conclusion that the transfer rules and the nationality clause constituted an infringement of Article 39 EC, the Court did not deem it necessary any longer to examine whether the contested rules also violated Articles 81 and/or Art. 82 EC.[146]

4.4.4.2. Advocate General Lenz' Interpretation of Article 81 EC

Nevertheless, the argumentation Advocate General Lenz offered to the Court in *Bosman* will be elaborated in the following since he was already then of the opinion that both sets of rules fell within the scope of Article 81 (1) EC being restrictions of competition.

4.4.4.2.1. Regarding the Nationality Clause and Article 81 EC

Lenz did not indicate any implied exemptions from the competitions rules on "sporting grounds". Hence, the nationality clauses restricted the opportunities for clubs to compete with each other in recruiting players, thereby constituting an agreement sharing sources of supply within the meaning of Article 81 (1) (c).[147]

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[145] See „*Professional Sport In The Internal Market*", TMC Asser Institute, September 2005, p. 56.
[146] *Bosman*, para. 138.
[147] *Bosman*, para 262.

4.4.4.2.2. Regarding the Rules on Transfer and Article 81 EC

Analogous considerations applied according to Lenz to the rules on transfers which he described as *"replacing the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and the clubs being deprived of the possibility of making use of the chances, with respect to the engagement of players, which would be available to them under normal competitive conditions. If the obligation to pay transfer fees did not exist, a player could transfer freely after the expiry of his contract and choose the clubs, which offered him the best terms. Under those circumstances a transfer fee could be demanded only if the player and his club had contractually agreed that in advance."*[148]

4.4.4.3. Collective Bargaining Agreement as an Exemption under Articles 81/82 EC

Lenz also briefly touched upon the issue so vigorously disputed in US anti-trust sport cases, namely whether a labour exemption rule applied in European competition law. [149] During the proceedings, UEFA had argued that the present dispute was a *"concealed wage dispute*"[150] and that the relationship between employer and employee should not be subjected to the provisions of European competition law with reference to the labour law exemption under American law. In Lenz opinion there was no rule to the effect that agreements which concerned employment relationships in general and completely were outside the scope of the provisions on competition in the EC Treaty. Lenz held that the conclusion from American law to be drawn for EC law was only that in order to guarantee the collective bargaining autonomy of employers and trade unions, it might be necessary to exclude collective agreements from competition law, when it was necessary for that purpose. He stated that corresponding restrictions on the scope of Article 81 (ex 85) EC might indeed exist but would "*admittedly be limited in character*".[151]

In some recent decisions, the European Court pointed out that competition law contains some immunity for labour related regulations as part of Collective Labour Agreements.[152] The ECJ links this to the nature and the purpose of the Collective Labour Agreements, in which social partners attempt to improve employment and labour conditions by their joint efforts.

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[148] *Bosman,* ibid.
[149] *Bosman*, para 266. See on the US American issues chapter III of this thesis.
[150] *Bosman,* para 271.
[151] *Bosman*, para. 274. Lenz did not go into more detail after having reached the conclusion that the rules of UEFA or FIFA" *quite certainly are not collective agreements"*.
[152] Pavlov (2000), ECR I-6451, quoted in „Professional Sport In The Internal Market", TMC Asser Institute, September 2005, p.56 (fn.97).

However, it is not clear whether and to what extent transfer regulations can be accommodated in Collective Labour Agreements and to what extent those regulations may subsequently evade an application of European competition law.[153]

4.4.4.4. Conclusion

There is no doubt that the transfer system in *Bosman* violated the EC competition rules as well. Transfer rules and nationality clauses clearly restrict competition between clubs as they impede the fielding and recruitment of new players and therefore constitute significant barriers to the normal system of supply and demand. Although the legal impact of competition law to Collective Labour Agreements has not yet been fully clarified, social dialogue between player unions and the respective sports bodies on a pan-European level seems to be an adequate mean in order to evade the application of competition law to the sports labour market in the future.

4.4.5. Player Release Clauses or "The Threat of a New Bosman"

4.4.5.1. Introduction

The current case of the Belgian First League Club SC Charleroi is might have the same impact on European Sport as Bosman had about 10 years ago.

4.4.5.2. The facts of the Case

In 2005 the Belgian first league club SC Charleroi had the chance to qualify for the European Champions League. To improve its chances, the club advised one its players, the highly promising Moroccan national Abdelmajid Oulmers, not to participate in a national game between his home country and Burkina Faso. However, on request of the FIFA that referred to its Statutes the player had to take the journey. Article 37 of the FIFA statutes stipulates that the clubs are obliged to release their players for international games without getting any compensation (so called *Player Release Clause*).[154] The player returned seriously injured from the game and had to rest for seven months. Without their star player, SC Charleroi failed to qualify for the European Champions League competition.

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[153] „*Professional Sport In The Internal Market*", TMC Asser Institute, September 2005, p. 56. Also see Meier in *"From Bosman to Collective Bargaining Agreements? The Regulation of the Market for Professional Soccer Players*" The International Sports Law Journal 2004/3-4, p. 4-13 and Hendrickx in " *European Social Dialogue in Professional Sports: the Legal Framework*" The International Sports Law Journal 2003/3, p.18-22.

[154] Article 37 of the FIFA Statutes, available at: http//www.fifa.com.

Subsequently, the Belgian club sued FIFA for damage claims of a total amount of 1.25 Million Euros. The club puts the claim on grounds of competition law. It argues that FIFA abused its dominant position as defined in Article 82 EC.

The G14, a group of leading European football clubs, supports the legal action of SC Charlerois against the FIFA.[155] The G-14 is asking for 860 million euros damages from the costs incurred, over the past ten years, of putting players at FIFA's disposal to play in national teams and their subsequent unavailability if they suffer injury.[156] The G-14's aim is to avoid professional clubs being forced to accept possible damages when they "lend" players for national teams. It thus wants to see the current FIFA rules on the compulsory release of players for international matches judged illegal or amended through a dialogue with the clubs. The G-14 also states that it wants a situation in which a fair percentage of revenues from the final tournaments, notably the World Cup, is redistributed amongst all those clubs who release their players for these tournaments. In principle, G-14 could renounce some or all of the past damages, on the basis that all clubs, not just G-14 clubs, were protected in the future.

The case was brought before the Charleroi Commercial Court (Belgium) on March 2006. The decision of the Charleroi Commercial Court is expected by the end of May 2006. However, it is quite probable that the case will be referred to the European Court of Justice.

4.4.5.3. Compatibility of Article 47 FIFA Statutes with EC Law

The G14-Group claims that Article 47 of the FIFA-Statutes violates Article 82 EC. They argue that the obligation to release players to international tournaments or to qualification games without compensation constitutes an abuse of a dominant position in the market. Being on top of the pyramid FIFA evidently holds a dominant position in the market of organising international competitions such as the FIFA World Cup and the games related to it. In order to determine a possible infringement of Art 82 EC, the crucial question is whether the obligation laid down in Article 37 of the FIFA Statutes can be considered an abuse of FIFA's dominant position.

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[155] The G 14 is a group of leading clubs, established as a European Economic Interest Grouping and based in Belgium and comprising 18 members from seven EU Member States. This Group has been refused to any formal recognised status by FIFA. For more details see: http//www.g14.com.

[156] See "*FIFA breaks EU Competition Rules*" available at: http//www.euraktiv.com/en/sports.de

4.4.5.3.1. Arguments in favour of FIFA

FIFA alleges that the *Player Release Clause* is necessary for the organisation of international competitions since the release of players to International Tournaments or to qualification games would be essential to the game and therefore would not infringe competition law. Furthermore FIFA argues, that the teams also benefit when they release their players for international games. Due to the exposure to a wider audience the value of the players would be raised.

4.4.5.3.2. Arguments in favour of the Clubs

The G-14 agrees with FIFA on the fact that the exposure to a wider audience raises the value of the player. However, this would not justify a system of mandatory and uncompensated release of players to the extent it is currently practiced by FIFA. Furthermore the group argues that it is FIFA which primarily financially benefits from the obligation to release top-players.

4.4.5.4. Conclusion

Again, a court has to define about the monopolistic structure of FIFA and must provide answers to the difficult question whether Article 49 can be considered a "rule of the game" that is necessary for organisation of such tournaments or if this provision is predominantly of commercial character. On grounds that FIFA made a profit of 214 Million Swiss Franks in 2005[157], redistribution of revenues amongst all those clubs release their player for international games seems to be appropriate. The case could have the same impact as the Bosman case 10 years ago. Should the court decide in favour of SC Charleroi, it would set a precedent for clubs all over Europe to set off legal proceedings against FIFA.

4.4.6. Player Agents

4.4.6.1. Introduction

The use of sports agents that manage the athlete's career became more and more important after the *Bosman* Ruling. From that moment on player were able to better plan their careers as they became "free agents" after the expiry of their contracts. The activities of such agents are equally regulated by the FIFA. The question of their compatibility with European competition law was addressed and clarified in a decision of January 2005.

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[157] „FIFA erwartet Gewinnsteigerung für 2006" in Frankfurter Allgemeine Zeitung (FAZ), 22.04.2006.

4.4.6.2. Regulations until 2001

In order to ensure the quality of player agents, FIFA had issued rules governing access to the profession.[158] These rules were repeatedly challenged on the grounds that the ban on players and clubs using the services of agents who were not licensed by FIFA is anticompetitive.[159] As a result, a complaint against FIFA regulations governing football players' agents was lodged before the Court of First Instance by French resident Laurent Piau.[160] He argued that the FIFA regulations breached EU competition rules on the basis that the restrictions on access to the profession that they brought about were *"excessive, opaque and discriminatory*".[161]

In a Statement of Objections addressed to FIFA, the Commission recognized the right of FIFA to regulate the profession in an attempt to promote good practice, as long as access remained open and non discriminatory. The Commission also took the view that the FIFA rules amounted to anticompetitive agreements, because they prevented or restricted the access to this profession by natural or legal persons possessing the requisite skills and qualifications, particularly by requiring payment of large and non-interest-bearing deposit.

4.4.6.3 Change of Regulations

Consequently, FIFA reviewed the rules at issue, and new provisions entered into force on 1 March 2001, but were amended further on 3 April 2002.[162]

According to the new FIFA regulations, to carry on the occupation of players' agent, a person must hold a licence issued by the competent national association for an unlimited period.[163] Among other conditions for licence-holders it is to arrange professional liability insurance, in order to cover any claims for compensation from a player of a club. Before the agents were only required to pay a deposit instead. The aspiring agent will also have to pass a multiple choice test. The relations between the agent and the player must be the subject of a written

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158 Regulations from 20. May 1994, adopted by FIFA on 1 January 1996.
159 DN: IP/99/782 21/10/99, „Commission Launches Formal Proceedings on FIFA Rules Governing Players' Agents".
160 *Piau v. Commission*, T-193/02. Available www.euractiv.com (as a press release).
161 Ibid.
162 FIFA Player Agents Regulations from 10.12.2002, available at: www.fifa.com/documents/static/regulations/Match_Agents_Regulations_EFSD_2003. Also see Rainer Vetter, "*Das FIFA-Spielervermittler-Reglement im Spannungsverhältnis zum europäischen Kartellrecht*" in SpuRt 6/2005, p. 233-236.
163 Art. 1 of the FIFA Player Agents Regulations.

contract for a maximum period of two years, which may be renewed. The contract must specify the agent's remuneration, to be calculated on the basis of the player's basic gross salary. In the event of non-compliance with the regulations, a system of sanctions for clubs, players and agents is established.

Following the adoption of the new rules, the Commission took the view that FIFA's aim of extending good practice, raising professional standards and protecting players from unqualified and unscrupulous agents prevailed over competition considerations and therefore rejected the complaints.

Nevertheless, *Piau* still considered that even the amended FIFA regulations were contrary to the EC competition rules. In his view, the provisions were to be rated as a restraint of trade as defined in Art. 81 (1) EC and could not be exempt under Art.81 (3). He also believed that by setting these rules, FIFA had abused its dominance within the meaning of Art. 82 EC. He maintained his complaint before the Commission.

4.4.6.4 The New Judgment

On 26 January 2005 the Court of First Instance ruled that the FIFA regulations on the occupation of football players' agents are not contrary to community competition law.[164] The new FIFA criteria were objective and non-discriminatory.[165]

4.4.6.4.1. Infringement of Art. 81 (1) EC

First of all, the court stated that football clubs and national associations to which they belong are undertakings and associations of undertakings respectively and that therefore the regulations constitute a decision by an association of undertakings. It is an economic activity for the provision of services, which does not fall within the special nature of sport as defined by the case law.

Further, the court observed that the requirement of a licence to carry on the occupation of player's agent constitutes a barrier to access to that economic activity and affects the play of competition. It can therefore be accepted only to the extent that the amended regulations

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[164] Judgment of the Court of First Instance of the European Communities in case T 193/02 (Piau v. Commission); available at www.euractiv.com (as a press release).

[165] See critical on the decision of the Court of First Instance R.B. Martins in "*The Laurent Piau Case of the ECJ on the Status of Players' Agents*" in The International Sports Law Journal, 2005/3-4, p.8-11.

contribute to promoting economic progress, allow consumers a fair share of the resulting benefit, so not impose restrictions which are not indispensable to the attainment of those objectives and do not eliminate competition, in which case an exemption could be granted.

4.4.6.4.2. Exemption under Art. 81 (3) EC

The Court of First Instance emphasised the need to introduce professionalism and morality to the occupation of players' agent in order to protect players whose careers are short. Furthermore, it underlined the fact that competition is not eliminated by the licence system, since the FIFA regulations do not impose quantitative restriction on access to the occupation of player's agents. The Court additionally considered the almost general absence (except in France) of national rules and the lack of a collective organisation of player's agents as circumstances which justify the rule-making action on the part of FIFA.

4.4.6.4.3. Abuse of a Dominant Position Art. 82 EC

FIFA, which constitutes an emanation of the clubs, thereby holds a dominant position of services of players' agents. Nevertheless, the FIFA regulations do not impose quantitative restrictions on access to the occupation of player's agent which harm competition, but qualitative restrictions which may be justified, and do not therefore constitute an abuse of FIFA's dominant position in that market.

4.4.6.5. Conclusion

It will be interesting to see if the European Court of Justice will uphold the decision of the Court of First Instance in the Piau appeal.[166] This decision has already been criticised for regarding the new regulations of player agents compatible with EC competition law. Opponents to the decision argue that there is a collective organisation of player agents in Europe, the International Association of Player Agents. Although this organisation is not very active it could, possibly in cooperation with FIFA, assure morality to the occupation of players' agent in order to protect players' careers.

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[166] See critical on the decision of the Court of First Instance R.B. Martins in "*The Laurent Piau Case of the ECJ on the Status of Players' Agents*" in The International Sports Law Journal, 2005/3-4, p.8-11.

4.4.7. Salary Cap

4.4.7.1. Introduction

In the *Bosman* ruling, Advocate General Lenz named the determination of specified limits for the salaries to be paid to the players by the clubs as an alternative way of keeping the financial balance between all the leagues clubs without referring to the transfer fees.[167]

The crisis in many European clubs, notably in football, due to bad financial management, overspending and excessive player salaries has spurred a debate in Europe as to whether the introduction of a salary cap system like that applied in the NBA and the NFL in the US might be necessary.[168] So far these thoughts have not led to a genuine European salary cap system like that of US leagues, but a number of the major European clubs (G14 clubs) and certain national leagues have already made proposals to introduce salary caps systems. Serie A, the leading Italian football league and the football league in England have also considered salary caps. The top English rugby competitions, the Guinness Premiership (Union) and the Super League (League), already have caps in place. UEFA, however, is waiting to see how the new licence system will affect the cost control issues.

4.4.7.2. Compatibility with EC Competition Law

It is quite obvious that the salary cap restraints the trade, since it limits the possibility for the players to freely negotiate their salaries with the team. Salary caps may be justified on the grounds that they maintain the economic viability of teams competing in the league and they preserve a competitive balance. Arguably, they are too economic in nature to fall within the scope of the sporting exemption. Therefore salary caps may be defined as inherent in the proper functioning of sport and thus excluded from the scope of Article 81 EC. Alternatively, the salary caps may be considered suitable for an exemption under Article 81 (3) EC.

Depending on the unsettled question of whether collective bargaining agreements are subject to European competition law, salary caps could also fall outside the scope of EC competition rules due to their labour law related nature. Therefore, the players associations need to be consulted and contractually involved when introducing this restrictive measure. If, on the other hand, only the teams and the federations decided to establish a salary cap system without the involvement of the players, the possible exemption of bargaining labour agreements from competition law would not apply.

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[167] *Bosman.* para 226

[168] See on the salary cap in US Sports part IV of the thesis.

4.4.7.3. Conclusion

The salary cap seems to be a possible measure to maintain financial balance between the league clubs. Consent about the introduction of such a cap could be provided through a collective bargaining agreement between the players and the federations. Such a pan-European agreement could be declared binding by decision of the European Union Commission according to Art. 139 II EC.

5. The Reception of Sport in the European Constitution

5.1. Introduction

With the *Bosman* Ruling in 1995, the impact of European Law on professional sport as business became obvious to the sport federations. As the cases above have shown, the EC-Treaty itself offered no legal basis to which the judges could refer to: sport wasn't even mentioned in the Treaty. The new European Constitution could pave the way for the establishment of a truly European Sports Policy.[169]

5.2. Historical Summary

A first step on the way to a European Sports Policy can be seen in the Declaration of Amsterdam to Sport in 1997[170], even if it was only a political utterance without any legal binding effect. The declaration asserts 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.*

In 1999 the European Union worked out the *European Model of Sport* which dealt with questions concerning the development of European sport. The comments of the national

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[169] See „*Sport in the European Constitution*" by Alexandre Mestre in The international Sports Law Journal 2005/1-2, p. 83/84 and "*Die Aufnahme des Sports in die Europäische Verfassung*" by Meinhard Grodde, SpuRt 2005, p. 222-227. Also: Siekmann " Article III-282 of the Constitution for Europe and an EU Policy for Sport" The International Sports Law Journal 2004/3-4, p-77.

[170] Treaty of Amterdam – Presidency Conclusions, see fn.16.

sports federations and EU Member States about this paper formed a basis for the Helsinki-Report end of 1999[171] and the *Declaration on Sport* attached to the Treaty of Nice in 2000.

Finally, on 29 October 2004 the European Constitution was signed by the heads of states and governments of the EU-member states.

5.3. The Inclusion of Sport in the Treaty

Article I-17 in conjunction with Article III-282 of the European Constitution makes sport part of the "*coordinating, complementary and supporting action"* competences of the EU, which therefore allows for EU support for sport.

Article III-282 refers to the "*European sports dimension*" which in itself demonstrates that the EU is concerned about building a European sports policy. [172]

5.4. Consequences for European Sports-Law

The fate of the European constitution remains uncertain, since the reverends failed in France[173] and in the Netherlands[174]. On this background the EU politicians conceded a one-year intermission on the EU-summit in 2005 and extended the deadline for the ratification through the EU-Member States until 2007[175]. Sweden, Denmark, Great Britain and Poland have postponed their reverends indefinitely.

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[171] Commission of the European Communities: "Report from the Commission to the European Council with a view to safeguarding sports structures and maintaining the social significance of sport within the Community framework" (The Helsinki Report on Sport), Com. (1999) (644).

[172] Article III - 282 of the Treaty establishing a Constitution for Europe (Education, Youth, Sport & Vocational Training)
1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and complementing their action. It shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
The Union shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function.
2. Union action shall be aimed at:
...
(g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.
…

[173] 29.05.05: 55 % voted against it.

[174] 01.05.05: 61.6 % voted against it.

[175] The original deadline for the ratification would have been the 1.11.2005.

Even if the ratification of the European Constitution has not been executed yet, the signature on 29 October 2004 in Rome of the Treaty establishing a Constitution for Europe was an important step, not only for the European Union, but also for European sport. For the first time in European Union history, sport was integrated in the primary law of the EU. Finally, Europe has a specific legal basis for sport.

Besides the fact that with its reception in the European Treaty Sport has finally received a European identity, Advocate-Generals and judges of both the European Court of Justice and the Court of First Instance finally derive some guidance from the Treaty on which to base their interpretation or application of EU law in the field of sport.

Chapter III: Restraints of Trade in U.S. Sports Law

1. Introduction

Earlier than in European Sport, sport in the U.S. has faced antitrust and labor issues at both the professional and amateur level of competition. No labour issues have been so nationally infamous as the strikes and lockouts related to professional sports leagues as the owners of teams and leagues have fought the employee-players in court. [176] Judges have pondered and struggled as to how to apply traditional antitrust and labour laws to the sports industry. However, U.S. sport maintained to establish not only highly commercialized and economical sports leagues, but also an extremely balanced sports system at the same time. In contrast to the European approach, U.S. Sport uses various restrictive measures to ensure a competitive balance within the leagues. In order to accomplish this, U.S. professional leagues and federal courts created some unique legal sport exemptions.

[176] The highly contentious negotiations between National Hockey League owners and players that led to a lockout, wiping out the entire 2004-05 NHL season.

2. Outline of the American Model of Sport

2.1. Introduction

The American Model of Sport differs from the European Model in some essential ways. The most obvious differences are displayed in the following.

2.2. The "Big Four" instead of a Pyramid

In contrast to the European structure, the predominant regulation of a particular sport has not in general terms been carried out by one single sports association embracing both amateur and professional interests. Professional sport in the U.S. is mainly organized in the four major league sports.[177] The leagues names are Major League Baseball (MLB), National Football League (NFL), National Basketball Association (NBA) and National Hockey League (NHL). These leagues ought to be described more as business corporations than as ordinary sports associations. In fact, major league sports in the U.S. have often been referred to "sports industries" much more closely related to entertainment industry than to activities carried out within the same sport at college or amateur grassroots level.

2.3. Private Structure of the League

The leagues are structured as private associations, and are thus entitled to certain autonomy in self-government and autonomous regulation. They are bound together by the constitution or by-laws adopted by the participating teams. The NBA, NFL and MLB are headed by a commissioner, who is in charge of administrating, interpreting and enforcing the rules and the discipline of the sport and league.

2.4. Amateur and Professional Sport

In contrast to the European model, the U.S. model of sport is characterised by a strict division between amateur and professional sports. Since U.S. sports associations are not structured as a pyramid, but in non-hierarchical way, the major leagues organise sport only on a professional level. Amateur sport, on the other hand, is mainly carried out at college.

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[177] Naturally, professional sport in the US consists of far more than the major leagues, but these leagues are very illustrative of how professional team sports are conducted in the US.

2.5. Closed System

The major leagues are generally considered to be "hermetic", since there is no system of promotion and relegation between junior leagues and senior leagues. The structure is also "closed" in the sense that member teams do not compete simultaneously in different competitions. And apart from occasional exceptions,[178] nor do teams release players to compete in national team competitions.[179]

2.6. Sport and Entertainment

Being a part of the entertainment industry, and having a clear understanding of what this means, is also very significant in the U.S. in terms of shaping the rules of the game in order to please the broadcasters, television audiences and general commercial interests involved in sport. U.S. professional sport recognized that the breaks during the course of the game are essential for the business aspects of the sport. That is why the rules of the game are constantly being orientated to the entertainment business, as, for example, the installation of more time-out breaks in basketball or the reduction of the shot clock in order to make the game more attractive to the viewer.

3. The Federal Laws

3.1. Sherman Act

The Sherman Antitrust Act of 1890 (Sherman Act) is the most fundamental federal law that governs anticompetitive business behaviour.[180] Congress enacted the Sherman Act to regulate business practices among competitors affecting interstate commerce. In other words, whenever commerce or trade crosses states lines, antitrust laws apply. The primary purpose of the Sherman Act is to promote competition and to deter monopolistic practices that ultimately hurt consumers.

Section 1 of the Sherman Act states that

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[178] Such as the consecutive NBA-dominated "Dream Team" at the Olympic Games.
[179] Thomas Hoehn und Stephan Szymanski: "*The Americanization of European Football*", Economic Review (April 1999) at 213.
[180] See Adam Epstein *Sports Law* (2003), chapter 9: Antitrust and Labor Issues in Sport.

"*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal*."

The United States Supreme Court has determined that the language of the Act cannot be construed literally because *"every agreement concerning trade...restrains. To bind, to restrain, is of their very essence."*[181] The Supreme Court has therefore held that the Sherman Act prohibits "*contracts or combinations that unreasonably restrain competition."*[182] The Sherman Act is applied when the activity in question "involves or affects" interstate commerce.[183] Thus, in determining whether a particular situation is a restraint of trade, courts must determine the reasonableness of the situation.

Section 2 of the act prohibits monopolization of trade and commerce. The Supreme Court has implemented two separate standards in deciding whether a particular restraint on trade is unreasonable: the "per se" rule and the "rule of reason".

3.2. The Application of the Sherman Act to Sport

Due to the powerful sanctions available under U.S. anti-trust law, the player restraints in professional sports have most frequently been challenged according to the Sherman Act. And unlike European Courts, American Courts have never had greater concerns about the applicability of competition law to professional sport. This can be put down to the fact that U.S. sport is characterised by a strict division between amateur and professional sport in addition to the fact that it is more commercialized. Accordingly, U.S. Courts always considered professional sport to be business, which is subject to the rules of antitrust laws. Interestingly, competition authorities in the United States acknowledge the specific economic nature of the sport market by having granted professional sports several exemptions from competition law.

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[181] Lee Goldman, The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports markets, 1989, Utah L.Rev., 617,622 (1989).

[182] Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976).

[183] See McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242 (1980) (establishing that federal jurisdiction requires the plaintiff to prove that defendant's activity is involved in interstate commerce or, if it is a local activity, that it has an effect on some other activity in interstate commerce); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976) (holding that a restraint which substantially and adversely effects interstate commerce is sufficient to establish jurisdiction under the Sherman Act application.)

3.3. Clayton Act

Congress passed the Clayton Act in 1914. This act provides that labour unions and labour activities are exempt from the Sherman Act. Section 6 of the Clayton Act states that labour is not to be considered "*commerce*". This exemption to antitrust law is known as *the statutory labour exemption*. Section 16 of the Clayton Act allows the government or a private plaintiff to obtain an injunction against anticompetitive behaviour if necessary.

4. Judicial Analysis

Taken literally, all contracts would violate the Sherman Act.[184] The Supreme Court has therefore stated to prohibit only those agreements which *unreasonably* restrain trade.[185] Typically the *"Rule of Reason*" is the analytical tool courts use to determine if an agreement unreasonably restrains trade, but in limited circumstances, a rule of *per se illegality* applies.[186] Under the rule of *per se illegality*, some agreements are considered so harmful to competition that they are deemed illegal without an inquiry.[187] The Supreme Court has applied *per se illegality* to tying arrangements,[188] division of markets[189] and group boycotts.[190]

4.1. *Per Se Rule* Analysis

When a court uses the *per se rule* analysis, any labour practices that are inherently unreasonable restraints of trade will be invalidated. In Northern *Pacific Railway Co. v. United States*[191], the Supreme Court stated that certain agreements or practices, because of their pernicious effect on competition, are conclusively presumed to be unreasonable and therefore illegal.[192] For example, price fixing is a *per se* violation of antitrust laws, since it is anticompetitive and hurts consumers. If a restraint of trade fails the *per se* test, further examination of the labour practice is not necessary under a rule of reason analysis.

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[184] See Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918). The Court recognized that "*every agreement concerning trade, every regulation of trade, restrains."*

[185] See Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

[186] See Michael D. Blechman, Relationship Among Competitors, 941 PLI/Corp. 7, 12 (1996) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)).

[192] See Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)"[*T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming value are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use*."

[188] See Northern Pac. Ry. v. United States, 356 U.S. 1, 8 (1958).

[189] See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 244 (1899).

[190] See Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467- 68 (1941).

[191] Northern Pacific Railway Co. v. United States, 356 U.S.1 (1958)

[192] Northern Pacific Railway Co. v United States, 356 U.S. 1, 5 (1958).

4.2. Rule of Reason Analysis

Under the rule of reason analysis, a court must examine the labour practices at issue and determine whether it is reasonable or unreasonable. Therefore it has to weigh the pro-competitive effects of the restraint against the anti-competitive effects. Some restraints are necessary as a "legitimate business practice".[193]

5. Sport Relevant Exemptions

5.1. Baseball-Exemption

5.1.1. Introduction

Baseball has held a unique exemption from antitrust laws in accordance with the interpretation of the Supreme Court in *Federal Baseball Club v. National League*.[194] In its decision of 1922, the Court had to examine a system in U.S. Baseball which can be compared to the *Pre-Bosman* transfer system in European football. This exemption from the antitrust laws is unique to baseball, since antitrust laws do apply to other sports such as boxing, football and basketball.[195]

5.1.2 Reserve Clause System *or* the American Variant of the Pre-Bosman System

The first type of player restraint to be challenged by means of the anti-trust laws in the U.S. court system was the "*reserve clause*". Originally, the reserve system had been developed in the 1880s in professional baseball as a preventive measure against clubs from competing leagues from "stealing" players. Equally, the reserve rule also placed obligations upon clubs within the same league prohibiting them from employing or negotiating with other players "reserved" to another club.[196] The typical reserve clause would give the club the exclusive right to "reserve" a player, i.e. unilaterally to prolong his contract upon expiry. The player could not oppose the clause, even if he wanted to sign for another club. In reality, the club could hold on to a valuable player his entire career by making use of the reserve clause, even if he wanted to sign for another club. Consequently, the reserve clause amounted in its most

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[193] Standard Oil Company of New Jersey v United States, 221 U.S. 1 (1911).
[194] Federal Baseball Club of Baltimore v. NL of Professional Baseball Clubs, 259 U.S. 200 (1922).
[195] See Michael Jay Kaplan, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. Fed. 495, 496 (1974)
[196] See Lionel Sobel: "*Professional Sports and the Law*" (1075), Ch.2.

restrictive sense to a perpetual lock on the services of players from the initial signing through to the end of a player's career.

5.1.3. The Reserve Clause under Challenge

The First Supreme Court case that laid the ground for professional baseball's antitrust exemption was in 1922.[197] The suit arose out of a "war" between the two then competing baseball leagues The Federal League and the American and National Leagues. The challenge was brought by the Federal Baseball League, alleging that the American and National Leagues` enforcing of their reserve clauses prevented the Federal League from obtaining quality ball players and becoming a financial success.

The Supreme Court based its decision on the rather feeble assumption that the activities of organized baseball did not even fall within the scope of the Sherman Act.[198] It held that the *Reserve Clause System* did not affect interstate commerce -as required by the Sherman Act- even though players travelled across state lines. Justice Oliver Wendell Holmes assumed that this was only incidental to the game.[199]

5.1.4. Toolsen v. New York Yankees

A few decades later, in 1953, the Supreme Court reaffirmed baseball's antitrust exemption by ruling in favour of the New York Yankees in a case involving a player (George Toolson) who brought suit against the New York Yankees challenging baseball's player reserve system as a violation of federal antitrust laws. Toolson was under contract with the Yankees' farm club in Newark when he was assigned, against his wishes, to Binghamton. Toolson refused to report to his new club and was, in accordance with league rules, placed on the ineligible list, blacklisting him from any other baseball team.

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[197] Federal Baseball Club of Baltimore Inc. vs. National League of Professional Baseball Clubs, 259 US 200 (1922).

[198] The court recognized that the giving of exhibitions of baseball constituted "business" which, however, was not the same as "commerce" in the context of the Sherman Act ("Personal effort, not related to production is not a subject of commerce"). The court also held that "the Leagues must induce free persons to cross state lines, but this transportation is a mere incident, not the essential theme". Therefore, the court rejected that baseball engaged in inter-state trade or commerce. Ld at 208-209.

[199] Federal Baseball Club of Baltimore Inc. vs. National League of Professional Baseball Clubs, 259 US 200 (1922), 156.

The Supreme Court upheld the 1922 decision, declaring that Congress "*had no intention of including the business of baseball within the scope of the federal antitrust laws.*"[200] In reaching this decision, the Court noted that baseball had developed for thirty years under the assumption that antitrust laws did not apply to it.[201]

5.1.5. Flood v. Kuhn

Curt Flood, one of the best baseball players at that time, challenged the ruling in Federal Baseball following the 1969 season, after he was traded from the St. Louis Cardinals to the Philadelphia Phillies against his will and thus refused to play for his new team. Curt Flood wanted to be made a free agent to be able to negotiate his own professional destiny after the end of his contract with the Philadelphia Phillies. Instead, he decided to proceed against the commissioner of the MLB Kuhn and argued that the reserve clause would violate antitrust laws. [202]

The reasoning of the court was one of the most unusual in the history of the United States Supreme Court.[203] Although the Supreme Court upheld baseball's antitrust exemption by finding for the defendants in the case, it noted that the reserve system was *illogical* and *unrealistic*.[204] The Court also acknowledged that baseball was indeed involved in interstate commerce. Nevertheless, baseball's antitrust exemption was a decision that deserved the benefit of stare decisis and that any changes in the law pertaining to antitrust statutes and baseball would have to be made through legislative action with the consequence that Major League Baseball's exemption from antitrust laws could only be challenged and changed by Congress.

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[200] Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953).

[201] See id. at 357. In addition, the Court indicated that Congress' silence on the matter in the aftermath of the ruling constituted acquiescence. The court did not rule out the possibility that there were "evils" in baseball that should be rectified by the Sherman Act, but did express a preference for a legislative, rather than a judicial, solution.

[202] Flood v. Kuhn, 407 U.S. 258 (1972).

[203] See Johnson, *When a Professional Sport Is not a Business*, in Quirk, Sports and the Law, (1999) p. 149 f..

[204] The court noted: "*If there is any inconsistency and illogic in all of this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in Toolson and from the concerns as to retrospectively therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency"*, at 284.

5.1.6. Curt Flood Act

Following the Court's recommendations that professional baseball's antitrust exemption be remedied by congressional action, the House of Representatives and the Senate lobbied successfully to pass what came to be called *the Curt Flood Act*. This act was enacted in 1998 and although it does not completely eliminate baseball's exemption it does limit it significantly. The Curt Flood Act is restricted to the players and gives them the right to sue their employers for antitrust violations.

However, it is important to note that the Curt Flood Act of 1998 only provided for extension of the anti-trust laws to the narrow area of activity "*directly relating to or affecting employment of Major League baseball players to play baseball at the Major League level…*".[205] This means that the act does not extend the reach of the anti-trust law to baseball matters not relating to Major League employment in particular the amateur draft in baseball and the Minor League reserve clause.[206]

5.2. Nonstatutory Labour Exemption

5.2.1. Introduction

The *Nonstatutory Labour Exemption* is a controversial judicial principle that holds that antitrust laws are not applicable when unions (employees) and management (employers) take part in the collective bargaining process of negotiating a working labour contract. It can be described as a "shield" against government interference into union activities and the collective bargaining process. Congress favours the latter rather than having to ask the courts to intervene in labour disputes. As already seen, the European Court of Justice recently followed this approach and also considers the exclusion of *Collective Labour Agreements* from the scope of competition law. [207]

5.2.2. The *Rozelle Rule*

For many years, NFL players' mobility was limited by the so-called "*Rozelle Rule"*, named for the commissioner who first implemented it, which allowed the commissioner to "compensate" any team who lost a free agent to another team by taking something of equivalent value,

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[205] 15 U.S.C. 3 27 (a).
[206] See Yasser, McCurdy, Goplerud and Weston: "Sports Law Cases and Materials" at 243.
[207] See Chapter II 4.4.3.

usually draft picks[208], from the team that had signed the free agent and giving it to the team which the player had left. Fear of losing several future high draft picks greatly limited free agency as no team wanted to sign a veteran player only to learn that it would lose, for example, its next two first-round draft picks.

The alleged "Restraint of Trade" was solely on the labour market in which the clubs employed the players. The NFL argued that besides being stated in each NFL player's standard contract, the *Rozelle Rule* had also been authorized by the Players' Union (the NFLPA) in the 1970s collective bargaining agreement and was thus exempt from anti-trust attacks.

In Brown v. Pro Football, Inc.[209], the U.S. Supreme Court affirmed the position that courts should become less involved in disputes that arise from the collective bargaining process.

5.3. Sports Broadcasting Act

5.3.1 Introduction

The Sports Broadcasting Act was passed in response to a Court decision which ruled that the NFL's method of negotiating television broadcasting rights violated antitrust laws. The Act also represents the consequence with regard to the increasing importance of television in the scope of sport. In this respect, European courts recently had to deal with very similar legal issues.[210]

5.3.2. The NFL Cases

At the beginning of the 1960s public interest in televised professional football had become so big that the newly formed American Football League (AFL) provided a perfect opportunity to fill this void. In one of the first big network contracts for regular season sports, the NFL signed a league-wide television contract with the broadcaster ABC for the league's first full schedule of games in 1960. As a response to the threat by a rival football league, the NFL sold a pooled package of its team broadcast rights to CBS for the 1961 season.

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[208] The so called draft-system describes the way of allocating new talents to bad performing team. Accordingly, the worst performing team of the league has the option to pick the best new college or high-school player for the next season. This way, a fair balance within the league is maintained.

[209] Brown v. Pro Football Inc., 116 S.Ct. 2116 (1996).

[210] See Chapter II, 4.4.3.

After the Department of Justice had already won a lawsuit against the NFL for violating the antitrust laws with regard to its restrictive practice in handling broadcasting rights in 1953,[211] it once again sued the NFL, and the court found that the pooling of broadcasting rights was a horizontal restraint in violation of anti trust law.[212]

Whereas professional baseball had received a helping hand from the Supreme Court in the Federal Baseball case exempting the reserve clause from the anti-trust laws back in 1922, the U.S. Congress responded very quickly to help the professional leagues pool their television rights after the NFL lost the case in 1961.[213]

5.3.3. The Exemption in the Sports Broadcasting Act

The Act (cited as 15 USC 1291) makes the federal antitrust laws inapplicable to any agreement transferring broadcasting rights made by an organized professional league involving the sports of football, baseball, basketball, or hockey, but not collegial or other professional sports such as soccer, golf or motor racing.[214]

There are, however, exceptions and amendments to the Sports Broadcasting Act. The exemption does not apply to the broadcast of professional football games on Friday nights and Saturdays during the college football season, and the Act was later mended to include protection for high school football. On the other hand, the Act does not apply to inter-collegial sports.

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[211] In 1953 the Department of Justice had initiated a lawsuit against the NFL for violation of the anti-trust laws because the NFL had placed selling restrictions on television and radio rights on its members to any game being shown within the home territory of another member club (United States v. NFL 116 F supp.319 (E.D. Pa. 1953). The Department of Justice won the case, and as a result the NFL was left with only one legal restriction, namely that teams retained the ability to restrict other telecasts when they in fact had a home game.

[212] United States v. NFL, 196 F. supp. 445 (E.D. Pa. 1961).

[213] In fact, it just took 72 days for Congress to respond to the NFL's request by enacting the Sports Broadcasting Act (15 USC. § 1291).

[214] See David L. Anderson, "*The Sports Broadcasting Act: Calling It What It is*" Comm. & Ent. L.J. 945, 946 (1995). Section 1 provides in pertinent part: The antitrust laws ... shall not apply to any joint agreement by or among persons engaged in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

5.3.4. "Anti-Siphoning" Regulations in Sport

As described earlier in the thesis, the European Union responded to the increase of commercialisation regarding the television market and the sports rights with the insertion of Art. 3 A into the *Television without Frontiers Directive*. The same issue arose in U.S. Sports more than 30 years earlier, but has been treated in a different way.

The increase of cable TV in the 1950s was regarded as a threat to the position of Major Television Networks, since it had the capacity to provide subscription services. In order to protect the television structure of those years, the Federal Communications Commission (FCC) promulgated rules which sharply restricted the showing of sports events by Subscription Television. These limits prohibited specific events such as the NCAA men's basketball tournament and the Super Bowl from being sold to anyone other than broadcast television. The restrictions also provided for regulations of pre-season and regular season games.[215]

The cable television industry challenged the FCC regulation in a lawsuit, and the anti-siphoning rules in so far as they applied to pay cable were struck down by the US Court of Appeals for the District of Columbia in Home Box Office vs. FCC.[216]

In this decision one can find a definition of the so-called siphoning:

> *"Siphoning is said to occur when an event or program currently shown on conventional free TV is purchased by a cable operator for the showing on a subscription cable channel. If such a transfer occurs, the Commission believes the program or event will become unavailable for showing on free television system or its showing on free television will be delayed…A segment of the American people – those in areas not served by cable or those too poor to afford subscription cable service – could receive delayed access to the program or could be denied access altogether. The ability of half a million cable subscribers thus to pre-empt the other 70 million television homes is said to arise from the fact that subscribers are willing to pay more*

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[215] In the Amendment of part 73 of the Commission's Rules and Regulations (Radio Broadcasting Services) to provide for subscription TV service, 4th Report and Order, 15 FCC 2d 466, para.1, 288-290 (1968).

[216] 567 F. 2d 9 (D.C.Cir.) Cert. denied, 434 US US 829.

to see certain types of features than are advertisers to spread their messages by attaching them to the same features." [217]

By the end of the 1980s almost all professional boxing was available exclusively to pay-per-view audiences.

For now combination of protests from fans and most importantly the fear of congressional intervention seems to have kept pay-per-view and subscription television at bay when it comes to the biggest American sporting events such as the Super Bowl in football or the World Series in baseball.

5.4. The Single-Entity Defence

5.4.1. Introduction

Even though the individual teams may compete with each other on the court or field, the league itself is solitary, and therefore the question arises as to whether the teams are actually "competing" with each other. With regard to the peculiarities of league sports the economist Walter Neale argued as early as 1964 that not the individual teams are considered entities, but the whole league itself is one entity in the sense of economic theory.[218] Starting from this approach it has been discussed if sport leagues can be considered as single entities and therefore be exempted from the application of antitrust laws.[219]

5.4.2. The Single Entity Structure

Within a single entity one enterprise totally controls the other enterprises, whereas all the enterprises pursue a joint generic purpose and a respective interest. Due to the emerging lack of competition between team members, a single entity is incapable of conspiracy within the meaning of section 1 of the Sherman Act.

Professional sports leagues are usually not considered "single entities" under antitrust law since the teams are separately owned. Therefore, American courts repeatedly refused to acknowledge the single entity status of one of the "big four" professional sports leagues in the

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[217] Id at 25.

[218] Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J.E. 1-14 (1964). Also see Hannamann, *Kartellverbot und Verhaltenskoordinationen im Sport* (2001), p. 350.

[219] See Weistart/Lowell, The Law of Sports, 1979 p. 698 ff.; Heermann, Professionelle Sportligen auf der Flucht vor dem Kartellrecht" available at http//www.sportrecht.org.

recent years.[220] Indeed, the financial, legal and administrative independence of the Major Leagues' member teams has been too immense to assume a total control by the respective association.[221] This reservation with respect to the application of the single-entity doctrine to sport leagues was given up in the Fraser-ruling in 2000.

5.4.3. Fraser vs. Major Soccer League

5.4.3.1. The Innovative Structure of MSL

New professional U.S. sports leagues like Major League Soccer (MLS) have gone even further in a syndicated ownership model, partly to avoid anti-trust challenges, partly for organizational reasons. Technically, Major League Soccer itself owns all of the teams. Each team has an "owner/investor", meaning that the individuals have a financial stake in their respective team, but possess little decision-making power. All player contracts are also made with the League, rather than the individual franchise "owner".

5.4.3.2. The Facts of the Case

In Fraser vs. Major League Soccer, a group of professional soccer players in the US claimed that the MLS violated Section 1 of the Sherman Act.[222] The players argued that by contracting for their services centrally through the league, member teams were prevented from competing for players on an individual and direct basis. As a result, the plaintiff maintained that individual player salaries were lower than directly contracted by the league. The players argued that they would have the opportunity to obtain higher salaries if they were permitted to negotiate their contracts directly with each of the MLS franchises and have more than one franchise bid for their services simultaneously. However, due to the single entity structure, the court (for the first time in a sports league case) concluded that the players' claim that the MLS policy of centrally contracting all players through the league as compared with individual franchises was in violation of section 1 of the Sherman Act could not succeed as a matter of law.

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[220] See North American Soccer Laeague v. National Soccer League, 505 F Supp. 659 (SDNY)

[221] Klingmüller, *Die rechtliche Struktur der US-amerikanischen Berufssportligen am Beispiel der National Basketball Association (NBA*), 1998, p. 84 ff..

[222] Fraser v Major League Soccer L.L.C., 284 F.3d 47 (1st Cir. 2002). For a more detailed analysis of the case see: Paul D. Abbott, "*Antitrust and Sports – Why Major League Soccer Succeeds Where Other Sports Leagues Have Failed*", published in the Sports Lawyers Journal, Spring 2001.

5.4.4. Conclusion

Recently, start-up leagues such as the Women`s National Basketball Association, Major League Soccer, Women's United Soccer Assoctiation and Arena Football League are examples in which the league owns the teams and is thus considered a single entity. In this league structure, while teams compete with each other for wins and losses, the league is able to keep salaries manageable.

The practical result of Fraser could be that new Sport Leagues will implement the single entity model in order to avoid costly player salaries and anti-trust lawsuits, but it is unlikely that traditionally organized leagues such as the NFL will renew their attempts to achieve single entity status. Nevertheless, organisation as a single entity will likely be the choice of organizational structure for future leagues.

6. The Salary Cap

6.1. Introduction

One of the most controversial issues in US professional sport in the last years has undoubtedly been the fixed restrictions on players, the so-called "salary-caps". The idea of salary caps is to reduce the salaries of the superstars of sport and/or diminish the ability of the clubs to overbid one another to sign attractive players. The NBA was the first league to introduce a salary cap in 1983. At that time, professional Basketball had entered a state of financial crisis due to the rising player salaries, which were out of proportion to the stagnated development of the league.[223] The salary cap finally resulted of a collective bargaining agreement[224] between the NBA and the National Basketball Players Association (NBPA).

[223] David Stern, commissioner of the NBA, quoted after Daspin, 62 Indiana Law Journal p.95 (107) (1986).

[224] The Collective Bargaining Agreement, or "CBA," is the contract between the NBA (the commissioner and the 30 team owners) and the NBA Players' Association that dictates the rules of player contracts, trades, revenue distribution, the NBA Draft, and the salary cap, among other things. In June 2005, the NBA's 1999 CBA expired, meaning the League and the players' union had to negotiate a new agreement; in light of the fiasco that was the 2004-05 NHL lockout, the two sides quickly came to an agreement, and ratified a new CBA in July 2005. The new agreement will expire following the 2010-11 season, but the League has the option to extend it through the 2011-12 season if they wish. If so, the League must exercise its option to extend the agreement by December 15, 2010.

6.2. The Way the Cap Works

The salary cap is calculated by taking a fixed percentage of overall projected gross revenues, subtracting projected player benefits and dividing the remaining figure by the number of teams in the league. The salary cap works in two ways: it sets a limit on the percentage of the projected gross revenues that a team is allowed to spend on salaries, but it also guarantees the players that a certain percentage of the gross revenues is in fact spent on player salaries and benefits in a given year.

6.3. Exceptions from the Cap

Because the NBA's salary cap is a "soft" one, there are certain exemptions from the salary cap[225]. One of the most important exceptions is the so-called “Larry Bird” exception, named after the now retired Celtic Boston Basketball Star.[226] This exception allows teams to re-sign, or extent the contracts of their own players, at any amount regardless of the salary cap. To qualify as a Bird free agent, a player must have played for three seasons without being waived or changing teams as a free agent. The same goes for players with one-year contracts, who will be paid the minimum salary according to their pay agreement, even if it goes beyond the Salary Cap.

6.4. Salary Cap as a Restraint of Trade

A salary cap will by definition result in players receiving lower salaries than in a free-market system without the cap. Likewise, the cap can result in less player movement among teams because a new team’s signing with a new player could exceed its salary cap limitations. For this reason the salary cap must undoubtedly be considered as a restraint of trade. It is more difficult to if it is also an unreasonable restraint of trade, i.e. if these negative effects outweigh the pro-competitive effects of the provision. In answering this question, U.S. sports clubs always refer to the aim and object of the salary cap, which is to avoid an uneconomic budgetary policy with regard to the players’ salaries in order to guarantee the economical balance and existence of the league.[227]At the same time the salary cap achieves that the star

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[225] These exceptions in the NBA version of the salary cap are the reason, why it is also called a “soft cap” in contrast to the “hard cap” of the NFL.

[226] Also known as the so-called “veteran free agent exemption”, see critical to this Daspin, 62 Indiana Law Journal 95, 106, fn. 73 (1986). Also Fikentscher, “*Der Salary Cap im Sport im Schnittpunkt zwischen Arbeits- und Kartellrecht”* in Spektrum des Sportrechts p. 187 (190).

[227] Levine, 11 Cardozo Arts & Entertainment Law Journal 71, 95 (1992); Fikentscher, “*Der Salary Cap im Sport im Schnittpunkt zwischen Arbeits- und Kartellrecht*” in Spektrum des Sportrechts, p. 187 (192).

players are spread throughout the different teams and helps this way to maintain a certain balance, since no single team is financially able to create an accumulation of star-players.

A final legal assessment of this question has not yet been answered by courts.[228] This can be put down to the fact that with regard to the Nonstatutory Labour Exemption antitrust law is not applicable to the content of the collective bargaining agreements (see 5.2.1.).

6.5. Conclusion

The salary cap is definitely no "miracle cure" for all financial problems that occur in league sport, since a considerable part of them are linked to simple mismanagement. Nevertheless, the use of salary caps in U.S. sport successfully led to a solution to the problem of clubs spending unsustainable levels on player levels on player wages in order to compete at the highest level.

Chapter IV: Restraints of Trade in South African Sport

1. Introduction

Sport is a crucial component of South Africa's contemporary society. South Africans are being described as a "sports-mad" nation, one in which sport is virtually regarded as a religion.[229] It enjoys vast significance in South Africa and forms an integral part of South African society.

The past four decades have seen vast changes in South Africa, not only for the society in general, but also in South African Sport, in particular. On a legal and political level, South Africa has seen the introduction of four different constitutions during this period. Sport has not only taken the lead in the abolition of discrimination, but, because of the public

[228] In Fraser v. Major League the Court did not deal with this question, since it only referred to the single entity status of the MSL.
[229] Basson and Loubser, "*Sport and the Law in South Africa*" (2000), Chapter 3-1

prominence of sport, also in demonstrating that people of different racial and ethnic backgrounds can live and work together harmoniously.[230]

Due to the historical disparity the society in South Africa is still to a large extent composed of both first and third world elements that still reflect the divisions created by Apartheid. The majority of historically disadvantaged communities still live in informal settlements where basic infrastructure is still being developed to provide the basic amenities of life. Consequently, the development of sports facilities has not a top priority so that there are still major disparities in the facilities and opportunities that are available to various communities.[231]

Nevertheless, sport in South Africa is developing fast and will benefit from big sporting events such as the 2010 Soccer World Cup. The latter, for instance, will create significant direct and indirect economic benefits for the country. South Africa expects some 400.000 visitors.[232] Television coverage of the World Cup will bring South Africa into the homes of new tourism markets such as Brazil, Argentina, Eastern Europe, Japan and South Korea. An economic impact study predicts that 2.72 million tickets will be sold, generating revenue of R 4,6 billion.[233] Capital expenditure on the upgrades of stadia and other infrastructure is expected to an amount to R 2,3 billion. The event will lead to an estimated direct expenditure of R 12,7 billion, while contributing R 21,3 billion to the country's gross domestic product. Some 159.000 new employment opportunities are expected to be created and an estimated R 7,2 billion will be paid to government in taxes.[234]

With the economical developments in South African sport, the legal issues such as restraints of trade will be of increasing importance in sport as comparable developments in Europe and U.S. have already proved. In the following it will be examined, how South African Courts have dealt with this matter so far and demonstrate "hidden" crucial issues, which have not been decided yet.

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[230] Steve Cornelius in "*Levelling the Playing Field: Affirmative Action in Sport in South Africa*", published in The International Sports Law Journal 2002/3, p.2

[231] Steve Cornelius, ibid.

[232] South Africa Yearbook 2005/06, Sport and Recreation, available at: www.gcis.gov.za/docs/publications/yearbook/sport.pdf

[233] Ibid

[234] Ibid

2. The South African Constitution and Sport

Neither the South African Constitution nor any other statutory South African law provides any provisions with reference to sport. It is therefore necessary to take a closer look at the South Africa's Constitution to examine whether sport is covered on a constitutional level.

2.1. The South African Bill of Rights

South Africa entered into a new era with the commencement of the interim Constitution on 27 April 1994[235] and the 1996 Constitution on 4 February 1997.[236] For the first time, a justifiable Bill of Rights was contained in the Constitution.[237] The cornerstone of the South African democracy lies in a Bill of Rights set out in Chapter 2 of the Constitution, which in its turn enshrines "*the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom"*. [238] Of the many rights embodied in the Bill of Rights, those which are particularly relevant to this work are the following:

- Human Dignity, section 7 (1) and 10.
- Freedom of Movement, section 21 (1).
- The right to choose their trade, occupation or profession freely, section 22.
- The right to fair labour practices, section 23 (1).
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2.2. Horizontal Effect

Although the Constitutional Court held that the Bill of Rights in the interim Constitution did not apply in matters between individuals, section 8 (2) of the 1996 Constitution provides that "*a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."* As a result, the possibility now exists that a fundamental right may be enforced in private disputes between individuals.[239]

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[235] Constitution of the Republic of South Africa (Act 200 of 1993).
[236] Constitution of the Republic of South Africa (Act 108 of 1996).
[237] See Johan de Waal, *Introduction to the Law of South Africa* (2004), Chapter 2, p. 66/67.
[238] Constitution of the Republic of South Africa (Act 108 of 1996), Chapter 2 (Bill of Rights), Section 7 (1).
[239] See Seedorf in "Die Wirkung der Grundrechte im Privatrecht in Südafrika" (2005), p.237 f..

3. The Restraints of Trade Doctrine in South African Law

3.1. Historical Background

Over a long period of time South African law was influenced by the colonial powers.[240] In the 16th century it was under the influence of the Dutch colonial rule that brought the Roman-Dutch law along. When in the 19th century the British colonized South Africa they did not impose their substantive legal system in a formal way. Instead, it was decided that the local Roman-Dutch law would remain in force. However, the Roman-Dutch law of the Cape Colony was overlaid with a heavy English law influence. This influence of English law also affected the legal treatment of restraints of trade. In most cases where a restraint of trade was involved, courts contended that English law applied in this area.[241] According to this, all restraints of trade were viewed as contrary to public policy and therefore *prima facie* void. Later on this English approach was criticized for not being adequate to South Africa's specific legal issues and it was questioned whether South African courts are free to modify the English law doctrine in South Africa.[242] In 1984, the renunciation of the English law culminated in the *Magna Alloys* judgment.[243]

3.2. Magna Alloys Case

One of the important matters in the *Magna Alloys* Case is that the Appellate Division decided that the English approach was not suitable for South Africa and that some restraints were still illegal due to different public policy values in South Africa.[244] It was stated that restraint of trade problems had to be dealt within the terms of South African principles of public policy. However, the court did not really discuss the principles that made South African law different from English law, and the case is opaque in laying down more specific rules. From the *Magna Alloys* decision follows that restraints of trade are deemed *prima facie* valid and enforceable provided they are not contrary to public policy. A party wishing to avoid the operation of such a covenant must prove that its enforcement would be in conflict with public policy. Consequently, *public policy* and not *reasonableness* is now the test applied with regard to the enforceability of contracts in restraint of trade, but the unreasonableness of a restraint is still

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[240] See on the Historical Background of the Legal System in South Africa: François du Bois, *Introduction to the Law of South Africa*, (2004) Chapter 1.
[241] Durban Rickshas Ltd v. Ball 1933 NPD 479, 489.
[242] Katz v Efthimiou 1948 (4) SA 603 (0) 610.
[243] Magna Alloys and Research (SA) Ltd v. Ellis 1984 (4) SA 874 (A). Also see Guhl „Comparison of post-employment restraints in South Africa, England and Germany (2004) p.27.
[244] Magna Alloys, p.891.

an important part of the evidence in deciding whether a restraint is contrary to public policy.[245]

3.3. Impact of the Constitution to the Common Law Doctrine of Restraint of Trade

During the Interim-Constitution[246] South African Courts considered the impact of the Constitution on the Restraint of Trade Doctrine and uniformly dismissed the suggestion that Constitutional law would have an effect on the common law doctrine.[247] It was argued, that the common law had guaranteed sufficient protection for decades and therefore no revision of the Restraint of Trade Doctrine as defined in *Magna Alloys* was required.

However, the Restraint of Trade Doctrine in South Africa is an expression of the fundamental right of Freedom of Trade as it is set out in Section 22 of the Constitution. Insofar, the application of this common law principle is bound by the Constitution. This has to be taken into account when applying the Restraint of Trade Doctrine and interpreting the undefined term of public policy. Considerations of public policy are not constant and the nature and effect of restraints of trade might vary. Public policy in this regard should, therefore, always be considered against the background of the Constitution.[248]

4. The South African Model of Sport

Contrary to the American counterparts, South African sport organisations and clubs are in general not driven by profits. Although federations as the SAFA (South African Football Association) or the UCBSA (United Cricket Board of South Africa) and the respective leagues are considered to be private bodies[249], they are not highly commercialized entities as the "Big Four" leagues in US Sport. South African Sport is to a high extent influenced by the South African Government which can also be seen as related to the country's responsibility to overcome the burdens of the former Apartheid System. Affirmative Action Programs are trying to redress the imbalances that have been created as a result of decades of

[245] Introduction to South African Law and Legal Theory, 2nd Edition (1995), p. 716.
[246] The Constitution of the Republic of South Africa Act 200 of 1993.
[247] Waltons Stationery Co. (Edms) Bpk v. Fourie 1994 (4) SA 507 (O); Kotze & Genis (Edms) Bpk v. Potgieter 1995 (3) SA 783 (C) ; Knox D'Arey Ltd v Shaw 1996 (2) SA 651 (W).
[248] Coetzee v. Comitis and Others 2001 (I) SA 1254 (C), para 30.
[249] Cronje v. The United Cricket Board of South Africa 2001 (4) SA 1361 (TPD).

institutionalised racial discrimination in sport. The South African government also realized the importance of sport as a means to educate the public about HIV/AIDS and to reduce the level of crime.[250] Similar to the different "soft law" initiatives in Europe (such as the Amsterdam Declaration, Helsinki Report and Nice Declaration) the South African government also established guidelines for sport as the *White Paper* or the *Ministerial Task Team Reports* in order to address the goals just mentioned.[251] The governmental influence in sport can be compared to the "socio-cultural" approach in Europe, even if the issues South Africa has to deal with vary.

As in Europe, sport in South Africa is normally organised in a hierarchical structure which is similar to the pyramid structure in European sport. In football, for instance, there is the world governing body FIFA at the top. Under FIFA on the next lower level is the CAF (Confederation of African Football), UEFA's sister confederation in Africa. The highest authority in South African Football is SAFA[252] that is affiliated to the CAF and the FIFA.[253] The National Soccer League (NSL), the only professional football body affiliated to and recognised by SAFA, regulates the various professional football leagues in South Africa. Accordingly the hierarchy in football is: FIFA, CAF, SAFA and NSL. The same applies, e.g., to Cricket: On an international level there is the International Cricket Board (ICC). Affiliated to the ICC, the sole controlling body in South Africa is the United Cricket Board (UCBSA) that consists of eleven affiliated regional Cricket Boards.

Corresponding to the European model is the embodiment of the "One-Association-Principle" according to which there is only one federation per sport in the country. As a result, a player that wants to play professional league cricket in South Africa has to join the UCBSA. In football, the only way to practice football on a professional level would be to contract with SAFA and play in the NSL or in one of its affiliated leagues.

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[250] See the *White Paper, Sport and Recreation South Africa, Getting the Nation to Play*, published by the Ministry for Sport and Recreation, available at: http://www.srsa.gov.za/WhitePaper.asp.

[251] Also see the *Ministerial Task Team Reports: A High Performance Sports System for South Africa*, available at: http://www.srsa.gov.za .

[252] SAFA was founded in 1991 and is the culmination of a long unity process that was to rid the sport in South Africa of all its past racial division. Four disparate units (The Football Association of South Africa; the South African Soccer Federation; the South African Soccer Association and the South African National Football Association) came together to form the organisation in Johannesburg to set South African soccer on the road to international competition after a lifetime of apartheid in soccer.

[253] South Africa's Membership of the world governing body was confirmed at their congress in Zurich in June 1992.

And unlike the "hermetic" U.S. American model, sport in South Africa is "open" to relegation and promotion. As a result, the organisation of sport in South Africa is more similar to the European model than to the U.S. American sports system.

5. Relevant Case Law

South African sport has not been subject to much litigation and few guidelines have emerged that can be seen as the basis of a South African "lex sportiva".[254] Nevertheless, a number of judgments dealing with restraints of trade in sport have been passed in recent years by South African Courts and will be examined in the following.

5.1. Highland Park Case

In 1978, the enforceability of a restraint of trade in the field of sport was an issue in Highland Park Football Club Ltd v Viljoen and Another.[255]

5.1.1. The Facts of the Case

A 26 year old professional footballer was traded from a club called Roodepoort Guild to the Highland Park team, that had already won the National Football League eight times. He signed a 6-months contract. When his Fixed Term contract with Highland Park had expired, the club refused to renew the contract with the player. As a result of this, after the 1977 playing season the player made a contract with the Dynamos Football Club on 8 December 1977.

The club applied for an interdict restraining the player from playing professionally for any other club until 1 Oktober 1980 without its permission. It referred to the provision of clause 12 (a) of the contract:

> *The player agrees, undertakes and binds himself that on the expiry of this agreement and unless and until he is formally transferred by the Club to another club, he will not*

[254] See Rochelle le Roux "*2003: Annus Horribilis for South African Sport?"* published in The International Sports Law Journal 2004/1-2, p.47.
[255] 1978 (3), SA 191 (W)

for a period of three years after the date of such expiry play professional football in the Republic of South Africa, save the prior written permission of the Club.

5.1.2. The Ruling of the Court

The Court held that generally an employer cannot protect himself against competition from his former employee after termination of the contract between them, unless the employer retains some proprietary right or interest worthy of protection, such as the interest in a trade secret or client connection.[256] In the event of the sale of a business the purchaser of the goodwill of the business can protect himself against such competition, because otherwise he will not have the full advantage of the assets he has bought. However, an employer may not prevent an employee, in this case a professional football player, from using his skills in his trade or profession after his employment contract terminates, even if such skills were at least partly acquired by the training, teaching and know-how which the employer had invested in the player during his contract of employment. The restraint was therefore not enforceable.

5.1.3. Conclusion

In this decision the court had to deal with a restraint that was quite obvious against public interest. The post-contractual prevention for a professional player to play for a competing club for a period of three years is out of all proportion and therefore not reasonable. Firstly, the court stated that the club does not retain a proprietary interest, parallel to the interest in a trade secret or client list, in the services of a player after the termination of the player's contract. Secondly, it is essential to the game of football to have competition. If every club incorporated rules as laid down in clause 12 (a) to its contracts, a lack of players would be caused and thus the existence of the game would be in danger. Lastly, to prevent a 26 year old professional player for three years from performing is almost likely to a life ban, if one considers that a career of a professional player only lasts for about ten years.

The court did not specifically deal with the special nature of sport, but treated the problem by referring to the Restraint of Trade Doctrine in a "normal" employment contract. Although it came to a fair judgment this way, it did not address the last two issues mentioned above that are linked to the peculiarities of sport.

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[256] See Busson and Loubser " *Sport and the Law in South Africa*" (2000), chapter 8 p. 39.

5.2. Golden Lions Rugby Union v AJ Venter

More recently, a South African court had to decide whether a contract term purporting to give a sporting body the right to renew a player's contract on termination is a restraint of trade.

5.2.1. The Facts of the Case

In the 1999 case between the Golden Lions Rugby Union (GLRU) and AJ Venter[257], the player's contract contained a clause purporting to give the GLRU a *right of first refusal*, provided that the GLRU does not offer less favourable terms than those offered by a third party.[258] When Venter received an offer from the Natal Rugby Union (NRU) the GLRU relied on a right of first refusal and offered Venter the same financial terms as those offered by the NRU. Venter and the NRU argued that the clause relied upon by the GLRU constituted an unenforceable restraint of trade. Moreover, they held that the GLRU could not offer exactly the same terms as the NRU, for instance in respect of the living, training and working environment of the player and the coaching stuff involved.[259]

5.2.2. The Ruling of the Court

The court held that the right of first refusal did not constitute an unreasonable and unenforceable restraint of trade. In its examination of the legal issue the court paid special attention to the interpretation of the provision that contained this right. The court stated that the right of first refusal in this case cannot be seen as an *option*. If it does have any meaning, it can only be that in the absence of another offer the Lions would have the first right to negotiate a renewal on such terms as the parties may agree but only if the terms offered by the Lions are not less favourable than the existing terms. This is not an enforceable restraint of trade. But even though the provision cannot be considered as a restraint of trade, the court ruled in favour of AJ Venter, since the right of the first refusal in this case was not expressly limited to financial matters. Consequently, the GLRU could not enforce the right in this case, because it could not match the terms of the NRU in respect of living, training and working environment of the player and the coaching stuff involved.

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[257] AJ Venter v. South African Rugby Football Union and Others, unreported.
[258] Clause 5.4.1. of Annexure "C" of the Venter Judgment.
[259] Clause 10.1 of the Contract between Venter and the NRU: "*The player (AJ Venter) acknowledges that the varied training programme for members of the squad includes training on the beach and swimming in the sea. The special training methods are integral to the system utilised by the NRU and endeavour to ensure that members of the squad attain peak physical fitness in a manner which is varied and interesting.*"

5.2.4. Conclusion

The right of first refusal can be considered as a restraint of trade that operates while the player is still under contract with the team or the union. But it is as such not unreasonable, since it gives the club/union only the right to offer the player a new offer. This is common praxis in sport and does not restrict the player's freedom to move or to work elsewhere unreasonably, since the clubs as the employer have a proprietary interest in keeping the player. In contrast, whenever the restraint prevents the player from taking up employment elsewhere, the restraint turns unreasonable. Again, the court did not deal with the special nature of sport.

5.3. Coetzee v. Comitis and Others

5.3.1. Introduction

Only three years after the *Bosman* ruling, South Africa had its own *Bosman*: André Coetzee, a 21 year old footballer who could not obtain a clearance from his club. And just like *Bosman* to European Sport, the *Coetzee* ruling[260] had a tremendous impact on South African sport.[261] In this case, Coetzee contented that the constitution, rules and regulations of the National Soccer League (NSL), relating to the transfer of professional soccer players whose contract have terminated, were contrary to the public policy and unlawful and/or inconsistent with the provisions of the Constitution of South Africa and therefore invalid.

5.3.2. The Facts of the Case

André Coetzee was a professional footballer who played for Ajax Cape Town in the NSL. When in 2000 his contract came to an end, Coetzee approached Ajax to grant him a new contract, but he was informed that there was no prospect of him playing for Ajax anymore. Coetzee accordingly requested the club for a *clearance certificate* so that he could join a different club. As in European Football, it is common cause that a professional footballer is required to obtain a *clearance certificate* from his club before he can be registered by the NSL as a player of a new club. In the meantime Coetzee was approached by another club, Hellenic, that offered to sign him on as a professional player, provided he was furnished with a *clearance certificate*. After Coetzee had contacted Ajax again, they informed him that they require R 50000 compensation before they would issue a *clearance certificate*. As Hellenic

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[260] Coetzee v. Comitis and Others 2001 (4) SA 1361 (TPD).

[261] See Rochelle Le Roux "*Under Starter's Orders: Law, Labour Law and Sport"* Industrial Law Journal Volume 23 (2002). Herman Gibbs „Coetzee Ruling aids local players", published in the Sunday Times 13.06.2004. Available at: www.sundaytimes.co.za/Articles/

was not prepared to pay this amount, Ajax did not issue a *clearance certificate*. Consequently, Coetzee could not join the new club. He contended that the Regulations of the NSL violated the fundamental rights of professional players, including fair labour practices, freedom of association and human dignity and asked the Cape Provincial Division Court for a decision.

5.3.3. The Transfer System Prior to *Coetzee*

The transfer system at the time *Coetzee* was decided was similar to the European transfer system prior to *Bosman*.[262] Any footballer wishing to play professional football had to register with the NSL. Further, he was required to obtain a clearance certificate from his club before he could be registered by the NSL. Once a player wanted to be transferred from one club to another, the club needed to place the player on a transfer list and stipulated it wishes to transfer the fee involved. If the player concluded a contract with a new club, his former club was entitled to compensation. The amount of the compensation payable (in the event that the two clubs could not agree upon the amount of compensation) was calculated by an arbitrator in terms of a pre-set formula, which did not take into account factors personal to the player. Compensation was always be payable by the new club unless the player is given a free transfer (so called free agent). Only when the compensation fee was paid by the new club, the old club issued a clearance certificate. So once a player has joined a club affiliated to the NSL he is not able to leave the club for another, unless and until compensation has been agreed to and a clearance certificate has been issued by the transferring club. This applied regardless of whether or not the player's contract with the selling club had ended.

5.3.4. The Ruling of the Court

In order to determine whether Coetzee was entitled to any relief, the court had to determine whether those provisions of the constitution, rules and regulations of the NSL relating to the transfer of professional soccer players whose contracts had terminated were contrary to public policy and therefore unlawful, or whether they were inconsistent with the provisions of the Final Constitution and therefore invalid.

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[262] See to the former Transfer System Coetzee, p. 1254. See also: Rochelle Le Roux "Transferring a Football Player: Not Quite Section 197 of the LRA" (2002), p. 4, available at http//www.sasc.org.za/ClientFiles/Le%20Roux%20-%20Betting%20on%20 Expectations.pdf.

5.3.4.1. Restraint of Trade

The Court held that, although any profession must be regulated to a certain extent, such regulation must be reasonable and must not violate the constitutional rights of individuals.[263] The situation which arises when a player's contract has come to an end and he is, by virtue of a compensation dispute, prevented from joining a new club is *akin to a restraint of trade provision in a normal commercial employment contract*.[264] Such a restraint must not offend public policy. The court then referred to the *Magna Alloys* Case and stated that the definition of restraint of trade as it was established in this case is even under the new Constitution good law. Nevertheless, the court acknowledged the influence of the Constitution on the common law doctrine of restraints of trade and the need to orientate the latter to constitutional law.[265]

5.3.4.2. Violation of Public Policy

The court accordingly stated, that **"***if we should find that the regulations violate one or more of the applicant's or other football players' fundamental rights, then it follows as a matter of logic that the only choice with which a professional football player is faced is to enter into a contract which violates these rights, thereby offending public policy, or not to play professional football at all. This is no choice."*[266]

In the following, the court found that the compensation regime impacted on three fundamental rights of a player: (1) The right to *Human Dignity*[267], (2) the *Right to Freely Choose a Profession or Occupation* [268] and (3) *Freedom of Movement*. [269]

5.3.4.2.1. Infringement of Human Dignity

The court held that the relevant NSL Regulations rendered a player helpless as they can prevent a player from taking up new employment. Further, he can give no input in respect of the transfer fee. Even it the matter is referred to an arbitrator, the latter will determine the compensation payable according to a fixed formula for which there is no rational basis. The player's income will be fed into a formula to produce a transfer fee. The transfer fee thus

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[263] *Coetzee*, p. 1269 (para. 27).
[264] *Coetzee*, p. 1270 (para. 29).
[265] *Coetzee*, p. 1270 (para. 30).
[266] *Coetzee*, p. 1269 (para. 28).
[267] Section 7 (1) and section 10 of the Constitution.
[268] Section 22 of the Constitution.
[269] Section 21 (1) of the Constitution.

determined bears no relation to any amount expended by the club in training the player.[270] With regard to the fact, that the player is at no point entitled to argue the case or to gibe input as to the amount of compensation to be paid, this amounts to treating the player as an object[271] and offends his human dignity as enshrined in s 7 (1) and s 10 of the Constitution.

5.3.4.1.2. Freedom of Choosing Ones Profession

The court also found, that the Rules of the NSL are contrary the player's right to choose his profession freely, since the player has only one choice and that is to enter a contract that violates his fundamental rights or not to play professional football. The club argued that "*there is no obligation on any footballer to play professional football*", which was rejected by the court, as it only *"shows a scurrilous disregard for a person's…right to choose his profession freely.*"[272] The court further dealt with the argument that because the applicant entered into the contract with Hellenic *freely* and *voluntarily*, it does not violate fundamental rights. The court stated that "*if entering into a contract which incorporates these rules is the only option open to a person who wants to pursue a career of professional football, it can hardly be said that he agreed to these terms out of his own free will*."

5.3.4.1.3. Freedom of Movement

In his line of arguments the club referred to the *Bosman* Case and sought to distinguish it from the present situation at issue in that the NSL rules do not contain a provision preventing a player from moving do a different *region*.[273] It was further argued, that inasmuch as the South African Bill of Rights does not have a provision similar to Article 48 EC it cannot properly be relied on the *Bosman* decision. The court did not agree with this approach and held that although the rules of the NSL do not expressly forbid a player from moving from one region to another, that may well be the effect thereof. If, at the expiry of his contract with Hellenic in Cape Town, Coetzee wanted to move to a club, e.g., in Johannesburg, he would be prevented from doing so unless and until the clubs have agreed on a transfer fee, or the arbitration proceedings have been finalised. Therefore, the NSL Regulations restricted a player in his Freedom of Movement.

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[270] This is the argument often used by clubs to justify their entitlement to a transfer fee, see Le Roux "*Transferring a Football Player: Not Quite Section 197 of the LRA*" (2002), fn. 10 available at: www.sasc.org.za/ClientFiles/ Le%20Roux%20-%20Betting%20on%20Expectations.pdf

[271] The Court noted that this treatment is "*not very different from the manner in which the book value of a motor vehicle is determined"*, see Coetzee, para 34.

[272] *Coetzee*, p. 1268 (para 27).

[273] *Coetzee*, p. 1272 (para. 36).

5.3.4.2. The Decision

Accordingly, the court concluded that the compensation regime was unreasonable and therefore contrary to public policy[274]. It also held it to be inconsistent with the Constitution and therefore invalid. The court granted the NSL a period of six months' grace to correct the constitutional inconsistencies in its regulations.

5.3.5. Conclusion

The *Coetzee* ruling is the most important decision with regard to restraints of trade in South African sport so far, not only because it had such a profound impact on the transfer system in professional sport. The judgment is very interesting for various reasons.

5.3.5.1. Horizontal Effect of the Bill of Rights

This case illustrates the reach of the Bill of Rights. As displayed above, fundamental rights may be enforced in private disputes between individuals and therefore have a horizontal effect. Consequently, even "private" bodies such as the NSL must ensure that their policies and procedures adhere to the new constitutional order.

5.3.5.2 The Impact of European Sports Law

In the *Coetzee* ruling the court explicitly referred to the *Bosman* decision that had already changed European sport. The *Coetzee* ruling shows that developments in European sport have a profound effect even on sport in South Africa. The court considered the principles made in *Bosman* regarding the transfer system and showed that they can be transposed to the system of the NSL. Insofar it does not matter whether the freedom of movement concerns the freedom to move between different Member States as in Europe or between different regions as in South Africa.

5.3.5.3. No Mention of the Peculiarities of Sport

Although the court took regard of *Bosman,* the *Coetzee* ruling did again not deal with peculiarities of sport. The court only drew a parallel to an usual commercial employment contract and finally applied "normal" common law and constitutional law respectively.[275] Doing this, the court neither did address the question, whether a professional athlete is a

[274] *Coetzee*, p. 1273 (para.41).
[275] *Coetzee*,p.1270 (para. 29).

worker, nor if sport can be regarded as normal trade. Evidently the court presupposed this. Accordingly, it did not deal with the crucial question, to what extent the Restraint of Trade Doctrine is applicable to sport. Also, the court did not examine whether there are any justifications on sporting grounds. The interesting question, if the obligation to pay transfer fees even for out-of-contract players was necessary to ensure the survival of smaller clubs was not discussed by the court. Consequently, the court did neither address the issue of its purpose to serve as a compensation for the costs incurred by the club in training the player.

5.3.6. The New NSL Transfer System

The *Bosman* and the *Coetzee* rulings forced the FIFA and the NSL to revisit their transfer regulations. The new NSL rules as amended on 12 November 2005 state under chapter 2 that *these rules are designed to give effect to the general principles within the constraints imposed by the Constitution of the Republic of South Africa and other relevant provisions of South African law*.[276] The new transfer system of the NSL is focused on the training compensation for young players[277] and the stability of contracts.[278] Since it is very similar to the FIFA Transfer System, it is referred to its illustration made in chapter III of the thesis.

5.4. The Cronjé-Affair *or* Can a Life-Ban be regarded as a Restraint of Trade?

The former South African Cricket Star Hansie Cronjé, who died in a plane crash in 2002, was involved in the most prominent match fixing scandal in South Africa so far. In the following, the United Cricket Board of South Africa (UCBSA) subsequently passed a resolution banning him for life from all activities of the UCBSA and its affiliates. Cronjé held that this ban was an unreasonable restraint of trade and also inconsistent with the provisions of the Constitution of South Africa and therefore invalid.[279]

5.4.1. The Facts of the Cronjé Affair

Hansie Cronjé had been the captain of the national cricket team. In April 2000 it came to knowledge of the United Cricked Board of South Africa (UCBSA) that Cronjé had been involved in "match fixing". In the following he was replaced as captain and withdrawn from

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[276] Chapter 2 (The Status, Registration and Transfer of Players), para 22 of the NSL Rules.
[277] Chapter 3 (The Quantification of Compensation for the Education of Young Players) of the NSL Rules.
[278] Chapter 2, paras 35-37 of the NSL Rules.
[279] Cronjé v The United Cricket Board Of South Africa 2001 (4) SA 1361 (TPD).

the national team.[280] After his contract with UCBSA had expired on 30 April 2000, Cronjé was promised indemnity against criminal prosecution in South Africa if he told the truth before the King Commission[281] which had been established after Cronjé confessed that he had accepted money from bookmakers. In October 2000, the UCBSA banned him for life from playing cricket under the auspices of the UCBSA. Cronjé turned to the court to contest the life ban and asked to set aside the resolution passed by the UCBSA banning him from cricket and to grant an "interdict" restraining the UCBSA from taking steps aimed at interfering with his personal, private and social life as well as his right to secure employment and income from activities such as coaching or commentating. Cronjé argued, *inter alia*, that he was not given a fair hearing before the resolution was taken and that his right to fair administrative action had been violated.[282]

5.4.2. The Decision of the Court

The Court had to deal with the question, whether the life ban of Cronjé was an unreasonable restraint of trade. It was obvious that the life ban had to be considered as a restraint of trade. The interesting question is, whether it was also unreasonable and therefore against public policy.

5.4.2.1. Cricket's Unique Code of Honour

In order to emphasize the "immeasurable" harm Cronjé caused to the integrity of the game the court pointed out the unique code of honour existing in cricket: "*Cricket places a premium on integrity and honesty both on and off the field. The game, more than any other, has traditionally been associated with the qualities of honesty, integrity, fair play and team work. The ICC states that one of the greatest testaments to this fact is the acceptance into common usage of the expression "it's just not cricket" to describe anything which is underhand. "*[283]

5.4.2.2. The Right of Non-Association

The court further held, that the UCBSA is a voluntary association and as such remains free to associate which whomever it wants to. The right to freedom of association[284] also comprises a

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[280] See Rochelle Le Roux "*The Cronje Affair – Reflecting on Match Fixing in Cricket*" paper presented at the 11th ANZLSA Conference in Perth, 2001, published in The International Sports Law Journal 2002/2, p.11-15.
[281] The Commission was named after the Judge Edwin King and established by the South African Government in terms of national legislation (Subsection 84 (2) (f) of the Constitution of the Republic of South Africa Act 108 of 1996.
[282] Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996.
[283] *Cronjé*, p.1366.
[284] Section 18 of the Constitution of the Republic of South Africa Act 108 of 1996.

passive or negative right, namely the freedom to disassociate with whomever it wants to.[285] Accordingly the court stated that the life ban imposed on Cronjé was not an active disciplinary step in the sense of a punishment but purely the will to refuse to associate with Cronjé by prohibiting him from partaking in the said activities. This applies regardless of the fact that Cronjé's contract with the UCBSA had expired before the resolution was passed. [286]

5.4.2.3. The Right to a Hearing

Cronjé argued that he was not given a fair hearing before the resolution was taken and that his right to fair administrative action in section 33 of the Constitution had been violated.[287] The court, however, held that UCBSA was not obliged to give Cronjé a hearing before the resolution was passed. Since the contract between Cronjé and the UCBSA had expired before the resolution was passed the latter had no power to summon him to a hearing. Moreover, the court held that UCBSA as a private body is not bound to the principles of *natural justice* either.[288] The Court stated that "*the rules of natural justice are part of administrative law that regulate the exercise of public power. That was so at common law an, in my view, remains so under the Constitution."* The UCBSA on the other hand has no statutory recognition or "official" responsibility for the game of cricket in South Africa and is wholly unconnected to the State. The Court finally concluded that a violation of section 22 of the Constitution was not given.

Consequently, the court came to the conclusion that a life-ban as imposed on Cronjé was not unreasonable and therefore not against public policy.

5.4.3. Conclusion

The Judge stated that UCBSA was entitled to exclude Cronjé from all the activities of the UCBSA and its affiliates. Consequently, the resolution did not prevent him from coaching, sponsoring or otherwise promoting or participating in the game of cricket beyond the activities of UCBSA and its affiliates. Cronjé's conduct had caused immeasurable harm to the

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[285] *Cronjé*, p.1373.
[286] *Cronjé*, p.1372.
[287] Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996.
[288] The Court referred to the decision "South Africn Roads Board v. Johanneburg City Council (1991 (4) SA 1 (A) at 10 G-I) where the Appellate Division stated that "*A rule of natural justice…comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates to the contrary…".*

integrity of the game both nationally and internationally, the stature and integrity of the national side and the idealistic and commercial interests of UCBSA and its affiliates. Therefore, the decision to ban him for life seems to be appropriate.

Nevertheless, with regard to the Court's reasoning concerning the right to a hearing it is highly questionable if this decision is in accordance with constitutional law. It seems, that the court presumed that fundamental rights are not directly applicable to the case at hand once it had elaborated that the UCBSA is not a public body. Especially with regard to the *Coetzee* ruling of the same year this outcome is quite surprising. As shown above, the Bill of Rights does not only apply to acts of purely administrative power on a vertical level, but also on a horizontal basis in the private law sector. Accordingly, even "private" bodies must ensure that their policies and procedures adhere to the new constitutional order. As the court in *Coetzee* stated, public policy in this regard should, therefore, always be considered against the background of the Constitution. This applies especially in cases, where the private body is as powerful as the NSL or the URBSA. Also the Court of Arbitration for Sport[289] maintains that sports-governing bodies resemble governmental bodies as far as their structure and their role as regulatory bodies are concerned. It states that similar principles govern their actions, for example when changing the legislation or administrative rules. [290] In this regard, the *Coetzee* ruling and the *Cronje* case are comparable. In both cases a player faced a restraint by an federation and found himself, due to the pyramid structure and its "One Association Principle", in a helpless situation. In *Coetzee,* the restraint had the consequence that the player could not perform his profession anymore, since the NSL was the only federation where soccer on a professional level can be played in South Africa. The same applies to Cronjé and the URBSA. So even if the ban "only" affected Cronje's activities in the URBSA, it actually had the effect that he could not play professional cricket at all, since URBSA is the sole controlling body for cricket in South Africa.

5.4.4. General Consequences regarding the Requirements for a Life Ban

A life ban represents for an athlete the most severe mean to punish him and can only be permissible under strict limitations. Besides the fact, that it can only be permissible if the ban

[289] The Court of Arbitration for Sport (CAS) was created in 1994 and is an independent body, which provides for services in order to facilitate the settlement of sports related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world. For more information see: www.tas-cas.org.

[290] CAS, 17 July 1998, CAS 98/200.

is *absolutely necessary* for the protection of sport, the legal procedural has to be followed. In the view of the fact that the decision to ban an athlete for life interferes in his *Right to Choose Trade, Occupation or Profession Freely*, in his *Freedom of Movement* and possibly in his *Human Dignity*, the highest requirements have to be met. As far as the content is concerned, a weighing between the restrictions of a player's fundamental rights and the purpose of the ban has to be made. With regard to the procedure, the player has to be granted a hearing. Accordingly, the rule of natural justice applies with the consequence that even private bodies such as the NSL or the URBSA have to follow the same legal procedures as governmental bodies.

5.5. Recognition of the Special Features of Sport

As the case law above has shown, South African courts have not specifically dealt with the special nature of sport so far. However, in a recent decision a South African court paid more attention to the peculiarities of sport.[291] The court had to decide about the admissibility of a late application of a footballer for a clearance certificate. Although the player was aware by 16 October 2002 that his former club did not intend to issue the clearance certificate he waited until 25 October to lodge his application.[292] The court remarked the following:

"The Court must, however, be mindful of the fact that, unlike any other employees, professional footballers only have a relatively short period within which to practice their profession, a profession which is inherently risky as they may suffer injuries which may ruin their careers; they are subjected to the vagaries of selection not faced by other employees; they are required to earn sufficient to sustain themselves and their families in a relatively short period and cannot simply, like any other employee, decide to move from one employer to another. Here we have a class of employees who face restrictions in carrying out their trade which restrictions can have an effect on their earnings that cannot be calculated with any degree of certainty."

This statement can be assessed as a first step towards a better consideration of the specificities of sport. As the comparison with the European and U.S. American legal practice has shown, it

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[291] McCarthy v. Sundowns Football Club and Obters (2003) 24 ILJ 197 (LC).
[292] See Rochelle Le Roux „2003: Annus Horribilis for South African Sport?" The International Sports Law Journal 2004/1-2, p.47; also Rochelle Le Roux in "Be(a)tting on Expectations" (2004) p.5.

is not sufficient to simply apply "normal" common law principles to sport such as South African courts have done so far. It can be expected that with the increase of commercialisation the legal issues in sport will become more complex. At least when the claims will be based on competition law aspects, the courts will have to take the peculiarities of sport into consideration.

6. The Affect of *Bosman* to South African Players in Europe

6.1 Introduction

In legal terms the *Bosman* ruling only provided free mobility within the member states for EU nationals and nationals from EEA countries (Liechtenstein, Norway and Iceland). Non-EU/EEA players were not directly affected by Bosman. But, as already seen in the *Coetzee* ruling, *Bosman* also affected South African courts dealing with similar issues in sport. But as the following will show *Bosman* and especially the rulings in *Kolpak* and *Simutenkov* also affect South Africans playing in Europe.

6.2. Free Movement for South African Players in EU Member States

30 South African players are currently playing for European soccer teams, including stars as Quinton Fortune (Manchester United), Sibusiso Zuma (Arminia Bielefeld) or Steven Pienaar (Ajax Amsterdam).[293] Those player were not directly affected by *Bosman*, but they could benefit from the latest developments in Europe with regard to the *Kolpak* and *Simutenkov* rulings of the ECJ.

6.2.1. The Direct Effect of the Provisions relative to the Free Movement of Workers

The association, cooperation or partnership agreements which the European Community has concluded with third countries contain, for the most part, provisions concerning the freedom of movement of workers.[294] As elaborated in *Kolpak* and *Simutenkov*, for an individual to be able to assert his rights to contest the legality of a nationality clause laid down by a sporting federation, a direct effect thereof must be acknowledged.

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[293] See http://www.sportscheduler.co.sz/sa_players_overseas.htm.

[294] Article 310 EC states that the Community „*can conclude, with one ore more State(s) or international organisation(s), agreements which create an association characterized by laws and reciprocal agreements, common actions and special procedures*".

6.2.2. The Agreement with the African, Caribbean and Pacific States (ACP-States)

The Community has concluded agreements concerning a large number of States with which its Member States are connected by past or present colonial links. Since very recently, these relations are governed by a Partnership Agreement signed at Cotonou in Benin; the treaty concerns no less than 77 African, Caribbean and Pacific (ACP) States.[295] Its goal is to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.[296] Contrary to the various Lomé Conventions which preceded it, the Cotonou Agreement contains a provision relative to migration within which the question of equality of treatment of workers from an ACP State is settled.

Article 13 (3) stipulates that

> *"…the treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working condition, remuneration and dismissal, relative to its own nationals. Further in this regard, each ACP State shall accord comparable non-discriminatory treatment to workers who are nationals of a Member State"*.

Regarding the wording, as well as the aims and context of the Agreement, it seems that this clause is sufficiently clear, precise and unconditional to have direct effect.[297] In consequence a national from one of the countries party to the Agreement can rely on it before the courts to oppose a nationality clause limiting his participation in a sports competition so long until he is legally employed in a Member State.

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[295] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, O.J. 2000, L 317/3. The Agreement entered into force on 1 April 2003. The African Member-States are: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo (Brazzaville), Congo (Kinshasa), Cote d'ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe.

[296] Art. 1 (1) of the Agreement.

[297] See Hedemann-Robinson, „An overview of recent legal developments at Community level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European Court of Justice, 38 CML Rev. (2001), 525-586. Also Holzke, "Die Gleichstellung drittstaatenangehöriger Berufssportler nach der "Kolpak" Entscheidung des Europäischen Gerichtshofs", (2004) SpuRt, 1-7.

6.2.3. Conclusion

So far, no court has dealt with the question whether the Cotonou Agreement is able to extend the scope of Article 39 EC even to ACP States. Nevertheless, there is no reason why Article 13 (3) of the Cotonou Agreement should not have the same effect as Article 23 of the PCA Agreement between the EU and Russia or Article 38 of the PCA Agreement between the EU and Slovakia. Although the Cotonou Agreement does not provide for EU market access for South Africans, South African players, provided that they are lawfully employed in one of the EU Member-States, now have the same rights as European players with regard to rules relating to the nationality of a player. Accordingly, any rule that provides a privilege for EU players, as for instance Rule 15 of the DHB Spielordnung in *Kolpak* or the provision of the RFEF in *Simutenkov*, has to apply to South African players, too.

7. Restraints of Trade Based on Competitional Law

7.1. Introduction

As already demonstrated for the European and especially the US American sports system, competition law is of increasing importance to the scope of sport. The more sport is considered to be trade or business, the more obvious is the application of competition law to professional sport. In Europe, the application of competition law to sport was only recognized in the 1995 *Bosman* Ruling. In South African sport, competition law has so far been of no relevance. But it is to expect that future claims in the area of sport will involve aspects of competition law. In the absence of reported cases on the application of the Act to restrictive practices in Sport in South Africa, possible applications are referred to without attempting detailed analysis of hypothetical situations.

7.2. Competition Act 89 of 1998

7.2.1 Outline of the Competition Act

South Africa's competition law is regulated in the Competition Act 89 of 1998. The Act is very similar to the European equivalents Article 81 and 82 EC. According to section 3 (1) the *Act applies to all economic activity within, or having an effect within, the Republic.* Accordingly, sport is subject to the Act in so far as it constitutes an economic activity. It is important to point out, that the Act provides two exemptions which are of importance with

regard to sport. One the one hand collective bargaining within the meaning of section 23 of the Constitution (Labour Relations), and the Labour Relations Act 1995[298] are exempted from the application of the Competition Act.[299] On the other hand, competition law does not apply to *"concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose*". [300]

Section 4 (1) of the Act concerns restrictive horizontal practices and prohibits *agreements between, or concerted practice by, firms, or a decision by an association of firms, if (a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in the market….* The same provision also contains an exemption similar to 81 (3) EC, according to which restrictive agreements are prohibited *"unless a party to the agreement, concerted practise, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect…*".

Anti-competitive conduct by a sports governing body or a sports broadcasting company that is dominant in a particular market is governed by section 8 of the Competition Act. Therefore, Section 8 of the Competition Act of 1998 corresponds to Article 82 EC.

7.2.2. Exclusive Jurisdiction

It is important to note that according to section 65 of the Act a provision of an agreement that is prohibited or may be declared void in terms of the Act can only be declared void by the Competition Tribunal or the Competition Appeal Court. An issue arising in any action in a civil court concerning conduct prohibited under the Act must be referred to the Competition Tribunal to be considered on its merits by the Tribunal. The jurisdiction of the ordinary courts in civil matters concerning the Competition Act is therefore ousted. This means that if the validity or enforceability of a restraint or restrictive provision in a sport-related contract is questioned, an ordinary court must refer the issue for decision by the Computational Tribunal, with the possibility of appeal to the Competition Appeal Court.

[298] Act No. 66 of 1995.
[299] Section 3 (1) (b) of the Competition Act 89 of 1998.
[300] Section 3 (1) (e) of the Competition Act 89 of 1998.

7.3. Possible Impact of the Competition Act on South African Sport

7.3.1. Monopolistic Structure of the Federations

Due to the fact that sports federations in South African Sport are to a high extent organized in a pyramid system, the same legal issues apply as in European Sport. The hierarchical structure combined with the rule that only one federation is allowed to represent the respective sport in the country gives federations as the UCBSA or the SAFA by nature a dominant position. Since the rules of the international federations as the ICC or the FIFA stipulate that their members may only participate in sport events organised or at least authorised by the federations themselves, it makes it almost impossible to establish new leagues. As the comparison to the European situation has shown, it will be difficult for sporting federations to argue that they only pursue a non-commercial socio-economic objective in order to stay immune from competition law.[301] On the other hand, South African sport federations cannot be considered to be structured as single-entities either and may therefore not refer to the single entity defence as laid down in section 5 (4) of the Act. Consequently, provisions preventing from establishing new leagues would not be in accordance with South African competition law.

Another issue connected with the monopolistic structure of the federation arises with regard to the Player Agents, since persons who would like to be accredited by SAFA in order to work as a Player Agents have to obtain a FIFA International Players' Agent Licence.[302] Consequently, the result to this issue is directly linked to the decision of the Court of First Instance in the Piau appeal.

With regard to the issue of the compatibility of a salary cap with South African competition law it can also be referred to the legal examinations made in the European and US American part of the thesis. Salary Caps are by definition restrictive, but could fall out of the application of competition law or at least be exempted due to their positive effects. As in the US System, the most suitable way of introducing the use of salary caps is through a collective bargaining agreement between the players and the federations.

And as Article 37 of the FIFA statutes, which stipulates that the clubs are obliged to release their players for international games without getting any compensation, also applies to South

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[301] See Section 3 (1) (e) of the Competition Act.
[302] See Regulations Governing Player's Agents in SA, available at: www.safa.net/guidelines

African football clubs, even South African clubs occupying foreign national players could sue FIFA for damage claims on grounds of an abuse of FIFA's dominant position according to section 8 of the Competition Act 89 of 1998. In this regard, the decision of the ECJ on the players release clause affair has to be awaited.

7.3.2. Broadcasting

The Competition Act is also applicable when it comes to Broadcasting. The same issues concerning Collective and Exclusive Selling in the European or US American sports market can also apply to South African Sport. And as in Europe, the Independent Communications Authority of South Africa (ICASA) recently adopted regulations similar to the "Television without Frontiers Directive" in order to ensure public access to the broadcasting of *national sporting* events.[303] These sporting events now must be broadcast live, live delayed or delayed by free-to-air television broadcasters. The origin of these regulations is section 30 (7) of the Broadcasting Act 1999. According to section 30 (7) subscription broadcasting services may not acquire exclusive rights for the broadcast of national sporting events, as identified in the public interest from time to time by the ICASA in consultation with the Minister of Public Enterprise and the Minister of Sport. These regulations are an expression of the socio-economic environment in South Africa.[304] For once, subscription television is still an exception. Furthermore national access to the broadcasting of sports such as rugby and cricket is supposed to develop support for sports such as rugby and cricket, which were previously regarded as elitist sports. These regulations will certainly assist to broaden the audience and support base of these sports.[305]

7.3.3. Restrictions in the Labour Market

Competition law can also be applicable when it comes to restrictions in the labour market. Like *Bosman*, also *Coetzee* could have based his claims on grounds of the Competition Act since the agreement between NSL and the clubs concerning the payment of compensation even for out of contract players restrained him from playing elsewhere and therefore prevented competition in the South African transfer market for professional footballers. There also does not exist a Collective Bargaining Agreement which would exclude the application

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[303] See Rochelle Le Roux in „2003: Annus Horribilis for South African Sport?" The International Sports Law Journal 2004/1-2, p.47; Toni Erling "Exclusive Sports Rights", Mail & Guaridan online, available at: http://www.themedia.co.za/article.aspx?articleid=30937&area=/media_insightlegal_spin/

[304] Le Roux, ibid.

[305] Le Roux, ibid.

of competition law to labour law issues.[306] But the exclusive jurisdiction of the Competitional Tribunal might be a reason that one might prefer not to have competition law involved, since an ordinary court must refer the issue for decision by the Competitional Tribunal if the validity or enforceability of a restraint or restrictive provision in a sport-related contract is questioned. This procedure may obviously entail considerable additional delay and costs.

Final Conclusion

Restraints of trade in sport are increasingly coming into the focus of the courts. Whereas the U.S. already started to deal with the issue of restraints of trade in sport about a century ago, the judging of restraints of trade in sport Europe and, in particular, in South Africa is a rather recent development. The initial reservation of the European and South African courts to apply the restraint of trade rules to sport can be traced back to several facts. For once, the commercialisation of sports in Europe and South Africa is a quite recent phenomenon. Furthermore, it took a long time for the issue of restraints of trade in sport to be brought to the courts in Europe and South Africa and for athletes and clubs to subsequently realize that restraints were no inherent, incontestable part of sport. Some restraints, such as the transfer system prior to *Bosman* and *Coetzee,* existed for a long time before they eventually were brought to the courts. But only the *Bosman* ruling empowered the athletes and clubs to use law as a defence against unfair restrictions. In South Africa the *Coetzee* ruling and the subsequent decisions could initiate a similar development in sports and law. As the comparison between Europe, USA and South Africa demonstrated, the respective courts deal with restraints of trade in sport in very different ways.

In Europe, the ECJ struggled in its endeavour to reconcile the two different approaches of the single market concept on the one hand and the socio-economic approach on the other hand. According to the single market concept sport should be dealt with like any other business. The socio-cultural approach, however, calls for the defence of the specificities of sport. Although the ECJ always paid attention to the socio-cultural significance of sport, the Court never disassociated from the single market concept of the European Union. As a result, it spent a great amount of effort on defining guidelines which stipulate if and to what extent EU law is applicable to restraints of trade in sport. In a long process the Court elaborated three different

[306] According to section 3 (1) (a) the Competition Act does not apply to collective bargaining within the meaning of section 23 of the Constitution, and to the Labour Relations Act, 1995 (Act. No. 66 of 1995).

categories of rules. One category comprises sporting rules or practices that are either of sporting interest only or deemed to be essential for the proper functioning and organisation of sport. These rules fall outside the scope of the EC Treaty's basic freedom and competition law provisions. As soon as these predominately sporting rules become economic in nature and constitute restrictions, they fall into the scope of a second category. These rules are subject to EC law and principally prohibited as, e.g., nationality restrictions in the composition of club sport, out-of-contract transfer payments, nationality rules in breach of non-discrimination provisions and periods of long exclusivity for sport rights. A third category comprises restrictions that are subject to EC law, but are exempted should the rule be necessary for the proper functioning and organisation of sport. So far, the EU has considered the maintenance of competitive balance in sport, the preservation of the integrity of sport, encouraging the education and training of young players and the protections of national team sports as being legitimate objectives. Consequently, a range of sporting rules is deemed to be compatible with the treaty such as the use of transfer windows, the collective sale of broadcasting rights, in contract transfer payments and rules relating to players' agents.

These guidelines, however, are still quite vague and it is extremely difficult to predict whether a rule is of sporting interest only or should be exempted because of its necessity for the proper functioning of sport. It remains to be seen if the incorporation of sport into the new European Constitution will create more legal certainty.

The U.S. approach to professional sport is entirely based on the *economic ratio* and does not include a socio-cultural aspect. This enabled the U.S. to create highly commercialized professional leagues which mainly focus on profit and entertainment. Since the professional leagues realised that a well balanced, exciting competition benefits all teams and their owners, they adopted several measures that enhance the competitive balance between clubs on the field by limiting the economic competition off the field. *Bosman* style reserve clauses, salary caps, collective bargaining agreements and draft systems are examples of measures installed to limit the effect of market powers and to enforce exciting competition and thus increase profits. Based on the assumption that sport related disputes should rather not be resolved in the courtroom, important exemptions were created in order to protect the mentioned measures. The dubious anti-trust exemption in federal baseball, the Nonstatutory Labor Exemption or the Sports Broadcasting Act reflect the intention to remain independent of courts interferences. For the same reason new leagues such as the MSL are preferably structured as single entities.

In contrast to the U.S. American leagues, professional sport in South Africa is still in its infancy. On the one hand sport is not yet commercialized enough to be organized in a structure similar to the one found in the United States. On the other hand the socio-cultural aspect of sport is still of enormous importance especially in order to overcome the burdens of the former Apartheid System. Sports organisations are committed to take political action in cooperation with state authorities. For this reason, sport in South Africa should, as far as possible, retain the unique mix of professional and amateur interests to benefit social issues. As a result, the application of restraint of trade rules to sport implicates similar issues as in Europe.

So far, South African courts only had to deal with few cases regarding restraints of trade in sport and hardly any guidelines have emerged that can already be seen as a South African sports policy. This is also related to the fact that South African courts never really paid special attention to the uniqueness of sport when dealing with restraints of trade in sports. They more or less considered sport to be as any other trade or business and accordingly applied the Restraint of Trade Doctrine to sport as to any other trade related case. Consequently, South African courts never even tried to define guidelines for the treatment of restraints of trade in sport or to consider possible exemptions from the restraint of trade doctrine, for instance, when dealing with sport rules of barely economic value. Until now, this practice was quite satisfactory. However, with South Africa's economy growing, sport is going to be more and more commercialized and new legal issues related to restraints of trade will appear. Moreover, dealing with legal issues in the sports sector will become even more complicated with claims based on competition law. As highlighted, there are already a number of issues that are only waiting to be discussed on grounds of competition law.

The recent decision *McCarthy v. Sundowners Football Club* indicates that South African Courts start to recognize the special character of sport. In this decision the Court accepted that sport is different from usual trade and that professional footballers are *unlike any other employees*. As the development in Europe has shown, it will be essential for South African Courts to carry on in recognizing these special features and to generate respective guidelines to which they can orientate their rulings in the near future.

In the endeavour to establish a framework for the future dealing with restraints of trade in sport it will be important to receive further assistance from the so called *soft law* as, for instance, the *White Paper* or the *Ministerial Task Team Reports*. As in Europe, the incorporation of sport into the Constitution would also be a possibility to achieve some guidance for the interpretation of restraints of trade in sport.

Another way of dealing with this issue would be to exempt sport at least to a certain extent from the application of South African law. Even if measures like the peculiar baseball exemption or the structure of leagues as single entities are rather unlikely to appear in South African Sport, a so called block exemption designed to exempt various sporting activities from the application of the Competition Act could be introduced. This could be considered, for example, for the collective selling of broadcasting rights. The European Union is already considering an approach similar to the Sports Broadcasting Act in the United States. In South Africa, such an exemption could be granted by the Competition Commission.

A more appropriate way to prevent the application of the Competition Act to sport would be to put more emphasis on a social dialogue between the players and the clubs. As in the U.S., this would allow to keep disputes arising from employment relationships out of the courtrooms. Collective Bargaining Agreements would better serve the finding of solutions that are adequate for both parties. As already demonstrated, courts often show a lack of sensitivity for the special needs of athletes or clubs.

It will be interesting to see how South African courts will deal with restraints of trade in the future. The jurisdiction of the European and US courts could be used as a reference.

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Appendix: Selected Statutes

1. EC Treaty Articles

Article 2 (ex 2) EC
The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3 (ex 3) EC
1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) a common commercial policy;
(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
(d) measures concerning the entry and movement of persons as provided for in Title IV;
(e) a common policy in the sphere of agriculture and fisheries;
(f) a common policy in the sphere of transport;
(g) a system ensuring that competition in the internal market is not distorted;
(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
(i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
(j) a policy in the social sphere comprising a European Social Fund;
(k) the strengthening of economic and social cohesion;
(l) a policy in the sphere of the environment;
(m) the strengthening of the competitiveness of Community industry;
(n) the promotion of research and technological development;
(o) encouragement for the establishment and development of trans-European networks;
(p) a contribution to the attainment of a high level of health protection;
(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
(r) a policy in the sphere of development cooperation;
(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
(t) a contribution to the strengthening of consumer protection;
(u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 5 (ex Article 3b)
The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article 12 (ex Article 6)
Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Article 39 (ex Article 49) Freedom of Movement for Workers
1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Article 49 (ex Article 59) Freedom to provide services
Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

Article 81 EC Treaty

(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

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

Article 82 EC Treaty

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Sherman Act

§1. Every Contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the Several States, or with foreign nations, shall be deemed guilty of a felony, and, onconviction thereof, shall be punished by fine not exceeding $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. Competition Act No. 89 of 1998

Chapter 1
3. Application of the Act
(1) This Act applies to all economic activity within, or having an effect within, the Republic, except –
(a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);
(b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995;
(c) the rules of a professional association to the extent that they are exempted in terms of Schedule 1;
(d) acts subject to or authorised by public regulation; or
(e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

(2)….

Chapter 2
4. Restrictive horizontal practices prohibited
(1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if –
(a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
(b) it involves any of the following restrictive horizontal practices:
(i) directly or indirectly fixing a purchase or selling price or any other trading condition;
(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
(iii) collusive tendering.

(2) –(4) …

(5) The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by, -
(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or
(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

8. Abuse of dominance prohibited
It is prohibited for a dominant firm to –
(a) charge an excessive price to the detriment of consumers;
(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act:

(i) requiring or inducing a supplier or cunstomer to not deal with a competitor;
(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
(iv) delling goods or services below their marginal or average variable cost; or
(v) buying up a scarce supply of intermediate goods or resources required by a competitor.